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**A Response to Judge Pryor’s Proposal to “Fix” the Guidelines: A Cure Worse than the Disease**

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**Introduction**

Federal sentencing has improved significantly over the past twelve years, beginning with the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which made the previously mandatory guidelines advisory. Compared with all state guidelines systems, including the most restrictive, the federal system pre-*Booker* had been a “stark outlier” in its emphasis on enforcement of predetermined rules over judicial discretion to individualize sentences.<sup>1</sup> Under this regime, the guidelines became far too severe, overly rigid, and unjust. Racial disparity and over-incarceration spiraled out of control. *Booker* opened a path to balanced, smarter sentencing. Although there is still room for improvement, advisory guidelines allow for more individualized justice, and permit judges to act as a check on unwarranted disparity that is built into certain guidelines, or that results from disparate enforcement and charging practices by police and prosecutors. They reduce severity in individual cases and thus prison crowding overall. They also provide meaningful feedback to the Commission in the form of judicial variances so that it can sensibly review and revise the guidelines. For the first time since the guidelines went into effect thirty years ago, both the prison population and the racial gap in sentence length have decreased. At the same time, the advisory guidelines exert a powerful influence over final sentences. Indeed, the federal “advisory” guidelines are as restrictive as the most restrictive guidelines (classified as “presumptive”) in the states.<sup>2</sup>

Immediately after *Booker* and intermittently since then, some called for a “fix” to perceived or potential problems of an advisory guidelines system, most notably the purported problem of sentencing disparity. But no real problems materialized, and any “fix” would have its own problems. A consensus appeared to develop that *Booker* was the “fix,” or at least that an overhaul was unnecessary and possibly perilous.<sup>3</sup>

Now, once again, a “fix” has been proposed. Commissioner and federal appellate judge, William H. Pryor, Jr., proposes a legislative framework that he says would address complexity, disparity, and (to a limited extent) severity. The new framework would return to a version of the pre-*Booker* mandatory guidelines with strict appellate review of Commission-controlled departures. Unlike the pre-*Booker* regime, the new system would include fewer and wider ranges based on a few facts, and a requirement that aggravating facts be charged in an indictment and

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<sup>1</sup> Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 155–56, 171 (2005).

<sup>2</sup> *Id.* at 156, 169.

<sup>3</sup> See *infra* notes 4-8 and accompanying text.

proved to a jury beyond a reasonable doubt or admitted by the defendant. To avoid an unconstitutional delegation of legislative authority to define elements of crimes, the aggravating elements would be enacted by Congress. According to Judge Pryor, the statutory mandatory guidelines system would eliminate the need for statutory mandatory minimums except for “egregious offenses.” Judge Pryor said that “at least for now,” the proposal was solely his, and not the official position of the Sentencing Commission.

We agree with Judge Pryor that unwarranted disparity is a problem and that the guidelines are overly complex and in many instances unnecessarily severe. We disagree, however, that Judge Pryor’s proposal is the way to solve those problems. Indeed, his proposal would likely exacerbate many of the problems he identifies and erase the promising gains of the post-*Booker* era. The worst instances of unwarranted disparity occur not because of the advisory nature of the guidelines, but because of certain guideline rules and the continuing existence of statutory mandatory minimums, which exacerbate disparities in enforcement and charging policies by police and prosecutors. Problems of severity and complexity largely exist not because of congressional mandates but because of the Commission’s own decisions. With the exception of statutory mandatory minimums, the Commission has the power to substantially address all of the problems identified by Judge Pryor without the need for legislation. As for statutory mandatory minimum sentences, they should be addressed on their own terms by Congress, as many recent bipartisan bills have proposed.

This is not the first time the Commission and others have considered some version of a mandatory guidelines system after *Booker*. At a series of hearings in 2009, judges were asked if they would support a mandatory guidelines system with facts charged in an indictment and proved to a jury beyond a reasonable doubt, wider ranges, and possibly fewer mandatory minimums. The answer was a resounding “no.”<sup>4</sup> Eighty-six percent of judges responding to a survey in 2010 opposed the idea.<sup>5</sup> The Department of Justice (DOJ) declined to support it because prosecutors “were not enthusiastic about this course,” and because mandatory sentencing laws come at the “heavy price” of excessive prison terms and should not be extended.<sup>6</sup> In October 2011, the Constitution Project urged members of Congress to “oppose any

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<sup>4</sup> *Public Hearing in Atlanta, Ga. on Federal Sentencing Policy: Hearing Before the U.S. Sentencing Comm’n* 150–51, 159–61 (2009) (Judges Conrad, Hinkle, Presnell); *Public Hearing in Stanford, Cal. on Federal Sentencing Policy: Hearing Before the U.S. Sentencing Comm’n*, 40–44, 60, 65, 84–85 (2009) (Judges Walker, Shea, Winmill); *Public Hearing in New York, N.Y. on Federal Sentencing Policy: Hearing Before the U.S. Sentencing Comm’n* 145–49, 380–84 (2009) (Judges Woodcock, Chin, Arcara, Gertner, Dearie); *Public Hearing in Chicago, Ill. on Federal Sentencing Policy: Hearing Before the U.S. Sentencing Comm’n* 73–79 (2009) (Judges Rosen, Carr); *Public Hearing in Denver, Colo. on Federal Sentencing Policy: Hearing Before the U.S. Sentencing Comm’n* 304–07 (2009) (Judges Pratt, Gaitan).

<sup>5</sup> See U.S. Sent’g Comm’n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19.

<sup>6</sup> Lanny A. Breuer, *The Attorney General’s Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT’G REP. 110, 112 (2010).

law that would increase undue rigidity in federal sentencing.”<sup>7</sup> And at a Commission hearing in February 2012, practitioners and civil rights groups unanimously opposed replacement of the advisory guidelines system with this structure.<sup>8</sup>

In this Article we set forth our reasons for opposing Judge Pryor’s proposal and offer workable solutions to problems that undoubtedly exist. Part I provides a very brief summary of the history of the guidelines. Part II summarizes Judge Pryor’s proposal. Part III critiques his proposal on the grounds that it would lead to greater severity and more harmful disparity than that which currently exists, and is unnecessary to reduce complexity. Part IV describes why greater simplicity and fairness can be achieved by the Commission without the need for congressional action and without the harm of more rigid guidelines. In sum, the Commission can: (1) lessen the outsized emphasis on criminal history—a factor that more than any other creates and exacerbates unwarranted racial disparity; (2) greatly reduce the number of aggravating offense characteristics—the vast majority of which are not required by Congress; (3) better calibrate the remaining offense characteristics to measure culpability—the most obvious and long-discussed examples being shifts away from blunt measures like weight in drug cases and intended loss in fraud cases, which say little about a person’s blameworthiness (as compared to their role in the offense); (4) limit the impact of far-flung conduct committed by others that is currently attributed to defendants; (5) expand opportunities for nonincarceratory sentences; and (6) prepare and abide by prison impact analyses before increasing any guideline. None of those steps requires legislation, and all of them would permit the Commission to serve an important function and the guidelines to evolve.

We appreciate Judge Pryor’s thoughtful attempts to diagnose and treat federal sentencing’s ills. Ultimately, however, we believe the proposed cure is worse than the disease. Judge Pryor is right to note that “the history of the federal guidelines offers a case study of the follies of pursuing perfect justice instead of recognizing the need for simple rules.” The advisory guidelines may not be perfect, but they have provided the fairest and most constructive sentencing system since the passage of the Sentencing Reform Act. Efforts to further improve the system should build on their advisory nature.

## **I. A Brief History of the Guidelines**

### **A. The Pre-*Booker* Mandatory System**

From 1987 through 2004, all sentencing rules were mandatory. Mandatory minimums and the most severe mandatory guidelines had a demonstrable adverse impact on African

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<sup>7</sup> Letter from Virginia Sloan, The Constitution Project, to the Hon. James Sensenbrenner and the Hon. Robert Scott (Oct. 11, 2011) (on file with authors).

<sup>8</sup> See U.S. Sent’g Comm’n, Public Hearing on Federal Sentencing Options after *Booker* (Feb. 16, 2012) (testimony of Federal Defenders, American Bar Association, National Association of Criminal Defense Lawyers, Practitioners Advisory Group, Families Against Mandatory Minimums, and American Civil Liberties Union), <http://www.ussc.gov/policymaking/meetings-hearings/february-16-2012>.

Americans, as did prosecutors' charging and sentencing decisions.<sup>9</sup> Average prison sentences were about the same for all races before 1987, but a wide gap immediately opened when mandatory guidelines and mandatory minimums went into effect. By 1994, the average prison sentence served by African Americans was almost double that served by whites.<sup>10</sup>

Judges nominally imposed sentences, but often had little or no say in what those sentences would be. The Sentencing Commission prohibited or strongly discouraged downward departures based on mitigating offender and offense characteristics, and prohibited disagreements with the guidelines themselves. Courts of appeals strictly enforced those limits. Contrary to the Sentencing Reform Act, the Commission received no systematic feedback from sentencing judges on how the guidelines were, or were not, working.<sup>11</sup> With incessant pressure for greater severity from DOJ or Congress, nearly all of the Commission's amendments increased severity or restricted judicial discretion.<sup>12</sup> The guidelines developed in a "one-way upward ratchet," driven by politics and divorced from sound policy.<sup>13</sup>

In 2003, DOJ demanded that Congress put a stop to what it incorrectly claimed were increasing judicial departures.<sup>14</sup> Congress responded with the PROTECT Act, in which it directed the Commission to substantially decrease judicial downward departures. By 2004, judicial departures fell from an estimated rate of 10.9 percent to 5.2 percent, less than one fourth the rate of government-sponsored departures.<sup>15</sup>

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<sup>9</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1687–89 & nn. 298–302, 305–07 (2012).

<sup>10</sup> See U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM at 133 (2004) [hereinafter USSC, FIFTEEN YEAR REVIEW].

<sup>11</sup> See 28 U.S.C. § 994(o) (directing the Commission to review and revise the guidelines in light of sentencing data and comments). "[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949–50 (1st Cir. 1993) (Breyer, J.).

<sup>12</sup> Baron-Evans & Stith, *supra* note 9, at 1662–63.

<sup>13</sup> Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005).

<sup>14</sup> Baron-Evans & Stith, *supra* note 9, at 1664–67. After the PROTECT Act had already been enacted, the Commission, having previously mis-reported many government-sponsored departures as judicial departures, reported that 40 percent of the departures the Department had attributed to judges were actually sponsored by prosecutors. See *id.* at 1665–66 & nn. 185–90; U.S. Sent'g Comm'n, *Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

<sup>15</sup> See *id.* at 60; U.S. SENT'G COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 26A [hereinafter USSC, 2004 SOURCEBOOK].

## B. The Post-*Booker* Advisory System

On January 12, 2005, the Supreme Court decided *Booker*. To remedy the Sixth Amendment violation in allowing judges to find mandatory guideline-enhancing facts by a preponderance of the evidence, the Court rendered the guidelines “advisory.” It did so by excising 18 U.S.C. § 3553(b) and § 3742(e), thus releasing the Commission’s iron grip on departures.<sup>16</sup> The Court made clear in subsequent decisions that judges have discretion under § 3553(a) to vary from the guideline range based on individualized circumstances,<sup>17</sup> or because the guideline itself reflects an unsound judgment.<sup>18</sup> At the same time, judges must treat the guideline range as the starting point and the initial benchmark, and must remain cognizant of it throughout the sentencing process.<sup>19</sup> A sentence within the guideline range requires little explanation unless a party contests that sentence.<sup>20</sup> In contrast, a justification for a variance must be “sufficiently compelling to support the degree of the variance,” and a “major” departure or variance must “be supported by a more significant justification than a minor one.”<sup>21</sup> A court of appeals may apply a presumption of reasonableness to a guideline sentence, though a district court may not.<sup>22</sup>

## C. Where Things Stand Today

For the first time since the guidelines’ inception, there is a functioning feedback loop. In response to variance rates and open discussion by the courts of the flaws in certain guidelines, the Commission has incrementally reduced guideline ranges in some key areas, including for drug and fraud offenses, recommended reduced statutory penalties to Congress, and slowed the one-way upward ratchet.<sup>23</sup> In addition to changes to the guidelines and statutes, unnecessary

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<sup>16</sup> See *United States v. Booker*, 543 U.S. 220, 234, 258–61 (2005).

<sup>17</sup> See *Gall v. United States*, 552 U.S. 38, 56–61 (2007); *Pepper v. United States*, 562 U.S. 476 (2011).

<sup>18</sup> See *Rita v. United States*, 551 U.S. 338, 357 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009).

<sup>19</sup> See *Gall*, 552 U.S. at 46–50 & n.6; *Rita*, 551 U.S. at 350–51.

<sup>20</sup> *Rita*, 551 U.S. at 356–57.

<sup>21</sup> *Gall*, 552 U.S. at 50.

<sup>22</sup> See *Rita*, 551 U.S. at 347, 351; *Nelson v. United States*, 555 U.S. 350, 351 (2009).

<sup>23</sup> For example, the Commission reduced crack penalties in 2007, citing judicial variances and a case involving the crack guidelines pending in the Supreme Court, and urged Congress to take further action—see U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 115–22 (2007); U.S.S.G. App. C, amend. 706 (2007)—which it eventually did in the Fair Sentencing Act of 2010. The Commission reduced the drug guidelines by two levels in 2014 (U.S.S.G. App. C, amend. 782 (2014)), and urged Congress to reduce mandatory minimums (*Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 83 (2013) (statement of Judge Patti B. Saris, Chair, U.S. Sent’g Comm’n)). The Commission lessened the impact of the loss and victim tables in the fraud guideline (U.S.S.G. App. C, amends. 791, 792 (2015)) in response to high rates of government-sponsored and non-government-sponsored below-guideline sentences; see 77 FED. REG.

severity has been reduced by increased rates of sentencing below the guideline range, with non-government-sponsored rates at 21.3 percent in 2015,<sup>24</sup> slightly lower than the rate of 21.4 percent in 2014.<sup>25</sup> And prosecutors, no longer confined to motions for substantial assistance departures to ameliorate overly severe sentences, now move for variances,<sup>26</sup> and have been encouraged by DOJ to do so in cases in which the guideline range is unnecessarily severe.<sup>27</sup>

At the same time, sentencing decisions are “anchored by the Guidelines.”<sup>28</sup> Although 51.2 percent of sentences were below the guideline range in 2015 (29.3 percent based on a government motion, 21.3 percent without a government motion<sup>29</sup>), the difference between the average guideline minimum and the average sentence imposed was only 13 months, slightly less than in 2014.<sup>30</sup> As the Supreme Court has observed, “when a Guidelines range moves up or down, offenders’ sentences move with it.”<sup>31</sup> Indeed, a chart with a line tracking the guidelines-

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2778, 2783 (Jan. 19 2012); U.S. Sent’g Comm’n, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (FY 2015). See also, e.g., U.S.S.G. App. C, amend. 798 (2016) (narrowing definition of “crime of violence” in career offender guideline based in part on high rate of variances); *id.* amend. 754 (2011) (reducing increases under illegal reentry guideline based on stale prior convictions, citing appellate decisions approving variances based on unwarranted uniformity); *id.* amend. 742 (2010) (eliminating “recency” points from criminal history score, citing frequent below-guideline sentences and lack of empirical correlation with recidivism).

