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Decoupling Federal Offense Guidelines from Statutory Limits on Sentencing

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I. INTRODUCTION

The United States Sentencing Commission (Commission) must strike a delicate balance when incorporating statutory limits on sentencing into the U.S. Sentencing Guidelines Manual (Guidelines). On one hand, the Guidelines must be “consistent with all pertinent provisions of any Federal statute.”¹ On the other, the Commission’s “characteristic institutional role” is to advise sentencing courts based on “empirical data and national experience.”² Particularly in the realm of controlled substance offenses, the Commission may find itself hard-pressed to reconcile harsh, quantity-based statutorily-mandated minimum sentences with its own research, expertise, and judgment. In such a situation, the Commission has three choices: (1) calibrate its offense guideline by proportionately extrapolating the statutory limitation across the guideline; (2) incorporate the statutory limit into the offense guideline to the least extent possible, often resulting in anomalous cliffs and plateaus within the offense guideline; or (3) not incorporate the statutory limit into the offense guideline but permit the statutory provision to limit an offender’s ultimate Guidelines range through the operation of Chapter Five of the manual.

This Article discusses the sensibility of each of these three options. Part II sets forth a hypothetical controlled substance offense to better illustrate the choices faced by the Commission. Part III recounts approaches that the Commission has actually adopted in incorporating statutory limits into the

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1. 28 U.S.C. § 994(a) (2006).

2. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

Guidelines. Part IV addresses the goals of guideline sentencing and concludes that the Guidelines' structure should be primarily driven by actual fairness concerns. Applying actual fairness as the overriding concern, Part V concludes that statutory limits should not be incorporated into an offense guideline when some offenders subject to the guideline will not be subject to the statutory limit. In particular, the drug distribution guideline should be decoupled from Congress's mandatory minimum sentences and revised to reflect the Commission's purest sentencing recommendations because defendants can avoid mandatory minimum sentences either through the operation of the statutory "safety valve" or through the government's failure to charge or adequately prove triggering drug quantities. The current drug distribution guideline, which is extrapolated from statutorily-imposed mandatory minimum sentences, works actual unfairness when applied to defendants who are not subject to those mandatory minimums.

II. A HYPOTHETICAL COMMISSION AND THE BETEL NUT GUIDELINE

In order to conceptualize the issue at hand, it is perhaps easiest to take a step back from the reality of the United States' current federal sentencing scheme and enter a hypothetical parallel sentencing universe. Envision a fresh sentencing commission with the wisdom, research, and expertise to promulgate "pure" offense guidelines. For the purposes of this section, pure offense guidelines are guidelines that are correct from the commission's point of view in the absence of any external legislative directives. Pure offense guidelines are the commission's best effort to independently develop guidelines based on data and experience that produce proper ranges of imprisonment based on the seriousness of the offense conduct and the characteristics of the offender.³ If the commission were king, the pure guidelines would be the sentencing scheme of the kingdom.

Enter the hypothetical legislature. The hypothetical legislature identifies a new substance to control: the betel nut.⁴ The commission is therefore faced with creating an offense guideline for betel nut distribution. Based on its wisdom and expertise, the commission finds that the ideal measure of offense seriousness is the quantity of betel nut distributed by the offender.⁵ Thus, in

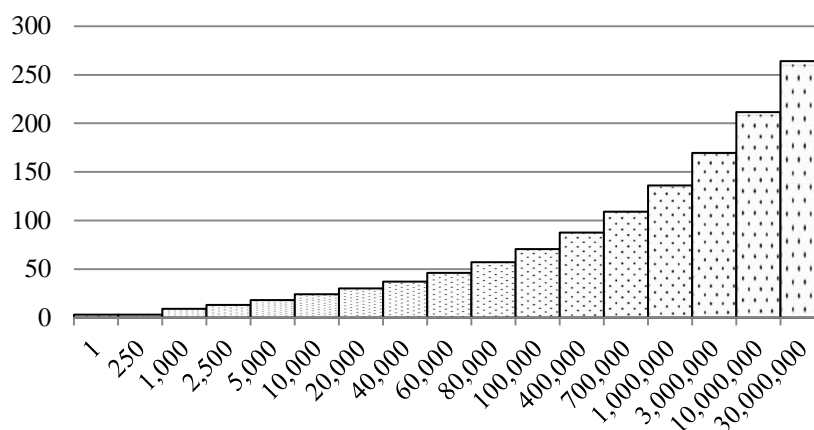
3. For the guidelines to be "right" or for ranges to be "proper," the commission must subscribe to one or more sentencing theories that its guidelines effectively carry out. The specific policy views of this hypothetical commission are not important – the salient point is that the pure guidelines represent the commission's best attempt at implementing its own vision for federal sentencing, whatever that vision may be.

4. For general background on the history, usage, effects, risks, and non-criminalization of the betel nut, see TODD A. THIES, *LEGALLY STONED: 14 MIND-ALTERING SUBSTANCES YOU CAN OBTAIN AND USE WITHOUT BREAKING THE LAW* 85-90 (2009).

5. Here, the hypothetical commission has parted way with the many commentators who have long criticized the use of controlled substance quantity as an accurate

its pure offense guideline, the commission correlates the offense level with the quantity of nuts distributed. Figure 1 displays the commission's pure betel nut offense guideline:⁶

Figure 1: Mean Sentence for Betel Nut Distribution Under "Pure" Offense Guideline



The x-axis represents the quantity of nuts distributed. The y-axis represents the mean number of months within the guidelines range for an offender with no prior criminal history.⁷

proxy for offense seriousness. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 915 (1991) (“Sentencing commissions can quantify harms more easily than they can quantify circumstances. Commissions count the stolen dollars, weigh the drugs, and forget about more important things.”); David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 452-53 (1993) (opining that the quantity for many offenses – including larceny, fraud, and narcotics offenses – “is often beyond the defendant’s control or expectations” and arguing that quantity-driven offense guidelines give law enforcement the ability to manipulate sentences through suggesting higher quantities in undercover operations). See generally Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANTITATIVE CRIMINOLOGY 155 (2009) (finding that quantity-driven sentencing results in excessively uniform sentences for offenders with highly dissimilar roles in the offense). Neither this hypothetical nor this Article is meant to weigh the relative merits (or lack thereof) of quantity-based offense guidelines. For purposes of the hypothetical, it is best to accept that the hypothetical commission has judged that quantity correlates perfectly to offense seriousness for betel nut distribution without probing deeper into the assumptions underlying that judgment.

6. The (hypothetical) data underlying Figure 1 may be found in Table 1 of Appendix A. The data is identical to the quantities and corresponding offense levels in the (real) offense guideline applicable to the distribution of ketamine. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2013).

Influenced by “political considerations,” the hypothetical legislature places statutory limitations on sentencing betel nut distributors that are out of alignment with the commission’s pure guidelines. Specifically, the legislature sets a statutory minimum sentence of five years’ imprisonment for the distribution of 10,000 nuts and a statutory minimum sentence of ten years’ imprisonment for the distribution 400,000 nuts. Under the commission’s pure offense guidelines, the distribution of 10,000 nuts should yield a range of 21 to 27 months’ imprisonment for a defendant in criminal history category I. The distribution of 400,000 nuts should yield a range of 78 to 97 months’ imprisonment for a defendant with the same minimal criminal history.

With statutory minimums higher than the commission’s judgment of the proper punishment for the distribution of betel nuts, the commission must elect from three options: (1) elevate the entire betel nut offense guideline by proportionately extrapolating the legislatively-sanctioned punishment levels; (2) incorporate the statutory limits into the guideline as “cliffs,” but otherwise keep the guideline as close to the pure guideline as possible; or (3) make no changes to the pure offense guideline but allow another guideline provision to ensure that a defendant’s ultimate guidelines range of imprisonment conforms to the statutory limits on sentencing.

