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# WHY THE PRIOR CONVICTION SENTENCING ENHANCEMENTS IN ILLEGAL RE-ENTRY CASES ARE UNJUST AND UNJUSTIFIED (AND UNREASONABLE TOO)

DOUG KELLER\*

**Abstract:** This Article discusses an important federal sentencing issue that has received little scholarly attention, despite affecting thousands of lives each year: the harsh prior conviction sentencing enhancements that defendants can receive in illegal re-entry cases—and only in illegal re-entry cases. The Sentencing Commission created the enhancement through a perfunctory process that radically altered illegal re-entry sentencing, shifting the focus at sentencing from the illegal re-entry offense to the status of the defendant’s worst prior conviction. The result is a scheme where the length of the sentence many illegal re-entry defendants receive hinges on what they previously did—sometimes many years ago—rather than on the conduct for which they are ostensibly being prosecuted. Despite the unusual nature of the enhancement, the Commission has never provided a justification for it, nor is one apparent. Moreover, the enhancement undercuts Congress’s goal of reducing unwarranted sentencing disparity and recommends sentences that are simply too harsh for illegal re-entry offenses. Although courts were previously powerless to do anything about the Commission’s indiscriminate decision making, that is no longer the case. Since the Supreme Court held in 2005 in *United States v. Booker* that the Guidelines are not mandatory, courts may now evaluate the soundness of the Guidelines themselves before imposing a sentence. Even a cursory examination of the prior conviction enhancements shows that they are unsound and should not be followed.

## INTRODUCTION

Perhaps the most famous illegal re-entry defendant of all time is Hugo Roman Almendarez-Torres. He is the named defendant in *Almendarez-Torres v. United States*, a 1998 case (cited tens of thousands of

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times) in which the U.S. Supreme Court held that the fact of a prior conviction need not be alleged in the indictment in an illegal re-entry case, even though that fact raises the statutory maximum penalty.<sup>1</sup> Although the legal issue the case raised has been thoroughly dissected,<sup>2</sup> perhaps the most interesting issue the case presented—one not discussed by the Court or commentators—is how Mr. Almendarez-Torres received a sentence of over *seven years* for entering the country without permission after having been deported.<sup>3</sup> A novice to federal sentencing might assume that this incident was not Mr. Almendarez-Torres's first immigration conviction or that his offense involved violence, the potential for violence, or injury to someone. Indeed, given that a defendant can commit some rather serious federal crimes and receive a sentence of less than seven years—for example, distributing heroin,<sup>4</sup> sexually abusing a minor under the age of 16,<sup>5</sup> or providing over 1000 pounds of explosive materials to a known felon<sup>6</sup>—the novice might assume that Mr. Almendarez-Torres seriously hurt someone in the commission of his crime. But the way in which Mr. Almendarez-Torres committed his offense was no different than the way in which most people commit the offense of illegal re-entry: he crossed the U.S./Mexico border on foot

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<sup>1</sup> 523 U.S. 224, 226–27 (1998).

<sup>2</sup> See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 487–90 (2000) (discussing *Almendarez-Torres* and observing that the approximately year-old opinion was arguably “incorrectly decided”); Amy Luria, *Traditional Sentencing Factors v. Elements of an Offense: The Questionable Viability of Almendarez-Torres v. United States*, 7 U. PA. J. CONST. L. 1229, 1233–38 (2005) (discussing *Almendarez-Torres* and its progeny); Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 769–88 (2008) (discussing *Almendarez-Torres* and the ethical quandary it can put counsel in when deciding whether to preserve, for Supreme Court review, the issue of whether the decision was rightly decided, given that the Court itself has expressed doubts about its vitality). The case has garnered so much attention, in part, because Justice Thomas—who provided the fifth vote for the majority in *Almendarez-Torres*—later decided that his vote was wrong. *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring) (explaining “one of the chief errors of *Almendarez-Torres*” to which he “succumbed”); see also *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting) (dissenting from the denial of certiorari, contending that the Court should address the vitality of *Almendarez-Torres*).

<sup>3</sup> Joint Appendix at \*17aa, *Almendarez-Torres*, 523 U.S. 224 (No. 96-6839) (documenting that Mr. Almendarez-Torres received an eighty-five-month prison sentence).

<sup>4</sup> Compare U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2009) (providing an offense level of 22 for a defendant convicted of selling between 60 and 80 grams of heroin), with *id.* § 2L1.2(a)–(b) (providing an offense level of 24 for a defendant convicted of illegal re-entry who qualifies for the 16-level, prior conviction enhancement).

<sup>5</sup> Compare *id.* § 2A3.2(a) (providing an offense level of 18 for a defendant who is convicted of sexually abusing a minor), with *id.* § 2L1.2(a)–(b).

<sup>6</sup> Compare *id.* § 2K1.3(a)–(b) (providing an offense level of 17 for a defendant convicted of providing a known felon of over 1000 pounds of explosives), with *id.* § 2L1.2(a)–(b).

without violence or injury to anyone.<sup>7</sup> What aggravated Mr. Almendarez-Torres's illegal re-entry offense was that, four years earlier, he had been convicted of burglary in Texas, for which he had received a sentence of approximately one year.<sup>8</sup> That prior conviction, entirely unrelated to his illegal re-entry offense, increased his federal sentence by approximately six years,<sup>9</sup> meaning he spent more time in federal prison because of his prior state conviction than he spent in state custody for that original offense by a factor of approximately six. There is no other federal crime Mr. Almendarez-Torres could have committed where a prior burglary conviction would have had a similar effect on his subsequent sentence.

For those unfamiliar with illegal re-entry sentencing, this result might seem perplexing. But something similar to this result occurs in thousands of federal cases each year. Defendants who re-enter illegally receive a sentence that is often doubled or tripled based on a prior conviction for which the defendant already served a sentence, possibly years or even decades ago. The conduct that placed the defendant before the sentencing judge to begin with—i.e., illegal re-entering—plays only a marginal role in the defendant's sentencing fate.

This Article explains how the prior conviction enhancement became the engine that drives illegal re-entry sentencing, why it never should have been promulgated, and what courts can and should do about it now.

Part I begins with some necessary historical context.<sup>10</sup> For many years, district court judges had nearly unfettered sentencing discretion. Because of that fact, a widespread perception formed that a defendant's sentence hinged almost entirely on the identity of the sentencing judge. Prompted, in part, by complaints about unwarranted sentencing disparity, Congress passed sentencing reform in the 1980s that led to the creation of the Sentencing Commission. Congress tasked the Commission with creating guidelines for categories of offenses and categories of defendants, which would further the purposes of sentencing, including reducing unwarranted disparity. The Commission, in response, adopted

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<sup>7</sup> See Joint Appendix, *supra* note 3, at \*13aa.

<sup>8</sup> See *id.* (observing that Mr. Almendarez-Torres was convicted of burglary in Dallas, Texas in March 1991 and was deported to Mexico in April 1992).

<sup>9</sup> See *id.* at \*17aa (noting that Mr. Almendarez-Torres had an offense level of 21). This offense level would have been calculated by taking the base offense level of 8, subtracting three points for acceptance of responsibility, and adding in the 16-level increase for committing burglary. See U.S. SENTENCING GUIDELINES MANUAL §§ 2L1.2(a)–(b), 3E1.1(a).

<sup>10</sup> See *infra* notes 13–53 and accompanying text.

what it called a “modified real offense” approach to guidelines for categories of offenses. In accordance with this approach, the guideline range for a particular offense would differ based on specific characteristics of the offense that the defendant committed. In a fraud case, for example, punishment would differ depending on the amount stolen. This approach differs from a charge-based system, where, for example, all fraud offenders could receive the same punishment, regardless of how much was stolen. In creating its offense guidelines, the Commission relied largely upon data gathered from a study of past sentencing practices to identify which offense characteristics to include in the offense guidelines. The Commission also created guidelines for calculating each defendant’s Criminal History Score, which it refined to address recidivism concerns. Each defendant’s guideline range was located on a grid at the intersection of the offense guideline (based on characteristics of the present offense) and the criminal history score (based on prior criminal history).

Part II picks up the story after the creation of the original Sentencing Guidelines, following the evolution of the illegal re-entry Guideline provision, U.S.S.G. § 2L1.2.<sup>11</sup> That Guideline was originally created without enhancements for prior convictions. Several years later, the Commission added a small enhancement for defendants who had previously committed a felony—any felony. Never before had the Commission used such an enhancement in an offense guideline. Despite the unique nature of the enhancement, the Commission never provided a justification for what it had done, thus turning its back on the thoughtful process it engaged in while engineering the original Guidelines. This startling silence was a sign of things to come, as the Commission would revise the prior conviction enhancement several times without ever explaining its purpose or justifying the need for it. The Commission’s revisions would eventually result in a complicated structure in which a sentence can be increased by up to eight years based on a single prior conviction.

Part III argues that courts should stop giving effect to the prior conviction scheme.<sup>12</sup> The Part begins by pointing out that, since the Supreme Court rendered the Guidelines advisory in 2005, district courts can no longer sentence defendants by mechanically calculating the Guideline range and then selecting a sentence within that range. Rather, district courts should evaluate the soundness of the Guideline

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<sup>11</sup> See *infra* notes 54–138 and accompanying text.

<sup>12</sup> See *infra* notes 139–285 and accompanying text.

provisions themselves before exercising their own independent legal judgment regarding the appropriate sentence. Applying the lessons from the prior sections, Part III then evaluates the reasonableness of sentences that rely on the prior conviction enhancements. Given the endemic problems with the enhancement, any sentence that relies on such an enhancement will be unreasonable. This Part focuses on the enhancement's three main shortcomings.

- First, the enhancement has no apparent justification. Not only did the Commission fail to articulate a reason for the enhancement scheme, but potential justifications, such as the need to address recidivism, fail to account for it.
- Second, the enhancement scheme chips away at one of the primary goals of the Guidelines: to avoid unwarranted sentencing disparity. The structure of section 2L1.2 obliterates real offense sentencing for illegal re-entry cases, since defendants who have previously committed certain broad classes of crimes are all treated the same, regardless of the particular facts of the prior conviction. Further, wildly different prior convictions trigger the same sentencing increase.
- Third, even if a prior conviction scheme could be justified in the abstract, the scheme that the Commission selected results in Guideline ranges that are disproportionate to the seriousness of the offense of illegal re-entry. Defendants who receive the harshest prior conviction enhancement receive a sentence that puts them on par with defendants who commit much more serious offenses, including some terrorists. Moreover, illegal re-entry defendants often spend more time in federal prison because of their prior conviction than they did when convicted of committing that prior crime.

Given these shortcomings of the prior conviction enhancement scheme, courts should exercise their newfound sentencing discretion to decline to apply the enhancement, even in the typical case.

The final Part concludes with some brief thoughts on where sentencing in illegal re-entry cases should go from here. Unless and until the Commission acts, district courts should attempt to develop a sentencing regime for illegal re-entry cases that results in fair, just, and reasonable sentences. Regardless of what sort of scheme district courts rely on, however, the status quo is unacceptable.

## I. THE GENESIS OF THE SENTENCING GUIDELINES

Many law review articles<sup>13</sup> and court decisions<sup>14</sup> have told the story of the events leading to the creation of the Commission and the Guidelines. Rather than repeat what has been covered extensively elsewhere, the discussion below highlights some aspects of that story to provide relevant context to the current debate over the illegal re-entry Guideline. This context reveals two important lessons. First, one important goal of sentencing reform was to reduce unwarranted sentencing disparity, and the Commission chose to reach that goal, in part, by promulgating guidelines that recommended different punishments for the same offense based on differences in the way the offense was committed.<sup>15</sup> Second, according to the Commission, it created the original Guidelines only after careful study.<sup>16</sup>

The story of federal sentencing has a long first chapter. For two hundred years, federal district court judges had nearly unfettered discretion in sentencing criminal defendants.<sup>17</sup> Congress set a statutory maximum for each crime, and federal judges were allowed to select a sentence up to that ceiling.<sup>18</sup> As long as the judge did not select the sentence on a constitutionally impermissible basis (such as race or sex),<sup>19</sup> the sentencing decision was virtually unreviewable.<sup>20</sup> Empower-

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<sup>13</sup> See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 1–28 (1988); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 291–304 (1993); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purpose of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1049–56 (2003); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223–81 (1993).

<sup>14</sup> See, e.g., *United States v. Booker*, 543 U.S. 220, 294–303 (2005) (Stevens, J., concurring in part and dissenting in part) (discussing the history of Congress's decision to create a mandatory guideline regime in the context of disagreeing with the majority's holding that Congress would have preferred to institute advisory guidelines to remedy the Sixth Amendment problems with sentencings); *Mistretta v. United States*, 488 U.S. 361, 363–70 (1989) (discussing the creation of the Commission in the context of holding that the Guidelines neither violated the constitutionally based nondelegation doctrine nor the separation-of-powers principle).

<sup>15</sup> See *infra* notes 22–34 and accompanying text.

<sup>16</sup> See *infra* notes 38–53 and accompanying text.

<sup>17</sup> See *Mistretta*, 488 U.S. at 363; Stith & Koh, *supra* note 13, at 225–26.

<sup>18</sup> Stith & Koh, *supra* note 13, at 225.

<sup>19</sup> See *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (noting that “race, religion, or political affiliation of the defendant” are “constitutionally impermissible or totally irrelevant to the sentencing process”).

<sup>20</sup> See, e.g., *United States v. Maples*, 501 F.2d 985, 986 (4th Cir. 1974) (“We disclaim the right to exercise general appellate review over sentences, but we do not doubt our authority to vacate and correct sentences imposed in violation of constitutional or statutory rights.”).

ing federal judges with so much discretion was justified on the basis that judges were in the best position to know the appropriate punishment in an individual case.<sup>21</sup>

A perception developed that granting judges such wide discretion came with a rather large drawback: a defendant's punishment would hinge on which judge happened to do the sentencing. A bank robber might receive a three-year sentence if sentenced by one judge; that same defendant might receive an eight-year sentence if sentenced in the courtroom next door.<sup>22</sup> There were concerns that different sentencing outcomes resulted not only from judges' differing sentencing philosophies, but also on their subconscious biases and prejudices.<sup>23</sup>

In the 1980s, these concerns finally prompted Congress to overhaul federal sentencing, and it passed the Sentencing Reform Act of 1984.<sup>24</sup> The Act created the Sentencing Commission and assigned to it the responsibility of developing a comprehensive guideline system to govern federal sentencing.<sup>25</sup> The widely recognized primary goal of the guideline system was to reduce unwarranted sentencing disparity.<sup>26</sup>

Congress directed the Commission to develop guidelines for categories of offenses and for categories of defendants.<sup>27</sup> In developing guidelines for categories of offenses, Congress directed the Commission to take into account "the circumstances under which the offense was committed"<sup>28</sup> and the "nature and degree of the harm caused by the offense,"<sup>29</sup> and to "avoid[] unwarranted sentencing disparities

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<sup>21</sup> *Mistretta*, 488 U.S. at 363–64 (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971)).