<sup>24</sup> See U.S. SENT’G COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. N [hereinafter USSC, 2015 SOURCEBOOK].

<sup>25</sup> See U.S. SENT’G COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. N.

<sup>26</sup> See USSC, 2015 SOURCEBOOK, *supra* note 24, at tbl. N (7.7% government-sponsored variances in all cases); U.S. Sent’g Comm’n, *Quick Facts: Career Offenders* (FY 2015) (20.6% government-sponsored variances in career offender cases); U.S. Sent’g Comm’n, *Quick Facts: Methamphetamine Trafficking Offenses* (FY 2015) (12.4% government-sponsored variances in methamphetamine cases).

<sup>27</sup> See *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att’y Gen.); Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 3 (Aug. 12, 2013), available at <http://www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [hereinafter Holder Memorandum on Charging in Drug Cases].

<sup>28</sup> *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013).

<sup>29</sup> USSC, 2015 SOURCEBOOK, *supra* note 24, at tbl. N.

<sup>30</sup> U.S. Sent’g Comm’n, *Quarterly Data Report, Third Quarter 2016*, fig. E [hereinafter USSC, *Third Quarter 2016*] (showing 13-month difference in 2016 between average guideline minimum of 55 months and average sentence imposed of 42 months; 17-month difference between average guideline minimum of 62 months in 2014 and average sentence imposed of 45 months).

<sup>31</sup> *Peugh*, 133 S. Ct. at 2084.

recommended sentence for all cases and another line below it showing the actual sentences imposed in those cases shows the two moving in tandem.<sup>32</sup> This is so because the Court itself has “impose[d] a series of requirements on sentencing courts that cabin the exercise of [their] discretion.”<sup>33</sup> The guideline range “is intended to, and usually does, exert controlling influence on the sentence that the court will impose.”<sup>34</sup>

As a result of judicial discretion and lower guideline ranges, as well as lower statutory ranges in crack cases and a more targeted DOJ charging policy,<sup>35</sup> average sentence length has decreased by just over six months in all cases, and by just over 14 months in drug cases.<sup>36</sup> This may not seem like much, but the 68,210 federal defendants sentenced in 2015 together received 34,673 fewer years of imprisonment compared to average sentences in 2004, saving over \$1.1 billion dollars in costs of incarceration for one year alone.<sup>37</sup>

The federal prison population has finally stabilized after almost thirty years of unprecedented growth. From 1986 through 2004, it grew by 290 percent.<sup>38</sup> Over the next twelve years, following *Booker*, it grew by only 5.3 percent, and has decreased by 11.2 percent over the past three years.<sup>39</sup> This deceleration and eventual decrease occurred despite an increase in the average guideline minimum from 55 months in 2011 to 62 months in 2014,<sup>40</sup> before dropping

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<sup>32</sup> See USSC, *Third Quarter 2016*, *supra* note 30, fig. E; U.S. Sent’g Comm’n, *Final Quarterly Data Report 2014*, fig. C (2014).

<sup>33</sup> *Peugh*, 133 S. Ct. at 2084.

<sup>34</sup> *Id.* at 2085.

<sup>35</sup> See Holder Memorandum on Charging in Drug Cases, *supra* note 27, at 2; Memorandum from Eric H. Holder, Jr., to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 1 (Aug. 29, 2013), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-to-usas-and-aag-crm-retroactivity-of-drug-policy.pdf>; Memorandum to Department of Justice Attorneys from the Attorney General, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014), *available at* [https://www.justice.gov/oip/foia-library/ag\\_guidance\\_on\\_section\\_851\\_enhancements\\_in\\_plea\\_negotiations/download](https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download).

<sup>36</sup> Average sentence length decreased from 50.1 months to 44 months in all cases and from 81.3 months to 67 months in drug cases. See USSC, 2004 SOURCEBOOK, *supra* note 15, at tbl. 13; USSC, 2015 SOURCEBOOK, *supra* note 24, at tbl. 13.

<sup>37</sup> The Bureau of Prisons estimates the cost of incarceration in 2015 at \$31,977.65. Bureau of Prisons, *Annual Determination of Cost of Incarceration*, 81 FED. REG. 46,957 (July 19, 2016).

<sup>38</sup> See Federal Bureau of Prisons, Statistics (last updated Jan. 12, 2017) (46,055 in 1986, 179,895 in 2004), [https://www.bop.gov/about/statistics/population\\_statistics.jsp#old\\_pops](https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops).

<sup>39</sup> *Id.* (179,895 in 2004, 213,298 in 2013, 189,450 as of January 12, 2017).

<sup>40</sup> U.S. Sent’g Comm’n, *Final Quarterly Data Report 2014*, fig. C (2014).



back to 55 months in 2015 and 2016,<sup>41</sup> and despite a steady increase in the number of people prosecuted from 2006 through 2011, before dropping back to 2006 levels in 2015.<sup>42</sup>

Racial disparity has also decreased. Until 1987, average prison terms for blacks, whites, and Hispanics were about the same. A wide gap immediately opened when mandatory minimums and mandatory guidelines went into effect in the late 1980s. By 1994, the average prison term served by African Americans (81 months) was almost double that for whites (44 months). Sentences for African Americans began to drop in 2007, and the gap narrowed to five months in 2015.<sup>43</sup>

**[COMP: Please insert Figure 1 about here]**

## II. Judge Pryor's Proposal

### A. The Basics

On May 18, 2016, Judge Pryor gave a speech at a luncheon at the American Law Institute's annual meeting proposing a grand transformation of the federal sentencing guidelines that would make them as mandatory as they were before *Booker*. The speech, entitled "Returning to Judge Marvin Frankel's First Principles in Federal Sentencing" (hereinafter "Pryor"), was then posted on the ALI's website,<sup>44</sup> and is now published in this volume. Judge Pryor prefers to call the proposed guidelines "presumptive" rather than mandatory because, he says, "the pre-*Booker* guidelines were never truly mandatory."<sup>45</sup> We refer to his proposed guidelines as mandatory because that is the common understanding of the nature of the guidelines pre-*Booker*,<sup>46</sup> when the guideline range and limitations on departures were legally required to be followed and were enforced by strict appellate review.

Judge Pryor's stated goals are to reduce complexity and disparity, which he presents as serious problems after *Booker*, and to reduce severity for first-time, nonviolent offenders. The new guidelines would have fewer and wider ranges based on a few aggravating facts (e.g., drug

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<sup>41</sup> USSC, *Third Quarter 2016*, *supra* note 30, fig. E.

<sup>42</sup> U.S. Sent'g Comm'n, *Interactive Sourcebook*, tbl. 2 (FY 2006, FY 2012, FY 2015) (increase in number of offenders from 72,585 in 2006 to 84,173 in 2012, decrease to 71,003 in 2015).

<sup>43</sup> The gap began to narrow in 2007, when the Supreme Court decided *Gall v. United States*, 552 U.S. 38 (2007) (rejecting "extraordinary circumstances" test and permitting variances based on individualized circumstances), and *Kimbrough v. United States*, 552 U.S. 85 (2007) (permitting variances based on a policy disagreement with crack guidelines), and continued to narrow as judicial and government-sponsored variance rates increased. The Fair Sentencing Act of 2010 and DOJ's 2013 charging policies contributed to the narrowing of the gap as well.

<sup>44</sup> William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles in Federal Sentencing*, 29 FED. SENT'G REP. [REDACTED] (2017).

<sup>45</sup> Pryor, *id.* at [REDACTED].

<sup>46</sup> *See Booker*, 543 U.S. at 227.

quantity, possession of a weapon, and “one or two” others<sup>47</sup>). Aggravating facts (i.e., those that would place a defendant in a higher sentencing range) would have to be enacted by Congress, rather than promulgated by the Commission.<sup>48</sup> These facts would be required to be charged in an indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant.<sup>49</sup>

The Commission would no longer promulgate or revise the guidelines. It would issue commentary recommending higher or lower “specific” sentences within ranges, amend departure provisions, amend criminal history rules, recommend statutory changes to Congress, and collect and analyze data.<sup>50</sup>

According to Judge Pryor, the new statutory guidelines would “render mandatory minimums unnecessary, except perhaps for egregious offenses.”<sup>51</sup> He said that “at least for now,” the proposal was solely his, and not the official position of the Sentencing Commission.<sup>52</sup>

## B. Departures and Appellate Review

The statutory guidelines would “bind judges in most cases, subject to meaningful appellate review, but they would have some flexibility.”<sup>53</sup> Judges would be required to “adhere” to “enforceable” sentencing ranges, “absent substantial and compelling reasons to depart.”<sup>54</sup> “Downward departures would be appropriate in those cases outside the heartland where the guidelines fail to account for some compelling offender or offense characteristic.”<sup>55</sup> The Commission would “amend the provisions for departure.”<sup>56</sup> Judge Pryor emphasizes that the “unrestrained consideration of offender characteristics” must be “cabin[ed].”<sup>57</sup> According to Judge Pryor, with “less severe penalties and broader ranges, most cases would not present a reason for departure from the guideline range.”<sup>58</sup>

Appellate courts would “decide whether a district court erred in departing below a guideline range.”<sup>59</sup> They would “review *de novo* questions of lawful authority to depart and review for abuse of discretion exercises of that authority.”<sup>60</sup> “Appellate review would deter

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<sup>47</sup> Pryor, *supra* note 44, at [redacted].

<sup>48</sup> *Id.* at [redacted].

<sup>49</sup> *Id.* at [redacted], [redacted].

<sup>50</sup> *Id.* at [redacted].

<sup>51</sup> *Id.* at [redacted].

<sup>52</sup> *Id.* at [redacted].

<sup>53</sup> *Id.* at [redacted].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at [redacted].

<sup>56</sup> *Id.* at [redacted].

<sup>57</sup> *Id.* at [redacted].

<sup>58</sup> *Id.* at [redacted].

<sup>59</sup> *Id.* at [redacted].

<sup>60</sup> *Id.*

excessive departures and reduce the types of disparity that” are allegedly “see[n] in the current advisory system.”<sup>61</sup>

### C. Reference to a Similar Proposal

Judge Pryor indicates that his proposal is “similar” to one proposed by Judge William K. Sessions III in 2012,<sup>62</sup> except in one important respect. Rather than the Commission promulgating the guidelines, Congress would directly enact the initial aggravating factors and subsequent increases. This would avoid an unconstitutional delegation of legislative power to an agency in the Judicial Branch to promulgate elements of crimes.<sup>63</sup>

Judge Sessions’ proposal can shed light on the structure of Judges Pryor’s proposed statutory guidelines. Judge Pryor proposes fewer and wider ranges, but has not proposed a table. Judge Sessions proposed a table consisting of thirty-six mandatory ranges at the intersection of nine offense levels on a vertical axis and four criminal history categories (CHCs) on a horizontal axis. At the middle offense level of the table, the width of the ranges would be 80 months in CHC I (with the top of the range 74 percent higher than the bottom), 105 months in CHC II (with the top 87 percent higher than the bottom), 136 months in CHC III (with the top 100 percent higher than the bottom), and 226 months in CHC IV (with the top 150 percent higher than the bottom).<sup>64</sup>

To avoid an objection that judges would have unfettered discretion within the wide mandatory ranges, Judge Sessions proposed that each of those ranges be divided into three sub-ranges. The sub-ranges would be based on aggravating and possibly mitigating facts, designated by the Commission from among those in the current guidelines.<sup>65</sup>

Judge Pryor does not expressly mention sub-ranges. He states, however, that “[m]any factors [in the current guidelines] could be moved to the commentary—as reasons for sentencing courts to consider in deciding where *within* the broader ranges to impose a specific sentence,”<sup>66</sup> and that the Commission “could amend the commentary recommending higher or lower sentences *within* the wider ranges.”<sup>67</sup> Thus, it appears that there would be some version of recommended sub-ranges within the wide mandatory ranges.

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<sup>61</sup> *Id.*

<sup>62</sup> William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305 (2011). Judge Sessions’ proposal has been thoroughly critiqued in Baron-Evans & Stith, *supra* note 8.

<sup>63</sup> Pryor, *supra* note 44, at [redacted].

<sup>64</sup> Sessions, *supra* note 61, at 345.

<sup>65</sup> *Id.* at 343, 347–54.

<sup>66</sup> Pryor, *supra* note 44, at [redacted].

<sup>67</sup> *Id.* at [redacted].

### D. The Commission’s Response to Judge Pryor’s Proposal

On August 18, 2016, the Commission announced as a final priority for the coming year an examination “of the overall structure of the guidelines post-*Booker*.”<sup>68</sup> This, or something similar, has been on the Commission’s list of priorities for most of the twelve years since *Booker* was decided.<sup>69</sup> The Commission proposed a *Booker* “fix” (different from Judge Pryor’s) once, five years ago.<sup>70</sup> It was not well-received.<sup>71</sup> This year, the Chair announced that the Commission “will begin a comprehensive examination of how the current federal sentencing scheme could be simplified to better promote fairness and proportionality, reduce disparity, and maintain judicial flexibility.”<sup>72</sup> The Commission appears to be again considering the topic of a *Booker* “fix,” and presumably Judge Pryor’s proposal.

### III. Critiquing Judge Pryor’s Critique

Judge Pryor’s proposal seeks to address what he identifies as the two main problems with the current sentencing regime: unwarranted disparity and undue complexity. Both are surely problems, but as we discuss in this Part, the advisory nature of the guidelines is not the culprit. In fact, the advisory nature of the guidelines helps to alleviate those problems. In addition, the advisory guidelines help to address another problem that Judge Pryor mentions, but that we believe deserves more attention: severity.

As explained below, we believe that Judge Pryor’s proposal would create unwarranted disparities and exacerbate severity and prison crowding. Disparities are unwarranted when they stem from mandatory rules that do not and cannot make relevant distinctions among defendants, or that are wielded unfairly by prosecutors or law enforcement agents unchecked by neutral judges. Differences in sentencing outcomes for individual defendants that are relevant to the

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<sup>68</sup> This examination of “structure” may include “recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate,” including “possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant’s role, culpability, and relevant conduct.” U.S. Sent’g Comm’n, *Notice of Final Priorities*, 81 FED. REG. 58,004, 58,005 (Aug. 24, 2016).

<sup>69</sup> See, e.g., U.S. Sent’g Comm’n, *Notice of final priorities*, 73 FED. REG. 54,878, 54,878 (Sept. 23, 2008).

<sup>70</sup> In 2012, the Commission proposed that Congress enact legislation requiring judges to give the guidelines “substantial weight,” restrict mitigating departures, enact the Commission’s three-step process, and require stricter appellate review, albeit continuing with judge-found facts. U.S. Sent’g Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* 111–15 (2012).

<sup>71</sup> See Amy Baron-Evans & Thomas Hillier II, *The Commission’s Legislative Agenda to Restore Mandatory Guidelines*, 25 FED. SENT’G REP. 293 (2013) (reviewing widespread opposition, constitutional, and policy problems).