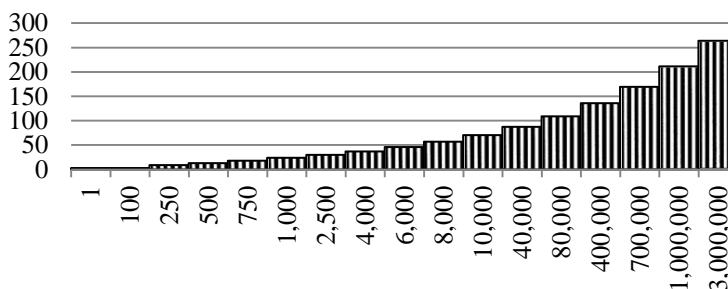
The first option, the “wholesale extrapolation approach,” would produce a guideline similar to Figure 2 for offenders with no prior criminal history.⁸

7. In simplified terms, under the (real) Guidelines the seriousness of the offense conduct is graded on a scale of 1 to 43 (the “offense level”) and the offender’s recent past criminal history is graded on a scale of I to VI (the “criminal history category”). The intersection of those two numbers in the Guidelines’ Sentencing Table discloses the offender’s advisory range of imprisonment. *See id.* ch. 5, pt. A; *see also* U.S. SENTENCING COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, available at www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf (last visited Sept. 23, 2013).

At the left end of the betel nut pure offense guideline graph, a distribution of 1 to 249 nuts results in an offense level of six, with a guidelines range of 0 to 6 months’ imprisonment for an offender in criminal history category I. Thus, the graph displays three months’ imprisonment for a distribution of 1 to 249 nuts. A distribution of 250 to 999 nuts leads to offense level eight, with the same 0 to 6 month guidelines range (mean of 3 months). One thousand to 2500 nuts leads to offense level ten and a guidelines range of 6 to 12 months (mean of 9 months). And so on up the graph until the distribution of 30,000,000 or more nuts leads to an offense level of 235 to 293 months’ imprisonment (mean of 264 months).

8. The (hypothetical) data underlying Figure 2 is reproduced in Table 2 of Appendix A.

**Figure 2: Mean Sentences for Betel Nut
Distribution Under
Wholesale Extrapolation Approach**



Under the wholesale extrapolation approach, the curve of incremental punishment for incremental additional quantity is retained; however, the quantities necessary to trigger greater punishments are significantly lower than the quantities necessary to trigger identical punishments under the pure guideline. Such ballooning is necessary to incorporate the statutory minimums and maintain a relatively gentle slope. For example, under the pure guideline, a distribution of 5,000 nuts was necessary to receive a guidelines range of 15 to 21 months' incarceration, but under the wholesale extrapolation approach a distribution of only 750 nuts will land an offender in the same guidelines range.⁹ On the high end, the pure guideline required a distribution of at least 30,000,000 nuts to reach the maximum offense level. Under the wholesale extrapolation approach, a significantly smaller distribution – 3,000,000 nuts – will place an offender at the top of the graph.

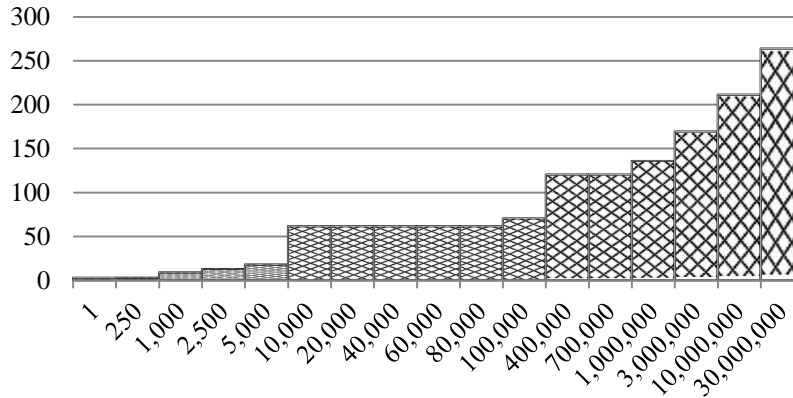
Rather than extrapolate the statutory minimums wholesale across every distribution quantity, under the second option, referred to as the “cliffs approach,” the commission could opt to incorporate the statutory minimums into the pure offense guideline as anomalous cliffs. Each cliff is followed by a similarly anomalous plateau until the gradual curve of the pure guideline catches up to the level of the cliff.¹⁰ This approach, set forth in Figure 3,

9. Assuming that the defendant is in criminal history category I.

10. The metaphor of “posts and lattices” has also been applied to this structure: if mandatory minimum sentences are posts and the overall guideline grid is a lattice, “long minimum sentences poke through the lattice and when they are very long, tower above it.” MICHAEL TONRY, SENTENCING MATTERS 97 (1996). Under the wholesale extrapolation approach, “the entire lattice is lifted, as if the mandatory minimums were posts, and the sentences for many crimes not covered by the mandatory provisions are lifted also.” *Id.*

keeps as true to the pure guideline as possible while incorporating the mandatory minimums into the offense guideline.¹¹

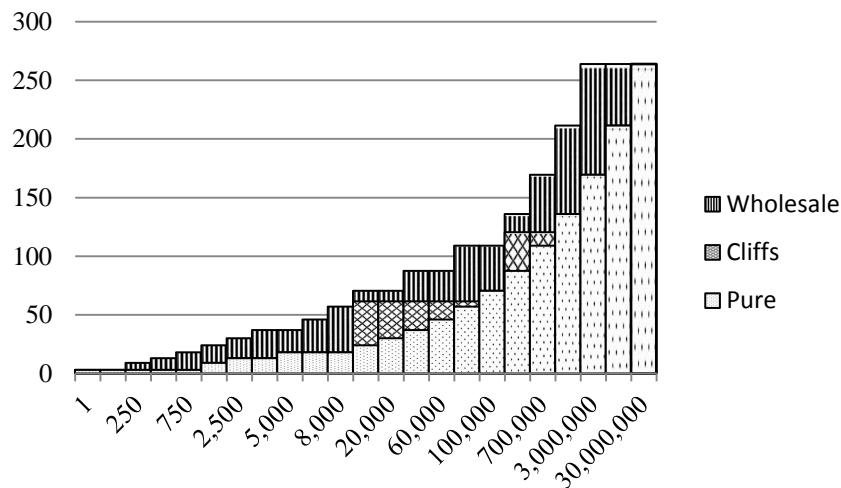
Figure 3: Mean Sentence for Betel Nut Distribution Under "Cliffs" Approach



For a better sense of the relative effects of the wholesale extrapolation and cliffs approaches, Figure 4 overlays both graphs with the pure offense guideline:¹²

11. The (hypothetical) data underlying Figure 3 is reproduced in Table 3 of Appendix A. The offense level that would produce the least severe Guidelines range for a defendant in criminal history category I that encompassed the mandatory minimum sentence was selected as the applicable offense level. Thus, offense level twenty-four, which produces a Guidelines range of 51-63 months' imprisonment for a defendant in criminal history category I, was selected to capture the five year mandatory minimum. Offense level thirty, which produces a Guidelines range of 97-121 months for a defendant in criminal history category I, was selected to capture the ten year mandatory minimum.

12. Although the data sets underlying Figure 4 are identical to those used in the previous figures, the visual representation of the data has been slightly modified. The curves in Figure 4 are not as smooth as in the previous graphs because the wholesale extrapolation approach utilizes different quantity thresholds than the other two approaches. Thus, Figure 4 includes additional quantity threshold (particularly at lower quantity levels), thereby creating the visual appearance of plateaus that do not appear in the previous graphs.

Figure 4: Overlay of the Three Approaches

The commission's final option is simply to retain its pure betel nut offense guideline. To ensure that a defendant's ultimate guidelines range comports with the mandatory minimum provisions, however, a separate guideline would be necessary that confines a defendant's guidelines range to the applicable statutory range.¹³

III. THE COMMISSION'S APPROACH TO MANDATORY MINIMUMS

Return, at least for a moment, from the hypothetical black-and-white land of pure guidelines and meddling legislatures to our more nuanced federal system. With roots reaching back to the founding of the nation,¹⁴ Congress

13. In the (real) federal system, this guideline already exists in the form of section 5G1.1 of the U.S. Sentencing Guidelines Manual. *See infra* notes 54-56 and accompanying text.