<sup>22</sup> As one commentator colorfully explained, it mattered whether the defendant appeared at sentencing before "Hang-em Harry or Let-em-loose Lou." Rappaport, *supra* note 13, at 1051.

<sup>23</sup> See Stith & Koh, *supra* note 13, at 231 (cataloguing liberal concerns that "federal judges . . . favored white, middle-class offenders"); see also Breyer, *supra* note 13, at 5 (noting some of the widespread sentencing disparities the Commission found with respect to the race and sex of the defendant).

<sup>24</sup> See Pub. L. No. 98-473, tit. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C.; 28 U.S.C.A §§ 991–998 (West 2008 & 2009 Supp.)).

<sup>25</sup> See 28 U.S.C.A §§ 991–998.

<sup>26</sup> See *Mistretta*, 488 U.S. at 366; S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity."); Breyer, *supra* note 13, at 4–5; Feinberg, *supra* note 13, at 295–96.

<sup>27</sup> See 28 U.S.C.A § 991(b).

<sup>28</sup> 28 U.S.C. § 994(c)(2) (2006).

<sup>29</sup> *Id.* § 994(c)(3).

among defendants . . . who have been found guilty of similar criminal conduct.”<sup>30</sup>

In response, the Commission adopted what it called a “modified real offense” approach to guidelines, under which the guideline range for a particular offense differed based on specific characteristics of the offense the defendant committed.<sup>31</sup> A real-offense system can be contrasted with a charge-offense system, which tethers a defendant’s sentence solely to the crime of conviction.<sup>32</sup> A real-offense system dictates that not everyone charged with the same crime—say, bank robbery—would be sentenced as if they committed the same act.<sup>33</sup> A defendant can rob a bank in a variety of ways, and not all bank robberies are equal. In practice, the real-offense guideline system would require judges to sentence defendants within a sentencing range based on the specific characteristics of the defendant’s present offense.<sup>34</sup> For instance, a defendant who committed a bank robbery (1) by stealing between \$50,000 and \$100,000, (2) with a gun, and (3) injuring someone in the process would have this conduct translated into a guideline range (expressed in months), and a judge would have to select a sentence within that range. All defendants who committed a bank robbery under similar circumstances would therefore receive a similar sentence.

In developing the Guidelines, the Commission initially attempted to follow Congress’s command to make sure that the four fundamental goals of sentencing were met: “deterrence, incapacitation, just punishment, and rehabilitation.”<sup>35</sup> The Commission quickly recognized, however, that these vague, salutary goals often conflicted. Rather than prioritizing one goal over another, the Commission attempted to side step the problem altogether by using historical sentencing practice as a guide:

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<sup>30</sup> *Id.* § 991(b)(1)(B).

<sup>31</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 1.4(a) (2009); Breyer, *supra* note 13, at 8–12; Stith & Koh, *supra* note 2, at 239 n.96 (“The Commission has, for the most part, adopted a ‘real offense’ approach . . .”).

<sup>32</sup> See Breyer, *supra* note 13, at 8–12; William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990) (“A major goal of the [Sentencing Reform] Act was to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences.”).

<sup>33</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 1.4(a) (2009).

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* at ch. 1, pt. A, § 1.2; see also 28 U.S.C. § 991(b)(1)(A) (setting forth the Commission’s purpose to assure the meeting of the purposes of sentencing).

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice.<sup>36</sup>

In other words, the Commission attempted to replicate past practice, with some notable exceptions.<sup>37</sup>

In so doing, the Commission used a wide range of information in an attempt to ensure that the initial batch of Guidelines was cooked just right: it analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the U.S. Parole Commission's guidelines and statistics, and data from other relevant sources to determine which distinctions were important in pre-Guidelines practice.<sup>38</sup>

After working for almost two years<sup>39</sup>—and “extensively debat[ing] which offender characteristics should make a difference in sentencing”<sup>40</sup>—the Commission crafted a Guideline regime that assigned a base offense level to nearly every federal crime.<sup>41</sup> This level could increase based on aggravating circumstances relevant to the offense (i.e., specific offense characteristics).<sup>42</sup>

In addition to generating an adjusted offense level for each defendant, the Commission also created, in chapter four of the Guidelines, a formula that would assign each defendant a Criminal History Score.<sup>43</sup> Although the Criminal History Score was adjusted to account for each of the “four purposes of sentencing,”<sup>44</sup> it was “designed to predict re-

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<sup>36</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 1.3 (2009).

<sup>37</sup> See Breyer, *supra* note 13, at 15–21. Then-Judge Breyer, who played an integral role in the crafting of the Guidelines, explained that white collar cases was one area in which the Commission made a deliberate effort to deviate from past practice. See *id.* at 20–21. He also noted, however, that deviations from past practice “constitute[d] a fairly small part of the entire Guideline enterprise.” *Id.* at 23. There were other more drastic deviations, however, including drug trafficking, robbery, crimes against the person, and burglary. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 69 (1987).

<sup>38</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 1.3 (2009).

<sup>39</sup> See Breyer, *supra* note 13, at 6 (explaining that the Commission “worked from the time of its appointment on October 29, 1985, until April 13, 1987” in crafting the initial Guidelines).

<sup>40</sup> *Id.* at 19.

<sup>41</sup> See U.S. SENTENCING GUIDELINES MANUAL chs. 2 & 3.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at ch. 4.

<sup>44</sup> *Id.* at ch. 4, pt. A, introductory cmt.

cidivism.”<sup>45</sup> Due to time constraints, the Commission did not develop the criminal history rules based on its own empirical research. Rather, it combined elements from the Parole Commission’s “Salient Factor Score” and the “Proposed Inslaw Scale,” both of which were designed to predict recidivism.<sup>46</sup>

Because the Criminal History Score was designed to address recidivism concerns, the score excluded stale convictions, as such convictions have no correlation to a defendant’s propensity to commit further crimes.<sup>47</sup> According to later reports, “[t]esting of the guidelines’ criminal history [score] . . . shows that the aggregate Chapter Four provisions are performing as intended and designed. . . . The empirical evidence shows that criminal history as a risk measurement tool has statistically significant power in distinguishing between recidivists and non-recidivists.”<sup>48</sup>

The defendant’s guideline range is located on the Commission’s sentencing chart—a 258-box sentencing grid—based on the defendant’s Criminal History Score (the horizontal axis) and the adjusted offense level (the vertical axis).<sup>49</sup> A district court judge would need to select a sentence within the Guideline range generated from the chart,<sup>50</sup> unless unusual circumstances warranted a departure.<sup>51</sup>

The Commission’s handiwork went into effect on November 1, 1987.<sup>52</sup> The Commission’s job, however, had only just begun, as it was expected to keep the Guidelines up to date, tweaking the provisions

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<sup>45</sup> U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13 (2004).

<sup>46</sup> *Id.* at 1; *see also* U.S. SENTENCING COMM’N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE 3 (2005).

<sup>47</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 nn.1–3 (2009).

<sup>48</sup> U.S. SENTENCING COMM’N, *supra* note 45, at 15.

<sup>49</sup> *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl.

<sup>50</sup> *See* 18 U.S.C. § 3553(b)(1) (2006); *see also* *Mistretta*, 488 U.S. at 367 (observing that Congress settled “on a mandatory-guideline system” after considering “other competing proposals for sentencing reform,” including an advisory system).

<sup>51</sup> *See* 18 U.S.C. § 3553(b)(1) (“[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”); *see also* *Koon v. United States*, 518 U.S. 81, 94–96 (1996) (discussing when departures would be appropriate).

<sup>52</sup> *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 235(a)(1), 98 Stat. 1987, 2031; *see also* United States Sentencing Commission Guidelines, 52 Fed. Reg. 44,674, 44,675 (1987) (“The [Sentencing Reform Act] requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987.”).

that did not work as intended or resulted in sentences that failed to satisfy the goals of sentencing.<sup>53</sup>

## II. THE HISTORY OF THE ILLEGAL RE-ENTRY GUIDELINE

The illegal re-entry Guideline provision, U.S.S.G. § 2L1.2, was forged during the process that gave birth to the original Guidelines. The original Guideline, based on the Commission's past-practice study, had no special enhancements for defendants with certain types of prior convictions.<sup>54</sup> Over time, however, the Commission radically changed the guideline for illegal re-entry, adding a series of harsh prior conviction enhancements that can triple a defendant's offense level and result in a much longer sentence.<sup>55</sup> The Commission, however, never explained the purpose of this dramatic shift in sentencing philosophy.

The modern crime of illegal re-entry was created in 1952, when Congress made it a felony, punishable by up to two years in prison, for someone to enter the United States after having been deported unless the person had received permission to re-enter from the appropriate authorities.<sup>56</sup> Although illegal re-entry was a crime before 1952, a patchwork of laws had governed the offense before then.<sup>57</sup>

When the Guidelines went into effect in 1987, the Commission drafted section 2L1.2 to cover illegal *entry* and illegal *re-entry*, assigning

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<sup>53</sup> See 28 U.S.C. § 994(o) (2006) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."); *Rita v. United States*, 551 U.S. 338, 350 (2007) (pointing out that the Commission's work to ensure that the Guidelines meet the goals of sentencing is "ongoing").

<sup>54</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1987).

<sup>55</sup> See *id.* at app. C, amend. 38 (1988); *id.* at app. C, amend. 193 (1989).

<sup>56</sup> See 8 U.S.C. § 1326 (2006).

<sup>57</sup> See *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 (1987). The Court noted:

Before § 1326 was enacted, three statutory sections imposed criminal penalties upon aliens who reentered the country after deportation: 8 U.S.C. § 180(a) (1946 ed.) (repealed 1952), which provided that any alien who had been "deported in pursuance of law" and subsequently entered the United States would be guilty of a felony; 8 U.S.C. § 138 (1946 ed.) (repealed 1952), which provided that an alien deported for prostitution, procuring, or similar immoral activity, and who thereafter reentered the United States, would be guilty of a misdemeanor and subject to a different penalty; and 8 U.S.C. § 137-7(b) (1946 ed., Supp. V) (repealed 1952), which stated that any alien who reentered the country after being deported for subversive activity would be guilty of a felony and subject to yet a third, more severe penalty.

*Id.* at 835.

both crimes a base offense level of 6.<sup>58</sup> To provide a harsher punishment for defendants who had illegally re-entered, all such defendants received a two-level increase for having been deported before.<sup>59</sup> As a result, the “original immigration guidelines did not deviate substantially from past practice”<sup>60</sup>—in conformity with the Commission’s general goal<sup>61</sup>—and defendants who committed an immigration offense, including illegal re-entry, served an average of fifteen months in prison.<sup>62</sup>

A year after the Guidelines went into effect, the Commission removed the crime of illegal entry from section 2L1.2.<sup>63</sup> To consolidate the remainder of that Guideline provision, the Commission changed the base offense level for illegal re-entry from 6 to 8 and eliminated the two-level increase for a prior deportation.<sup>64</sup> That is where the base offense level remains to this day.

The next year, in 1989, the Commission altered the illegal re-entry Guideline—and it did so in a fundamental and unprecedented way. The Commission first added a four-level increase for defendants who had been deported following a conviction for a “felony” not involving a violation of immigration laws.<sup>65</sup> Never before had the Commission required an offense level increase because of a single prior conviction different from the present offense. Indeed, it appears that the only other place the Commission had included any sort of prior conviction enhancement was in the alien smuggling Guideline, which included a two-level increase for defendants who had previously committed the same offense.<sup>66</sup>

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<sup>58</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (1987). According to the Commission’s past-practice study, defendants who were convicted of illegal entry before the Guidelines (not including defendants who received probation) served the equivalent in months of an offense level 6 (0–15 months imposed), and those convicted of illegal re-entry served the equivalent in months of an offense level 7 (0–21 months imposed). See U.S. SENTENCING COMM’N, *supra* note 37, at 34. The average time served for all immigration offenders, including those sentenced to probation, was 5.7 months. *Id.* at 69.

<sup>59</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) (1987) (“If the defendant previously has unlawfully entered or remained in the United States, increase by 2 levels.”).

<sup>60</sup> U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 65 (2004).

<sup>61</sup> See Breyer, *supra* note 13, at 17–18.

<sup>62</sup> See U.S. SENTENCING COMM’N, *supra* note 60, at 64–65.

<sup>63</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 38 (1988).

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at app. C, amend. 193 (1989). The Commission also encouraged an upward departure for defendants with a prior conviction for an aggravated felony or a violent felony. See *id.*

<sup>66</sup> See *id.* § 2L1.1(a)(2) (1989) (“If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.”).

The Commission thus blessed the “double counting” of a prior conviction. A single conviction would first lengthen a defendant’s sentence by increasing the defendant’s Criminal History Score; it would then raise it again by increasing the offense level. Many judges have wondered aloud about the wisdom of this practice; as one federal judge put it, while “it is sound policy to increase a defendant’s sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis.”<sup>67</sup>

The Commission did not explain why this sort of double counting was appropriate, nor did it explain how it determined that chapter four—which is said to reflect not only the risk of recidivism but general deterrence needs and retribution—did not adequately account for a defendant’s criminal history in illegal re-entry cases and only in illegal re-entry cases. Instead of providing an explanation, the Commission’s official Reason for Amendment simply documents what it did: “This specific offense characteristic is in addition to, and not in lieu of, criminal history points added for the prior sentence.”<sup>68</sup>

A second notable aspect of the Commission’s four-level increase was that a conviction could qualify for the enhancement regardless of its age, as the promulgated Guideline contained (and to this day contains) no temporal limitation.<sup>69</sup> Thus, unlike when calculating a defendant’s Criminal History Score, even ancient convictions count for purposes of the enhancement.<sup>70</sup> The Commission, however, never explained why a time limitation was appropriate for criminal history score purposes but not for section 2L1.2.

Although the Commission was silent as to why it added a “specific offense characteristic” for prior convictions, it was likely related to Congress’s decision the year before to increase the statutory maximum penalty for illegal re-entry for defendants who had certain qualifying prior convictions. With the Anti-Drug Abuse Act of 1988, Congress increased the statutory maximum for illegal re-entry from two to five years if the defendant had previously been convicted of a felony and to fifteen years if the defendant had previously been convicted of an “aggravated felony,”<sup>71</sup> defined as “murder, any drug trafficking crime,” traf-

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<sup>67</sup> *United States v. Galvez-Barrios*, 355 F. Supp. 2d 962, 963 (E.D. Wis. 2005), *quoted in* *United States v. Carballo-Arguelles*, 446 F. Supp. 2d 742, 745 (E.D. Mich. 2006).