<sup>72</sup> U.S. Sent’g Comm’n, *News Release: U.S. Sentencing Commission Announces Policy Priorities for 2016–2017 Amendment Cycle* (Aug. 18, 2016), <http://www.ussc.gov/about/news/press-releases/august-18-2016>.

purposes of sentencing do not constitute unwarranted disparity. Experience shows that severity would increase in a system of mandatory rules made by Congress, rather than a system allowing for judicial discretion with guidelines recommended by an expert sentencing commission.

As shown in Part I, post-*Booker* sentences do not justify a seismic overhaul of the advisory nature of the guidelines. The extreme racial disparity of the mandatory guidelines era has markedly decreased. The rate and extent of below-guideline sentences have stabilized and even decreased over the past two years. Preliminary data through the third quarter of 2016 show that the rate of non-government-sponsored below-range sentences has dropped even lower, to 20.6 percent.<sup>73</sup> The anchoring effect of the current guidelines is well-entrenched, with the average sentence just 13 months below the average guideline minimum. As shown in Part II, the ranges at the middle of Judge Sessions' table would be from 80 months to 226 months wide. That or any similar reduction in the number of ranges and corresponding expansion of widths would produce ranges that are wider than the extent of judicial variances from the advisory guideline range today.

Judge Pryor claims support from the Model Penal Code and state presumptive guidelines sentencing systems, but those systems only confirm that the proposal is not only unnecessary, but would be counterproductive, and that *Booker* was indeed the fix. To put things in perspective, we begin with a look at those systems.

#### **A. The Federal Advisory Guidelines System Is Now Within the Mainstream of Presumptive Guidelines Systems.**

According to Kevin Reitz, Reporter for the Model Penal Code, the federal mandatory guidelines were a “stark outlier” in their rejection of judicial discretion. Rendering them “advisory” has merely brought them into the mainstream of “presumptive” guidelines systems. The federal “advisory” guidelines are as restrictive of judicial discretion as “presumptive” guidelines in the states, even though contested enhancing facts may be found by a judge in the former but must be found by a jury in the latter.<sup>74</sup>

Data from the federal advisory system and a prominent state presumptive system are instructive. In 2015, federal judges imposed below-guideline sentences in 29 percent of cases (21.3 percent non-government-sponsored, 7.7 percent government-sponsored) for reasons other than substantial assistance or fast-track.<sup>75</sup> Another 21.6 percent were government-sponsored

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<sup>73</sup> USSC, *Third Quarter Preliminary 2016*, *supra* note 30, tbl.8.

<sup>74</sup> Reitz, *supra* note 1, at 156, 169, 171; *see also* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 121–22 (2013). Five states have presumptive guidelines: Minnesota, Kansas, North Carolina, Oregon, and Washington. *See* Sentencing Guidelines Resource Center, Robina Institute of Criminal Law & Criminal Justice, Univ. of Minnesota Law School, Jurisdictions, <http://sentencing.umn.edu/jurisdictions>. Alabama has “presumptive” guidelines only for drug and certain property offenses; the guidelines are voluntary for violent offenses, personal offenses, and other property offenses. *Id.*

<sup>75</sup> *See* USSC, 2015 SOURCEBOOK, *supra* note 24, at tbl. N.

substantial assistance or fast-track departures,<sup>76</sup> but these are considered to be guideline sentences because they are incorporated in the Guidelines Manual by virtue of legislation.<sup>77</sup> Thus, judges sentence within (or in rare cases above) the guidelines in 71 percent of cases.

Minnesota, the first guidelines system in the nation, has had a successful presumptive guidelines system for over thirty years.<sup>78</sup> It has two kinds of mitigated departures: dispositional (when prison is the presumptive sentence but the court imposes probation), and durational. In 2015, the rate of mitigated dispositional departures among those for whom prison was the presumptive sentence was 33.7 percent.<sup>79</sup> The rate of durational departures among those sentenced to prison was 25 percent.<sup>80</sup> There are no departures for substantial assistance or fast track in Minnesota. There are “*de facto* departures” in the form of charge bargains.<sup>81</sup> Because these are granted by prosecutors off the record, they cannot be quantified, but if they were included, departure rates in Minnesota would be even higher.<sup>82</sup>

The latest proposed Model Penal Code (MPC) on sentencing describes a “presumptive” guidelines system that is as or more flexible than the federal “advisory” guidelines system. Its “central institutional philosophy” is that “substantial judicial discretion to individualize penalties within a framework of law must be preserved in a sound sentencing system,”<sup>83</sup> and all decisionmakers, including the commission and appellate courts, are to act accordingly.<sup>84</sup> For the sake of sound policy, there “should be dialogue and collaboration between the commission and the judiciary.”<sup>85</sup> The MPC thus avoids creation of a commission “with authority to eliminate, override, or ignore the discretionary input of sentencing courts and the appellate bench.”<sup>86</sup> All contemporary state systems “have been designed and implemented in recognition of this principle,” and their success compared to experience with the formerly mandatory federal system

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<sup>76</sup> *Id.*

<sup>77</sup> See *Peugh*, 133 S. Ct. at 2084; Transcript of Oral Argument at 30–31, 38, *Beckles v. United States*, No. 15-8544 (U.S. Nov. 28, 2016); 18 U.S.C. § 3553(f); Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003); U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K3.1 (2016) [hereinafter USSG]

<sup>78</sup> Minnesota was the first jurisdiction (state or federal) to adopt sentencing guidelines, and has had a stable system for over thirty years. Its guidelines were always presumptive. It has required jury factfinding of contested enhancing facts and widened its ranges in response to *Blakely v. Washington*, 542 U.S. 296 (2004). It has a well-developed data collection and reporting system. See FRASE, *supra* note 74, at 122, 126–27, 131, 134.

<sup>79</sup> Minnesota Sent’g Guidelines Comm’n, *2015 Sentencing Practices: Annual Summary Statistics for Felony Offenders* at 25, fig. 12 (2016), <http://mn.gov/msgc-stat/documents/reports/2015/2015MSGCAnnualSummaryDataReport.pdf>.

<sup>80</sup> *Id.* at 29–30 & fig. 17.

<sup>81</sup> FRASE, *supra* note 74, at 132.

<sup>82</sup> *Id.* at 71–74, 132, 140.

<sup>83</sup> MODEL PENAL CODE, Sentencing § 1.02(2) cmt. h (Tentative Draft No. 1, 2007).

<sup>84</sup> *Id.*, § 1.02(2)(b)(i) & cmt. g; see also *id.*, Reporter’s Introductory Note to Article 7, at 263.

<sup>85</sup> *Id.*, § 7.ZZ cmt. b; see also *id.* § 7.XX cmt. c; § 6B.04 cmts. b, e; § 1.02(2) cmt. d, e.

<sup>86</sup> *Id.*, § 6A.01 cmt. f; Reporter’s Note to § 6B.04, at 57.

shows that “close controls” on sentencing courts “serve no good purpose.”<sup>87</sup> Judicial discretion is thus “an essential feature of the sentencing structure, not an unwanted element.”<sup>88</sup>

In furtherance of this principle, just as the federal advisory guidelines reflect a “rough approximation” of sentences that “might” achieve the purposes of sentencing in a typical case, and serve as the “starting point,”<sup>89</sup> the MPC guidelines represent “rough drafts” of proportionate sentences for ordinary cases, providing “starting points for reasoned analysis,” while permitting courts to consider a “wide range of subjective or case-specific factors” in determining sentences that are no more severe than necessary to achieve the statutory purposes.<sup>90</sup> Importantly, the commission may not proscribe any departure factor supported by the purposes of sentencing, or attempt to control the departure process.<sup>91</sup> The MPC expressly encourages departures based on offender characteristics that are relevant to sentencing purposes,<sup>92</sup> and deems the courts the prime arbiters of grounds for departure and their extent.<sup>93</sup>

Similarly, in the federal system post-*Booker*, courts must consider all relevant history and characteristics of the defendant and “‘impose a sentence sufficient, but not greater than necessary’ to comply with the sentencing purposes set forth in § 3553(a)(2).”<sup>94</sup> Unlike the MPC proposal, which prohibits “mere disagreement with a presumptive sentence as applied in an ordinary case,”<sup>95</sup> courts in the federal system “may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views.”<sup>96</sup> There are two good reasons for this distinction. First, the ability to vary based on a reasoned policy disagreement is necessary to make the federal guidelines “advisory” and thus constitutional even though contested guideline-enhancing facts are found by a judge.<sup>97</sup> Second, the MPC envisions sound guidelines for typical cases produced by the collective judgment of a well-balanced commission,<sup>98</sup> whereas some of the most severe guidelines in the federal system are based on mandatory minimums or

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<sup>87</sup> *Id.*, § 1.02(2) cmt. h.

<sup>88</sup> *Id.*

<sup>89</sup> *Rita*, 551 U.S. at 348–50; *Gall*, 552 U.S. at 49.

<sup>90</sup> MODEL PENAL CODE, Sentencing § 6A.01 cmt. f (Tentative Draft No. 1, 2007); *see also id.* § 1.02(2)(a) & cmts. b, c, e, f; § 6B.02 cmt. c; § 6B.04 cmts. b, e.

<sup>91</sup> *Id.*, § 6B.04 cmts. b, e.

<sup>92</sup> *See, e.g., id.* § 1.02(2) cmt. b, illus. 4 (address defendant’s alcohol problem, keep the defendant employed); § 1.02(2) cmt. e (realistic chance of successful rehabilitation); § 6B.04 cmt. e, illus. 2 (alcohol or drug dependency and amenability to treatment); § 7.XX cmt. b, illus. 4 (same).

<sup>93</sup> *Id.*, § 7.XX cmt. c. Departure factors may be prohibited only by constitutional law, a controlling judicial decision, or legislation in narrow circumstances. *Id.*

<sup>94</sup> *Gall*, 552 U.S. at 49–50 & n.6; *Pepper*, 562 U.S. at 490–93.

<sup>95</sup> MODEL PENAL CODE, Sentencing § 7.XX(2)(b) (Tentative Draft No. 1, 2007).

<sup>96</sup> *Pepper*, 562 U.S. at 501.

<sup>97</sup> *See Kimbrough*, 552 U.S. at 91, 10; *Cunningham v. California*, 549 U.S. 270, 279–81, 292–93 (2007).

<sup>98</sup> MODEL PENAL CODE, Sentencing § 7.XX cmt. c; *see also* § 6A.02; § 6B.04 cmt. c (“a well-constituted commission may speak with credibility to the appropriate sentencing benchmarks in categories of ‘ordinary cases’”).

congressional directives. Members of Congress may honestly believe that such legislation reflects the community view of the gravity of the offense, but research convincingly proves that it does not.<sup>99</sup>

Notably, although the MPC guidelines have “presumptive legal force,” they are “*subject to judicial discretion to depart*.”<sup>100</sup> Courts may depart based on a finding that “substantial circumstances” establish that the presumptive guideline sentence “will not best effectuate” the purposes of sentencing.<sup>101</sup> The MPC rejects a requirement of “compelling circumstances” because it “suggests that few departure[s] should be affirmed on appeal,” which is not the intent of the code.<sup>102</sup> The “substantial circumstances” standard “is meant to be less restrictive than the ‘substantial *and compelling* circumstances’ standard.”<sup>103</sup> In the federal system, a justification for a variance need not be “compelling” or “substantial” in every case. Instead, the court must provide a “specific reason” tied to relevant evidence.<sup>104</sup> However, the justification must be “sufficiently compelling to support the degree of the variance,” and a “major” variance “should be supported by a more significant justification than a minor one.”<sup>105</sup>

The post-*Booker* standard of review is meaningful but deferential, like the standard of review in presumptive guideline systems. Judge Pryor complains that if a sentence is reversed as procedurally unreasonable because the court miscalculated the guideline range, the district court can correctly calculate the range and impose the same sentence.<sup>106</sup> But that almost never happens; instead, the guidelines anchor sentences on remand just as they do at the original sentencing.<sup>107</sup> And Judge Pryor omits another important kind of review for procedural

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<sup>99</sup> After guilty verdicts in cases involving firearms, drug, fraud, and child pornography offenses, judges in the Northern District of Ohio, the Northern District of Illinois, and the Southern District of Iowa polled jurors about the appropriate sentence. “[J]urors recommended sentences that were 37% of the minimum Guidelines recommended sentences and 22% of the median Guidelines recommended sentences. Stated another way, the Guidelines range median was 445% of the median jurors’ recommendation, and the low end of the Guidelines range was 273% of the median jurors’ recommendation.” Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 187–88 (2010); *see also United States v. Collins*, 828 F.3d 386 (6th Cir. 2016) (upholding downward variance from 262–327 months to mandatory minimum of 60 months based on post-verdict juror poll with responses ranging from 0 to 60 months, with a mean of 14.5 months, a median of 8 months, and all but one juror recommending less than half the mandatory minimum).

<sup>100</sup> MODEL PENAL CODE, Sentencing § 6B.04(1) (emphasis added).

<sup>101</sup> *Id.*, § 7.XX(2) & cmt. b.; *see also id.*, § 6B.04 cmt. b.

<sup>102</sup> *Id.*, Reporter’s Note to § 6B.04, at 206–07; Reporter’s Note to § 7.XX, at 287–88.

<sup>103</sup> *Id.*, § 7.XX, cmt. c.

<sup>104</sup> 18 U.S.C. § 3553(c)(2); *Pepper*, 562 U.S. at 490–93.

<sup>105</sup> *Gall*, 552 U.S. at 50.

<sup>106</sup> Pryor, *supra* note 44, at [redacted].

<sup>107</sup> *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348–49 (2016) (noting that of the 75,000 cases sentenced in 2014, only 620 (1.1 percent) were reversed for guideline or statutory errors combined); *see also* Reply Brief for Petitioner at 12 & App.1, *Beckles v.*



unreasonableness: failure to address a party’s argument or to adequately explain the chosen sentence. When sentences are reversed on that basis, the sentence imposed on remand is different most of the time.<sup>108</sup>

Judge Pryor also complains that the highly deferential standard of review for “substantive unreasonableness” rarely leads to reversals.<sup>109</sup> But that does not make appellate review meaningless, just as appellate review of convictions is not meaningless though it rarely leads to reversals. Although true that one court has likened review for substantive unreasonableness to “shock-the-conscience” review,<sup>110</sup> it does not actually apply that standard. Like the other courts of appeals, it considers whether the sentence is based on an error of law or clearly erroneous assessment of the evidence, or is “otherwise unsupported as a matter of law,”<sup>111</sup> using as its “lodestar” the parsimony clause and sentencing purposes set forth in § 3553(a).<sup>112</sup> Under that standard, courts have reversed sentences as substantively unreasonable when, for example, the district court’s justification was contrary to “substantial evidence” or otherwise unsupported by the evidence;<sup>113</sup> when the district court ignored a relevant factor or gave too much or too little weight to a § 3553(a) factor in light of the evidence in the record;<sup>114</sup> or when the district court

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United States, No. 15-8544 (Nov. 17, 2016) (showing that the district court imposed the same sentence in only one of 88 cases in which defendant was resentenced using corrected guideline range after *Johnson*).