14. Seven of the twenty-three offenses set out in the 1790 Crimes Act carried mandatory minimum penalties of death. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (2011) [hereinafter 2011 MANDATORY MINIMUM REPORT]. Three of the offenses still carry mandatory minimum penalties today, although none require mandatory death. *Id.* at 7-8 (treason, murder, and piracy). Congress first mandated a minimum term of incarceration in the Sedition Act of 1798. *Id.* at 9. By the late 19th century, nearly one hundred federal offenses carried mandatory minimum penalties. *See id.* at app. C (listing ninety-two mandatory minimum penalties within the 1878 Revised Statutes).

has embedded nearly 200 mandatory minimum sentencing provisions into the current criminal code.¹⁵

The Commission has openly recognized that mandatory minimums are, in “numerous” respects, “both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve.”¹⁶ In its 1991 Report to Congress on Mandatory Minimums, the Commission identified three aspects of mandatory minimum sentences that “starkly conflict” with sentencing guidelines: (1) by focusing on a single indicator of offense seriousness, mandatory minimums impose a “tariff effect” that inhibits individualized tailoring of sentences based on offender characteristics and offense conduct; (2) mandatory minimums create a “cliff effect” by sharply increasing the punishment based upon small differences in offense conduct or criminal record; and (3) mandatory minimums are a form of charge-offense sentencing because they are generally effective only when the relevant information is included in the charging document, whereas the Guidelines operate under a modified real-offense approach to sentencing.¹⁷ The Commission concluded in its 1991 Mandatory Minimum Report, “[A]ll of the intended purposes of mandatory minimums can be equally or better served by guidelines, without compromising the crime control goals to which Congress has evidenced its commitment.”¹⁸ Clearly, the Commission feels that external limits constrain its ability to set the Guidelines in accordance with its own best judgment.¹⁹

15. *See id.* at app. A (listing 194 statutory provisions requiring mandatory terms of imprisonment). *But see* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993) (noting that “[t]he great majority of these mandatorys are seldom or never used”).

16. U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 26 (1991) [hereinafter 1991 MANDATORY MINIMUM REPORT].

17. *Id.* at 26-33. In a charge-offense system, a defendant’s sentence is determined entirely upon the offense of conviction while, in a real-offense system, the sentence is determined based upon all surrounding facts regardless of the relation between the facts and the offense of conviction. *See* Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1344-45 (1997). In calibrating the Guidelines, the Commission adopted a compromise system, a “modified real-offense system,” that contains some charge-based constraints but also requires the consideration of “real” facts beyond the charged offense like the offender’s criminal history and relevant conduct. *See id.* at 1348-49; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988).

18. 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 34.

19. The Commission’s 2011 Mandatory Minimum Report backed off its earlier language to some extent and focused on providing specific recommendations to Congress regarding the operation of individual mandatory minimum provisions, not only based upon the reality that mandatory minimums have become further entrenched in the federal criminal code, but also based on “a spectrum of views among

The tariff effect of mandatory minimum sentences creates unwarranted uniformity by focusing on a single characteristic of the offense or offender to the exclusion of all other characteristics.²⁰ Thus, dissimilar offenders are treated similarly – or, in many cases, identically – at sentencing by receiving sentences at or near the mandatory minimum.²¹ In order to reduce the tariff effect, the Commission considered setting the bottom of a guideline range higher than the minimum sentence mandated by statute for that offense conduct.²² Setting the minimum offense guideline higher than the minimum statutory sentence would provide some leeway to allow a less culpable offender to receive an offense level reduction for mitigating circumstances. Setting aside room at the bottom of the range to reward less culpable offenders, however, works to elevate the Guidelines ranges for typical and more culpable offenders.²³ The Commission found that this approach resulted in Guidelines ranges in typical cases at or near the statutory maximum sentence.²⁴ This approach therefore would unfairly treat typical offenders similarly to offenders with aggravating circumstances.²⁵ In short, not enough room existed between the statutory minimum and maximum for the Commission to fully distinguish between offenders with mitigating, typical, and aggravating circumstances. Thus, at least for drug offenses, the Commission elected to use the mandatory minimum as the “starting point” for base offense levels even though it resulted in typical offenders receiving similar or identical sentences to offenders deserving less punishment.²⁶

Whereas the tariff effect is concerned with uniform sentences for disparate offense conduct, the cliff effect concerns significantly different sentences for relatively similar offense conduct.²⁷ Offenders who happen to just surpass

members of the Commission regarding mandatory minimum penalties.” 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 345. However, the Commission did reaffirm the 1991 Mandatory Minimum Report by stating its uniform belief “that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act.” *Id.*

20. 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 27-28.

21. *Id.*

22. *Id.* at 29.

23. It has been calculated that for Guidelines ranges to truly bottom out at the mandatory minimum for the least culpable offenders while preserving the proportionality of the Guidelines, offense levels for all offenders would have to be increased by five levels. BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 26 (1994).

24. 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 29.

25. *Id.*

26. *Id.*; *see also* 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 53 (“The Commission historically has . . . set[] a base offense level for Criminal History Category I offenders that corresponds to the first guidelines range on the sentencing table with a minimum guideline range in excess of the mandatory minimum.”).

27. *See* 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 30-31.

or just fall short of the characteristic required to trigger the mandatory minimum sentence are treated quite differently than offenders on the other side of the cliff.²⁸ Mandatory minimums, when spaced only at wide intervals, are inherently cliff-inducing.²⁹ For drug distribution offenses, a certain enumerated drug quantity elevates a mandatory minimum sentence from zero to five years while another triggering drug quantity elevates it again to ten years.³⁰ A single gram may be the difference between falling on one side of the cliff or the other. The Commission found that the Guidelines were “unable to overcome entirely these effects,” especially where statutory limits on sentences were uncoordinated.³¹

With respect to controlled substances in particular, Congress enacted a scheme of mandatory minimum sentences for certain classes of drug possession and distribution in the early 1950s.³² Congress repealed these mandatory minimums in the Comprehensive Drug Abuse Prevention and Control Act of 1970.³³ Federal mandatory minimum sentences for drug offenses reemerged on a wide scale with the passage of the Anti-Drug Abuse Act of 1986 and the Omnibus Anti-Drug Abuse Act of 1988.³⁴ The Commission has been tasked

28. *Id.*

29. Each of the forty-three offense levels and six criminal history categories in the Guidelines are themselves mini-cliffs, but the Guidelines temper any cliff effect by providing for Guidelines ranges that overlap with each adjacent Guidelines range. For example, offense level twenty-five and criminal history category I produce a range of imprisonment of fifty-seven to seventy-one months. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2013). Increasing either the offense level or the criminal history category by one increases the Guidelines range to sixty-three to seventy-eight months. *Id.*

30. See 21 U.S.C. § 841(b)(1) (Supp. 2011).

31. 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 30-31 (recounting that first time offenders who crossed the threshold of possession of five grams of crack cocaine went from a statutory maximum sentence of one year to a statutory minimum sentence of five years under the version of 21 U.S.C. § 844 then in effect).

32. 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 22. Even earlier mandatory minimum penalties for controlled substance offenses dealt with the unlawful manufacture or sale of alcohol during prohibition. *Id.* at 21.

33. *Id.* at 22.