<sup>68</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 193 (1989).

<sup>69</sup> *See* *United States v. Olmos-Esparza*, 484 F.3d 1111, 1116 (9th Cir. 2007).

<sup>70</sup> *See id.*

<sup>71</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345 (codified as amended at 8 U.S.C. § 1326 (2006)). Aggravated felony is defined in 8 U.S.C. § 1101(a)(43). Congress

ficking in firearms or other destructive devices, and any attempt or conspiracy to commit these offenses.<sup>72</sup> The legislative history of these amendments sheds some insight on Congress's thought process. When Senator Chiles of Florida introduced the bill containing these amendments, he referred to "felons . . . involved in an array of illegal enterprises including drug trafficking, money laundering, fraudulent credit cards rings, racketeering, weapon sales, and prostitution."<sup>73</sup> He invoked "expansive drug syndicates established and managed by illegal aliens."<sup>74</sup> He also gave an example of an individual who should be prosecuted under these stricter penalties: "[A] Columbian . . . [who was] deported previously from the United States and . . . is linked with 50 drug related murders and is currently the subject of 6 drug killings in the New Orleans area and a series of drug killings in California."<sup>75</sup>

Before this statutory change, it would not have made much sense to have enhancements for illegal re-entry cases, because any enhancement would have pushed a defendant's Guideline range past the two-year statutory maximum. With that statutory cap lifted, the Commission was free to add specific offense characteristics to distinguish between aggravated and non-aggravated illegal re-entry cases. Although it was perhaps understandable for the Commission to want to add some sort of enhancement scheme, the scheme the Commission chose was not inevitable. For example, the Commission could have chosen to add an enhancement for defendants who had been previously deported more than once, because such defendants had continually flaunted our immigration laws. Such defendants would be good candidates for enhancements because they had not been deterred from returning to this country. That type of enhancement would have been consistent with the original version of U.S.S.G. § 2L1.2, which distinguished between a defendant who had never been deported and a defendant who had previously been deported. Or the Commission could have looked to the legislative history of the amendment, done independent research, and decided to limit any enhancement to reflect what Congress appeared most concerned with: the individual who returns to the United

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would later increase the statutory maximum—again without explanation—to ten or twenty years, depending on the nature of the prior conviction. *See* Pub. L. No. 103-322, § 130001 (1994).

<sup>72</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)).

<sup>73</sup> 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

States after deportation with the specific purpose of continuing criminal activities. Rather than use a narrow enhancement scheme with such a basis, the Commission instead selected a scheme that had no pedigree, that research did not support, and that was a sharp break from the enhancements in the rest of the Guidelines—enhancements that generally reflected some fact about the offense for which the defendant was being sentenced.

Presumably, the Commission chose an enhancement scheme that reflected Congress's decision to tether the increase in the statutory maximum to the nature of a defendant's prior conviction, but Congress did not direct the Commission to follow its lead with a new prior conviction enhancement scheme. This, despite the fact that Congress has, at times, ordered the Commission to add a particular enhancement.<sup>76</sup> Moreover, legislative history regarding Congress's purpose suggests that it had a particular kind of offender in mind for increased punishment.<sup>77</sup> Indeed, the Commission's decision mirrors its much criticized judgment to craft drug offense Guidelines by replicating the weight-driven scheme Congress had created for its mandatory minimum penalties for drug offenses.<sup>78</sup> In crafting such a regime, the Commission cast aside its sentencing expertise and created Guidelines without using any sort of empirical approach.<sup>79</sup>

Two more years passed before the Commission once again altered the Guideline provision for illegal re-entry. And it once again did so in

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<sup>76</sup> See *infra* notes 97–98 and accompanying text.

<sup>77</sup> See *id.*

<sup>78</sup> See *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (“The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the [Anti-Drug Abuse Act of 1986’s] weight-driven scheme.”); Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 582–83 (2009) (pointing out that the Commission blindly adopted Congress’s weight-based approach, used in crafting mandatory minimum statutes, for its drug guidelines). Several scholars have criticized the Commission’s weight-driven drug guidelines. See, e.g., Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 *CORNELL J.L. & PUB. POL’Y* 551, 559 (2006) (“The guidelines’ approach to drug sentencing in general has been the subject of harsh criticism for several reasons, including their perceived excessive severity and their primary focus on the weight of the drugs involved as a proxy for culpability and as a justification for longer sentences.” (internal footnotes omitted)); see also Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 *FED. SENT’G REP.* 247, 251 (1994) (“[T]he connection between actual drug amounts and a defendant’s culpability is often tenuous at best.”); Jon O. Newman, *Five Guideline Improvements*, 5 *FED. SENT’G REP.* 190, 190 (1993) (arguing that the drug-weight system should be replaced with a regime that will “correlate drug sentences primarily with the defendant’s role in the drug distribution system”).

<sup>79</sup> See *Kimrough*, 552 U.S. at 96.

an unprecedented way.<sup>80</sup> The 1991 Guideline amendments included a reshaping of U.S.S.G. § 2L1.2 such that it mandated a draconian 16-level increase for defendants who had been deported after a conviction for an “aggravated felony,” as defined in 8 U.S.C. § 1101(a)(43).<sup>81</sup> Thus, defendants who had previously been convicted of an aggravated felony saw their offense level triple, from 8 to 24, and their sentence length increase “anywhere from five to fourteen times.”<sup>82</sup> The Commission required this stunningly severe offense level increase with no justification—reasoned or otherwise:

The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known ground warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion.<sup>83</sup>

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<sup>80</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 375 (1991).

<sup>81</sup> *Id.*

<sup>82</sup> Adelman & Deitrich, *supra* note 78, at 589.

<sup>83</sup> Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felony Re-entry Cases*, 8 FED. SENT’G REP. 275, 276 (1996). McWhirter and Sands went on to note that the “16-level adjustment is unlike any in the guidelines. There is neither a gradual increase in severity of the offenses, such as in drug or fraud crimes, nor is the increase pegged to a more serious element in the offense itself.” *Id.* at 275; see also *Public Hearing Before the U.S. Sentencing Commission, Washington, D.C.*, U.S. Sentencing Comm’n 30 (Mar. 13, 2008) [hereinafter *2008 Hearing*] (testimony of Maureen Franco) (“No empirical study or policy analysis was conducted to justify the 16-level enhancement.”). The Department of Justice (“DOJ”) urged the Commission to adopt a 20-level enhancement, indicating that it considered such an enhancement necessary “to reflect the substantial increase in the maximum penalties in the Anti-Drug Abuse Act of 1988” for illegal reentry after deportation subsequent to a felony conviction. *Public Hearing Before the U.S. Sentencing Commission, Washington, D.C.*, U.S. Sentencing Comm’n 7 (Mar. 5, 1991) [hereinafter *1991 Hearing*] (statement Joe B. Brown, U.S. Dep’t of Justice). As the DOJ put it, “[a]n increased penalty of this magnitude—two years to 15 years—and limited to particularly defined offenses must, in our view, be reflected in the sentencing guidelines if the will of Congress is to be effectuated.” *Id.* at 8. The Department acknowledged that a 20-level increase would be “steep,” but that it would not be too harsh: “In the ordinary case, an alien drug dealer who illegally returns to the United States *to practice his trade* will continue this pattern of conduct until there is a substantial disincentive to do so.” *Id.* (emphasis added). It went on to suggest that “in the exceptional situation involving an illegal alien drug dealer who has some sympathetic reason to reside here illegally, the court may depart downward.” *Id.* In other words, if the alien did not return to commit crimes, the enhanced sentence would be greater than necessary to achieve just punishment. Thus, the Department viewed the enhancement as one that should apply only to those who return to continue their illegal activity.

Such perfunctory decision-making stands in stark contrast to the process envisioned in the Sentencing Reform Act, or the process the Commission used to create the original version of the Guidelines. It was also even further divorced from Congress's purpose for increasing the statutory maximum in the first place.

Perfunctory or not, the result of the Commission's amendment was nothing short of a complete overhaul in the sentencing of illegal re-entry cases. The focus of sentencing in such cases suddenly shifted from the facts of the defendant's illegal re-entry (which now had only marginal relevance to the sentencing outcome) to the defendant's prior convictions. Put in concrete terms, as a result of the Commission's amendment, a defendant convicted of illegal re-entry who had previously committed an aggravated felony could see the Guideline range span from between four and five years to eight and ten years, depending on the defendant's Criminal History Score.<sup>84</sup> Prior to the amendment, the same defendant would have received a sentence between one and three years.<sup>85</sup>

That same year, the Commission also created the only other enhancement that is even remotely similar to its illegal re-entry prior conviction enhancement: a prior conviction enhancement for firearm and explosive offenses.<sup>86</sup> This enhancement, however, was substantially narrower. Instead of covering the broad category of crimes that could be categorized as "aggravated felonies," the enhancement would be triggered only if the defendant had previously committed a "controlled substance offense" or "crime of violence."<sup>87</sup> This latter term covers offenses that have "as an element the use, attempted use, or threatened use of physical force against [another]" or offenses that are "burglary of a dwelling, arson, extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."<sup>88</sup> If the defendant has previously committed one qualifying offense, the defendant's offense level can increase by up to 8 (to

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<sup>84</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 375 (1991).

<sup>85</sup> See *id.* § 2L1.2(a).

<sup>86</sup> See *id.* app. C, amend. 373 (amending U.S.S.G. § 2K1.3, the explosive materials guideline provision, to include prior conviction enhancements); *id.* at app. C, amend. 374 (amending U.S.S.G. § 2K2.1, the firearms guideline provision, to include prior conviction enhancements).

<sup>87</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K1.3(a)(1), (2) (2009) (prior conviction enhancement for explosive material offenses); *id.* § 2K2.1(a)(1)–(4) (prior conviction enhancement for firearm offenses).

<sup>88</sup> *Id.* § 4B1.2(a). Both § 2K1.3 and § 2K2.1 adopt this definition. See *id.* § 2K1.3 n.2; *id.* § 2K2.1 cmt. n.1.

an offense level of 20); if the defendant has committed two qualifying offenses, the defendant's offense level can increase by up to 12 (to an offense level of 24).<sup>89</sup> That means a defendant who commits a firearms or explosives offense can have committed two prior qualifying convictions and still receive less of an increase in his sentence than an illegal re-entry defendant who commits one such offense.<sup>90</sup> A 16-level increase is never possible for a firearms or explosives offense.<sup>91</sup> The enhancement is also not triggered if the prior conviction is too stale to score for criminal history purposes.<sup>92</sup> The Commission, unfortunately, has never explained why it created a much narrower prior conviction enhancement for firearm/explosives offenses than it did for illegal re-entry offenses.

During the next year, in 1992, a notable (but often unnoticed) development in the world of prior conviction enhancements occurred. Recall that, in the original Guidelines, the Commission had created a two-level increase for defendants in alien smuggling cases who had previously committed the same offense.<sup>93</sup> According to the Commission, the enhancement had been created because it served as a proxy for defendants who were involved in "ongoing criminal conduct."<sup>94</sup> In 1992, however, the Commission decided to remove it after "further study" convinced it that the enhancement was "not a good proxy for such conduct."<sup>95</sup> The Commission also noted that "the inclusion of a prior criminal record variable in the offense guideline is inconsistent with the general treatment of prior record as a separate dimension in the guidelines."<sup>96</sup> Thus, the Commission recognized the tension that its prior conviction enhancement had created with the Criminal History Score—and the dubiousness of the practice of double counting—and eliminated it for alien smuggling cases. But the Commission did not explain why the practice made sense in the context of illegal re-entry cases. In any event, the Commission's attempt at consistency in the

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<sup>89</sup> See *id.* § 2K1.3(a)(1),(2) (prior conviction enhancement for explosive material offenses); *id.* § 2K2.1(a)(1)–(4) (prior conviction enhancement for firearm offenses).

<sup>90</sup> See *id.* § 2K2.1(a)(2), (a)(4)(A); *id.* § 2K1.3(a)(1), (2).

<sup>91</sup> See *id.* § 2K2.1(a)(2), (a)(4)(A); *id.* § 2K1.3(a)(1), (2).

<sup>92</sup> See *id.* §§ 2K1.3 cmt. n.2, 2K2.1 cmt. n.1 (noting that only prior convictions that score for purposes of calculating a defendant's Criminal History Score can qualify as a triggering conviction).

<sup>93</sup> U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(a)(2) (1989) ("If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.").

<sup>94</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 450 (1992).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

alien smuggling context did not last long. In 1996, Congress ordered the Commission to include a sentencing enhancement for defendants in alien smuggling cases who had previously committed one or two prior offenses involving the same or similar conduct.<sup>97</sup> The Commission dutifully complied.<sup>98</sup>

Despite the radical path the Commission took with respect to illegal re-entry sentencing, the amendments did not have an immediate impact, given the small number of illegal re-entry cases brought in the early 1990s.<sup>99</sup> For example, in 1992, only 652 defendants were sentenced for illegal re-entry,<sup>100</sup> making up less than 2% of the federal criminal docket.<sup>101</sup> And of those defendants, an even smaller number received a prior conviction enhancement, though exact numbers are not available. Thus, the prior conviction enhancements, and particularly the new 16-level enhancement, affected only a small fraction of total cases, perhaps allowing it to go relatively unnoticed.

That all changed over the ensuing decade. Starting in the mid-1990s, prosecutions for illegal re-entry exploded, resulting in 1528 sentencings for illegal re-entry in 1995 and 6191 in 2000, nearly 20% of the federal criminal docket.<sup>102</sup> The Commission's prior conviction scheme was at issue in a growing number of cases. Sentence length for illegal re-entry also reached new heights, as the average sentence imposed increased to a staggering three years by 2000, more than double what it had been a decade before.<sup>103</sup>

With the increase in the number of cases and sentence length came complaints. As the Commission reported, "a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border between the United States and Mexico," had

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<sup>97</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 203(e), 110 Stat. 3009, 3009-566, 3009-567 (codified at 8 U.S.C § 1324 (2006)).

<sup>98</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 543 (1997).

<sup>99</sup> See *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed? Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 110th Cong. 7 (2000) (statement of John R. Streer, Vice-Chair, U.S. Sent'g Comm'n).

<sup>100</sup> *Id.* at exhibit 8.

<sup>101</sup> See U.S. SENTENCING COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING I, tbl.1 (2008) (documenting that 38,258 defendants were sentenced in 1992).

<sup>102</sup> See *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?*, *supra* note 99, at exhibit 8 (statement of John R. Streer, Vice-Chair, U.S. Sent'g Comm'n) (noting that there were 1528 illegal re-entry sentencings in 1995); U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.50 (stating that there were 6191 illegal re-entry sentencings during 2000); *id.* at 11, fig.A (noting that immigration cases counted for 19.9% of total cases).