<sup>108</sup> From 2008 through August 15, 2016, 58.1 percent of within-guideline sentences reversed on defendant’s appeal were lower on remand, 73.7 percent of above- and below-range sentences reversed on defendant’s appeal were lower on remand, and 45.5 percent of below-range sentences reversed on the government’s appeal were higher on remand. Overall the sentence on remand differed in favor of the appealing party in 61.4 percent of cases in which the sentence was reversed for these forms of procedural error. See Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (Aug. 15, 2016), <https://www.fd.org/docs/select-topics/sentencing-resources/where-procedure-meets-substance-making-the-most-of-the-need-for-adequate-explanation.pdf?sfvrsn=10>.

<sup>109</sup> Pryor, *supra* note 44, at 18.

<sup>110</sup> See *United States v. Park*, 758 F.3d 193, 200 (2d Cir. 2014).

<sup>111</sup> *Id.* at 200–01; *United States v. Cutler*, 520 F.3d 136, 158 (2d Cir. 2008).

<sup>112</sup> *Park*, 758 F. 3d at 200 (internal quotation marks and alteration omitted).

<sup>113</sup> See, e.g., *United States v. Olhovsky*, 562 F.3d 530, 552 (3d Cir. 2009) (“draconian” life sentence was imposed “with only minimal consideration of substantial evidence to the contrary); see also, e.g., *United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008) (sentence more than double the guideline range did not stem from a “plausible explanation”); *United States v. Dautovic*, 763 F.3d 927, 934–35 (8th Cir. 2014) (justification for downward variance “fails to support the degree of the variance in this case”); *United States v. Morgan*, 635 F. App’x 423, 448 (10th Cir. 2015) (judge considered improper factors and proper factors which, “properly viewed ... even cumulatively” did not support the extent of the downward variance).

<sup>114</sup> See, e.g., *United States v. Lychock*, 578 F.3d 214, 220 (3d Cir. 2009); *United States v. Howard*, 773 F.3d 519, 528 (4th Cir. 2014); *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011); *United States v. Paul*, 561 F.3d 970, 973 (9th Cir. 2009); *United States v.*

relied on an impermissible factor,<sup>115</sup> clearly erroneous findings of fact,<sup>116</sup> speculation, unfounded beliefs, or assumptions.<sup>117</sup>

Judge Pryor states that Kevin Reitz, Reporter for the Model Penal Code, has explained that the federal system “could learn a lot from state systems of appellate review.”<sup>118</sup> But in the 1997 article Judge Pryor cites, Professor Reitz observed that federal appellate courts had “choked off” district court discretion, contrary to the model advocated by Judge Frankel and others.<sup>119</sup> Current appellate review operates like the “meaningful but deferential” appellate review recommended by the MPC proposal, under which courts review *de novo* claims that a sentence is “unlawful or was imposed in an unlawful manner”; apply “deference” to departures, which are governed by sentencing purposes (not the sentencing commission) and “shall be upheld” when there is a “substantial basis for the rulings”;<sup>120</sup> and reverse sentences “not supported by an explanation of the sentencing court’s reasoning.”<sup>121</sup> Gone from the federal system is the rigid appellate enforcement of the pre-*Booker* guidelines and of Commission restrictions on departures based on mitigating offender characteristics—features of which Professor Reitz was highly critical,<sup>122</sup> as was Judge Frankel.<sup>123</sup> At the same time, the current system permits a presumption of reasonableness for within-guideline sentences, thus favoring guideline sentences on appeal and making the current system more stringent than the MPC.

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Friedman, 554 F.3d 1301, 1309–10 (10th Cir. 2009); *United States v. Lopez*, 343 F. App’x 484, 486 (11th Cir. 2009).

<sup>115</sup> *United States v. Chandler*, 732 F.3d 434, 437–39 (5th Cir. 2013) (district court relied on defendant’s status as a police officer, an error compounded by mischaracterization of defendant’s conduct); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (district court relied on factual determination that was clearly erroneous in light of the jury’s verdict); *United States v. Walker*, 649 F.3d 511 (6th Cir. 2011) (district court imposed above-guideline sentence based on defendant’s need for rehabilitation and psychiatric treatment, contrary to *Tapia v. United States*, 564 U.S. 319 (2011)).

<sup>116</sup> *United States v. Ressam*, 679 F.3d 1069, 1097 (9th Cir. 2012) (en banc).

<sup>117</sup> *United States v. Van*, 541 F. App’x 592, 597 (6th Cir. 2013) (where district court “unreasonably based his sentence in part on speculation that he was involved in an unknown criminal ‘scheme’”); *United States v. Aleo*, 681 F.3d 290 (6th Cir. 2012) (sentence was based primarily on judge’s unsupported “belief” regarding the development of guideline range); *United States v. Bradley*, 628 F.3d 394, 399–400 (7th Cir. 2010) (judge relied on “unsubstantiated belief” and unfounded “speculation” regarding defendant’s risk of recidivism).

<sup>118</sup> Pryor, *supra* note 44, at [redacted].

<sup>119</sup> See Kevin Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1466–71 (1997).

<sup>120</sup> MODEL PENAL CODE, Sentencing § 7.XX(1)–(2) & cmts. b, c; § 7.ZZ(1)–(2), (6)(d) & cmt. g, at 332 (Tentative Draft No. 1, 2007).

<sup>121</sup> *Id.* § 7.ZZ(6)(f).

<sup>122</sup> See Reitz, *supra* note 119, at 1458–71.

<sup>123</sup> See Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2048, 2050 (1992).

Professor Reitz praised the Minnesota system, whose features are likewise different from Judge Pryor’s proposal and in some ways less stringent than the current federal system. There, judges may depart based on “substantial and compelling circumstances” in light of the purposes of punishment,<sup>124</sup> but departures are upheld in practice if based on “substantial” reasons.<sup>125</sup> Although certain offender characteristics are off-limits for departure on retributive grounds, courts may depart based on those and other characteristics on utilitarian grounds.<sup>126</sup> The sentencing court’s judgment is overturned only for a “clear abuse of discretion,” which does not involve the appellate court reweighing relevant factors or substituting its own judgment.<sup>127</sup> Mitigated departures are “almost never” reversed, reflecting a “super deference” to trial court lenity.<sup>128</sup>

In light of all this, it is not surprising that Professor Reitz and other prominent scholars of sentencing guidelines systems have advised against adopting more binding guidelines in the federal system:

No member of Congress should work to overhaul the post-*Booker* Guidelines on the theory that they herald a return to the bad old days of fully discretionary judicial sentencing or on the theory that the new “advisory” Guidelines are extremely permissive compared with norms in guidelines sentencing systems nationwide. ... [T]he *Booker*-ized Guidelines ... remain as restrictive of judicial sentencing discretion as any system in the United States.<sup>129</sup>

It appears that Judge Pryor intends the statutory guidelines to be *more* restrictive of judicial discretion than any other system, through *de novo* appellate review to “deter” departures, a “compelling” reasons/“heartland” departure standard, a return to Commission control over departures, and restrictions on mitigating offender characteristics.<sup>130</sup> That is all the more reason to reject the proposal.

### **B. The Proposal Would Create and Exacerbate Unwarranted Disparities.**

Judge Pryor argues that disparities have increased since *Booker* because judges “are now freer to consider offender characteristics.”<sup>131</sup> He does not contend that judges are biased, but asserts that when judges consider all aspects of a defendant’s history and characteristics, as they are directed by statute to do,<sup>132</sup> consideration of factors such as employment, education, and

<sup>124</sup> Reitz, *supra* note 119, at 1482.

<sup>125</sup> See MODEL PENAL CODE, Sentencing, Reporter’s Note to § 6B.04, at 206–07 (Tentative Draft No. 1, 2007).

<sup>126</sup> Reitz, *supra* note 119, at 1487.

<sup>127</sup> *Id.* at 1485–86.

<sup>128</sup> *Id.* at 1486.

<sup>129</sup> Reitz, *supra* note 1, at 171; see also FRASE, *supra* note 74, at 241 (“[T]he post-*Booker* advisory guidelines ... may be the best structured sentencing system that can be devised for federal cases for the foreseeable future.”).

<sup>131</sup> *Id.* at [redacted].

<sup>132</sup> See 18 U.S.C. §§ 3553(a), 3661.

family support “inevitably will result” in disparities “correlated with race, class and gender.”<sup>133</sup> Thus, in Judge Pryor’s view, consideration of mitigating offender characteristics needs to be cabined.<sup>134</sup>

We believe the opposite is true: advisory guidelines help alleviate bias in the system and mandatory guidelines would exacerbate it. Restricting consideration of offender characteristics would create unwarranted disparity through “similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing,”<sup>135</sup> and this would most harm the disadvantaged and racial minorities—the vast majority of federal defendants. At the same time, a mandatory, charge-based system would transfer power over sentencing to prosecutors and law enforcement agents, which has been proven to result in unwarranted racial disparity. The best way to address racial disparity in the advisory guidelines system is to de-emphasize criminal history. Criminal history has an extreme disproportionate impact on African Americans, but this does *not* reflect their fair share of criminality. Research from across the country demonstrates that, as the result of disparate policing practices, African Americans are arrested and convicted in disproportionate numbers relative to similarly situated whites. Criminal history should thus be de-emphasized rather than baked in to mandatory rules.

**1. Mitigating Offender Characteristics.** The idea that judges should not only be forbidden from sentencing based on race or class, but should be forbidden from considering factors like education, employment or family status thought to be associated with those characteristics, may have been well-intentioned when conceived in the 1970s, but it was a serious mistake.<sup>136</sup> It harmed all defendants with relevant mitigating characteristics, especially the disadvantaged and racial minorities, particularly as implemented by the Sentencing Commission. Consideration of relevant mitigating offender characteristics leads to significantly less incarceration for racial minorities because they are the ones who are overwhelmingly and disproportionately in the criminal justice system. Although it may be possible for such considerations to reduce white incarceration levels by greater amounts (for which data is lacking), they take nothing from the positive decarceratory effect on minority groups. As Professor Tonry has put it, eliminating considerations that appeared to favor middle-class white defendants, of whom there are relatively few, “put judges in straitjackets that ma[de] it difficult or impossible to make allowances for disadvantaged offenders.”<sup>137</sup>

In addition, the more rigidly a guideline system cabins consideration of relevant offender characteristics, the more influence police and prosecutors have over the defendant’s ultimate

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<sup>133</sup> Pryor, *supra* note 44, at [redacted].

<sup>134</sup> *Id.* at [redacted].

<sup>135</sup> USSC, FIFTEEN YEAR REVIEW, *supra* note 10, at 113.

<sup>136</sup> MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 164–73 (1995).

<sup>137</sup> *Id.* at 167; *see also* See MODEL PENAL CODE, Sentencing § 6B.06 cmt. c (Tentative Draft No. 1, 2007) (The “extreme” restrictions under the federal guidelines “have drawn much criticism because they disadvantage defendants who might otherwise have made justifiable claims of mitigation.”).

sentence through enforcement and charging policies. Study after study has shown that those policies demonstrate racial bias.<sup>138</sup>

Judge Pryor attributes the rigidity of the formerly mandatory guidelines to the Sentencing Reform Act of 1984.<sup>139</sup> But Congress well understood that lack of advantages *should not* be used to choose prison over probation or to lengthen a prison sentence, but that courts *should* be permitted to consider offender characteristics in mitigation. It directed the Commission in 28 U.S.C. § 994(e) to “assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”<sup>140</sup> The Senate Report explained that the purpose of § 994(e) was “of course, to *guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.*”<sup>141</sup> Congress directed the Commission to consider the relevance of eleven factors, including the five identified in § 994(e), in establishing the type, length, and conditions of sentences for categories of offenders.<sup>142</sup> In other words, Congress considered all eleven offender characteristics to be relevant to all aspects of the sentencing decision, *except* that lack of education, skills, employment, or stabilizing ties could not be a basis for imposing or lengthening a term of imprisonment.<sup>143</sup> Section 994(e) was one of three provisions reflecting Congress’s judgment that prison was not an effective means of rehabilitation and should not be used to warehouse the disadvantaged.<sup>144</sup> The Senate Report explained that “these factors may play other roles in the sentencing decision,”<sup>145</sup> and gave several

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<sup>138</sup> See, e.g., U.S. Dep’t of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* (2015); U.S. Dep’t of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department* (2016).

<sup>139</sup> See Pryor, *supra* note 44, at [redacted] (citing 28 U.S.C. §§ 994(d) & (e) for the proposition that Congress “prohibit[ed] or limit[ed] consideration of several personal characteristics of defendants”).

<sup>140</sup> 28 U.S.C. § 994(e) (emphasis added).

<sup>141</sup> S. Rep. No. 98-225, at 175 (1983) (emphasis added).

<sup>142</sup> 28 U.S.C. § 994(d) (age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, criminal history, and degree of dependence on criminal activity for a livelihood).

<sup>143</sup> Section 994(e) was one of three provisions of the SRA that reflected Congress’s judgment that prison was not an appropriate means of rehabilitation, and that a term of imprisonment should therefore not be imposed or lengthened solely on the theory that prison might be rehabilitative.

<sup>144</sup> The other two provisions were 28 U.S.C. § 994(k) and 18 U.S.C. § 3582(a). See S. Rep. No. 98-225, at 67 n.140, 76, 119 (explaining that § 994(k) and § 3582(a) recognize that imprisonment is not an appropriate means of promoting rehabilitation); *id.* at 171 n.531 (explaining that these three provisions make clear that “a defendant should not be sent to prison only because the prison has a program that ‘might be good for him’”).

<sup>145</sup> S. Rep. No. 98-225, at 174.

examples suggesting how the Commission might recommend that these and other offender characteristics be considered to mitigate the kind or length of sentences.<sup>146</sup>

The Commission adopted a different approach. It prohibited or strongly discouraged departures based on mitigating factors that would have *benefited* the disadvantaged, the vulnerable, those who had overcome adversity, and racial minorities. When the Eighth Circuit approved a departure for a Native American who had overcome severe childhood adversity and had an exemplary work record,<sup>147</sup> the Commission deemed employment-related contributions and similar prior good works to be “not ordinarily relevant.”<sup>148</sup> It prohibited departures based on post-sentencing rehabilitation,<sup>149</sup> overruling seven courts of appeals.<sup>150</sup> When the Second Circuit upheld a departure based on the defendant’s “diminutive size [and] immature appearance,” after he was sexually victimized and subsequently placed in solitary confinement for his protection,<sup>151</sup> the Commission responded by asserting that “[p]hysical appearance, including physique, is not ordinarily relevant.”<sup>152</sup> When the Ninth Circuit upheld a departure based on the defendant’s “lack of guidance and education, abandonment by parents and imprisonment at age 17” in mitigation of his blameworthiness for his prior record and instant offense,<sup>153</sup> the Commission issued a policy statement asserting that a defendant’s “[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing” are “not relevant grounds” for departure.<sup>154</sup> The Commission also prohibited departures based on personal financial difficulties, such as a defendant pawning a gun legally owned by his father in order to pay child support,<sup>155</sup> and drug or alcohol dependence or abuse, and deemed “not ordinarily relevant” age, mental and emotional conditions, education, vocational skills, employment record, and family ties (or lack thereof).<sup>156</sup> At the same time, courts were not permitted to depart based on the racial disparity caused by the crack/powder ratio because that circumstance was not “atypical.”<sup>157</sup>

The Commission has not budged in recent years. In 2010, it received voluminous public comment and empirical evidence demonstrating that mitigating offender characteristics are

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<sup>146</sup> See *id.* at 171–74 & nn. 410–11.