34. *Id.* at 23-25. Congress attempted to calibrate the drug quantities necessary to trigger the ten year minimum as those attributable to “major traffickers, the manufacturers or the heads of organizations” and those necessary to trigger the five year minimum as those attributable to “serious traffickers,” that is, “managers of the retail level traffic.” H.R. REP. No. 99-845 § 314 (1986), *available at* 1986 WL 295596 (Leg.Hist.); see also U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6 (2002). The Fair Sentencing Act of 2010 repealed the minimum sentence applicable to possession of cocaine base and increased the threshold quantities of cocaine base necessary to trigger the applicable five and ten year minimum sentences for trafficking offenses. 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 29-31.

with incorporating mandatory minimums into its controlled substance offense guidelines since the promulgation of its first Guidelines Manual in 1987.³⁵

In drafting its drug trafficking guideline,³⁶ the Commission based the offense level largely on the quantity of the controlled substance trafficked and linked the quantity levels in the guideline to the quantities necessary to trigger the five and ten year mandatory minimum sentences required by the Anti-Drug Abuse Act of 1986.³⁷ The Commission then “extend[ed] the quantity-based approach across 17 different levels falling below, between, and above the two amounts specified in the statutes.”³⁸ Despite adverse testimony from judges and commentators,³⁹ and the Commission’s own conclusion that drug quantity is a poor proxy for culpability,⁴⁰ the Commission persists in employ-

35. See 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at i.

36. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2013). This guideline is also applicable to the manufacture, exportation, or importation of controlled substances. *Id.*

37. The drug quantity table in section 2D1.1 assigns base offense levels based on the quantity of the controlled substance so that a distribution of a quantity that triggers the five year statutory minimum results in a Guidelines range of 63 to 78 months’ imprisonment and a distribution of a quantity that triggers the ten year statutory minimum results in a Guidelines range of 121 to 151 months’ imprisonment. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 49 (2004) [hereinafter U.S.S.C. FIFTEEN YEAR REPORT]; see also 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 54 (the Guidelines are calibrated so that offense levels 26 and 32 correspond to five and ten year mandatory minimum sentences).

38. U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 49; see also *id.* at 53 (“[T]he Commission accommodated the mandatory minimum penalty levels when it developed the drug trafficking guideline, so the influence of the [Anti-Drug Abuse Act] is both *direct* when it controls the sentence in an individual case by trumping the guidelines, and *indirect* through its influence on the design of the drug guideline itself.”); 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at i (“The Sentencing Commission drafted the new guidelines to accommodate these mandatory minimum provisions by anchoring the guidelines to them.”).

39. See, e.g., *Transcript of U.S. Sentencing Comm’n Public Hearing*, at 16-17 (May 27, 2009) (testimony of Hon. Vaughn R. Walker) (“I’m not alone in my concern that the use of drug quantity as the chief determining factor in drug sentencing is, I think, highly problematic.”); *Mandatory Minimum Sentencing Provisions Under Federal Law Before the United States Sentencing Commission*, at 12-14 (May 27, 2010) (prepared statement of Stephen J. Schulhofer) (explaining how the concepts of relevant conduct and co-conspirator liability drive up the drug quantities attributable to less culpable defendants so that drug quantity does not actually distinguish between major and minor actors in drug distribution organizations); see also *United States v. Dossie*, 851 F. Supp. 2d 478, 481 (E.D.N.Y. 2012) (“Drug quantity is a poor proxy for culpability generally and for a defendant’s role in a drug business in particular.”).

40. See 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 165-68.

ing the wholesale extrapolation approach to incorporate mandatory minimums into the drug distribution guideline.

This policy choice significantly increases drug sentences beyond the statutorily-required minimums.⁴¹ Although no contemporaneous Commission publication explains why the Commission opted for this approach,⁴² it is fairly safe to assume that the Commission was motivated, at least in part, by a desire to minimize the cliff effect and further what it saw as “the Sentencing Reform Act’s goal of ensuring comparable sentences for similarly-situated defendants.”⁴³ But by setting the bottom of the applicable Guidelines range at or near the statutory minimum sentences,⁴⁴ the Commission’s approach left little latitude to alleviate the disproportionate impact of the tariff effect on less culpable offenders.⁴⁵

A later Commission publication defended the decision to set base offense levels slightly higher than the mandatory minimum levels in order to “permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.”⁴⁶ In the Commission’s view, this decision fulfills the statutory mandate that the Guidelines “reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance.”⁴⁷ According to the Commission, its approach also fulfills the statutory mandate

41. U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 54 (reporting that analyses have found that approximately twenty-five percent of the average expected prison term of seventy-three months for drug offenders sentenced in 2001 “can be attributed to guidelines increases above the mandatory minimum penalty levels.”).

42. *Id.* at 49.

43. 1991 MANDATORY MINIMUM REPORT, *supra* note 16, at 31; *see also* U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 50 (hypothesizing that a “possible reason for the Commission’s approach was to avoid sentencing ‘cliffs.’”). The Sentencing Reform Act directs the Commission to establish policies and practices that avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences.” 28 U.S.C. § 991(b)(1)(B) (2006); *see also* § 994(f) (directing the Commission to place special attention on “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities”).

44. *See supra* note 26 and accompanying text.

45. U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 49 (recognizing that the Guidelines’ approach “creates disparity by treating less culpable offenders the same as more culpable ones”).

46. 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 54; *see also* U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (1995) (“The base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities.”).

47. 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 54 (quoting 28 U.S.C. § 994(n))(internal quotation marks omitted).

to consider the community's view of the seriousness of the offense conduct because statutory limits on sentencing "reflect Congress's expression of the community view of the gravity of the offense."⁴⁸

The Commission does not always follow a uniform approach when incorporating mandatory minimum penalties into the Guidelines.⁴⁹ Child pornography offenses, for example, are another area in which legislation substantially constrains the Commission's ability to implement its own judgment in authoring guidelines ranges.⁵⁰ However, upon the enactment of a five year statutory minimum sentence for child pornography trafficking and receipt offenses, the Commission elected to amend the base offense level to 22, even though that offense level results in a Guidelines range of only 41 to 51 months for offenders in the least severe criminal history category.⁵¹ The Commission found this offense level appropriate because it foresaw that enhancements applicable in nearly every child pornography case would increase the offense level beyond the five year mandatory minimum.⁵² In other guidelines, particularly those in which consecutive sentences are mandated by statute, the Commission has simply dictated that the Guidelines sentence is the minimum term required by statute.⁵³

Statutory limits on sentencing need not be written into offense guidelines in order to ensure that offenders' ultimate Guidelines ranges comport with the statutory limits. As a safeguard backstopping all Guidelines calculations, section 5G1.1 of the Guidelines ensures that a defendant's Guidelines range never violates any applicable statutory limit on sentencing.⁵⁴ After a defendant's Guidelines range is calculated by inputting her offense level and criminal history category into the Sentencing Table,⁵⁵ section 5G1.1 con-

48. *Id.* (citing § 994(c)(4)).

49. *See id.* at 53 (noting that the Commission's "methods of incorporating mandatory minimum penalties into the guidelines have varied over time, with the benefit of the Commission's continuing research, experience, and analysis.").

50. *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 27-29; U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 72-75.

51. *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 55.

52. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 664 (2013).

53. *See, e.g.,* U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.4(b), 2A3.6, 2B1.6 (2013).

54. *See id.* § 5G1.1.

55. In simplified terms, a defendant's offense level is determined through the calculation of the Chapter Two offense guideline as altered by the Chapter Three adjustments. *See id.* § 1B1.1. The criminal history category is calculated through Part A of Chapter Four. *See id.* § 4A1.1. These two figures are then inputted into the Sentencing Table contained in Part A of Chapter Five to arrive at the defendant's Guidelines range of imprisonment. *See id.* ch. 5, pt. A.

stricts or alters the Guidelines range to fit within any applicable statutory minimum or maximum limit on the sentence.⁵⁶

IV. FAIRNESS AND INFORMATIONAL BENEFITS OF PURE OFFENSE GUIDELINES

The wholesale extrapolation approach adopted by the Commission is not necessary to implement the expressed will of the legislature. The legislature's will is only expressed in legislation – that is, the actual statutory limits on sentencing that have been enacted into law. If the legislature desired a smooth upward curve of punishment based on a specific offense characteristic, it could have provided for one through additional mandatory minimum sentences or through a directive to the Commission to fill out a curve.⁵⁷ But, other than the scant data points set out by mandatory minimum legislation, the will of the legislature as it relates to the punishment of various federal offenses is unknown.⁵⁸ Presuming otherwise is a dangerous supposition.