<sup>103</sup> See U.S. SENTENCING COMM'N, *supra* note 102, at tbl.50.

criticized the 16-level enhancement, pointing out that it resulted in “disproportionate penalties.”<sup>104</sup> The Commission also held meetings with judges from the Fifth Circuit about the illegal re-entry Guideline.

A core belief emanated from the meetings: The definition of a ‘prior aggravated felony’ was too broad and captured many relatively minor offenses. . . . The judges believed that a good number of these prior aggravated felonies were nonviolent, and often were motivated by family separation circumstances rather than sinister criminal intentions.<sup>105</sup>

The Commission’s research supported the judges’ experience, documenting that over half the time the conviction that triggered a defendant’s 16-level increase did not involve violence, injury, or a weapon.<sup>106</sup> Judges also noted that the severity of the penalty led to “inventive charging practices” and “distinctive judicial practices,” both of which varied by district, to mitigate the unwarranted harshness of the guideline.<sup>107</sup>

In response to the criticism, the Commission set out to study how it could more effectively tether the seriousness of a prior conviction to the amount it increased the defendant’s offense level.<sup>108</sup> Disappointingly, the Commission apparently started from the premise that its prior conviction scheme was justified and that it only needed to further refine the enhancement so that the 16-level increase was triggered in a smaller percentage of cases.<sup>109</sup> The Commission apparently never seriously considered abandoning the 16-level increase and never sought to ground the prior conviction enhancements in any sort of penal theory.<sup>110</sup>

According to an article written by a Commission researcher, the Commission considered re-working its prior conviction scheme to “link the enhancement level [increase] to a ‘time served’ indicator of [prior] offense severity.”<sup>111</sup> The proposed amendment required (with some exceptions) a 16-level increase for defendants who had served at least

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<sup>104</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632 (2001).

<sup>105</sup> Linda Drazga Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 530 (2003).

<sup>106</sup> *See id.* at 532.

<sup>107</sup> *Id.* at 531.

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* (discussing how the Commission wished to fix what it thought was a broken system without ever mentioning whether the Commission considered dropping its prior conviction scheme altogether).

<sup>110</sup> *See id.*

<sup>111</sup> Maxfield, *supra* note 105, at 531.

ten years on a prior aggravated felony; a 10- or 12-level increase for defendants who had served between five and ten years; an 8-level increase for defendants who had served between two and five years; and a 6-level increase for defendants who had served less than two years.<sup>112</sup> The public comments on the proposal were “positive.”<sup>113</sup> After running simulations, however, the “consensus reaction” among the commissioners was that the result of this proposal was “too generous,” i.e., not enough defendants with convictions for what the Commission considered to be serious crimes would receive the 16-level increase.<sup>114</sup> The Commission looked at simulations with shorter “time-served” break points, but concluded that the “time-served” strategy failed to distinguish sufficiently between serious and less serious prior convictions and that there were too many practical problems involved in setting up such a system.<sup>115</sup>

Once the Commission abandoned the time-served proposal, it decided to reclassify “aggravated felonies” as requiring an eight-level increase.<sup>116</sup> It also decided to retain the 16-level enhancement for the following broad categories of felonies:

- Drug trafficking offenses;<sup>117</sup>
- Crimes of violence<sup>118</sup> (defined as murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling, or any other offense that has as an element the use, attempted use, or threatened use of physical force against another person);<sup>119</sup>

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<sup>112</sup> *See id.* at 533.

<sup>113</sup> *Id.* at 537.

<sup>114</sup> *Id.* at 535.

<sup>115</sup> *Id.* at 535–36. Scrapping a time-served model based on practical concerns seems a bit peculiar, because the Guidelines require a proper understanding of how much time a defendant served on a prior sentence in other contexts. For example, a defendant receives three criminal history points for each prior conviction that was accompanied by a sentence served exceeding one year and one month. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(a) (2009). Any prior conviction for which the defendant served less than thirteen months but more than sixty days triggers a two-point increase in the defendant’s Criminal History Score. *See id.* § 4A1.1(b).

<sup>116</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632 (2001).

<sup>117</sup> *Id.* § 2L1.2(b)(1)(A)(i); *see also id.* § 2L1.2 cmt. 1(B)(iv) (defining drug trafficking offense).

<sup>118</sup> *Id.* § 2L1.2(b)(1)(A)(ii).

<sup>119</sup> *See id.* § 2L1.2 cmt. 1(B)(iii). This broad definition of crime of violence covers many more offenses than the definition of “crime of violence” provided for firearms and explosives offenses. *See id.* §§ 2K1.3 cmt. 2, 2K2.1 cmt. 1.

- Firearm offenses;<sup>120</sup>
- Child pornography offenses;<sup>121</sup>
- National security or terrorism offenses;<sup>122</sup>
- Human trafficking offenses;<sup>123</sup> and
- Alien smuggling offenses committed for profit.<sup>124</sup>

The amendment also further expanded the reach of the 16-level increase such that the enhancement could apply if the triggering crime *could have* resulted in punishment of at least a year in jail—before, the enhancement would apply only if the defendant *had served* at least one year.<sup>125</sup> The lone exception to this rule applies to drug trafficking offenses, as the defendant must have served at least thirteen months to qualify for the 16-level increase; a shorter sentence, however, still results in a 12-level increase.<sup>126</sup>

The Commission again declined to provide any justification for its enhancement scheme or explain why it made sense to single out illegal re-entry cases for harsh enhancements for prior convictions.<sup>127</sup> The Commission also continued to leave out a time-limit provision that would disqualify stale convictions.

Since 2001, the Commission has tinkered with U.S.S.G. § 2L1.2,<sup>128</sup> but the essential structure of the provision has remained the same. The Commission has held hearings on the Guideline, soliciting feedback from judges, probation officers, the Department of Justice (“DOJ”),

<sup>120</sup> *Id.* § 2L1.2(b)(1)(A)(iii); *see also id.* § 2L1.2 cmt. n.1(B)(v) (defining firearm offense).

<sup>121</sup> U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(iv) (2009); *see also id.* § 2L1.2 cmt. n.1(B)(ii) (defining child pornography offense).

<sup>122</sup> U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(v) (2001); *see also id.* § 2L1.2 cmt. n.1(B)(viii) (defining terrorism offense).

<sup>123</sup> *Id.* § 2L1.2(b)(1)(A)(vi); *see also id.* § 2L1.2 cmt. n.1(B)(vi) (defining human trafficking offense).

<sup>124</sup> *Id.* § 2L1.2(b)(1)(A)(vii); *see also id.* § 2L1.2 cmt. n.1(B)(i) (defining alien smuggling offense).

<sup>125</sup> *See id.* § 2L1.2, cmt. n.2 (defining felony as “any federal, state, or local offense *punishable* by imprisonment for a term exceeding one year” (emphasis added)); *see also* United States v. Pimentel-Flores, 339 F.3d 959, 964–65 (9th Cir. 2003) (observing that an aggravated felony—which would now only trigger an 8-level increase—only included crimes in which the defendant had been punished by one year, whereas felonies triggering the 16-level increase were crimes in which the defendant could be punished by at least a year).

<sup>126</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A), (B).

<sup>127</sup> *See id.* at app. C, amend. 632 (2001).

<sup>128</sup> *See, e.g.,* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 722 (2008) (altering the definition of “forcible sex offenses”).

and defense lawyers.<sup>129</sup> At these hearings, the DOJ has advocated replacing the current prior conviction enhancement that depends on the identity of the prior crime with a time-served model, similar to the one the Commission rejected in 2001.<sup>130</sup> The DOJ's concerns with the current system, however, are not that it is too harsh, as it wants a time-served system to be sentence-neutral, meaning average sentence lengths would remain the same.<sup>131</sup> Its concerns instead center on the complexity of the present system—complexity that exists mostly because it is often difficult to determine whether a defendant's prior conviction falls under one of the generic crimes listed in the Guidelines, resulting in significant litigation.<sup>132</sup> Defense attorneys, for their part, have lodged a series of complaints against the current scheme, often pointing out to the Commission that the current system has no announced justification.<sup>133</sup> Nevertheless, the Commission has chosen to remain silent on the scheme's purpose and seems disinclined to rework the enhancement in any sort of fundamental way.

Since the 2001 amendment, the number of defendants sentenced for illegal re-entry has continued to rise. In 2008, there were 13,575 such defendants,<sup>134</sup> which means that approximately one in six federal sentencings during 2008 were for illegal re-entry cases.<sup>135</sup> More cases coupled with longer sentences have resulted in enormous monetary costs, as taxpayers must expend about \$25,000 per year to house a federal prisoner.<sup>136</sup> Thus, to use 2008 as an example, the government will spend approximately \$600 million in housing costs for illegal re-entry

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<sup>129</sup> See generally *2008 Hearing*, *supra* note 83; *Public Hearing Before the U.S. Sentencing Commission, San Diego, Cal.*, U.S. Sentencing Commission (Mar. 6, 2006) [hereinafter *2006 Hearing*].

<sup>130</sup> See *2008 Hearing*, *supra* note 83, at 20–22 (testimony of Diane J. Humetewa, U.S. Attorney, Dist. of Ariz.).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See, e.g., *2006 Hearing*, *supra* note 129, at 22 (testimony of Comm'r Ruben Castillo) (“When we were out in Texas, the Federal Defenders gave some, I thought, compelling testimony that said, in the first instance, the Commission has never articulated a justification for the 16-level enhancement.”).

<sup>134</sup> U.S. SENTENCING COMM'N, *supra* note 102, at tbl.50 (noting that there were 13,575 illegal re-entry sentencings during 2008).

<sup>135</sup> See *id.* at tbl.13 (noting that there were 76,366 sentencings during 2008). That trend has continued under President Obama, as prosecutions for illegal re-entry increased almost 40% during the first ten months of his tenure. See TRAC Immigration, Immigration Prosecutions at Record Levels in FY 2009, <http://trac.syr.edu/immigration/reports/218/> (last visited Apr. 19, 2010).

<sup>136</sup> See Annual Determination of Average Cost of Incarceration, 73 Fed. Reg. 33,853, 33,853 (2008).

defendants sentenced during that year.<sup>137</sup> Increased prosecutions also result in enormous social costs—families are separated and children (citizen and non-citizen alike) are forced to grow up in broken homes or without a home, increasing the chance that they themselves commit crimes.<sup>138</sup> The Commission, however, has failed to do a single study on whether these enormous economic and moral costs are worth bearing.

### III. COURTS SHOULD REJECT THE PRIOR CONVICTION ENHANCEMENT

With an overview of the current illegal re-entry Guideline in mind, this Part explains how and why courts should reject the prior conviction enhancement. The first subsection below explains how district courts are now empowered to reject the enhancement.<sup>139</sup> The framework finds its roots in the Supreme Court's 2005 decision in *United States v. Booker*, where the Court held that the Guidelines are advisory—just one factor among several for district courts to consider at sentencing.<sup>140</sup> As a result of that decision, district courts must consider arguments, if raised, that the Guideline itself was not developed through careful study and therefore fails to reflect the purposes of sentencing. Appellate courts may find that reliance on such a guideline is unreasonable. The second subsection answers why sentencing courts should reject the prior conviction enhancement.<sup>141</sup> In nearly every case, the prior conviction enhancement fails to serve the congressionally mandated goals of sentencing properly. That is so because the enhancement (1) has no justification; (2) fosters unwarranted sentencing disparity; and (3) results in a disproportionate penalty.

#### A. *New Discretion in Applying the Guidelines*

Throughout the mandatory Guidelines era, complaints that a given Guideline provision was unfair, unreasonable, or served no pur-

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<sup>137</sup> In 2008, 13,575 illegal re-entry defendants received an average sentence of 22.6 months. U.S. SENTENCING COMM'N, *supra* note 102, at tbl.50. That means illegal re-entry defendants received, in the aggregate, 25,566.25 years of prison. According to the DOJ, it costs \$24,922 a year to house a federal prisoner. Annual Determination of Average Cost of Incarceration, 73 Fed. Reg. at 33,853. That means it will cost \$637,162,082.50 to house those prisoners.

<sup>138</sup> See, e.g., JOSEPH MURRAY ET AL., EFFECTS OF PARENTAL IMPRISONMENT ON CHILD ANTISOCIAL BEHAVIOUR AND MENTAL HEALTH: A SYSTEMATIC REVIEW 56 (2009); Jeremy Travis, *Families and Children*, 69 FED. PROBATION 31, 38 (2005).

<sup>139</sup> See *infra* notes 142–164 and accompanying text.

<sup>140</sup> See 543 U.S. 220, 243–44 (2005).

<sup>141</sup> See *infra* notes 165–172 and accompanying text.

pose had to be directed to the Commission or Congress. Complaints directed to the district court at sentencing were to no avail. Sentencing judges could not impose a below-Guideline sentence just because, in their judgment, the Guideline provision at issue was defective.<sup>142</sup> Rather, the court was required to sentence the defendant within the Guideline range unless extraordinary circumstances required another result.<sup>143</sup> A court's judgment that the Guideline provision reflected unsound policy was not enough.<sup>144</sup>

That changed in 2005 with the Supreme Court's decision in *Booker*, where the Court held that the mandatory Guideline regime violated defendants' Sixth Amendment right to be sentenced based on facts found by a jury beyond a reasonable doubt or admitted by the defendant.<sup>145</sup> To cure the constitutional shortcomings of the Guidelines, the Court excised the portions of the Sentencing Reform Act that made them mandatory.<sup>146</sup> The surgery rendered the Guidelines advisory and required district courts to "consider" the Guideline range as one of several statutory factors set forth in 18 U.S.C. § 3553(a) in selecting a sentence.<sup>147</sup> Thus, district courts no longer need to impose a within-Guideline sentence. Instead, they must select a sentence below the statutory maximum (and above or at the statutory minimum, if there is one) that is sufficient, but not greater than necessary, to comply with the four traditional goals of sentencing set out in 18 U.S.C. § 3553(a)(2).<sup>148</sup>

The Supreme Court has also clarified that—to ensure that the Guidelines are not treated as mandatory—sentencing judges may consider arguments that a below-Guideline sentence is appropriate because the "Guidelines sentence itself fails properly to reflect § 3553 considerations,"<sup>149</sup> that "the Guidelines reflect an unsound judgment,"<sup>150</sup> or that

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<sup>142</sup> 18 U.S.C. § 3553(b)(1) (2006) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.").

<sup>143</sup> See *Koon v. United States*, 518 U.S. 81, 95 (1996) (discussing when departures would be appropriate).

<sup>144</sup> See *id.*

<sup>145</sup> See 543 U.S. at 243–44.

<sup>146</sup> See *id.* at 245.

<sup>147</sup> *Id.*

<sup>148</sup> See *Rita v. United States*, 551 U.S. 338, 348 (2007) (listing the four traditional goals of sentencing: "(a) 'just punishment' (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation").