<sup>147</sup> *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990).

<sup>148</sup> USSG § 5H1.11, p.s. (1991).

<sup>149</sup> *Id.* § 5K2.19, p.s. (2000).

<sup>150</sup> See *United States v. Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000); *United States v. Rudolph*, 190 F.3d 720, 722 (6th Cir. 1999); *United States v. Roberts*, No. 98-8037, 1999 WL 13073, at \*6–7 (10th Cir. Jan. 14, 1999); *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998); *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76, 79 (3d Cir. 1997).

<sup>151</sup> *United States v. Lara*, 905 F.2d 599, 601–02 (2d Cir. 1990).

<sup>152</sup> USSG § 5H1.4, p.s. (1991).

<sup>153</sup> *United States v. Floyd*, 945 F.2d 1096, 1099–100 (9th Cir. 1991).

<sup>154</sup> USSG § 5H1.12, p.s. (1992).

<sup>155</sup> See *United States v. Bristow*, 110 F.3d 754, 755, 757–58 (11th Cir. 1997).

<sup>156</sup> See USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (2009).

<sup>157</sup> See *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369–70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996).

highly relevant to the purposes of sentencing.<sup>158</sup> In response, it changed a few characteristics from “not ordinarily relevant” to “may be relevant,” but only if they are “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines”<sup>159</sup>—the same standard for characteristics deemed “not ordinarily relevant.”<sup>160</sup> The Commission simultaneously amended the introductory commentary to state that the “most appropriate use” of offender characteristics is in choosing a sentence within the guideline range, rather than varying from it.<sup>161</sup> The Manual continues to state that courts are not permitted “to substitute their policy judgments for those of Congress and the Sentencing Commission,” as to do so “would produce unwarranted sentencing disparity,”<sup>162</sup> despite Supreme Court holdings to the contrary.

This history proves the wisdom of maintaining judicial discretion to consider mitigating offender characteristics, and not returning control of departures to the Commission. Not only were untold dollars in prison costs wasted, but the very people these policies were purportedly

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<sup>158</sup> See, e.g., U.S. Sent’g Comm’n, Public Comment on Proposed Amendments – Amend. No. 2, Specific Offense Characteristics (2010), <http://www.ussc.gov/policymaking/public-comment/public-comment-march-17-2010> (Comment of Philip Miller, Chief U.S. Probation Officer, E. Dist. of Mich. 3–4 (2010)); *id.* (Letter from Probation Officers Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm’n 3 (Feb. 3, 2010)); *id.* (Letter from Jon Conyers, Jr., Chair, H. Comm. on the Judiciary, and Robert C. “Bobby” Scott, Chair, H. Subcomm. on Crime, Terrorism, & Homeland Sec., to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm’n 2–3 (Apr. 6, 2010)); *id.* (Statement of Margy Meyers & Marianne Mariano, Fed. Pub. & Cmty. Defenders, Before the U.S. Sentencing Comm’n 19, 43–80 (Mar. 17, 2010)); *id.* (Letter from Practitioners Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm’n 6–10 (Mar. 22, 2010)); *id.* (Letter from Carissa Byrne Hessick, Assoc. Professor, Ariz. State Univ., to the U.S. Sentencing Comm’n 1–5 (Mar. 17, 2010)).

<sup>159</sup> Compare USSG §§ 5H1.1 (age), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition or appearance including physique), 5H1.11 (military service) (2011), with USSG §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11 (2001). See also *id.* app. C, amend. 739 (2010). The Commission also changed drug or alcohol dependence or abuse from a prohibited ground to one that “ordinarily is not a reason for a downward departure.” Compare USSG § 5H1.4 policy statement (2011), with USSG § 5H1.4 policy statement (2001). See also *id.* app. C, amend. 739 (2010).

<sup>160</sup> See USSG § 5K2.0(a)(4), p.s. (2011) (stating that circumstances deemed “not ordinarily relevant” may be considered “only if ... present to an exceptional degree”); *id.*, § 5K2.0, p.s. (2001) (“[A]n offender characteristic or other circumstance that is, in the Commission’s view, ‘not ordinarily relevant’ ... may be relevant ... if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the guidelines.”). Education and vocational skills, drug or alcohol dependence or abuse, employment record, family ties and responsibilities, civic, charitable or public service, employment-related contributions and similar prior good works remain “not ordinarily relevant.” See USSG §§ 5H1.2, 5H1.4, 5H1.5, 5H1.6, 5H1.11, p.s. (2016).

<sup>161</sup> USSG ch. 5, pt. H, introductory cmt. (2011); *id.* app. C, amend. 739 (2010).

<sup>162</sup> USSG § 5K2.0, comment. (backg’d) (2016).

meant to protect from unfair treatment were deprived of mitigating departures. Learning from past mistakes, particularly in the federal system, the proposed Model Penal Code for sentencing would forbid sentencing commissions from proscribing grounds for departure.<sup>163</sup> In addition, the code would direct the commission to give no aggravating weight in its guidelines to race, ethnicity, sexual orientation, or identity, national origin, religion or creed, political affiliation, or belief,<sup>164</sup> but that this *may not* be read to prohibit consideration of these characteristics “if such factors are part of a showing that the defendant presents circumstances of hardship, deprivation, vulnerability, or handicap that ought to be weighed in mitigation of sentence.”<sup>165</sup>

The fact is, defendants of all races and socioeconomic classes are treated with greater fairness when the sentencing judge takes account of their individual strengths and needs. African American offenders comprised 28.5 percent of defendants not convicted of an immigration offense in 2015.<sup>166</sup> They received below-guideline sentences at a rate slightly lower than their percentage of the non-immigration population based on previous employment record (24.7%) and family ties and responsibilities (26.6%), but at a higher rate based on education and vocational skills (31.7%), need for training, skills, or treatment (30.6%), and disadvantaged upbringing/lack of youthful guidance (37.9%).<sup>167</sup>

Contrary to Judge Pryor’s suggestion,<sup>168</sup> there is no empirical support for the notion that consideration of mitigating offender characteristics leads to *unwarranted* demographic disparities. The Commission report he cites did not make that finding. It reported that black males receive longer sentences than white males after controlling for *some* factors,<sup>169</sup> but acknowledged that many legally relevant factors could not be measured, that others may have been erroneously omitted, and that if all relevant factors were included, it could change the result.<sup>170</sup> Indeed, the Commission’s datasets do not include, and its study therefore did not control for, many relevant factors that legitimately and legally affect judges’ sentencing decisions, including most offender characteristics.<sup>171</sup> The study also failed to take full account of

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<sup>163</sup> MODEL PENAL CODE, Sentencing § 6B.04 cmts. b, e (Tentative Draft No. 1, 2007).

<sup>164</sup> *Id.* § 6B.06(2)(a).

<sup>165</sup> *Id.* § 6B.06(4)(a) & cmt. d. The MPC further advises that the legislature not forbid the commission or the judiciary from weighing specific factors unless constitutional or strong public policy concerns are present, such as in the “few areas” outlined in § 6B.06. *Id.* § 6B.06 cmt. a.

<sup>166</sup> We excluded immigration offenders because they usually have no opportunity to argue for below-range sentences based on mitigating characteristics (because of fast track plea agreements or deportation); if all offenders were included, African Americans’ portion would be greater.

<sup>167</sup> U.S. Sent’g Comm’n, Individual Offender Datafiles 2015, <http://www.ussc.gov/research/datafiles/commission-datafiles> [hereinafter USSC, Individual Offender Datafiles 2015].

<sup>168</sup> Pryor, *supra* note 44, at     .

<sup>169</sup> U.S. Sent’g Comm’n, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* (2010).

<sup>170</sup> *Id.* at 4, 9–10, & nn. 35–39.

<sup>171</sup> See Baron-Evans & Stith, *supra* note 9, at 1694–97.



the impact of criminal history on sentencing decisions, or the constraint of mandatory minimums on judicial discretion to mitigate sentences.<sup>172</sup> For these and other reasons, the Commission’s study has been widely criticized, and its finding of a race effect associated with increased judicial discretion has been contradicted by other research.<sup>173</sup>

The upshot is that racial disparity is not attributable to unfair consideration of mitigating offender characteristics, but to factors not fully accounted for or examined at all in the Commission’s study. Two of those factors, criminal history and mandatory minimums, have a demonstrated and unwarranted disproportionate impact on African Americans. The proposal would exacerbate both problems.

**2. Charging Decisions.** Under the proposal, law enforcement agents and prosecutors would control sentences through pre-charging and charging decisions and through prosecutors’ control over the only viable way out for defendants, motions for substantial assistance. As the Commission has pointed out, “Disparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the [mandatory] federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced.”<sup>174</sup>

Indeed, the Commission’s research demonstrates that mandatory, charge-driven guidelines would result in unwarranted racial disparity. For example, among offenders who possessed or used a gun during a drug offense, African American offenders are more likely than whites to be charged with a mandatory minimum of five or more years under 18 U.S.C. § 924(c) rather than receive the two-level increase under the guidelines.<sup>175</sup> Similarly, 29.9 percent of African American drug offenders eligible for an enhancement for a prior “felony drug offense” under 21 U.S.C. § 851 received it, thus doubling their mandatory minimums or requiring mandatory life, whereas only 25 percent of eligible whites, 19.9 percent of eligible Hispanics, and 24.8 percent of eligible defendants of “other” races received it.<sup>176</sup> And Commission data

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<sup>172</sup> See *id.* at 1692–1703; Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC’s 2010 Report*, 10 CRIMINOLOGY & PUB. POL’Y 1077 (2011); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion & Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013); Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT’G REP. 311 (2013).

<sup>173</sup> See Baron-Evans & Stith, *supra* note 9, at 1692-1703; Ulmer et al., *supra* note 173; Fischman & Schanzenbach, *supra* note 173; Starr & Rehavi, *supra* note 173; Hofer, *supra* note 173.

<sup>174</sup> USSC, FIFTEEN YEAR REVIEW, *supra* note 10, at 92.

<sup>175</sup> *Id.* at 90, 131.

<sup>176</sup> U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 257–58 (2011).

from 2006, 2008 and 2009 showed “jaw-dropping, shocking disparity” in prosecutors’ charging practices among districts.<sup>177</sup>

If the goal is to reduce unwarranted disparities, a mandatory charge-driven system is not the answer.

**3. Criminal History.** Criminal history is closely associated with race. African Americans have more criminal history than whites. But this does not reflect their fair share of criminality. Research from across the country demonstrates that, as a result of disparate policing practices, African Americans are arrested and convicted in disproportionate numbers relative to similarly situated whites. We therefore urge the Commission in Part IV to de-emphasize criminal history, especially those enhancements that are not correlated to recidivism, are weighed more heavily than is justified by their relationship to recidivism, or that predict only minor future crimes.

**a. Disproportionate impact.** Criminal history increases sentences under the advisory guidelines in numerous ways, each of which has a disproportionate impact on racial minorities. Prior convictions increase the criminal history score,<sup>178</sup> which can increase the criminal history category and in turn the guideline range.<sup>179</sup> In 2015, black defendants comprised 20.5 percent of all defendants, but 34 percent of defendants in the top three criminal history categories.<sup>180</sup> Prior convictions are also double-counted in the offense level under certain guidelines, which apply disproportionately to black or Hispanic defendants.<sup>181</sup> Further, just one criminal history point disqualifies a drug trafficking offender from safety-valve relief from a mandatory minimum,<sup>182</sup> as well as the two-level safety-valve reduction in the offense level.<sup>183</sup> Black offenders qualify for the safety valve far less often than any other group, primarily because of criminal history.<sup>184</sup> Finally, prior convictions for a “controlled substance offense” or a “crime of violence” trigger the harsh automatic punishments under the career offender and armed career criminal guidelines.<sup>185</sup> In 2015, 56.7 percent of defendants sentenced under the career offender guideline,

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<sup>177</sup> *United States v. Young*, 960 F. Supp. 2d 881, 882–83, 907 (N.D. Iowa 2013). “For example, a defendant in the Northern District of Iowa (N.D. of Iowa) who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska,” and a defendant in the Eastern District of Tennessee is “3,994% more likely” to receive the enhancement than in the Western District of Tennessee. *Id.* at 882, 992.

<sup>178</sup> *See* USSG § 4A1.1.

<sup>179</sup> *See* USSG Ch. 5, Pt. A (Sentencing Table).

<sup>180</sup> USSC, Individual Offender Datafiles 2015, *supra* note 1687.

<sup>181</sup> Of defendants sentenced under § 2K2.1(a), 47.1% are black; 95% of defendants sentenced under §§ 2L1.1(b)(3), 2L1.2(b), 2L2.1(b) and 2L2.2(b) are Hispanic. *Id.*

<sup>182</sup> 18 U.S.C. § 3553(f)(1).

<sup>183</sup> *See* USSG § 2D1.1(b)(17).

<sup>184</sup> U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM at xxviii, 354 (2011).

<sup>185</sup> *See* USSG §§ 4B1.1, 4B1.4. The career offender guideline catapults defendants into the highest criminal history category, CHC VI, and an offense level at or near the statutory

and 65.3 percent of defendants sentenced under the armed career criminal guideline, were black.<sup>186</sup> Black defendants comprised only 30.0 percent of defendants convicted of the eight common instant offense types for career offenders,<sup>187</sup> but they were 57.1 percent of such defendants sentenced as career offenders.<sup>188</sup>

Criminal history can also affect judicial discretion. In our experience, when defendants have a lengthy record, even if comprised of minor offenses such as drug possession, driving offenses, or trespassing, judges are generally less likely to exercise leniency and more likely to sentence within the guideline range. This helps explain why empirical research has shown that “criminal history has significant and substantial effects beyond the presumptive sentence.”<sup>189</sup> The Commission’s failure to account for this factor in its study explains a substantial part of the race effect it found. “Black male disparity is more than 30% larger when a measure of criminal history . . . above that which is already captured by the presumptive sentence . . . is not included in the analysis.”<sup>190</sup>

**b. Disparate policing practices.** Blacks comprised about 13 percent of the U.S. population in 2010.<sup>191</sup> They reported using an illicit drug in the past year at about the same rate as whites (16.8% and 15.3%, respectively<sup>192</sup>), and there is “little evidence, when all drug types are considered, that blacks sell drugs more often than whites.”<sup>193</sup> Blacks are about half as likely as

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maximum; the armed career criminal guideline requires an offense level of at least 33 and a criminal history category of at least IV.

<sup>186</sup> USSC, Individual Offender Datafiles 2015, *supra* note 1687.

<sup>187</sup> From most to least frequent, those are drug-trafficking, firearms, robbery, racketeering/extortion, assault, sexual abuse, murder, and arson. USSC, 2015 SOURCEBOOK, *supra* note 24, at tbl. 22.

<sup>188</sup> USSC, Individual Offender Datafiles 2015, *supra* note 1687.

<sup>189</sup> Ulmer et al., *supra* note 173, at 1093.