Thus, the Commission is left to promulgate Guidelines, within the statutory constraints of its discretion, that best guide sentencing courts to the imposition of just punishment. The primary focus in guideline promulgation should be achieving actual fairness for defendants. Because pure offense guidelines are, by definition, the Commission's best approximation of just punishment, the Commission should deviate from pure offense guidelines only to the extent necessary to comply with legislative directives. Secondary benefits of pure offense guidelines include communicating the Commission's disagreement with certain mandatory minimum sentences to other stakeholders in the federal sentencing system. But the overriding focus of guideline drafting should be to achieve actual fairness in sentencing rather than relative fairness or any secondary concerns.

56. When a defendant is sentenced on multiple counts of conviction, a recent amendment to the Guidelines mandates that a mandatory minimum applicable to any of the counts increases the floor of the Guidelines range applicable to all of the counts. *See id.* § 5G1.2(b) & cmt. n.3; *see also* Kevin Bennardo, *Sweeping Up Guideline Floors: The Misguided Policy of Amendment 767 to the U.S. Sentencing Guidelines Manual*, 60 UCLA L. REV. DISC. 60, 63 (2013).

57. Congress has previously directly instructed the Commission regarding the appropriateness of certain Guidelines ranges. *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993); *see also* U.S.S.C. FIFTEEN YEAR REPORT, *supra* note 37, at 72-73 (recounting direct amendment of the Guidelines by Congress through the PROTECT Act of 2003).

58. *See* *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) (Statutory minimum and maximum sentences say “nothing about the appropriate sentence within these brackets, and we decline to read any implicit directive into that congressional silence.”).

A. *Actual, Not Relative, Fairness*

In crafting the Guidelines, the Commission is generally tasked with assigning a fair punishment – or range of punishments – for certain offense conduct given certain offender characteristics.⁵⁹ A sentence’s “fairness” can be viewed through the lens of either relative fairness or actual fairness. Relative fairness measures how much a given sentence deviates from sentences of similarly-situated offenders. Actual fairness measures how much a given sentence deviates from the objective “right” sentence.⁶⁰ While the imposition of incremental punishment for incremental wrongdoing is one facet of fair punishment, achieving actual fairness will always produce relative fairness, but the reverse does not necessarily hold true.

Actual fairness concerns should trump relative fairness concerns in all instances. No matter how much disparity is created between sentences for two similarly-situated offenders, a sentencing entity should always strive to impose the “right” sentence on each offender. It makes little sense, in the name of reducing disparity, to anchor the sentence of one offender to an unfair sentence of another offender. As described by one district court judge, “[i]t is better to have five good sentences and five bad ones than to have ten bad but consistent sentences.”⁶¹ If an earlier court errs and imposes an incorrect sentence that is never rectified, certainly later courts should not follow the error for all similarly-situated defendants. Although imposing the same erroneous sentence repeatedly would create relative fairness, the result would be a string of consistently unfair sentences.

The overwhelming drawback of the wholesale extrapolation approach is that it substitutes the legislature’s data points for the Commission’s expertise as the foundation for the Guidelines range. These forced data points, based on mandatory minimum sentences, undermine the Commission’s efforts to promulgate actually fair offense guidelines based on empirical evidence and research.⁶² Thus, the resulting offense level determination is likely to deviate

59. *See id.* at 109 (noting the Commission’s “characteristic institutional role” is to advise sentencing courts based on empirical data and national experience).

60. While reasonable minds may differ on what constitutes the “right” sentence, all minds should agree that the right sentence is a fair one.

61. *U.S. Sentencing Comm’n Public Hearing*, at 3 (Feb. 11, 2009) (prepared statement of Robert L. Hinkle, Chief Judge, U.S. District Court for the Northern District of Florida).

62. Justice Breyer, one of the original members of the Sentencing Commission, has called for the removal of all mandatory minimums sentences:

[S]tatutory mandatory sentences prevent the [C]ommission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments Congress, in simultaneously requiring guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions.

substantially from the pure offense guideline. Because a pure guideline is the Commission's best attempt at writing an actually fair guideline, any deviation from it – either on the harsh or lenient side – must be treated as a negative from the Commission's perspective. For that reason the Commission should only diverge from its pure guidelines to the minimum extent possible within the confines of its legislative mandates.⁶³

Stephen Breyer, Associate Justice, Supreme Court of the United States, *Federal Sentencing Guidelines Revisited*, Address to the University of Nebraska College of Law, Roman L. Hruska Institute (Nov. 18, 1998) in 11 FED. SENT'G REP. 180, 184-85 (1999).

63. Others have previously given voice to this thought, including Professor (and recent appointee to the Sentencing Commission) Rachel Barkow:

[T]he best approach for a commission – unless the legislative body explicitly orders otherwise – is to accept legislative judgments based on political factors but not to extend them further than the legislature commands if doing so would conflict with the commission's expert judgment . . . [because if] the mandatory minimum is not the product of careful study or research, then keying all guidelines to that minimum exacerbates the harms of a failure to reflect on the consequences and goes against an agency's mission to base its decisions on empirical information and studies.

Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1614 (2012). Professor Barkow suggests that any cliffs resulting from such a sentencing scheme would be justified by the need to reconcile Congress's directives to fashion guidelines that both meet the sentencing mandates of 18 U.S.C. § 3553(a)(2) and maintain consistency with federal statutes as required by 28 U.S.C. § 994. *See id.* at 1616.

Likewise, judges and commentators have directly urged the Commission to reduce the impact of mandatory minimum sentences on the Guidelines. *See* Letter from the Hon. Paul Cassell, Chair of the Comm. on Criminal Law of the Judicial Conference of the U.S., to the Hon. Ricardo H. Hinojosa, Chair of the U.S. Sentencing Comm'n, at 1 (Mar. 16, 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20070320/walton-testimony.pdf (last visited Sept. 8, 2013) (commenting on the guideline amendments in response to the passage of the Adam Walsh Child Protection Act of 2006 “that when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by the statute.”); *U.S. Sentencing Comm'n Public Hearing*, at 17 (May 28, 2009) (testimony of Hon. Vaughn R. Walker) (“Statutory minimums, of course, inevitably create . . . cliffs. But the Commission should not aggravate the problematic character of these minimums by conforming sentences not subject to statutory minimums to these same features.”); *U.S. Sentencing Comm'n Public Hearing*, at 29 (May 27, 2010) (prepared statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia) (urging the Commission “to review the guidelines presently linked to mandatory minimums and set guideline levels based on data and research.”); *U.S. Sentencing Comm'n Public Hearing*, at 5 (May 27, 2010) (prepared statement of Jay Rorty, American Civil Liberties Union, Center for Justice) (urging the Commission “to eliminate the ripple effects of mandatory minimums throughout the guideline system by abandoning offense levels that are calibrated to mandatory minimums.”);

A second drawback of the wholesale extrapolation approach is its failure to effectively reduce relative unfairness. In quantity-driven offense guidelines, relative fairness cuts both ways: offenders responsible for similar quantities should receive similar offense levels while offenders responsible for dissimilar quantities should receive dissimilar offense levels. In a quantity-driven offense guideline, utilizing the cliffs approach to incorporate a mandatory minimum produces relative unfairness along the middle of the offense guideline's punishment curve in two ways: (1) offenders immediately on either side of a cliff receive dissimilar offense levels despite accountability for similar quantities; and (2) offenders along the plateau to the right of a cliff receive similar offense levels despite responsibility for dissimilar quantities.⁶⁴ Despite its relatively smooth upward curve, the wholesale extrapolation approach contains significant relative unfairness as well. The relative unfairness, however, is pushed to the top of the curve. By plateauing earlier, the wholesale extrapolation model works substantial relative unfairness by failing to differentiate between offenders responsible for large-but-dissimilar quantities.⁶⁵ Although the curve is relatively smooth in the middle, the wholesale extrapolation model simply shifts the unfairness out of the middle of the curve and into the margins. Thus, the wholesale extrapolation approach retains significant unwarranted uniformity; such unwarranted uniformity is troubling from a relative fairness standpoint.⁶⁶

see also Schulhofer, Prepared Statement, *supra* note 39, at 28 (calling for the Commission to maintain Guidelines keyed to the quantity-based mandatory minimums, but to not take drug quantity any further into account in drafting the controlled substance guidelines beyond the levels prescribed by the mandatory minimums).