<sup>149</sup> *Id.* at 351.

<sup>150</sup> *Id.* at 357.

they “do not generally treat certain defendant characteristics in the proper way.”<sup>151</sup> As the Court described in its 2007 decision in *Rita v. United States*, the Guidelines were developed based on the Commission’s study of empirical evidence of thousands of pre-Guidelines sentences, and the Commission also may revise its Guidelines based on data and consultation with judges, practitioners, and experts in the field.<sup>152</sup> If a particular Guideline was developed in this manner, it is “fair to assume” that it “reflect[s] a rough approximation of sentences that might achieve § 3553(a)’s objectives.”<sup>153</sup> The Court reiterated in 2007 in *Gall v. United States* that the Guidelines were generally “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”<sup>154</sup> The Court recognized, however, that “not all of the Guidelines are tied to this empirical evidence.”<sup>155</sup>

Applying these principles in *Kimbrough v. United States* in 2007, the Supreme Court—in the course of holding that a district court may disagree with the Commission’s judgment that 1 gram of crack cocaine should be punished as severely as 100 grams of powder cocaine—observed that judges may disagree with Guidelines that are not the product of “empirical data and national experience,” and thus “do not exemplify the Commission’s exercise of its characteristic institutional role.”<sup>156</sup> The Court confirmed that a district court may vary from a Guideline range based on a policy disagreement with the Guideline even in a factually ordinary case.<sup>157</sup>

At the appellate level, post-*Booker*, all sentences are reviewed for reasonableness.<sup>158</sup> Reasonableness review has been divided into two components: procedural reasonableness and substantive reasonableness.<sup>159</sup> Procedural reasonableness review requires the appellate court

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<sup>151</sup> *Id.*

<sup>152</sup> *See id.* at 349–50.

<sup>153</sup> *Id.* at 350.

<sup>154</sup> 552 U.S. 38, 46 (2007).

<sup>155</sup> *Id.* at 46 n.2; *see also* *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

<sup>156</sup> 552 U.S. at 109.

<sup>157</sup> *See id.* at 101 (“The Government acknowledges that the Guidelines are now advisory and that, as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” (alteration in original) (citation and quotation marks omitted)); *see also* *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (observing that *Kimbrough* “makes plain that a sentencing court can deviate from the guidelines based on general policy considerations”).

<sup>158</sup> *See Gall*, 552 U.S. at 46.

<sup>159</sup> *See id.* at 51; *see also* *United States v. Smart*, 518 F.3d 800, 803 (10th Cir. 2008) (“Our appellate review for reasonableness includes both a procedural component, encompassing

to confirm, among other things, that the district court properly calculated the Guideline range, responded to any non-frivolous arguments made for a non-Guideline sentence, and explained its sentencing decision.<sup>160</sup> These last two requirements are important because they help to facilitate appellate review of the sentence, assure the defendant and public that the court seriously undertook its weighty responsibility, and provide feedback to the Commission so that it can review and revise its Guidelines.<sup>161</sup>

Once the appellate court has confirmed that the sentence is procedurally reasonable, it must determine whether the sentence is substantively reasonable—that is, whether the sentence is too long or too short in light of the goals of sentencing.<sup>162</sup> Essentially, this inquiry requires the appellate court to determine whether the district court abused its discretion in its balancing of the sentencing factors.<sup>163</sup> In other contexts, the Court has equated the abuse of discretion standard with asking whether the district court followed “sound legal principles.”<sup>164</sup> In short, post-*Booker*, district courts can no longer mechanically follow the Guidelines. They must instead listen to, and consider, policy challenges to the Guidelines themselves.

#### B. *The Prior Conviction Enhancement Is Unsound*

Even measured against the forgiving standard of “reasonableness,” the prior conviction enhancements cannot pass muster. The deficiencies of the enhancements are not mere quibbles. Rather, their shortcomings infect almost every aspect of the conviction scheme.

One broad point deserves mentioning first, as it informs the entire discussion that follows. As explained above, the Supreme Court has observed that Guidelines that fail to take into account empirical data and national experience do not provide useful advice to judges.<sup>165</sup> Such a Guideline does “not exemplify the Commission’s exercise of its characteristic institutional role,”<sup>166</sup> which can result in a “Guidelines sentence

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the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence.”).

<sup>160</sup> See *Gall*, 552 U.S. at 51.

<sup>161</sup> See *Rita*, 551 U.S. at 356–58.

<sup>162</sup> See *United States v. Orlando*, 553 F.3d 1235, 1239 (9th Cir. 2009); *United States v. Carty*, 520 F.3d 984, 991, 993 (9th Cir. 2008) (en banc).

<sup>163</sup> See *Gall*, 552 U.S. at 46.

<sup>164</sup> *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (citations and quotation marks omitted).

<sup>165</sup> See *Kimbrough*, 552 U.S. at 109–10.

<sup>166</sup> *Id.*

itself [that] fails properly to reflect § 3553(a) considerations.”<sup>167</sup> This failing is readily apparent in the prior conviction enhancements in the illegal re-entry Guideline.<sup>168</sup> Thus, the reasonableness of the Guideline provision must be viewed through a less deferential lens.

And through that lens, the discussion below examines the three primary deficiencies with the prior conviction enhancements in the illegal re-entry Guideline provision. First, this Part explores the fact that the Commission has never provided any justification for the prior conviction enhancement.<sup>169</sup> Moreover, given the way the enhancements are structured, their existence seems to further no goal of sentencing. The Part next discusses the fact that the enhancement creates rather than avoids unwarranted disparities, contrary to one of the primary purposes of the Guidelines.<sup>170</sup> Finally, the Part contends that the enhancements are simply too harsh, even if the general idea of a prior conviction scheme could be justified.<sup>171</sup>

In short, the process by which the Commission crafted the illegal re-entry Guideline provision renders sentences that rely on the Guideline longer than necessary to serve the congressionally mandated goals of sentencing. Indeed, such a sentence will be unreasonably long. That is because the illegal re-entry Guideline is not a “sound legal principle[,]” and thus district courts abuse their discretion when they rely on the Guideline provision to sentence a defendant.<sup>172</sup> The sentence will not only be substantively unreasonable, but procedurally unreasonable as well, because there will not be a sufficient explanation in the record to justify the district court’s sentencing decision. The prior conviction enhancements, therefore, should not be followed, even in the typical case.

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<sup>167</sup> *Rita*, 551 U.S. at 351.

<sup>168</sup> See Adelman & Deitrich, *supra* note 78, at 587 (noting that the Commission “clearly did not base its decision [to create the prior conviction enhancement] on research or expertise”); *supra* notes 13–53 and accompanying text (discussing the way in which the prior conviction enhancement was designed). This point is no less true in light of the studies the Commission did in 2001. The Commission’s research was aimed at nothing more than trying to redesign the prior conviction enhancement so that it resulted in a fairer distribution of offense level increases. See Maxfield, *supra* note 105, at 530–31. The research was not aimed at justifying the enhancement to begin with. See *id.*

<sup>169</sup> See *infra* notes 173–183 and accompanying text.

<sup>170</sup> See *infra* notes 224–253 and accompanying text.

<sup>171</sup> See *infra* notes 254–285 and accompanying text.

<sup>172</sup> *Martin*, 546 U.S. at 139 (citations and quotation marks omitted).

## 1. The Prior Conviction Enhancement Serves No Purpose

Perhaps the strongest indication that the prior conviction enhancement is unsound is the fact that the Commission has never articulated a justification for it. Moreover, even the potential justifications for the enhancement—namely, deterrence and just desert based justifications—cannot support its use. Finally, to the extent that any other justification can support a prior conviction scheme in the abstract, none exist that can justify the Commission’s scheme.

### a. *The Commission Never Provided a Justification for the Prior Conviction Enhancement*

When Congress increased the two-year statutory maximum for illegal re-entry in 1988—raising it to five or ten years for defendants with certain types of prior convictions<sup>173</sup>—it was perhaps not surprising that the Commission would seek to add offense characteristics for more serious offenses. But what is most striking about how the Commission revised the Guideline is that it never once provided any justification for its decision to use a prior conviction enhancement scheme. It never, for example, articulated why someone with a certain type of prior conviction commits a much more serious illegal re-entry than someone without that prior conviction. Its troubling silence started in 1989, when it decided to add a four-level prior conviction enhancement for all prior felony convictions.<sup>174</sup> Turning its back on the empirical evidence upon which the initial Guideline was based, the Commission fundamentally altered the way illegal re-entry defendants were sentenced without conducting a study or following any sort of historical precedent.<sup>175</sup> Later, in 1991, when the Commission installed the 16-level increase, it maintained its silence on why such enhancements were needed.<sup>176</sup> In 2001, when a flood of criticism forced the Commission to re-think what it had done, it merely altered the distribution of the types of convictions that would receive the 16-level increase to bolster the chances that more serious types of prior convictions would qualify.<sup>177</sup> It failed, however, to first ground its scheme in a theory of punishment. Thus, the Commission has never explained why any prior conviction should af-

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<sup>173</sup> See Pub. L. 100-690, § 7345(a), 102 Stat. 4471 (codified as amended at 8 U.S.C. § 1326 (2006)).

<sup>174</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 193 (1989).

<sup>175</sup> See *supra* notes 65–68 and accompanying text.

<sup>176</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 375 (1991).

<sup>177</sup> See Maxfield, *supra* note 105, at 530–32.

fect anything other than a defendant's Criminal History Score, nor has it explained why illegal re-entry cases deserve to be singled out for special treatment. The prior conviction enhancement scheme therefore currently has no announced purpose.

Three consequences flow from the fact that the Commission has never articulated any purpose for its prior conviction scheme.

First, it calls into question what the Commission was attempting to accomplish with the studies it performed in 2001. As outlined above, the Commission primarily rejected the time-served model because it was deemed too lenient on defendants.<sup>178</sup> But an evaluation of whether any enhancement is too harsh or too lenient requires it to be compared to the purpose it is intended to serve.<sup>179</sup> Without ever settling on a justification for its prior conviction enhancement scheme, the Commission's conclusion that the time-served model was not harsh enough for enough defendants appears to be nothing more than a reflexive, subjective opinion that more defendants should serve more time. Thus, far from helping to legitimize the enhancements, the Commission studies seem to undercut their legitimacy further.

A second consequence of the Commission's failure to provide any justification for its enhancement scheme is that it makes it more difficult for district courts to evaluate whether applying the prior conviction enhancement effectively serves its intended purpose in any given case. In other words, district courts cannot effectively determine whether the goals of the enhancements are served in a particular case and, therefore, should or should not be followed because the Commission has not revealed its intended purpose.

Third, the lack of an articulated purpose for the prior conviction enhancement will typically render procedurally deficient any sentence that relies on the enhancement. In nearly any illegal re-entry sentencing, the district court will not explain why it believes the defendant's prior conviction should so greatly increase the sentence length; rather, it will likely apply the prior conviction enhancement and then use the Guideline range, which will heavily depend on that enhancement, as its starting point in selecting the defendant's sentence.<sup>180</sup> Following such a

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<sup>178</sup> See *id.* at 535.

<sup>179</sup> As one commentator has explained: "The link between sentencing purposes and sentencing *severity* is relatively straightforward," as any effort to determine whether a particular sentence is justified "presupposes some standard for evaluating what counts as a justified sentence." Rappaport, *supra* note 13, at 1067.

<sup>180</sup> See *Gall*, 552 U.S. at 49 (noting that the Guideline range "should be the starting point and the initial benchmark[]" in determining what sentence is appropriate).

procedure necessarily means, as the Supreme Court has noted, that the court “rest[ed] [its] decision upon the Commission’s own reasoning” that the enhancement is appropriate.<sup>181</sup> In other words, the district court will adopt the Commission’s silence as its justification for applying the prior conviction enhancement. In those cases, therefore, the district court will have run afoul of the procedural requirement that it explain its sentencing decision, because the primary force behind its sentencing decision will be unexplained.<sup>182</sup> Indeed, if a defendant committed any offense other than illegal re-entry and a district court decided to use its post-*Booker* discretion to increase a defendant’s offense level by 16 because the defendant had previously committed, say, burglary, without providing an explanation for why this action was appropriate, there would be no doubt that such a sentence would be procedurally unreasonable.<sup>183</sup> A sentence is no more reasonable when a district court relies on the Commission’s reasoning—thereby adopting its silence on a justification for the sentence’s length—and applies the prior conviction enhancement in an illegal re-entry case, because the record ultimately remains barren of a justification for the sentencing decision.

b. *The Prior Conviction Scheme Cannot Be Justified on the Basis of “Deterrence”*

Although the Commission did not articulate a reason for its prior conviction scheme, one potential justification that has intuitive appeal is general deterrence. That is, to the extent that we want to deter people from other countries from entering the United States without permission, we are particularly concerned about deterring those with an aggravated criminal background. Depending on the nature and age of a person’s prior conviction, it may indicate a risk to commit more crimes once in the United States.

Several problems plague this justification. First, as noted above, the Commission specifically designed chapter four’s Criminal History Score based in large part on validated measures of recidivism.<sup>184</sup> According to the Commission, the criminal history rules generally work as intended and, if anything, may not take into account certain factors that predict reduced recidivism.<sup>185</sup> Given that fact, to the extent that

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<sup>181</sup> *Rita*, 551 U.S. at 357.

<sup>182</sup> *See Gall*, 552 U.S. at 51.

<sup>183</sup> *Cf.* *United States v. Ausburn*, 502 F.3d 313, 329–31 (3d Cir. 2007) (holding a sentence was unreasonable because the district court had given a well-above Guideline sentence without explanation).

<sup>184</sup> *See* U.S. SENTENCING COMM’N, *supra* note 46, at 1.

<sup>185</sup> *See* U.S. SENTENCING COMM’N, *supra* note 45, at 15.

the prior conviction enhancement scheme is designed to account for a deficiency in the criminal-history calculation, it would stand to reason that some sort of empirical data would be needed. But the Commission has never cited any evidence that giving defendants in illegal re-entry cases substantially longer sentences has any effect on deterring individuals from attempting to return to the United States.<sup>186</sup>

Moreover, even the Commission itself has expressed doubt about the usefulness of a prior conviction enhancement when prior convictions are already accounted for in a defendant's Criminal History Score.<sup>187</sup> As noted above, in the context of eliminating a prior conviction enhancement for alien smuggling cases, the Commission justified its decision to remove the enhancement in part by stating that such enhancements are "inconsistent" with the use of a Criminal History Score.<sup>188</sup> The Commission's skepticism is likely related to its admission elsewhere that "[t]here is no correlation between recidivism and Guidelines' offense level" and "the guidelines' offense level is not intended nor designed to predict recidivism."<sup>189</sup>

Additionally, the prior conviction enhancements' unsophisticated means of accounting for a defendant's prior conviction seems poorly suited to account for concerns about recidivism. The enhancements never "time out."<sup>190</sup> No matter how dated the conviction is, the defendant will receive the increase.<sup>191</sup> But substantial empirical research has found a strong correlation between the freshness of a prior conviction and the likelihood a defendant will commit more crimes in the future.<sup>192</sup> That is why chapter four's Criminal History Score does not

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<sup>186</sup> In fact, there is a wide body of literature that casts doubt on the relationship between sentence length and deterrence. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, in 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 28 (Michael Tonry ed., 2006) ("Current knowledge concerning deterrence is little different than eighteenth-century theorists such as Beccaria . . . supposed it to be: certainty and promptness of punishment are more powerful deterrents than severity. . . . Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects."); see also AMY BARON-EVANS, OFFICE OF DEFENDER SERVS. LEGAL, POLICY & TRAINING DIV., SENTENCING BY THE STATUTE 7-9 (Apr. 27, 2009), available at [http://fd.org/pdf\\_lib/Sentencing\\_By\\_the\\_Statute.pdf](http://fd.org/pdf_lib/Sentencing_By_the_Statute.pdf) (summarizing some of the literature).