<sup>190</sup> *Id.*

<sup>191</sup> U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2014*, available at [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2014\\_PEPSR6H&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPSR6H&prodType=table).

<sup>192</sup> Substance Abuse & Mental Health Servs. Admin., Results from the 2010 National Survey on Drug Use and Health, tbl. 1.19B, available at <http://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsTables/NSDUHTables2010R/HTM/Sect1peTabs1to46.htm>.

<sup>193</sup> NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 60 (Jeremy Travis et al. eds., 2014).

whites to have a firearm in their homes.<sup>194</sup> Nonetheless, African Americans accounted for 39 percent of drug sale arrests and 41 percent of weapon possession arrests in 2010.<sup>195</sup>

According to the National Research Council, extreme racial disparities in imprisonment have been “partly caused and substantially exacerbated” by police arrest practices associated with the “war on drugs,” including racial profiling, and harsh sentencing laws and guidelines that apply disproportionately to black people, including three-strikes laws,<sup>196</sup> such as the career offender and armed career criminal guidelines.

Research from across the country shows that black drivers and pedestrians are stopped, frisked, searched, and arrested far in excess of their portion of the population or their share of criminality. The use of racial profiling to stop, question, and search black and brown drivers in an effort to find drugs, guns, and cash originated in 1984 with Operation Pipeline, a key initiative of the “war on drugs.” Endorsed and financed by the Drug Enforcement Administration, thousands of state and local police officers were trained in its methods.<sup>197</sup> The practice became institutionalized in police departments across the country, and was adopted in some cities to stop and frisk pedestrians.<sup>198</sup>

The practice of targeting minorities for investigatory stops has been defended as an effective and efficient policing strategy on the theory that minorities are more likely to commit crime.<sup>199</sup> But this theory has been tested and disproved in studies across the nation. These studies, which analyze data recorded by police officers<sup>200</sup> and control for crime rates and other

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<sup>194</sup> Rich Morin, Pew Research Center, *The Demographics and Politics of Gun-Ownning Households* (July 15, 2014), [www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households](http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households).

<sup>195</sup> Arrest rates for 2010 were obtained from the Bureau of Justice Statistics, Arrest Data Analysis Tool, *available at* <http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#>.

<sup>196</sup> NAT’L RESEARCH COUNCIL, *supra* note 194, at 70–71, 73, 91, 102–129.

<sup>197</sup> See Gary Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism*, *ESQUIRE*, Jan. 29, 2007, [www.esquire.com/news-politics/a1223/driving-while-black-0499](http://www.esquire.com/news-politics/a1223/driving-while-black-0499) (originally published as *DWB*, *Esquire*, Apr. 1999, at 118–127); see also David Kocieniewski, *New Jersey Argues that the U.S. Wrote the Book on Race Profiling*, *N.Y. TIMES*, Nov. 29, 2000, at A1.

<sup>198</sup> See, e.g., Charles Epp & Steven Maynard-Moody, *Driving While Black*, *WASH. MONTHLY*, Jan. 1, 2014, at 14.

<sup>199</sup> See Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers’ Characteristics during Traffic Stops with Police: Results from a National Survey*, 21 *JUST. Q.* 49, 50 (2004); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 *MINN. L. REV.* 265, 294 (1999).

<sup>200</sup> In response to public attention and lawsuits, police in some jurisdictions are required to record the details of traffic and (sometimes) pedestrian stops, including the reason for the stop, the race of the person stopped, and (in some jurisdictions) the outcome. See Frank R. Baumgartner et al., *Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002–2013* at 5, *POLITICS, GROUPS, & IDENTITIES*

variables, consistently find that minorities are stopped, frisked, searched, and arrested at disproportionately high rates, but that drugs, weapons, and other contraband are found at significantly lower rates in frisks and searches of minorities than of whites.

For example, in Los Angeles, analysis of field data reports on pedestrian and motor vehicle stops from July 2003 through June 2004 revealed that the black stop rate per 10,000 residents was 3,400 stops higher than the white stop rate, after controlling for crime rates in the reporting districts and a range of other variables.<sup>201</sup> Stopped blacks were 127 percent more likely to be frisked, 76 percent more likely to be searched, and 29 percent more likely to be arrested than stopped whites.<sup>202</sup> But frisked blacks were 42 percent less likely than frisked whites to be found with weapons, 25 percent less likely to be found with drugs, and 33 percent less likely to be found with other contraband. Searched blacks were 37 percent less likely than searched whites to be found with weapons, 24 percent less likely to be found with drugs, and 25 percent less likely to be found with other contraband.<sup>203</sup> The researchers concluded that it was thus “implausible that higher frisk and search rates are justified by higher minority criminality,”<sup>204</sup> and that if the same level of justification were used to search minorities and whites, fewer minorities would be searched, or proportionately more whites would be searched.<sup>205</sup>

Similar results are found in New York City. Based on analysis of 4.4 million documented pedestrian stops in New York City from 2004 through 2012, the court in *Floyd v. City of New York* found that 52 percent of those stopped were black, 31 percent were Hispanic, and 10 percent were white, compared with a population 23 percent black, 29 percent Hispanic, and 33 percent white.<sup>206</sup> A weapon was seized in one of every 71 stops of whites, 100 stops of blacks, and 91 stops of Hispanics; other contraband, including illegal drugs and stolen property, was seized in one of every 43 stops of whites, 56 stops of blacks, and 59 stops of Hispanics.<sup>207</sup> When the total number of stops declined by 22 percent in 2012, the disparity in “hit rates” was even more pronounced: a weapon was found in one of every 49 stops of whites, but it took 93 stops of blacks and 71 stops of Hispanics to find a weapon.<sup>208</sup> The court found that blacks and Hispanics

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(2016), <http://dx.doi.org/10.1080/21565503.2016.1160413>; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. TIMES, Oct. 25, 2015, at A1.

<sup>201</sup> Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5–6 (2008), available at <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf>.

<sup>202</sup> *Id.* at 27.

<sup>203</sup> *Id.* at 7–8. Similar, but less extreme, results were found for Hispanics.

<sup>204</sup> *Id.* at 27.

<sup>205</sup> *Id.* at 23–24.

<sup>206</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013).

<sup>207</sup> *Id.*

<sup>208</sup> Office of the Public Advocate, City of New York, *Stop and Frisk and the Urgent Need for Meaningful Reforms* 1 (May 20, 2013), available at <http://archive.advocate.nyc.gov/stop-frisk>.

were more likely to be stopped above and beyond the crime rate in a given area,<sup>209</sup> and that “blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites.”<sup>210</sup>

Data from North Carolina,<sup>211</sup> Kansas City,<sup>212</sup> Connecticut,<sup>213</sup> Illinois,<sup>214</sup> San Francisco,<sup>215</sup> and a national survey<sup>216</sup> point to the same conclusion: blacks, and to a lesser extent Hispanics, are disproportionately stopped, frisked, searched, and arrested, but are found with contraband significantly less often than whites. Because police find contraband where they look for it, blacks are arrested and convicted in disproportionate numbers relative to similarly situated whites,<sup>217</sup> and “[p]olice profiling results in many more arrests of black people than would otherwise occur.”<sup>218</sup> Although some police departments are beginning to institute reforms,<sup>219</sup> even in “most of the states that monitor traffic stops most closely, officials acknowledge that this close attention has not had a discernible effect.”<sup>220</sup>

Another contributing factor is that in poor urban areas, the purchase and consumption of illegal drugs, and incidents like drunkenness and domestic disturbances are more likely to take place in public, whereas in suburban and more affluent urban areas, these activities are more likely to take place in private.<sup>221</sup> Residents of poor urban areas are thus “more exposed to police scrutiny and are more likely to be arrested than people residing in the suburbs or in wealthier urban neighborhoods.”<sup>222</sup> However, there is evidence that police overlook criminality by whites when they see it. A study of indoor and outdoor drug markets in Seattle found that blacks were

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<sup>209</sup> *Floyd*, 959 F. Supp. 2d at 560.

<sup>210</sup> *Id.*

<sup>211</sup> Baumgartner et al., *supra* note 201.

<sup>212</sup> Epp & Maynard-Moody, *supra* note 199, at 14.

<sup>213</sup> Matthew B. Ross et al., Inst. for Mun. & Reg’l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* iv, 73, 95, 108, 134, 161, 175 (2016), available at [www.ccsu.edu/imrp/Publicatons/Files/May%202016%20Connecticut%20Racial%20Profiling%20Report.pdf](http://www.ccsu.edu/imrp/Publicatons/Files/May%202016%20Connecticut%20Racial%20Profiling%20Report.pdf).

<sup>214</sup> LaFraniere & Lehren, *supra* note 201.

<sup>215</sup> Office of the San Francisco Dist. Att’y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* 29-31 (2016), available at [http://sfdistrictattorney.org/sites/default/files/Document/BRP\\_report.pdf](http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf).

<sup>216</sup> Engel & Calnon, *supra* note 200.

<sup>217</sup> Harris, *supra* note 200, at 297, 301–02.

<sup>218</sup> NAT’L RESEARCH COUNCIL, *supra* note 194, at 91 n.16.

<sup>219</sup> *See All Things Considered: To Reduce Bias, Some Police Departments Are Rethinking Traffic Stops* (NPR radio broadcast July 25, 2016), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=486945181>.

<sup>220</sup> LaFraniere & Lehren, *supra* note 201.

<sup>221</sup> NAT’L RESEARCH COUNCIL, *supra* note 194, at 128.

<sup>222</sup> *Id.*; *see also* USSC, FIFTEEN YEAR REVIEW, *supra* note 10, at 134 (noting the “relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods”).

overrepresented in both outdoor and indoor arrests, with arrests of suspected black dealers outnumbering arrests of suspected white dealers by nearly two to one, and that significant outdoor drug activity that overwhelmingly involved whites appeared to be “largely invisible” to the police.<sup>223</sup>

The upshot is that African Americans appear in federal court with many prior convictions that they would not have if they were white. This is reflected in the disproportionate racial impact of criminal history enhancements under the guidelines. Rather than baking this unwarranted disparity into mandatory guidelines, the Commission should de-emphasize criminal history, as we recommend in the next part.

### **C. Mandatory Guidelines Would Increase Severity and Prison Crowding.**

Judge Pryor recognizes that the guidelines were and still are too severe. He attributes this to Congress, while acknowledging that the Commission failed to assert sufficient independence until recently.<sup>224</sup> Notably, this show of independence followed *Booker*. Before *Booker*, the Commission was responsive only to DOJ and Congress.<sup>225</sup> After *Booker*, the federal judiciary has finally been integrated into the guidelines development process. Under Judge Pryor’s proposal, Congress, not the Commission, would be directly in charge of guideline increases.

Judge Pryor’s proposal, in any event, is not intended to significantly reduce severity. He specifically does “not suggest dramatic, across-the-board reductions in federal sentences,” but only that “penalties could be reduced for first-time and low-level non-violent offenders.”<sup>226</sup> The Commission has been directed since day one to ensure that first-time, non-violent offenders do not go to prison at all.<sup>227</sup> It chose not to follow that directive,<sup>228</sup> but can follow it now.

Judge Pryor makes no prediction as to whether Congress would increase penalties in the initial set of statutory guidelines, but suggests that it would not raise penalties over time. He posits that requiring Congress to enact aggravating factors into law would “likely deter increases in severity” because Congress would find it more difficult to enact aggravating factors through the bicameral legislative process rather than through a seven-member Commission.<sup>229</sup> But this

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<sup>223</sup> Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 119, 122, 129–30 (2006).

<sup>224</sup> Pryor, *supra* note 44, at [redacted].

<sup>225</sup> See Michael Tonry, *Federal Sentencing Can Be Made More Just, if the Sentencing Commission Wants to Make It So*, 12 FED. SENT’G REP. 83, 83 (1999) (noting that the Commission “chose . . . to view the Department of Justice and conservative members of Congress as its primary constituency,” while “federal judges were not well-integrated into the federal [guideline] development process”); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 765 (2005) (“[T]he Sentencing Commission was a highly politicized agency from the outset.”).

<sup>226</sup> Pryor, *supra* note 44, at [redacted].

<sup>227</sup> 28 U.S.C. § 994(j).

<sup>228</sup> See USSG, ch. 1, pt. A, § 1.4(d) (1987).

<sup>229</sup> Pryor, *supra* note 43, at [redacted].

prediction is contrary to experience. Congress legislates through the bicameral process whether it issues directives to the Commission or directly enacts penalty increases. And while Congress finds it difficult to reduce penalties (as shown in the past few years), it has had little trouble increasing them. “Congress is, as it was intended to be, a political, non-expert lay body,” and “such a body’s view of the needed or desirable changes [has] in the past focused on two elements, the need for harsher sentences, and the need for less judicial discretion.”<sup>230</sup>

Indeed, Congress had no trouble enacting specific directives and mandatory minimums before *Booker*, and has enacted far fewer specific directives and mandatory minimums after *Booker*. In the eighteen years before *Booker* (1987–2004), Congress issued 59 specific directives to the Commission, or 3.3 per year. In the eleven years after *Booker* (2005–2015), Congress issued eight specific directives, an average of 0.7 per year. There have been no specific directives in seven of these eleven years, and none in the past three years. In the eighteen years before *Booker*, Congress enacted 167 new, increased, or expanded mandatory minimums, an average of 9 per year. In the eleven years after *Booker*, it enacted 34 new, increased, or expanded mandatory minimums, an average of 3 per year, and most of these (22) were in the Adam Walsh Act of 2006.<sup>231</sup> There were zero new or expanded mandatory minimums in six of these eleven years.

**[COMP: Please insert Figure 2 about here]**

We make no claim of causation about the reduction in directives and mandatory minimums post-*Booker*, but the reduction shows that the increase in judicial discretion did not drive Congress to act in harmful ways. And there are good reasons to believe that having Congress directly enact aggravating factors would make increases in severity *more* likely. Congress often enacts legislation directing the Commission to raise penalties if the Commission finds an increase appropriate. The Commission then studies the issue and may conclude that no increase is appropriate, or that a narrower or smaller increase is warranted.<sup>232</sup> Likewise, when the Commission is considering a penalty increase on its own, it studies whether the increase is warranted. The Commission may be influenced by politics, but under Judge Pryor’s proposal, increases would be driven by politics alone. There would be no feedback from judges or study by the Commission before an increase was enacted.

Similarly un-reassuring is Judge Pryor’s statement that his proposed system “would arguably render mandatory minimums unnecessary, except for egregious offenses.”<sup>233</sup> Judge Pryor says that Congress “enacts mandatory minimums because it wants to make sure federal judges don’t impose unduly lenient sentences for certain types of aggravated offenses or for

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<sup>230</sup> Transcript of Hearing on Federal Sentencing Options after *Booker* before U.S. Sent’g Comm’n at 273 (Feb. 16, 2012) (Sara Sun Beale), [http://www.ussc.gov/sites/default/files/Transcript\\_5.pdf](http://www.ussc.gov/sites/default/files/Transcript_5.pdf).

<sup>231</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).

<sup>232</sup> See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 74-75 (1991) [hereinafter USSC, 1991 MANDATORY MINIMUM REPORT].