64. In the betel nut hypothetical, the cliffs approach created relative unfairness in two places in the middle of the curve corresponding to the triggering quantities of the two mandatory minimum sentences. *See supra* Figure 3.

65. Applying the wholesale extrapolation approach to the betel nut hypothetical resulted in the imposition of identical offense levels on all offenders who distributed more than 3,000,000 nuts. *See supra* Figure 2. But under the pure betel nut offense guideline, a distribution of ten times that quantity was necessary to reach the maximum offense level. *See supra* Figure 1.

66. *See supra* notes 20-25 and accompanying text (describing the tariff effect of mandatory minimum sentences). Numerous commentators have noted the troubling nature of excessive uniformity. *See* Schulhofer, *Rethinking Mandatory Minimums*, *supra* note 15, at 210-11; Schulhofer, Prepared Statement, *supra* note 39, at 10 (excessive uniformity "often is even more troubling" than sentencing disparities in the punishment of similarly situated offenders); *U.S. Sentencing Comm'n Public Hearing*, at 10 (May 27, 2010) (prepared statement of James E. Felman, American Bar Association) ("Treating unlike offenders identically is as much a blow to rational sentencing policy as is treating similar offenders differently.").

B. Communicative and Informational Benefits of Pure Guidelines

Pure offense guidelines inform stakeholders in the federal sentencing process of the Commission's unmitigated judgment regarding the appropriate punishment for certain offense conduct given certain offender characteristics. Congress could use this information when considering whether to craft or amend statutory limits on sentencing.⁶⁷ Sentencing courts could use this information when deciding whether to impose a mandatory minimum sentence or a more severe one. But by inserting statutory limits on sentencing directly into the offense guidelines, the wholesale extrapolation approach cloaks the Commission's true judgment regarding appropriate punishment. Similarly, the cliffs approach obscures the Commission's judgment behind each cliff in the offense guideline.

Such obfuscation inappropriately causes the Commission to absorb some of the blame for the harshness of Congress's mandatory minimum penalties.⁶⁸ In a world of pure offense guidelines that are not linked to mandatory minimum penalties, some members of the community and more than a few defendants may be disillusioned to learn that the Commission's research and expertise would support a more lenient sentence than the mandatory minimum. A defendant sentenced under a ten-year mandatory minimum would likely feel wronged upon learning that the Commission would deem the appropriate sentence to be in the range of 78 to 87 months. It is simply not the function of the Commission to put up a smokescreen to shield the legislature from customer dissatisfaction with its sentencing statutes. Moreover, pure guidelines could be appropriately illuminating to the community and prompt further pressure on Congress to amend statutory limits to fall more in line with the Commission's judgments. If the Commission simply writes mandatory minimums into the offense guidelines, as it currently does with the controlled substance guideline, no view other than the statutorily-imposed one is present. This approach inevitably leads to offense guidelines that the Commission cannot defend and public dissatisfaction with the work of the Commission that diverts attention from the mandatory minimums that drive the Guidelines.⁶⁹

67. See Barkow, *supra* note 63, at 1617.

68. See, e.g., Douglas A. Berman, *Anonymous Hacks USSC Website to Avenge Aaron Schwartz's Suicide*, SENT'G L. & POL'Y (Jan. 26, 2013, 12:08 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2013/01/anonymous-hacks-ussc-website-to-avenge-aaron-swartzs-suicide.html (noting that the Commission's website may not have been the most fitting target for the hackers' protest).

69. The Commission has been urged to "reject sentences where it cannot provide an empirical basis and an articulable justification for the sentences that it recommends." *Transcript of U.S. Sentencing Comm'n Public Hearing*, *supra* note 39, at 22 (in reference to the Drug Quantity Table of U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)).

V. DELINKING CHAPTER TWO OFFENSE GUIDELINES FROM STATUTORY LIMITS

The Commission is statutorily-mandated to promulgate Guidelines that are “consistent with all pertinent provisions of any Federal statute.”⁷⁰ This Congressional directive, however, requires only that the ultimate output of the Guidelines – an offender’s Guidelines range – conform to federal law. Thus, the focus of the conformity should be on the final sentencing range calculated through the Guidelines, not on each individual offense guideline.

Because section 5G1.1 ensures that a defendant’s ultimate Guidelines range will comply with all applicable statutory limits,⁷¹ the Commission need not incorporate mandatory minimums or maximums into Chapter Two offense guidelines.⁷² To maximize actual fairness, the decision of whether to embed a statutory limit on sentencing into an offense guideline should be dictated by whether defendants sentenced under the offense guideline are always subject to the mandatory minimum provided that the triggering characteristic is present. If not, then permitting a mandatory minimum sentence to skew the entire offense guideline for all defendants works actual unfairness for those defendants not subject to the mandatory minimum. In those cases, the Chapter Two offense guideline should be left pure and section 5G1.1 is the proper tool to increase the Guidelines range as needed to comport with the mandatory minimum applicable to a particular defendant. The next sub-part explains the avenues through which a federal defendant convicted of a controlled substance offense may avoid the operation of an otherwise applicable mandatory minimum. The final sub-part concludes that the drug distribution guideline should be revised into a “pure guideline” in order to better guide district courts when sentencing controlled substance offenders who have avoided the operation of mandatory minimum penalties.

A. *Mechanisms of Mandatory Minimum Avoidance*

A defendant charged with a federal drug distribution offense may avoid the operation of an otherwise applicable mandatory minimum through three

70. 28 U.S.C. § 994(a) (2006); *see also* § 994(b)(1) (Guidelines ranges must be “consistent with all pertinent provisions of title 18, United States Code”); *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (the Commission’s broad discretion in formulating Guidelines must “bow to the specific directives of Congress”).

71. *See supra* notes 54-56 and accompanying text.

72. Indeed, the Commission already takes this approach with respect to some infrequently applied mandatory minimums. *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 14, at 56. The Commission accounts for other statutory limits outside of the Chapter Two offense guidelines. *See id.* at 57-58 (explaining that the fifteen year mandatory minimum sentence for possession of a firearm after three violent felony or serious drug convictions is reflected in the Chapter Four Armed Career Criminal guideline rather than the Chapter Two offense guideline).

distinct avenues: (1) providing substantial assistance to the government; (2) meeting the requirements of the “safety valve”; or (3) having the prosecution fail to charge the triggering drug quantity in the indictment or prove it beyond a reasonable doubt. As explained below, the Commission should promulgate a pure drug trafficking guideline to facilitate fair sentencing of offenders who avoid statutorily-imposed mandatory minimum sentences through the latter two avenues.

1. Substantial Assistance

A defendant who provides substantial assistance to the government may avoid a mandatory minimum penalty either through 18 U.S.C. § 3553(e) or Federal Rule of Criminal Procedure 35(b).⁷³ Under both mechanisms, the government holds the power – checked by the bounds of constitutional motives – to decide whether to bring a motion to reduce the sentence below the otherwise applicable mandatory minimum for a defendant who has provided substantial assistance.⁷⁴

Subsection 3553(e) authorizes a district court, upon a motion by the government, to impose a sentence below the statutorily-required minimum at the defendant’s original sentencing hearing.⁷⁵ Motions premised on this sub-

73. See 18 U.S.C. § 3553(e) (2006) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance”); FED. R. CRIM. P. 35(b) (“[T]he court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”).