<sup>187</sup> See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 450 (1992).

<sup>188</sup> *Id.* at app. C, amend. 450.

<sup>189</sup> See U.S. Sentencing Comm'n, *supra* note 45, at 15.

<sup>190</sup> See U.S. Sentencing Guidelines Manual § 1L1.2 cmt. n.1(B) (vii) (2009).

<sup>191</sup> *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) ("The enhancement applies regardless of the time of conviction." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B) (vii))).

<sup>192</sup> See Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316-17 (1997).

count dated convictions, because they have no meaningful relationship to predicting a defendant's future criminal conduct.<sup>193</sup> Likewise, the much more modest prior conviction enhancements in the fire-arms/explosives context can also time out.<sup>194</sup> Additionally, the illegal re-entry prior conviction enhancements have not been tailored to ensure that defendants who are most likely to attempt to return illegally (or return illegally to commit more crimes) receive the highest offense level increase; rather, the enhancements appear to be set up to reflect the seriousness of the prior offense.

In sum, no empirical evidence supports the need for these convictions on a deterrence rationale, and they are ill designed to address that concern.

*c. The Prior Conviction Scheme Cannot Be Justified on the Basis of "Just Deserts"*

The poor fit between the prior conviction scheme and concerns about recidivism is perhaps why most courts that have tried to impute some sort of justification to the scheme have declined to do so on that basis. Rather, courts have tried to justify the scheme based on the idea that the enhancements were meant to increase a defendant's sentence to reflect the seriousness of the current offense—what is known as the "just deserts" goal of sentencing.<sup>195</sup> For example, the Ninth Circuit reached that conclusion, pointing out that the Seventh Circuit had explained (based on its own suppositions) that the prior conviction enhancements are "a measure of the seriousness of the crime committed, ratcheting up the sentence because it is a more serious offense to return after deportation when the defendant has previously committed a serious crime . . . ."<sup>196</sup>

But a bit of reflection reveals the lack of conceptual fit between the seriousness of illegally re-entering this country and the nature of the defendant's criminal history. To begin with, the just deserts rationale

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<sup>193</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt. nn.1–3 (excluding stale convictions from a defendant's Criminal History Score).

<sup>194</sup> See *id.* § 2K1.3 cmt. n.2 (indicating that only prior convictions that score for purposes of calculating a defendant's Criminal History Score can qualify as triggering convictions); *id.* § 2K2.1 cmt. n.10 (same).

<sup>195</sup> Rappaport, *supra* note 13, at 1058 (quoting the Senate report that accompanied the Sentencing Reform Act.) "Seriousness of the offense" is listed along with "promote respect for the law" and "provide just punishment for the offense" in 18 U.S.C. § 3553(a)(2)(A) (2006). This cluster of purposes, as the legislative history indicates, is really just another way of articulating the "just deserts concept of punishment." See Rappaport, *supra* note 13, at 1058 (quoting the Senate report that accompanied the Sentencing Reform Act).

<sup>196</sup> *United States v. Gonzalez*, 112 F.3d 1325, 1330 (7th Cir. 1997).

seeks to scale a defendant's punishment to reflect the "gravity of the defendant's conduct."<sup>197</sup> The gravity of a defendant's conduct is typically measured "along two dimensions—the blameworthiness of the defendant's mental state and the harm caused by the conduct."<sup>198</sup> The question thus becomes: does a defendant with certain prior convictions cause more harm or have a more culpable mental state than a defendant who illegally enters the country without the same background?

It seems clear that a defendant does not cause additional harm when that defendant enters the United States with his prior convictions.<sup>199</sup> Indeed, because the prior conviction enhancements—unlike nearly every other offense characteristic—do not have anything to do with the way in which a defendant committed the present crime, it does not seem possible to link a defendant's prior conviction to new harm caused. Rather, when the defendant illegally re-enters the United States, or enters and remains, that defendant causes the same amount of harm the defendant would have created if he or she had a prior conviction. The only way a defendant's prior conviction can relate to causing harm—the argument that defendants with criminal histories are more likely to commit more crimes—is just a repackaging of the above-discussed concerns about recidivism.<sup>200</sup>

Nor does a defendant necessarily appear to have a more culpable mental state for illegally re-entering if the defendant has an aggravated criminal background, especially if that aggravated background is for dated conduct or for non-immigration related offenses.

The awkward fit between a defendant's prior convictions and the just desert theory has led most criminologists to deny that there is any relationship between the two at all.<sup>201</sup> The relationship is "mysterious,"<sup>202</sup> one criminologist writes, and another explains that "[a]ny reli-

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<sup>197</sup> Rappaport, *supra* note 13, at 1064 (quoting the Senate report that accompanied the Sentencing Reform Act).

<sup>198</sup> *Id.*

<sup>199</sup> Cf. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 596 (2003) (observing that even a defender of a just desert theory who believes a defendant's criminal history is generally relevant in assessing punishment "acknowledges that a prior criminal record is irrelevant for assessing the harm caused by the current offense").

<sup>200</sup> See *supra* notes 184–194 and accompanying text.

<sup>201</sup> See, e.g., Rappaport, *supra* note 199, at 595; Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 88 n.265 (1983).

<sup>202</sup> Rappaport, *supra* note 199, at 595.

ance on an offender's prior criminal record can only rest on predication rather than desert."<sup>203</sup> As one commentator has put it:

[T]he just deserts model has little to offer in terms of how criminal history should be factored into the sentencing calculus because the notion just doesn't fit the theory. Its "he should have known better this time" rationale for greater culpability loses credibility when extended to prior crimes which are completely unrelated in nature or time to the current offense.<sup>204</sup>

In sum, "[p]opular conceptions of desert theories would appear to rule out the use of criminal history information, as the focus is on the offense of conviction, and not previous criminal conduct."<sup>205</sup>

Those criminologists that do support the idea that the just deserts theory can take into account prior convictions do so on the basis that such a theory must account for a defendant's general character, and prior convictions are relevant in assessing a defendant's character.<sup>206</sup> But this view fails to explain why a defendant should be punished twice for bad character; once when the defendant serves the original sentence for the prior conviction and then again for the later crime. Moreover, this sort of theory (applied in illegal re-entry sentencing) implies that a defendant's character should be the primary focus at sentencing, which would require a much broader evaluation of a defendant's background than the Commission, and therefore the Guidelines, currently envision.<sup>207</sup> The Commission has stated that "[m]ilitary, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining" whether a non-Guideline sentence is appropriate<sup>208</sup>—nor is "[l]ack of

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<sup>203</sup> Weigend, *supra* note 201, at 88 n.265; *see also* Roberts, *supra* note 192, at 311 ("[D]esert theorists see a clear distinction between crime seriousness and criminal history . . .").

<sup>204</sup> Barbara M. Vincent, *So What's the Purpose?*, 9 FED. SENT'G REP. 189, 189 (1997).

<sup>205</sup> Roberts, *supra* note 192, at 317.

<sup>206</sup> *See* Rappaport, *supra* note 199, at 598–602.

<sup>207</sup> *See id.* at 600.

<sup>208</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2009). This point aptly demonstrates the bizarreness of the Commission's sentencing philosophy in illegal re-entry cases. If a defendant has previously spent time in the U.S. military, the Commission expects the sentencing judge to turn a blind eye to that fact because it is irrelevant in an evaluation of the defendant. But if the defendant had previously committed a crime, that fact should be the driving force behind his sentence. It is perplexing, to say the least, to believe that one can accurately judge a person's character by looking primarily at a person's prior conviction (no matter how dated or how trivial of a sentence he received for that prior conviction).

guidance as a youth and similar circumstances indicating a disadvantaged upbringing.”<sup>209</sup>

Taking into account a defendant’s general character in any significant way would also seem to require a much more detailed look at the defendant’s past crime, including an evaluation of motive, because that would be key to an understanding of what the crime indicates about the defendant’s character. In short, it makes little sense for the Commission to say that a defendant’s sentence should hinge primarily on a judgment about that defendant’s character and then to allow only the defendant’s criminal history onto the ledger, refusing to weigh any good works.<sup>210</sup>

Because of these general objections, this “character-based approach has failed to win wide acceptance as a justification for considering an offender’s criminal history.”<sup>211</sup> As a result, many criminal theorists believe that the “just desert theory cannot explain the major role that criminal history plays in modern sentencing schemes” and that concerns about recidivism are the real driving force behind relying on a defendant’s criminal history.<sup>212</sup>

d. *Even If a Justification Exists for a Prior Conviction Scheme in General, No Justification Exists for the Scheme the Commission Designed*

Despite the lack of conceptual fit between the existence of *prior* convictions and the seriousness of a defendant’s *current* offense, there does seem to be widespread popular support for the idea that there is a relationship between the two.<sup>213</sup> Opinion polls, for example, show that the public believes that a defendant who has committed a prior offense deserves to be punished more harshly if the defendant commits another offense, even apart from concerns about recidivism.<sup>214</sup> Arguably, then, the courts and the Commission are justified in joining with the majority

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tion) while at the same time ignoring a person’s selfless acts in risking his life to protect this country.

<sup>209</sup> *Id.* § 5H1.12.

<sup>210</sup> Of course, in *Gall*, the Supreme Court made it clear that district courts can and should take into account the circumstances of a defendant’s life in selecting a sentence. *See* 552 U.S. at 50. But nowhere does the Court indicate that sentencing should be solely about the defendant’s character, nor does the Court indicate that such an evaluation of the defendant’s character should consist of reducing the defendant’s worth to a prior judgment of conviction.

<sup>211</sup> Rappaport, *supra* note 199, at 601.

<sup>212</sup> *Id.* at 602.

<sup>213</sup> *See* Roberts, *supra* note 192, at 311–13.

<sup>214</sup> *See id.* at 311–12.

view on this moral issue. Or perhaps there are other justifications that are more difficult to articulate for why we might want to punish someone more harshly for having committed a serious prior offense.

But even if there is a justification that would support some sort of prior conviction scheme, it could almost certainly not explain the prior conviction scheme that exists in U.S.S.G. § 2L1.2. Any justification for the Commission's scheme would have to explain why a prior conviction should play such a decisive role in a defendant's sentence. Consider a defendant who illegally re-enters and is in Criminal History Category III. The defendant would face a Guideline range of two to eight months after pleading guilty.<sup>215</sup> If one of those prior convictions was for burglary, however, the guideline range would explode to forty-six to fifty-seven months.<sup>216</sup> The prior conviction is by far the most important ingredient in the Guideline calculation. Why the defendant tried to return, how many times the defendant had previously been deported, and prior immigration convictions incurred would be irrelevant. Even just desert theorists who believe criminal history should be considered believe that it should play only a "limited role" at sentencing.<sup>217</sup> After all, if one is attempting to assess a defendant's moral culpability in committing a crime, the focus should be on the facts of the defendant's current crime.

Moreover, any justification for the Commission's prior conviction scheme would have to explain why such a draconian scheme is justified only for illegal re-entry defendants and no other type of defendant. The just deserts theory, for example, does not seem to explain why illegal re-entry cases should be treated differently.<sup>218</sup> Conversely, if there is a penal theory that would justify harsh prior conviction enhancements, why not apply them at every federal sentencing? The fact that the Commission has refused to go down that path shows the enhancement's awkward fit with known penal theories.

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<sup>215</sup> The defendant would have a base offense level of 8. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2009). The defendant would receive 2 levels off for accepting responsibility for the conduct. *See id.* § 3E1.1(a). That would result in an adjusted offense level of 6. If the defendant were in Criminal History Category III, the Guideline range would be two to eight months.

<sup>216</sup> The defendant would have a base offense level of 8. *See id.* § 2L1.2(a). The defendant would then receive a 16-level increase for committing a crime of violence. *See id.* § 2L1.2(b)(1)(A)(ii). The defendant would receive 3 levels off for accepting responsibility for the conduct. *See id.* § 3E1.1(b). That would result in an adjusted offense level of 21. If the defendant were in Criminal History Category III, the Guideline range would be forty-six to fifty-seven months.

<sup>217</sup> Roberts, *supra* note 192, at 318.

<sup>218</sup> *See supra* notes 195–212 and accompanying text.

Indeed, judges have noted the peculiar fact that “[n]owhere but in the illegal re-entry Guidelines is a defendant’s offense level increased threefold based solely on a prior conviction.”<sup>219</sup> This point is important, because nearly any hypothetical justification for a prior conviction enhancement scheme would struggle to provide normative support for treating illegal re-entry cases differently. What was the Commission thinking when it did so?

One potentially troubling implication is that class and race issues may have subconsciously infected the Commission’s decision-making process. Although these sorts of questions have been thoroughly discussed in the context of the Commission’s seemingly irrational decision to increase the Guideline range for crack-cocaine offenses,<sup>220</sup> the same issues lurk around the Commission’s decision to increase so dramatically the penalties for non-violent immigration offenses. Approximately eighty percent of immigration offenders never made it past high school.<sup>221</sup> They are primarily Mexicans with few financial resources, and even though Hispanics constitute approximately thirteen percent of the total U.S. population, they account for approximately forty-three percent of federal offenders.<sup>222</sup> The disproportionate impact of the harsh enhancements on a minority group without a reasoned justification raises the specter that race and class issues have subconsciously seeped into the Commission’s thought process.<sup>223</sup> The taint of irrational prejudice certainly makes the Commission’s lack of articulated justification even more troubling. But regardless of what actually motivated the Commission’s decision, it was an inexplicable one.

In sum, the Commission did not tailor its enhancement scheme to serve any purpose of sentencing. A district court relying on such a scheme to sentence a defendant has imposed a sentence that has not been justified and, in most cases, cannot be justified—in other words, a sentence that is substantively and procedurally unreasonable.