<sup>233</sup> Pryor, *supra* note 44, at 22.



offenders with serious criminal records.”<sup>234</sup> But Congress appears to view as “egregious” the offenses that are subject to mandatory minimums now, and is likely to find new offenses egregious in the future for political reasons. The proposed mandatory guidelines would render mandatory minimums “unnecessary” only because they would prevent judges from exercising leniency in the vast majority of cases.

As noted in Part I of this Article, the prison population grew by 290 percent from the guidelines’ inception until *Booker*, grew by only 5.3 percent in the twelve years after *Booker*, and has decreased by 11.2 percent over the past three years. If the guidelines had been mandatory all along, the prison population would undoubtedly have continued to grow. Instead of the Commission lowering guideline ranges in some key areas in response to feedback from judges and courts of appeals, the guidelines would have continued to develop in a “one-way upward ratchet,”<sup>235</sup> and judges would have been required to follow the guidelines in the vast majority of cases.

#### D. Complexity

In calling for fewer aggravating and mitigating factors, Judge Pryor cites the need to greatly simplify the guidelines. He recounts the early criticisms of the guidelines’ complexity by Judges Marvin Frankel and Jon Newman, and describes how matters have grown worse over time, noting that the Guidelines Manual has expanded from its original 268 pages to today’s 542 pages. He also makes the claim that the guidelines have “grown in complexity” since *Booker*,<sup>236</sup> which he largely attributes to legislation directing the Commission to add factors that make the Manual “more complicated.”<sup>237</sup>

We agree with his first point that the guidelines have always been, and remain, too complex. All else being equal, less complexity is better than more. If guidelines can measure culpability *via* rules that are simple and straightforward, they provide better notice to the public and defendants about sentencing exposure, thus enhancing the fairness of the process. In addition, uncomplicated Guidelines reduce the likelihood of error by litigants and judges thereby avoiding arbitrary differences in sentence length.

But we disagree that the advisory nature of the guidelines has contributed to complexity (indeed, we think it has likely helped to alleviate it), or that legislation is necessary to simplify

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<sup>234</sup> *Id.*

<sup>235</sup> Bowman, *supra* note 13, at 1319–20. *See also id.* (“[T]he power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice.”); Baron-Evans & Stith, *supra* note 9, at 1663 (“Without the balancing influence of the views of Article III judges (or line prosecutors) who had to apply the Commission’s policies in real cases, ‘Main Justice’ in Washington, backed by its allies in Congress, dominated the Commission’s agenda and specific outcomes.”).

<sup>236</sup> Pryor, *supra* note 44, at -.

<sup>237</sup> *Id.* at 13.

them, much less legislation creating a mandatory regime. As we discuss below in Part IV, the Commission can take significant steps to simplify them on its own within the framework of the current system.

As an initial matter, there is no evidence that *Booker* has created greater complexity in the system; in fact, as shown above, Congress has enacted far fewer directives after *Booker* than before. Judge Pryor laments what he refers to as the “*Booker* three-step process” whereby judges calculate the guideline range, consider any relevant guideline departures, and then decide whether to vary from the determined range for reasons described in § 3553(a).<sup>238</sup> But the three-step process is not actually required by *Booker* or any other Supreme Court case.<sup>239</sup> Courts require only that the guideline range be determined (with or without consideration of departures) and that a final sentence be grounded in and explained by reference to the § 3553(a) factors.<sup>240</sup> No circuit requires a district judge to jump through the hoop of determining departures.<sup>241</sup> Indeed, it is only the Commission that recommends that process.<sup>242</sup>

Judge Pryor cites state systems, including his own experience helping to create the Alabama Sentencing Commission, as models for simpler guidelines. But some greater amount of complexity in the federal system as compared to state systems is inevitable. State criminal codes typically differentiate among offenses with much more specificity than the federal code. For instance, a typical state robbery statute might have at least three degrees of the offense with

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<sup>238</sup> *Id.* at 12.

<sup>239</sup> See Baron-Evans & Hiller, *supra* note 71, at 296–98.

<sup>240</sup> See, e.g., *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008); *United States v. Messina*, 806 F.3d 55, 62 (2d Cir. 2015); *United States v. Hamilton*, 323 F. App’x 27, 31 (2d Cir. 2009); *United States v. Howe*, 543 F.3d 128, 137–39 (3d Cir. 2008); *United States v. Simmons*, 568 F.3d 564, 567–70 (5th Cir. 2009); *Tristan-Madrigo*, 601 F.3d at 635; *United States v. Drain*, 740 F.3d 426, 431–32 (7th Cir. 2014); *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *United States v. Chase*, 560 F.3d 828, 830–32 (8th Cir. 2009); *United States v. Ellis*, 641 F.3d 411, 422 (9th Cir. 2011); *United States v. Tom*, 327 F. App’x 93, 94, 97–99 (10th Cir. 2009); *United States v. Soto-Arreola*, 486 F. App’x 735, 742 (10th Cir. 2012); *United States v. Matthews*, 477 F. App’x 585, 588 (11th Cir. 2012); *United States v. Bigley*, 786 F.3d 11, 15 (D.C. Cir. 2015).

<sup>241</sup> See, e.g., *United States v. Politano*, 522 F.3d 69, 74–75 (1st Cir. 2008); *United States v. McGowan*, 315 Fed. App’x 338, 341–42 (2d Cir. 2009); *United States v. Colon*, 474 F.3d 95, 99 & n.8 (3d Cir. 2009); *United States v. Whitley*, 544 F. App’x 154, 158–59 (4th Cir. 2013); *United States v. Diosdado-Star*, 630 F.3d 359, 362–66 (4th Cir. 2011); *United States v. Randall*, 440 F. App’x 283, 289 (5th Cir. 2011); *United States v. Gutierrez*, 635 F.3d 148, 153 (5th Cir. 2011); *United States v. Mejia-Huerta*, 480 F.3d 713 (5th Cir. 2007); *United States v. Tristan-Madrigo*, 601 F.3d 629, 635 (6th Cir. 2010); *United States v. Jackson*, 547 F.3d 786, 793 (7th Cir. 2008); *United States v. Carter*, 425 Fed. App’x 527, 529–30 (8th Cir. 2011); *United States v. Vasquez-Cruz*, 692 F.3d 1001 (9th Cir. 2012); *United States v. Cooke*, 635 F. App’x 524, 525 (10th Cir. 2015); *United States v. Armenta-Mendoza*, 648 F. App’x 902 (11th Cir. 2016); *United States v. Nelson*, 644 F. App’x 979, 982 (11th Cir. 2016).

<sup>242</sup> USSG § 1B1.1(a)–(c).

increasing severity based on factors such as whether force was used, whether and what type of a weapon was possessed, and whether the victim was injured. The code then provides different levels of punishment for each degree of the offense. By contrast, the federal robbery statute, the Hobbs Act, prohibits the most basic form of robbery (as well as extortion), encompassing the least to the most severe conduct, and provides a single sentencing range of zero to 20 years imprisonment. Thus, the many factors measuring culpability that are typically captured by the offense of conviction in state court are left for the sentencing phase in federal court.

Professor Frase, a proponent of sentencing guidelines generally, cites this difference between state and federal codes, as well as the “chaotic state of federal criminal law” (due to the federal code’s lack of a comprehensive revision in over a hundred years), as yet another reason for resisting the sort of presumptive-style guideline system that seems to work well in states such as Minnesota.<sup>243</sup>

If some amount of complexity is inherent in a guideline system, it is far better to make those guidelines less rigid to prevent the complexity from driving the entirety of the sentence. Allowing for judicial discretion, guided by both the guidelines and with reference to broader sentencing goals outlined in § 3553(a), provides a relief valve for sentences that might otherwise be overdetermined by complex calculations.

In addition, simplicity for simplicity’s sake risks injustice as much as complexity. Some of the most criticized features of the guidelines relate to very simple metrics. The amount of drugs attributable to a defendant may be easily measured in many cases, but the calculation often says little about the person’s culpability. The same is true for loss amount in fraud cases. This is not to say that the current guidelines cannot be greatly simplified. They can be, and in the next part we offer specific examples. But some complexity, in the form of relevant distinctions, is beneficial. Pre-*Booker*, when it was said that the mandatory guidelines were hard to distinguish from mandatory minimums,<sup>244</sup> the Commission countered that the guidelines differentiate defendants convicted of the same offense by a variety of facts that indicate offense seriousness, while mandatory minimums are based on only one or two facts.<sup>245</sup> Accordingly, the Commission said, the guidelines make relevant distinctions whereas mandatory minimums create unwarranted uniformity.<sup>246</sup>

Although the guidelines certainly went overboard with minutiae, Judge Pryor’s proposed mandatory guidelines would be based on just a few aggravating facts,<sup>247</sup> the same sort of “blunt

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<sup>243</sup> FRASE, *supra* note 74, at 241.

<sup>244</sup> See USSC, 1991 MANDATORY MINIMUM REPORT, *supra* note 233, at 96–96, 98–100, 101, 103, 104–06 (1991).

<sup>245</sup> See *id.* at ii, 26–27; U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 57–58 (2011) [hereinafter USSC, 2011 MANDATORY MINIMUM REPORT].

<sup>246</sup> USSC, 1991 MANDATORY MINIMUM REPORT, *supra* note 233, at ii, 26–27; USSC, 2011 MANDATORY MINIMUM REPORT, *supra* note 246, at 57–58.

<sup>247</sup> Pryor, *supra* note 44, at     .

instrument” as mandatory minimums.<sup>248</sup> Judge Pryor rightly observes that the pre-*Booker* system required judges to be “as much of an accountant as an arbiter of justice.”<sup>249</sup> But assuming judges would have fewer numbers to add (which is far from clear<sup>250</sup>), this would not be a virtue if the ranges were based on a few aggravating factors that failed to make relevant distinctions, *and* judges were once again not permitted the leeway to do individualized justice.

Lastly, we note that Judge Pryor’s proposed “radically simpler system with wider sentencing ranges”<sup>251</sup> would appear either to invite greater variation in sentencing than there is today—since the extent of variances (13 months on average) is a fraction of the breadth of ranges in any radically simpler system<sup>252</sup>—or it would introduce a new kind of complexity. The Commission would be “recommending higher or lower [specific] sentences *within* the wider ranges” based on “factors moved from the current guidelines to the commentary.”<sup>253</sup> Thus, judges would presumably be calculating something akin to sub-ranges based on facts designated by the Commission. Moreover, unless courts were free to sentence above or below a recommended sub-range based on policy considerations alone (and not just facts), the sub-range system itself would violate the Sixth Amendment under *Cunningham v. California*, 549 U.S. 270 (2007).<sup>254</sup>

### E. Relevant Conduct

Judge Pryor states that the days of “relevant conduct” would be over,<sup>255</sup> but that would only be so if judges were prohibited from considering uncharged, dismissed, and acquitted conduct within the wide ranges. Under Judge Sessions’ proposal, to which Judge Pryor says his is similar, the judge would still be required to consider uncharged and acquitted conduct in imposing a sentence within the mandatory range.<sup>256</sup> Given the width of the ranges in Judge Sessions’ table or any similarly simplified grid, a defendant’s sentence could be more than doubled, for example

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<sup>248</sup> *Id.* at [redacted].

<sup>249</sup> *Id.* at [redacted].

<sup>250</sup> *Id.* at [redacted].

<sup>251</sup> *Id.* at [redacted].

<sup>252</sup> Sessions, *supra* note 62, at 345.

<sup>253</sup> Pryor, *supra* note 44, at [redacted], [redacted].

<sup>254</sup> The Court held in *Cunningham* that the California guidelines system was unconstitutional because it referred only to “facts” in aggravation and made no provision for the judge to sentence above the middle sub-range based solely on a policy judgment in light of the general objectives of sentencing or the judge’s subjective belief. *See* 549 U.S. at 279–81, 292–93. After the Court’s subsequent decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), a system that did not provide for the judge to sentence above *or* below a sub-range based on policy considerations alone would violate *Cunningham*.

<sup>255</sup> Pryor, *supra* note 44, at [redacted].

<sup>256</sup> Sessions, *supra* note 62, at 350. (“Uncharged relevant conduct could only be used to sentence within a larger cell on the simplified grid (and then only if found by the court by a preponderance of the evidence). Acquitted . . . could not increase a defendant’s offense level.”).

from 150 to 376 months, based on relevant conduct.<sup>257</sup> The Commission can limit or eliminate relevant conduct without resorting to mandatory guidelines, as we suggest in the next part.

#### **F. The Commission’s Effective Policymaking Would Be Diminished or Eliminated.**

Judge Pryor maintains that there would still be a role for the Commission: it could issue commentary recommending higher or lower sentences within ranges, amend departure provisions, amend criminal history rules, recommend statutory changes to Congress, and collect and analyze data.<sup>258</sup> Assuming it could do all of those things, its policymaking role would be reduced, and may well be eliminated, and there would be no systematic feedback to those prescribing punishments from the judges imposing them.

It is not clear that the Commission could continue to promulgate criminal history guidelines. Judge Pryor says that the criminal history guidelines “would not need congressional approval” because the Sixth Amendment does not apply to prior-conviction enhancements.<sup>259</sup> But the Commission cannot issue any kind of rule without congressional approval.<sup>260</sup> If Judge Pryor means that Congress could delegate rulemaking authority to the Commission to promulgate criminal history enhancements because they would not be “elements,” this is questionable. Because *Booker* rendered all of the guidelines advisory, whether the Sixth Amendment would apply to a mandatory version of the criminal history guidelines—which require factfinding beyond the mere “fact of a prior conviction”<sup>261</sup>—has not been tested. If the Sixth Amendment would apply, enhancing criminal history facts would be “elements,”<sup>262</sup> and Congress arguably could not constitutionally delegate its legislative responsibility to enact them.<sup>263</sup>

It is also quite possible that some members of Congress would see no need for a sentencing commission, since Congress would be enacting the statutory guidelines, or the Commission may simply be sidelined. Either way, the proposal would greatly diminish the need for or usefulness of a sentencing commission, including its work on data collection and research.

#### **G. What Would Judge Frankel Say?**

We strongly doubt that Judge Frankel would approve of a system that would restrict judicial discretion to consider mitigating offender characteristics, sideline or eliminate the Sentencing Commission, and place sentence severity squarely in the hands of political actors.

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<sup>257</sup> *Id.* at 345.

<sup>258</sup> Pryor, *supra* note 44, at [redacted].

<sup>259</sup> *Id.* at [redacted].

<sup>260</sup> The Commission cannot promulgate guidelines except by virtue of a congressional delegation of rulemaking authority. The congressional approval requirement, 28 U.S.C. § 994(p), ensures that it is “fully accountable to Congress,” *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

<sup>261</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>262</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

<sup>263</sup> *See* Pryor, *supra* note 44, at [redacted] & n. [redacted].