74. See *Melendez v. United States*, 518 U.S. 120, 125-26 (1996) (“We believe that § 3553(e) requires a Government motion requesting or authorizing the district court to ‘impose a sentence below a level established by statute as minimum sentence’ before the court may impose such a sentence.”); *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (holding that section 3553(e) grants the government “a power, not a duty, to file a motion when a defendant has substantially assisted,” but that “federal district courts have authority to review a prosecutor’s refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive”); see also *United States v. Roe*, 445 F.3d 202, 207-08 (2d Cir. 2006) (noting that “where a plea agreement provides that government will file a [section 3553(e)] motion if it determines that the defendant has provided substantial assistance,” the government must act in good faith in exercising its discretion to file such a motion).

Although often lauded for providing some relief from mandatory minimum penalties, these provisions create what has been termed a “cooperation paradox”: more culpable offenders are likely to be in a better position to render substantial assistance to the government and be relieved of harsh mandatory minimums while less culpable and less knowledgeable defendants are likely to be sentenced under the mandatory minimum regime. See Schulhofer, *Rethinking Mandatory Minimums*, *supra* note 15, at 211-13.

75. § 3553(e).

section reflect the defendant's substantial assistance to the government "in the investigation or prosecution of another person who has committed an offense."⁷⁶ Rule 35(b) provides a mechanism through which to reduce a sentence after its imposition.⁷⁷ In order for a defendant to receive the benefit of a post-sentencing Rule 35(b) motion, the government must generally move the court within one year of sentencing for a reduction of the defendant's sentence.⁷⁸ The rule provides that "the court may reduce the sentence to a level below the minimum sentence established by statute."⁷⁹

The federal courts of appeals almost universally hold that a successful motion to reduce sentence under either mechanism permits the district court to consider only the defendant's assistance in calculating the extent of the sentence reduction below the mandatory minimum.⁸⁰ A successful motion does not permit the sentencing court to consider all of the 18 U.S.C. § 3553(a) factors in fashioning a sentence below the statutory minimum.⁸¹ This limitation is clear from the face of subsection 3553(e), which grants the district court "the authority to impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance*."⁸² Federal courts uniformly interpret subsection 3553(e) in this way and only consider the defendant's assistance to the government in calculating the extent of the sentence reduction.⁸³

76. *Id.*

77. Rule 35(a), which does not grant authority to deviate below a mandatory minimum, authorizes a district court to correct a sentence within fourteen days of its imposition based on "arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(a).

78. FED. R. CRIM. P. 35(b)(1). For limited types of assistance, the rule permits for a reduction of sentence upon a motion by the government made more than one year after the defendant's sentencing. FED. R. CRIM. P. 35(b)(2) (in each of the exceptions, either the defendant or the government must be unaware of the information or its usefulness until after the one year deadline).

79. FED. R. CRIM. P. 35(b)(4).

80. *See infra* notes 83, 87 and accompanying text.

81. Subsection 3553(a) lists a variety of factors that district courts must consider in imposing sentences, such as the need for the sentence to provide just punishment, afford adequate deterrence, and protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a) (2006).

82. 18 U.S.C. § 3553(e) (2006) (emphasis added). The subsection's title – "Limited authority to impose a sentence below a statutory minimum" – also counsels against permitting district courts to reduce the defendant's sentence below the statutory minimum based on non-assistance factors. *Id.*

83. *See, e.g.,* United States v. Ahlers, 305 F.3d 54, 62 (1st Cir. 2002); United States v. Richardson, 521 F.3d 149, 159 (2d Cir. 2008); United States v. Winebarger, 664 F.3d 388, 392-96 (3d Cir. 2011); United States v. Hood, 556 F.3d 226, 234 n.2 (4th Cir. 2009); United States v. Desselle, 450 F.3d 179, 182 (5th Cir. 2006); United States v. Williams, 687 F.3d 283, 285-88 (6th Cir. 2012); United States v. Johnson, 580 F.3d 666, 672-73 (7th Cir. 2009); United States v. Williams, 474 F.3d 1130,

The text of Rule 35(b) is less straightforward. The text states only that “the court may reduce a sentence” if the defendant provides substantial assistance to the government; it does not explicitly limit the factors that the district court may consider in reducing the sentence.⁸⁴ Before a 2002 amendment to the rule that was “intended to be stylistic only,”⁸⁵ the language of Rule 35(b) was similar to that of subsection 3553(e): it conferred upon the court the authority to reduce the sentence “to reflect a defendant’s subsequent, substantial assistance.”⁸⁶ After the amendment, most federal courts of appeals that have considered the issue hold that a district court still may not increase a defendant’s reduction pursuant to Rule 35(b) for any reason unrelated to the defendant’s assistance to the government.⁸⁷ This result is sensible because the government would be disincentivized from making Rule 35(b) motions if such motions led to a full-blown resentencing during which the district court was free to consider any and all factors.⁸⁸ Only the Ninth Circuit permits district courts to increase the extent of a defendant’s sentence reduction based on factors unrelated to the defendant’s assistance to the government.⁸⁹ The Ninth Circuit held, however, that resentencing upon the grant of a Rule 35(b) motion “is not the equivalent of a *de novo* sentencing.”⁹⁰ The district court must use the original sentence as the “starting point” and may consider non-assistance factors only “in combination with the amount of assistance rendered by the defendant.”⁹¹ Thus, while a defendant may escape the operation of an otherwise applicable mandatory minimum sentence by providing substantial assistance to the government, the defendant’s sentence remains meaningfully tied to the mandatory minimum as the departure point for the reduction.

1130-32 (8th Cir. 2006); *United States v. Jackson*, 577 F.3d 1032, 1036 (9th Cir. 2009); *United States v. A.B.*, 529 F.3d 1275, 1281-85 (10th Cir. 2008); *United States v. Mangaroo*, 504 F.3d 1350, 1355-56 (11th Cir. 2007).

84. FED. R. CRIM. P. 35(b)(1), (b)(4).

85. FED. R. CRIM. P. 35 advisory committee’s note on the 2002 Amendment.

86. *See United States v. Poland*, 562 F.3d 35, 37-38 (1st Cir. 2009) (discussing the evolution of Rule 35(b)).

87. *See United States v. Grant*, 636 F.3d 803, 809-15 (6th Cir. 2011) (en banc); *Poland*, 562 F.3d at 41; *United States v. Shelby*, 584 F.3d 743, 745 (7th Cir. 2009). But in what has been called a “one-way ratchet,” district courts are generally authorized to take non-assistance factors into account when determining whether to limit the size of the sentence reduction. *See United States v. Davis*, 679 F.3d 190, 196-97 (4th Cir. 2012) (collecting cases).

88. *See Shelby*, 584 F.3d at 746-47.

89. *See United States v. Tadio*, 663 F.3d 1042 (9th Cir. 2011).

90. *Id.* at 1055.

91. *Id.*

2. The “Safety Valve”

The “safety valve” provision of 18 U.S.C. § 3553(f) relieves the least culpable defendants convicted of drug distribution offenses from the operation of mandatory minimum sentences.⁹² For a defendant to qualify for the safety valve, the court must find that: (1) the defendant has no more than one criminal history point under the Guidelines; (2) the defendant did not possess a firearm or other dangerous weapon or use violence or a credible threat of violence in connection with the offense; (3) the offense did not result in death or serious injury; (4) the defendant did not have a supervisory role in the offense; and (5) by the time of the sentencing hearing, the defendant has provided the government with all information and evidence the defendant has concerning the offense.⁹³ The defendant bears the burden of proving each of the safety valve requirements by a preponderance of the evidence.⁹⁴ Upon finding the safety valve requirements fulfilled, the district court is wholly unbridled from the mandatory minimum and “shall impose a sentence pursuant to the guidelines . . . without any regard to any statutory minimum sentence.”⁹⁵ Thus, the mandatory minimum sentence plays no role in determining the sentence for defendants who meet the safety valve’s requirements.⁹⁶

3. Failure to Charge or Adequately Prove Triggering Drug Quantities

The prosecutor must plead the quantity of the controlled substance in the indictment and prove the quantity beyond a reasonable doubt in order to trig-

92. 18 U.S.C. § 3553(f) (2006). The safety valve is available to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960, and 963. *Id.*

93. *Id.* Two bills currently before Congress would expand the scope of the safety valve. See Justice Safety Valve Act of 2013, S. 619, 113th Cong. § 2 (2013); Smarter Sentencing Act of 2013, S. 1410, 113th Cong. § 2 (2013). Because neither has been enacted into law, this article addresses only the current safety valve provision contained in 18 U.S.C. § 3553(f).