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<sup>219</sup> *United States v. Carballo-Arguelles*, 446 F. Supp. 2d 742, 745 (E.D. Mich. 2006) (quoting *United States v. Santos-Nuez*, No. 05-CR-1232-RWS, 2006 WL 1409106, at \*6 (S.D.N.Y. May 22, 2006)).

<sup>220</sup> *See, e.g.*, Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–77 (1995); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN L. REV. 1283, 1289–98 (1995).

<sup>221</sup> *See* U.S. SENTENCING COMM’N, *supra* note 102, at tbl.46.

<sup>222</sup> *See* U.S. SENTENCING COMM’N, *supra* note 101, at 5.

<sup>223</sup> *Cf.* *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo. 1994) (discussing the subconscious prejudice that might have infected the thought process behind the 100-to-1, crack to powder ratio), *rev’d*, 34 F.3d 709 (8th Cir. 1994).

## 2. The Commission's Prior Conviction Scheme Fosters Unwarranted Sentencing Disparity

Not only does the illegal re-entry Guideline stand on shaky theoretical ground, it undermines the primary purpose of the Guidelines: to reduce unwarranted sentencing disparity.<sup>224</sup> As explained above, one of the fundamental building blocks of the Guidelines was the idea of a real-offense system.<sup>225</sup> That is, defendants were to be punished based on their actual conduct in the offense of conviction.<sup>226</sup> A pure charged-based system was repudiated because of its tendency to view all conduct under the broad umbrella of a particular crime to be the same, despite the fact that a wide range of conduct could fall under any given criminal statute.<sup>227</sup> The charge-based system, for example, would be unable to differentiate between a bank robbery in which a gun was used to beat a teller in the course of stealing a large amount of money and a bank robbery in which no one was hurt, no weapon was used, and only a

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<sup>224</sup> Even apart from the prior conviction enhancements, sentencing in illegal re-entry cases already has serious problems furthering the goal of reducing unwarranted sentencing disparity because of the fast-track program, which allows defendants in some districts, but not others, to receive an extra sentence reduction if they quickly plead guilty. “By creating a situation where the severity of the sentence depends only upon place of arrest, the fast-track program promotes disparity in sentencing.” Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827, 828 (discussing the disparity caused by the fast-track program). The courts of appeals are currently split over whether district courts may mitigate the disparity caused by the fast-track program now that the Guidelines are advisory. See Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 487, 488 (2010) (documenting that the First and Third Circuits allow district courts to use their post-*Booker* discretion to mitigate the effects of the fast-track program, whereas the Fifth, Ninth, and Eleventh Circuits do not.) The circuits that do not allow district courts to take into account fast-track disparity do so on the basis that “Congress explicitly authorized downward sentencing departures for fast-track programs . . . .” *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 739 (9th. Cir.), *cert. denied*, 130 S. Ct. 83 (2009). This, despite the fact that the Supreme Court, in *Kimbough*, authorized district courts to disagree with the Guideline that authorized the 100-to-1 crack to powder cocaine ratio, which is a ratio Congress had implicitly improved of when it created that ratio in its drafting of the minimum mandatory penalties for crack cases. See 552 U.S. at 101–08. In other words, the circuits that have held that district courts may not mitigate disparity caused by the fast-track program have drawn a distinction between Guidelines that have been explicitly approved of by Congress and those that have been, at best, approved of implicitly. The disparity caused by the fast-track program, however, is beyond the scope of this article. Moreover, because the prior conviction enhancements are, at best, only implicitly approved of by Congress, the line of cases discussing fast-track disparity are inapplicable to policy attacks on the enhancements.

<sup>225</sup> See *supra* notes 31–34 and accompanying text.

<sup>226</sup> See *supra* notes 31–34 and accompanying text.

<sup>227</sup> See *supra* notes 31–34 and accompanying text.

small amount of money was taken.<sup>228</sup> Although both defendants committed “bank robbery,” one was clearly more culpable than the other. The benefit of a real-offense system is that it can account for that nuance, thereby ensuring that those defendants are not treated similarly.

The prior conviction enhancements, however, breathe new life into a pure charge-offense system, burying all elements of a real-offense system for purposes of illegal re-entry convictions.<sup>229</sup> The scheme treats broad classes of crimes the same way. Thus, the bank robbers in the above example would both receive the same enhancement if they were later convicted of illegal re-entry. The facts of their particular cases are irrelevant. Once it is determined that the defendant’s prior conviction falls under one of several generic labels, the defendant receives the enhancement.<sup>230</sup>

The way in which the Commission treats a prior drug trafficking offense illustrates the problem.<sup>231</sup> In one way, the drug-trafficking offense enhancement is more sophisticated and allows for a more nuanced determination than most of the other prior conviction enhancements. That is because—unlike the other prior conviction enhancements in U.S.S.G. § 2L1.2—the drug trafficking guideline tethers the offense level increase, in one small way, to a specific fact in the defendant’s prior conviction.<sup>232</sup> Defendants who served less than thirteen months for their “drug trafficking offense” receive the 12-level increase, whereas defendants who served thirteen months or more receive the 16-level increase.<sup>233</sup> The enhancement thus attempts to differentiate between serious drug trafficking offenses and less serious ones.<sup>234</sup> But that is where the individualized determination ends. The prior conviction enhancement does not account for the identity of the drug, the drug amount, or the defendant’s role in the trafficking.<sup>235</sup> Each of these characteristics, however, is key to the Guideline calculation for a defendant who is federally prosecuted for a drug-trafficking offense.<sup>236</sup> For example, a defendant who pled guilty to being a courier of 50 kilograms

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<sup>228</sup> See *supra* notes 31–34 and accompanying text.

<sup>229</sup> See U.S. SENTENCING GUIDELINES MANUAL § L1.2 (2009).

<sup>230</sup> See *id.*

<sup>231</sup> See *id.* § 2L1.2(b)(1)(A)(i), (B).

<sup>232</sup> See *id.*

<sup>233</sup> *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i), (B) (2009).

<sup>236</sup> See *id.* § 2D1.1 (providing the offense level for drug offenses, which is dependent on drug type and amount); *id.* § 3B1.2 (providing for an offense level reduction if the defendant played a minor or minimal role in his offense).

of marijuana would face a Guideline range of 18 to 24 months if the defendant had no criminal history,<sup>237</sup> whereas a defendant with some criminal history who pled guilty to conspiring to deal over 30 kilograms of heroin would face a Guideline range of 235 to 293 months.<sup>238</sup> The first defendant would likely get about a year and a half; the second would be looking at twenty to twenty-five years. If the defendants in these cases are later prosecuted for illegal re-entry, however, both will receive the same 16-level increase.<sup>239</sup> It is difficult to see how such a result is justifiable under a system that claims to tether the defendant's sentence to actual conduct.

The prior conviction enhancements foster unwarranted disparity in another way. In addition to using the charge-based system, the enhancement scheme does so in a particularly irrational way. Not only are certain classes of crimes treated the same way, but different classes of crimes are treated the same way. Terrorists, murderers, rapists, and child molesters receive the same steep 16-level enhancement as a defendant who committed extortion by saying, "Give me \$10 or I'll key your car,"<sup>240</sup> as a defendant who committed statutory rape when, as an 18-year old, he had consensual sex with his 14-year-old girlfriend;<sup>241</sup> as a defendant who committed an assault when he threw a rock at a car that had attempted to run him over during a dispute about a Sony Discman;<sup>242</sup> and as a defendant who committed arson by causing \$35 worth of damage to a car by throwing a lit match at it.<sup>243</sup> Likewise, defendants who commit a crime involving the use or attempted use of physical force against another would receive the same 16-level increase as a defendant who just

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<sup>237</sup> The defendant's base offense level would be 20. *See id.* § 2D1.1. The defendant would likely receive two levels off for being a minor participant in the marijuana sale. *See id.* § 3B1.2(b). Finally, the defendant would receive three levels off for pleading guilty and accepting responsibility for the conduct. *See id.* § 3E1.1(b). That would result in an adjusted offense level of 15. Since the defendant would be in Criminal History Category I, the guideline range would be eighteen to twenty-four months.

<sup>238</sup> The defendant's base offense level would be 38. *See id.* § 2D1.1. The defendant would likely receive three levels off for pleading guilty and accepting responsibility for the conduct. *See id.* § 3E1.1(b). That would result in an adjusted offense level of 35. If the defendant were in Criminal History Category IV, the Guideline range would be 235–293 months.

<sup>239</sup> *See id.* § 2L1.2(b)(1)(A)(i).

<sup>240</sup> *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 959 (2009).

<sup>241</sup> *See United States v. Hernandez-Castillo*, 449 F.3d 1127, 1131–32 (10th Cir. 2006).

<sup>242</sup> *See United States v. Perez-Nunez*, 368 F. Supp. 2d 1265, 1266–67 (D.N.M. 2005).

<sup>243</sup> *See United States v. Trujill-Terrazas*, 405 F.3d 814, 817 (10th Cir. 2005).

made a threat to use physical force.<sup>244</sup> The results are equally inexplicable with respect to the 8-level increase.<sup>245</sup> Conduct that can result in the 8-level increase can vary from shoplifting to attempted manslaughter.<sup>246</sup> Treating these defendants similarly does not avoid unwarranted sentencing disparities—it requires unwarranted disparities.<sup>247</sup>

Moreover, even defendants who commit precisely the same act do not necessarily receive the same enhancement, because many states have broadly defined crimes that do not fit under the generic definition provided in U.S.S.G. § 2L1.2.<sup>248</sup> To cite just one of the many examples, a defendant who was previously convicted of kidnapping will not necessarily receive the 16-level enhancement if the defendant had been convicted in California or Colorado, but will receive the enhancement if convicted in New York.<sup>249</sup> Likewise, a defendant who commits burglary in Arkansas will receive the 16-level enhancement, but not if the

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<sup>244</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(ii); *id.* § 2L1.2 cmt. n.1(B)(iii).

<sup>245</sup> See *id.* 2L1.2(b)(1)(C).

<sup>246</sup> See *United States v. Bonilla*, 524 F.3d 647, 655 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 904 (2009) (holding that New York's manslaughter law did not qualify for the 16-level increase but would presumably qualify as an aggravated felony, triggering the 8-level increase); *United States v. Pacheco*, 225 F.3d 148, 149–50 (2d Cir. 2000) (holding that the defendant's prior conviction for shoplifting in Massachusetts qualified as an aggravated felony, which at that point in time triggered the 16-level increase, but would now trigger the 8-level increase).

<sup>247</sup> Many district courts have already recognized this particular arbitrary aspect of the illegal re-entry Guideline provision; as one such judge recently commented:

[A] relatively minor drug offense might result in a sentence exceeding 13 months, automatically resulting in a 16-level enhancement under 2L1.2. Whereas a prior conviction for embezzlement, fraud, tax evasion, money laundering, involuntary servitude, obstruction of justice, perjury or bribery would result in an eight-level enhancement. Obviously, in a particular case any one of these crimes could be much more serious than that of, say, selling a few hundred dollars' worth of cocaine. But the Guideline does not recognize any such possibility. When viewing it in that fashion, one must conclude that 2L1.2 is arbitrary and capricious, and in many cases will produce a result that is simply not reasonable.

Memorandum Sentencing Opinion at 7, *United States v. Salazar-Pacheco*, No. 6:05-CR-137-ORL-31KRS (M.D. Fla. Jan. 20, 2006).

<sup>248</sup> This wrinkle is due to the complexities of the categorical approach, whereby courts determine the generic definition of the crime in the Guidelines and then determine whether the elements of the crime the defendant committed falls under that generic definition. See, e.g., *United States v. Grajeda*, 581 F.3d 1186, 1189–97 (9th Cir. 2009) (following the approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

<sup>249</sup> See *United States v. Moreno-Flores*, 542 F.3d 445, 448–57 (5th Cir. 2008) (discussing California kidnapping); *United States v. Cervantes-Blanco*, 504 F.3d 576, 578–87 (5th Cir. 2007) (discussing Colorado kidnapping); *United States v. Iniguez-Barba*, 485 F.3d 790, 792 (5th Cir. 2007) (discussing New York kidnapping).

defendant committed the burglary in California.<sup>250</sup> An even more inexplicable result occurs with respect to defendants who previously committed simple assault.<sup>251</sup> Such a conviction will result in a 16-level increase in a later illegal re-entry prosecution if the assault took place in one of four states; it will not result in a 16-level increase if the conviction occurred in any of the other forty-six states.<sup>252</sup> Observing this fact, one judge commented that “[i]t is difficult to see how the Guidelines promote uniformity in sentencing under this scheme.”<sup>253</sup> That conclusion seems inescapable.

The illegal re-entry Guideline provision lulls district courts into a false sense of security regarding the uniformity of their sentences. The Guidelines, in effect, act as a security blanket, stunting the development of a culture where like cases are truly treated alike—the faulty assumption that a guideline sentence avoids the problem of unwarranted disparity replaces analysis, thought, and judgment regarding what sort of sentence would facilitate proportionality.

### 3. Use of the Enhancement Results in Disproportionate Punishments

Aside from concerns that the prior conviction enhancements have not been tailored to serve any of the goals of sentencing and foster unwarranted sentencing disparities, the enhancements are simply too harsh. This is especially so for the 8-, 12-, and 16-level enhancements, which dramatically increase sentences, resulting in defendants serving over three years for doing nothing more than illegally re-entering the country.<sup>254</sup> Even if the Commission could offer some justification for increasing a defendant’s sentence in an illegal re-entry case for a prior conviction beyond what chapter four would recommend, there is no justification for the large increases found in U.S.S.G. § 2L1.2.

To put in perspective the severity of the 16-level increase, a defendant must cause over a million dollars of loss in a fraud case before that defendant’s offense level climbs by a similar amount.<sup>255</sup> Likewise, a de-

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<sup>250</sup> See *United States v. Aguila-Montes*, 553 F.3d 1229, 1229–30 (9th Cir. 2009) (noting that California burglary does not constitute generic burglary); *United States v. Mendoza-Sanchez*, 456 F.3d 479, 481–83 (5th Cir. 2006) (noting that Arkansas burglary constitutes generic burglary); see also *United States v. Carbajal-Diaz*, 508 F.3d 804, 807–13 (5th Cir. 2007) (holding that Missouri burglary constitutes generic burglary under the modified categorical approach).

<sup>251</sup> See *Perez-Nunez*, 368 F. Supp. 2d at 1268.

<sup>252</sup> See *id.*

<sup>253</sup> *Id.*

<sup>254</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A), (B), (C) (2009).