In his book, *Criminal Sentences: Law Without Order* (1973), Judge Frankel proposed that wholly indeterminate sentencing be replaced with greater consistency and procedural fairness, and a reduction in unwarranted disparities. He was motivated by a concern for defendants—that they were subjected to arbitrary exercises of power,<sup>264</sup> received no fair notice of what their sentences would be<sup>265</sup> and “no explanation or purported justification” for the sentence imposed,<sup>266</sup> and that sentences were too often unjustifiably harsh. One of his “basic premises” was “a firm conviction that we in this country send far too many people to prison for terms that are far too long.”<sup>267</sup> This, at a time when incarceration rates were a small fraction of what they are today. His idea of unwarranted disparity was the imposition of harsh sentences for illegitimate reasons, such as vindictiveness, bias, or whim. He provided several anecdotes to illustrate that view, but none of arbitrary leniency.<sup>268</sup> Judge Frankel argued that the answer was an agency with specialized expertise to develop “sentencing guidelines.” Because convicted persons suffer from a “lack of political power,” and political officials take an interest in sentencing only in times of perceived crisis, the agency would “serve in a sense as a lobby” for those sentenced, studying sentencing on an ongoing basis and promulgating rules subject only to congressional veto.<sup>269</sup>

Five years after the guidelines went into effect, Judge Frankel criticized their severity and rigidity, recommended that “mitigating departures,” which the Commission had forbidden or strongly discouraged, “ought to be presumed to be valid,” and challenged the Commission to identify “what we mean to achieve, and what we may in fact achieve, as we continue to mete out long prison sentences.”<sup>270</sup>

This never happened during the mandatory guidelines era. Instead, sentencing policy reflected a “tendency towards debasement in the criminal justice system, that is, the tendency towards the misuse of high ideals as camouflage for practices that are arbitrary, self-serving, or cruel.”<sup>271</sup> Judge Frankel’s “uniformity ideal” was debased “as cover for crude punitiveness.”<sup>272</sup> “Disparity-talk” was used “as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment.”<sup>273</sup>

The Supreme Court’s decisions rendering the guidelines advisory have gone a long way to rescuing federal sentencing from the entrenched problems of the mandatory guidelines era,

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<sup>264</sup> MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 11 (1973).

<sup>265</sup> *Id.* at 5–6, 10, 19, 96–97.

<sup>266</sup> *Id.* at 17, 42–44.

<sup>267</sup> *Id.* at 58.

<sup>268</sup> *Id.* at 17–18.

<sup>269</sup> Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 50–51 (1972).

<sup>270</sup> Frankel, *Sentencing Guidelines*, *supra* note 123, at 2051.

<sup>271</sup> Michael O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 813 (2006).

<sup>272</sup> *Id.* at 817.

<sup>273</sup> Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 ARIZ. ST. L.J. 425, 447 (2006).

and we should not reverse course. We offer the following recommendations to further improve the advisory guidelines system.

#### IV. Recommendations

We make the following recommendations to reduce unwarranted racial disparity, severity and complexity. All can be implemented by the Commission without the need for legislation.

##### A. De-Emphasize Criminal History.

Renowned scholars at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota recommend reducing or eliminating criminal history rules that have a disparate impact on nonwhite offenders, as the “fastest and least expensive” way of reducing racial disproportionality in prison populations, and the damaging effects on individuals, communities, and society of the real and perceived unfairness of criminal history enhancements, and because a “large body of research” suggests that lower incarceration rates for minority offenders will actually reduce crime.<sup>274</sup> They recommend that sentencing commissions “examine the racial impact of its criminal history score and all score components,” and that if a “particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including that component to ensure that the degree of added enhancement is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact.”<sup>275</sup>

We recommend that the Commission: (1) eliminate factors that increase the criminal history score but have little or no correlation with the likelihood of recidivism;<sup>276</sup> (2) eliminate misdemeanors and petty offenses under § 4A1.2(c)(1), nearly all of which stem from poverty or disproportionate police scrutiny (e.g., driving without a license or with a suspended license, insufficient funds check); (3) given that the automatic assignment of offenders to CHC VI under the career offender guideline is not justified by their recidivism risk,<sup>277</sup> limit the definition of “controlled substance offense” in the career offender guideline to the list of federal offenses Congress directed the Commission to include, and eliminate the less serious offenses the

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<sup>274</sup> RICHARD S. FRASE ET AL., ROBINA INSTITUTE OF CRIMINAL LAW & CRIMINAL JUSTICE, CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK 107 (2015).

<sup>275</sup> *Id.* at 116.

<sup>276</sup> The addition of two points for custody status under § 4A1.1(d) is a “much weaker predictor of re-offending than other dimensions of criminal history (such as number of priors).” FRASE ET AL., *supra* note 273, at 84. The additional point under § 4A1.1(e) for a “crime of violence” makes no independent contribution to the predictive power of the criminal history score. See U.S. Sent’g Comm’n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 11, 23 (2005).

<sup>277</sup> See U.S. Sent’g Comm’n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004); U.S. Sent’g. Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview* at app. A-1, A-2, A-3 (2016).

Commission added on its own;<sup>278</sup> (4) eliminate criminal history points under § 4A1.2(d) based on prior offenses committed before the age of 18 in light of disproportionate law enforcement contacts with young people of color;<sup>279</sup> (5) eliminate double counting of criminal history in offense levels under Chapter Two;<sup>280</sup> (6) encourage downward departure for age at time of release to reflect “aging out of risky occupations”;<sup>281</sup> and (7) explore whether and how the criminal history categories can be adjusted to reduce the weight given to criminal history.

### **B. Eliminate Unnecessary Aggravating Offense Characteristics.**

The Commission should remove or limit specific offense characteristics that are based on relevant conduct beyond the offense of conviction or acts of the defendant—enhancements that do not sensibly or fairly distinguish the defendant’s culpability and are not required by Congress. This includes the enhancements based on acquitted, uncharged, and dismissed conduct discussed in Part IV.D (below), the enhancements based on “jointly undertaken activity” when the defendant was not convicted of conspiracy, and many others.<sup>282</sup>

The Commission can simplify the drug guideline by deleting many of the specific offense characteristics that have been added over time, so that it looks “more like it did in 1987.”<sup>283</sup> This

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<sup>278</sup> Congress directed the Commission to include offenses “described in” 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503. **28 U.S.C. § 994(h)**. The Commission nonetheless added any state offense punishable by more than one year; aiding and abetting, attempt, conspiracy; “[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance” (21 U.S.C. § 841(c)(1)); “[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance” (21 U.S.C. § 843(a)(6)); “[m]aintaining any place for the purpose of facilitating a controlled substance offense” (21 U.S.C. § 856); and “[u]sing a communications facility in committing, causing or facilitating a drug offense” (21 U.S.C. § 843(b)). *See* U.S.S.G. § 4B1.2(b) & comment. (n.1) (Supp. 2016).

<sup>279</sup> *See* Joshua Rovner, The Sentencing Project, *Racial Disparities in Youth Commitments and Arrests* (2016), <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>; *see also* NAT’L RESEARCH COUNCIL, *supra* note 193, at 173.

<sup>280</sup> *See, e.g.*, USSG § 2K2.1, § 2L1.2.

<sup>281</sup> *See* United States v. Presley, 790 F.3d 699, 701–03 (7th Cir. 2015) (Posner, J.).

<sup>282</sup> USSG § 1B1.3(a)(1)(B), (a)(2) & cmt. background. Other examples include the victim enhancement under the fraud guideline at § 2B1.1(b)(2); the enhancement under the drug guideline at § 2D1.1(b)(1) “[i]f a dangerous weapon (including a firearm) was possessed”; the enhancements under the drug guideline for unlawful discharge into the environment of a hazardous substance and for offenses involving manufacture of methamphetamine that created a risk of harm, at § 2D1.1(b)(13)(A) & (C); and several enhancements under the robbery guideline that apply even if the defendant did not personally engage in the conduct, such as the increase “[i]f a firearm was discharged,” or “[i]f any person was abducted”; the enhancement under the alien smuggling guideline § 2L1.1(b)(2) “[i]f a firearm was discharged” or if a dangerous weapon “was brandished” or “was possessed.”

<sup>283</sup> Pryor, *supra* note 44, at     .



would mean eliminating the majority of the enhancements (13 of 21), none of which were required by a specific congressional directive.<sup>284</sup> In addition, the Commission should stop adding increases for issues *du jour*, and remove those that do not sensibly distinguish among offenses in light of the purposes of sentencing, and were not mandated by Congress.<sup>285</sup>

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<sup>284</sup> The thirteen enhancements under § 2D1.1 added after 1987 and not required by a specific directive are at the following subsections: (b)(3)(B) (if “a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used”); (b)(5) (for offenses involving importation of amphetamine or methamphetamine); (b)(6) (“[i]f the defendant is convicted under 21 U.S.C. § 865”); (b)(7) (if defendant or person for whose conduct defendant is accountable as relevant conduct “distributed a controlled substance through mass-marketing by means of an interactive computer service”); (b)(8) (if “offense involved the distribution of an anabolic steroid and a masking agent”); (b)(9) (if defendant “distributed an anabolic steroid to an athlete”); (b)(10) (if defendant convicted under 21 U.S.C. § 841(g)(1)(A)); (b)(13)(A) (if “the offense involved” discharge of a hazardous or toxic substance or transportation, storage or disposal of a hazardous waste); (b)(13)(B) (if defendant convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides); (b)(13)(C)(i) (if defendant convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides); (b)(14) (if “offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land” and defendant also receives aggravating role adjustment); (d)(1) (cross-reference to murder guideline); (d)(2) (cross-reference to attempt guideline if defendant was convicted of distributing a controlled substance “with intent to commit a crime of violence” and alternative special instruction at (e)(1) if defendant committed or attempted to commit a sexual offense by distributing a controlled substance, not the subject of any directive).

<sup>285</sup> Just in the last four amendment cycles, examples include: the new 6-level increase in the base offense level at § 2E3.1 for most animal fighting ventures, USSG § 2E3.1(a) (2016); the increased specific offense characteristic in § 2L1.1 for alien smuggling offenses involving unaccompanied minors, USSG § 2L1.1(b)(4) (2016), as well as the new presumption that “serious bodily injury” occurred “when the offense involved conduct constituting criminal sexual abuse,” USSG § 2L1.1 cmt. (n.4) (2016); the increase in penalties under § 2D1.1 for hydrocodone offenses to match those for oxycodone offenses, USSG App. C, amend. 793 (2015), adopted despite substantial evidence that the oxycodone guideline is not based on empirical evidence and other evidence that hydrocodone does not have the same abuse potential as oxycodone; the increase in § 2L1.1(b)(6) for “guiding persons through or abandoning person in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements,” USSG App. C, amend. 785 (2014); the new and expanded enhancements in § 2B1.1—already an absurdly complex guideline—for offenses involving misappropriation of trade secrets, USSG, App. C, amend. 771 (2013); the new specific offense characteristic at § 2B1.1(b)(8) for offenses involving conduct described by the SAFE DOSES Act, 18 U.S.C. § 670, criminalizing theft of pre-retail medical products, USSG, App. C, amend. 772 (2013); the new and especially steep specific offense characteristics in § 2L2.2(b)(4) for immigration fraud offenses where the defendant

### **C. Better Calibrate Remaining Offense Characteristics to Reflect Culpability.**

To address the long-standing problem of blunt measures like weight in drug cases and intended loss amount in fraud cases failing to reflect personal blameworthiness as compared to role in the offense, and to better differentiate among actors in concerted activity, the number and extent of reductions for mitigating role should be increased.<sup>286</sup>

The drug guidelines would also better track culpability and provide more proportionate punishments by eliminating the weight of inactive ingredients mixed with some, but not all, drugs, and taking account of crucial factors like dosage size.<sup>287</sup> To address proportionality in economic crime cases, the weight assigned to loss amount should be reduced, for example, by adjusting monetary values in the Chapter Two offense guidelines to adjust for inflation starting in 1987 when the guidelines went into effect.<sup>288</sup>

### **D. Limit the Impact of Relevant Conduct**

The Commission should eliminate acquitted conduct, and eliminate or at least limit the weight of uncharged and dismissed conduct,<sup>289</sup> and change the mens rea for jointly undertaken criminal activity to knowledge.

### **E. Expand Opportunities for Alternatives to Incarceration.**

The Commission should consider expanding the zones in which alternatives to incarceration are available, or expanding the sentencing options that are available in the current

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committed the offense to conceal involvement in an organization involved in “a serious human rights offense,” USSG App. C, amend. 765 (2012)—apparently applicable even when the defendant is never charged or even is acquitted of committing a human rights offense.

<sup>286</sup> See Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Hon. Patti B. Saris, U.S. Sent’g Comm’n, at 13 (Mar. 18, 2015), *available at* <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FPD.pdf>.

<sup>287</sup> Ample empirical and historical evidence shows that the use of drug type and quantity to set penalties in the Anti-Drug Abuse Act of 1986 was poorly conceived and has failed to track any sound theory of culpability. Use of the weight of inactive ingredients mixed with some, but not all, drugs, and neglect of crucial factors like dosage size, has resulted in offense levels that routinely fail to sentence proportionately and fairly in drug cases. See Statement of Molly Roth Before the U.S. Sentencing Comm’n, Washington D.C., appendix (Mar. 13, 2014), *available at* [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony\\_Roth.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony_Roth.pdf).

<sup>288</sup> Letter from Marjorie Meyers, *supra* note 287, at 14.

<sup>289</sup> See *An Interview with John Steer*, Champion, Sept. 2008, at 40, 42.

zones. The Commission should also amend Chapter Five to encourage judges to focus on the in/out decision.

### **F. Prepare and Abide by Prison Impact Analyses Before Increasing Any Guideline Range.**

The Commission should also consistently follow the mandate of 28 U.S.C. § 994(g): “The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.” If the Commission conducted prison impact assessments “since its inception,”<sup>290</sup> they appear to have had no influence until 2007, when, for the first time in a reason for amendment, the Commission cited a prison impact assessment when it reduced the base offense levels in crack cases.<sup>291</sup> Thereafter, the Commission cited prison impact in 2010 for slightly expanding the availability of alternatives,<sup>292</sup> and in 2014 when it reduced base offense levels for all drug offenses and when it made the amendment retroactive.<sup>293</sup> The Commission should conduct and abide by prison impact assessments on a regular basis and especially before increasing any guideline range.

### **V. Conclusion**

We have offered a few of many possible reforms that the Commission could adopt that would help reduce the problems with disparity, complexity, and severity about which Judge Pryor rightly complains. They do not require legislation or reversion to a mandatory guidelines system.

*Booker* was the best thing to happen to federal sentencing since passage of the Sentencing Reform Act. It reduced severity and ameliorated complexity and unwarranted disparity, especially unwarranted racial disparity. Further reforms should build on its legacy rather than attempting to fix those aspects of it that are not broken.

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<sup>290</sup> See U.S. Sent’g Comm’n, Public Meeting Minutes (Jan. 9, 2014) (“Since its inception, the Commission has used [its prison impact model] analysis as part of its fact finding during the amendment process to estimate the effect of proposed guideline changes to the federal prison system.”); see also, e.g., U.S. SENT’G COMM’N, ANNUAL REPORT 46 (1998) (“As directed by Congress, the Commission regularly assesses the impact of changes to the sentencing guidelines on the federal prison population.”).

<sup>291</sup> See USSG App. C, amend. 706 (2007).

<sup>292</sup> USSG App. C, amend. 738 (2010).

<sup>293</sup> USSG, App. C, amend. 782 (2014); *id.* amend. 788 (2015).