<sup>255</sup> See *id.* § 2B1.1(b)(1)(I).

defendant in a price-fixing scheme must have affected \$1.5 billion worth of commerce before receiving a 16-level increase.<sup>256</sup> Looked at another way, a defendant convicted of illegal re-entry who receives the 16-level increase will have an offense level of 24, which is on par with a defendant who threatened national security by using explosives to destroy an airport or an airplane,<sup>257</sup> transmitting national defense information,<sup>258</sup> or by tampering with restricted data concerning atomic energy.<sup>259</sup> Similarly, defendants who receive the 16-level increase will have a comparable offense level to defendants who committed such crimes as the sex trafficking of children,<sup>260</sup> sexually abusing a minor under the age of sixteen,<sup>261</sup> reckless manslaughter,<sup>262</sup> being involved in the slave trade,<sup>263</sup> and inciting a prison riot with a substantial risk of death.<sup>264</sup> A defendant who receives the 8-level increase will have an offense level equal to someone who has distributed between ten and twenty grams of heroin;<sup>265</sup> distributed obscene material to a minor;<sup>266</sup> obstructed justice;<sup>267</sup> or gave less than twenty-five pounds of explosive material to a known felon.<sup>268</sup>

Perhaps the most idiosyncratic aspect of the punishment structure of section 2L1.2—and the clearest example of its tendency to over-punish—is the fact that it typically results in a defendant serving more time in federal prison because of the prior conviction than the defendant originally did for the prior offense. A particularly egregious example of this phenomenon is seen in the U.S. Court of Appeals for the Tenth Circuit's 2005 decision, *United States v. Gonzalez-Coronado*, where the defendant received the 16-level increase even though the triggering prior conviction had resulted in no prison time.<sup>269</sup> Such results are indefensible, but unfortunately all too typical.<sup>270</sup> Indeed, it is entirely in-

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<sup>256</sup> See *id.* § 2R1.1(b)(2)(H).

<sup>257</sup> See *id.* § 2K1.4(a)(1).

<sup>258</sup> See *id.* § 2M3.3(a)(2).

<sup>259</sup> See *id.* § 2M3.5(a).

<sup>260</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(a)(4) (offense level 24).

<sup>261</sup> See *id.* § 2A3.2(a) (offense level 18).

<sup>262</sup> See *id.* § 2A1.4 (offense level 18).

<sup>263</sup> See *id.* § 2H4.1(a)(1) (base offense level 22).

<sup>264</sup> See *id.* § 2P1.3(a)(1) (offense level 22).

<sup>265</sup> See *id.* § 2D1.1(c)(12) (offense level 16).

<sup>266</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2G3.1(b)(1)(C) (offense level 15).

<sup>267</sup> See *id.* § 2J1.2(a) (offense level 14).

<sup>268</sup> See *id.* § 2K1.3(a)(4) (offense level 16).

<sup>269</sup> See 419 F.3d 1090, 1094–95 (10th Cir. 2005).

<sup>270</sup> See, e.g., *Perez-Nunez*, 368 F. Supp. 2d at 1266, 1267 (including the 16-level enhancement in the calculation of a defendant's offense level for a Colorado assault conviction that netted him twenty-four days in state jail).

explicable that federal judges regularly sentence defendants to more time for a state offense—where they often know almost nothing about the prior offense other than the name of the statute of conviction and perhaps a one or two sentence explanation of the crime—than the judge who sentenced the defendant in state court and presumably was intimately familiar with the facts of the offense.

Another idiosyncratic aspect of the enhancement that results in excessively long sentences is the fact that the triggering prior conviction can be ancient, as there is no time limitation built into the enhancement. A recent example is seen in *United States v. Amezcua-Vasquez*, decided by the U.S. Court of Appeals for the Ninth Circuit in 2009, where the defendant had lived in the United States for almost fifty years, having been brought to the United States in 1957, when he was two years old.<sup>271</sup> The defendant was eventually deported in 2006 and returned to the United States two weeks later.<sup>272</sup> He was apprehended at the border and quickly pled guilty to illegal re-entry.<sup>273</sup> Given that he was in Criminal History Category II, his Guideline range was forty-six to fifty-seven months—a range driven by a 1981 conviction for assault with great bodily injury and attempted voluntary manslaughter, which qualified for the 16-level increase.<sup>274</sup> Despite the fact that the Guideline range was driven by a twenty-five-year-old prior conviction, the district court selected a mid-Guideline range sentence of fifty-two months.<sup>275</sup>

The Ninth Circuit reversed, holding that the sentence was substantively unreasonable, one of the few cases reaching such a result.<sup>276</sup> In reversing, the court took on the policy behind the prior conviction enhancement directly, stating that it was unreasonable to increase “a defendant’s sentence by the same magnitude irrespective of the age of the prior conviction at the time of re-entry.”<sup>277</sup> The Ninth Circuit stated that the present offense was less serious than re-entry soon after committing a serious crime and that the guideline sentence did not avoid

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<sup>271</sup> See 567 F.3d 1050, 1052 (9th Cir. 2009).

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

<sup>273</sup> *Id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* at 1053.

<sup>276</sup> See *id.* at 1058. This fact prompted an attempt by some Ninth Circuit judges to have the case taken en banc. See *United States v. Amezcua-Vasquez*, 586 F.3d 1176, 1176 (9th Cir. 2009) (en banc).

<sup>277</sup> *Amezcua-Vasquez*, 567 F.3d at 1055 (emphasis omitted). The court continued: “Although it may be reasonable to take *some* account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country, it does not follow that it is inevitably reasonable to assume that a decades-old prior conviction is deserving of the same severe additional punishment as a recent one.” *Id.* at 1055–56.

unwarranted similarities among differently situated offenders.<sup>278</sup> It was not reasonable for the defendant's record of harmlessness to others for the past twenty-five years to subject him to the same severe enhancement applied to a recent violent offender.<sup>279</sup> The decision is encouraging, giving the green light to other reasonableness attacks to stale prior convictions. Indeed, this case provides a good template for attacking all aspects of the prior conviction enhancement in the district court and on appeal.

Judges across the political spectrum have spoken out against the harsh, unjust results mandated in illegal re-entry cases. For example, Judge Gregory Presnell of the U.S. District Court for the Middle District of Florida recently testified in front of the Commission that the prior conviction enhancement scheme for illegal re-entry cases has resulted in "grossly unjust results."<sup>280</sup> Former district court judge Paul Cassell, generally a defender of the Guidelines, has singled out the Guideline provisions for immigration offenses as those that "are quite often too high."<sup>281</sup> Indeed, a number of district court judges now recognize the endemic problems with U.S.S.G. § 2L1.2.<sup>282</sup>

In sum, the prior conviction enhancements punish people too harshly for doing no more than entering the United States without permission after having been deported. Even the Commission itself has recognized the relatively minor nature of the offense of illegal re-entry, by assigning the crime a base offense level of only 8.<sup>283</sup> That relatively minor crime should generally not be punished harshly. Moreover, the typical profile of a defendant convicted of illegal re-entry is not someone deserving of a steep penalty. As one district court judge explained during her testimony to the Commission:

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<sup>278</sup> *Id.* at 1056.

<sup>279</sup> *See id.*

<sup>280</sup> *Public Hearing Before the U.S. Sentencing Commission, Atlanta, Ga.*, U.S. Sentencing Commission 133 (Feb. 11, 2009) (testimony of Judge Gregory Presnell).

<sup>281</sup> Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1019 (2004).

<sup>282</sup> *See, e.g., Carballo-Arguelles*, 446 F. Supp. 2d at 745; *Santos-Nuez*, 2006 WL 1409106, at \*6; *United States v. Austin*, No. 05-CR-744-RWS, 2006 WL 305462, at \*8-9 (S.D.N.Y. 2006); Memorandum Sentencing Order at 7, *Salazar-Pacheco*, No. 6:05-CR-137-ORL-31RS; *United States v. Santos*, 406 F. Supp. 2d 320, 327-28 (S.D.N.Y. 2005); *United States v. Zapata-Treviño*, 378 F. Supp. 2d 1321, 1324-28 (D.N.M. 2005); *Perez-Nunez*, 368 F. Supp. 2d at 1267-69; *Galvez-Barrios*, 355 F. Supp. 2d at 961-63; *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1025-27 (D. Neb. 2005).

<sup>283</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2009).

[Illegal re-entry defendants] are not terrorists, and the vast majority of them are not violent criminals. Overwhelmingly, they are motivated by poverty to come to the United States to work. They come from Mexico or Central American countries to support their families or to reunite with family members who are already in the United States.<sup>284</sup>

With few exceptions, sending those people to prison for more than two years is disproportionate to the crime they have committed.<sup>285</sup> That is, it is unreasonable.

#### CONCLUSION

It has now been more than a decade since Mr. Almendarez-Torres was sentenced to prison for over seven years for illegal re-entry. The time is long past due for meaningful reflection on whether that sort of sentence is greater than necessary to satisfy the goals of sentencing. Does it really make sense to imprison a former burglar for over seven years because he made the poor decision to come back to the United States after having been deported? Was the \$175,000 we spent housing him over that time money well spent?<sup>286</sup>

The prior conviction enhancement has now been a part of the illegal re-entry sentencing landscape for over twenty years. During that time, the Commission has continually tinkered with the enhancement, ultimately reaching the complicated scheme that exists today. Despite the unique nature of the prior conviction enhancements, there has been surprisingly little discussion, especially among judges, about whether the enhancements are necessary to assure that sentences in illegal re-entry cases properly reflect the congressionally mandated goals of sentencing.

A large part of the problem can be traced to the fact that the Guidelines were mandatory for so long. Under a mandatory regime,

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<sup>284</sup> 2006 Hearing, *supra* note 129, at 33 (testimony of Chief Judge Martha Vazquez, Dist. of N.M.).

<sup>285</sup> That is not to say that certain illegal re-entry defendants do not deserve harsh penalties, approaching the twenty-year statutory maximum. For example, a defendant who harms law enforcement or others in the course of illegally re-entering—or who illegally re-enters to commit a serious offense—would warrant a long sentence.

<sup>286</sup> See Memorandum from Matthew Rowland, Deputy Assistant Dir., Admin. Office of the U.S. Courts to Chief Prob. Officers & Chief Pretrial Servs. Officers, Cost of Incarceration and Supervision 1 (May 6, 2009), available at <http://www.dcfpd.org/library/cost.pdf> (determining that it costs \$25,894.50 per year to incarcerate defendants convicted of non-capital crimes).

district courts were forbidden from questioning the policy behind any given Guideline provision—and from questioning whether there was any policy behind it at all. Thus, for close to twenty years, judges became accustomed to the idea that defendants in illegal re-entry cases could receive an enhancement based on the nature of their prior convictions. But now that the Guidelines are advisory, courts should be asking very serious questions about whether this regime makes any sense. As this Article shows, it does not. So, what to do about it?

The Commission, of course, is the body that could most easily fix the broken enhancement scheme. It has the ability—and the obligation—to determine what kind of enhancement system makes the most sense. So far, the Commission has not acted, even though many of the flaws catalogued above have been pointed out at public hearings.<sup>287</sup>

Until the Commission acts, district court judges, as the front-line sentencing actors, are in the best position to mend the system. Some district court judges, in fact, have occasionally recognized the problems with the prior conviction enhancements in particularly egregious cases and have used their post-*Booker* discretion to eliminate the injustice. But even those judges cannot quite escape the grip of this prior conviction-enhancement regime, as they still often give the enhancements some credence when they deserve none (or, at least, very little). Indeed, courts should free themselves from the shackles of the prior conviction enhancements entirely. A defendant's prior convictions in an illegal re-entry case should be treated like the defendant's prior convictions in any other case: they should be accounted for in the defendant's Criminal History Score. And if that score "under-represents" the defendant's criminal history, the court should upwardly depart, as it would in any other case.<sup>288</sup>

The obligation to ensure defendants receive fair sentences should not fall entirely on the Commission and courts. Defense counsel should present arguments against the prior conviction scheme to district courts, thereby arming the courts with reasons a below-Guideline sentence is warranted. By challenging the soundness of the Guideline

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<sup>287</sup> See, e.g., *2006 Hearing*, *supra* note 129, at 22 (testimony of Comm'r Ruben Castillo) ("When we were out in Texas, the Federal Defenders gave some, I thought, compelling testimony that said, in the first instance, the Commission has never articulated a justification for the 16-level enhancement.").

<sup>288</sup> U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(1) (2009) ("If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.").

range itself, defense counsel will trigger the district court's heightened obligation to respond to a defendant's non-frivolous argument for a below-Guideline sentence.<sup>289</sup>

All that said, there is something a bit uncomfortable about advocating for the wholesale rejection of an entire Guideline provision. Such a position risks a return to pre-Guideline sentencing, when district courts were armed with wide discretion and little direction. Moreover, district court judges are not in a great position to craft sentencing policy for a broad range of defendants. Indeed, that is why Congress created a sentencing commission and established a mandatory Guideline regime. But in this post-*Booker* world, district court judges are statutorily required to give sentences that are sufficient, but not greater than necessary, to satisfy the goals of sentencing, and they may not impose an unreasonable sentence. Guideline provisions that are rotten through and through—like the prior conviction enhancement—can no longer be followed. As one district court judge put it, “The Court’s invitation [in *Kimbrough*] . . . to critique the Guidelines . . . represents an opportunity for district courts to participate in the creation of a fairer system of federal sentencing.”<sup>290</sup> This is especially so when there is no evidence that the Commission relied on its institutional expertise in amending a Guideline. It also seems perverse for a district court judge to refuse to toss out a broken system because the system is more effec-

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<sup>289</sup> See *Rita v. United States*, 551 U.S. 338, 357–58 (2007). As the Court said in *Rita*:

Circumstances may well make clear that the judge rests his decision upon the Commission’s own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3353(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a)—that is argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way—or argues for departure, the judge normally need say no more.

*Id.* at 357. In other words, the district court does not need to say much at sentencing if it gives a within-Guideline sentence, because the appellate court can assume the district court found the Sentencing Commission’s explanation convincing. That rationale, however, does not work if the defendant challenges the Commission’s reasoning to begin with. In those cases, the district court must say more by defending why it agreed with the Commission’s judgment—a judgment that the defendant’s argument would have brought into question. Moreover, in cases in which a defendant challenges the soundness of a Guideline provision, a response from the district court is particularly warranted, since it will provide useful feedback to the Sentencing Commission, serving one of the primary purposes of the explanation requirement. See *id.* at 357–58.

<sup>290</sup> Adelman & Deitrich, *supra* note 78, at 576 (explaining how a district court judge should go about handling a defective guideline and identifying the illegal re-entry Guideline as one such guideline, given the prior conviction enhancements).

tively remedied by someone else. Although district courts' ad hoc responses are surely a second-best solution to the vexing problem of illegal re-entry sentencing, an even worse solution is to maintain the status quo in the hopes that a system-wide fix will occur. As long as the Commission refuses to promulgate an illegal re-entry Guideline provision that is justified, courts should be unwilling to respect a regime that results in unjust, unjustified, and unreasonable sentences.