94. See, e.g., *United States v. Tate*, 630 F.3d 194, 202 (D.C. Cir. 2011); *United States v. Montes*, 381 F.3d 631, 634 (7th Cir. 2004); *United States v. O’Dell*, 247 F.3d 655, 675 (6th Cir. 2001).

95. § 3553(f).

96. See *United States v. Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007) (“Because a mandatory minimum sentence that must be disregarded under § 3553(f) is not a § 3553(a) factor, it cannot be considered in any part of the sentencing decision when the safety valve applies.”); *United States v. Cadenas-Juarez*, 469 F.3d 1331, 1334-35 (9th Cir. 2006) (holding that when the safety valve applies, district courts must take the advisory Guidelines into account and impose a sentence without regard for the mandatory minimum); *United States v. Jeffers*, 329 F.3d 94, 100 (2d Cir. 2003) (“The plain meaning of [the safety valve] provisions limits a court’s discretion to determining whether or not the statutory criteria have been met; once it has been determined that they have, the court is required to disregard any mandatory minimum in imposing sentence.”).

ger mandatory minimum sentences for drug trafficking offenses.⁹⁷ The preceding two subparts of this Article described mechanisms by which an otherwise applicable mandatory minimum could be avoided at a defendant's sentencing hearing. This subpart describes the conceptually distinct situation in which the mandatory minimum is not applicable to the defendant despite the sentencing judge's finding that the defendant is responsible for a drug quantity that would otherwise trigger the mandatory minimum.

With the exception of the fact of a prior conviction, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" or to permit the establishment of such facts by a burden less than proof beyond a reasonable doubt.⁹⁸ Although this guarantee was explained at much greater length (and much more famously) in *Apprendi v. New Jersey* as a right secured by the due process clause of the Fourteenth Amendment enforceable against the states,⁹⁹ it was first recognized as a guarantee enforceable by federal defendants in *Jones v. United States* under the due process clause of the Fifth Amendment and the notice and trial guarantees of the Sixth Amendment.¹⁰⁰ In its application to the federal system, the Fifth Amendment requires that such facts be presented to the grand jury and pleaded in the indictment.¹⁰¹ Thus, a defendant who is indicted or found guilty of violating a federal statute that carries a statutory maximum cannot be sentenced based on aggravating facts found at sentencing to a term of imprisonment longer than the statutory maximum.

The Supreme Court recently held in *Alleyne v. United States* that the same result follows at the bottom of the sentencing range; with the exception of the fact of a prior conviction, any fact that raises the floor of the sentencing range must likewise be found by a jury beyond a reasonable doubt.¹⁰² The Court's decision in *Alleyne* explicitly overruled *Harris v. United States*,¹⁰³ in which the Court had previously held that a fact necessary to trigger a mandatory minimum need not be presented to the jury but could be found by the sentencing judge by a preponderance of the evidence.¹⁰⁴

97. See *infra* notes 111-115 and accompanying text.

98. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

99. See *id.*

100. 526 U.S. 227, 243 n.6 (1999).

101. *Id.* The due process clause of the Fourteenth Amendment has not been construed to include such a presentment and indictment requirement. See *Apprendi*, 530 U.S. at 477 n.3. Despite this difference, general references in this Article to *Apprendi* or its rule should be understood to encompass the federal requirement of indictment and presentment to a grand jury.

102. 133 S. Ct. 2151 (2013).

103. *Id.* at 2158.

104. *Harris v. United States*, 536 U.S. 545, 557 (2002). In the words of the *Harris* plurality, "[i]f the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legisla-

In *Alleyne*, the Court considered the mandatory minimum penalties applicable to a defendant convicted of using or carrying a firearm in relation to a crime of violence.¹⁰⁵ Under the statute, the minimum term of incarceration increases depending on whether the firearm was simply possessed (five years), brandished (seven years), or discharged (ten years).¹⁰⁶ However, the maximum term of imprisonment (life) is identical regardless of which mandatory minimum applies.¹⁰⁷ The jury found the *Alleyne* defendant guilty of using or carrying a firearm, but declined to find that the defendant had brandished a firearm.¹⁰⁸ At sentencing, the district court found that a preponderance of the evidence supported a finding that the *Alleyne* defendant was accountable for the brandishing of a firearm.¹⁰⁹ Accordingly, the district court found that the minimum term of incarceration was seven years and sentenced the defendant to that term.¹¹⁰

The *Alleyne* Court held that any “fact that increases a sentencing floor[] forms an essential ingredient of the offense.”¹¹¹ As such, these facts trigger the Sixth Amendment’s jury trial guarantee just the same as facts that increase the maximum punishment to which the defendant is exposed.¹¹² The Court’s holding in *Alleyne* is the Sixth Amendment mirror to *Apprendi*: now any fact (other than a fact of a prior conviction) that increases either the

tures require the judge to impose a minimum sentence when those facts are found – a sentence the judge could have imposed absent the finding.” *Id.* at 560.

105. *See Alleyne*, 133 S. Ct. at 2155-56.

106. 18 U.S.C. § 924(c)(1)(A) (2006).

107. *Id.*

108. *Alleyne*, 133 S. Ct. at 2156. Alleyne participated in a robbery in which his accomplice threatened the victim with a gun. *Id.* at 2155. The actual question was not whether Alleyne himself brandished a firearm, but whether he was accountable for his accomplice’s brandishing.

109. *Id.* at 2156. In doing so, the district court noted its reluctance at being cast in the role of the “reverser” of the jury’s finding. *See* Brief for Petitioner, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 5884834, at *6.

110. Brief for Petitioner, *supra* note 109, at *6. The Court of Appeals affirmed the district court’s finding as constitutionally permissible under *Harris*. *United States v. Alleyne*, 457 F. App’x 348, 350 (4th Cir. 2011) (per curiam). Indeed, the criminal statute at issue in *Alleyne* was the same statute at issue in *Harris*. The *Harris* plurality found that a “sentencing factor” that increases only the minimum punishment to which a defendant is exposed does not implicate constitutional concerns. *Harris v. United States* 536 U.S. 545, 556 (2002). The *Harris* holding reaffirmed the pre-*Apprendi* opinion of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which the *Apprendi* Court explicitly noted was beyond the scope of its decision. *See Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000) (stating that its decision did not overrule *McMillan* because *Apprendi* did not impact “cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict . . .”).

111. *Alleyne*, 133 S. Ct. at 2161.

112. *Id.* at 2161-62.

minimum or the maximum potential punishment to which the defendant is exposed must be found by the jury beyond a reasonable doubt or included in the guilty plea.¹¹³

In the wake of *Alleyne*, the drug quantity necessary to trigger a mandatory minimum penalty must be pleaded in the indictment and proved beyond a reasonable doubt in order for the defendant to be subject to the mandatory minimum penalty.¹¹⁴ Because the drug quantity is a fact that raises the floor of the sentencing range, a quantity-based mandatory minimum penalty cannot be triggered unless the necessary drug quantity is pleaded in the indictment.¹¹⁵ If no drug quantity is pleaded in the indictment, the defendant will be subject to the statutory sentencing range applicable to a defendant who has distributed an unspecified quantity of the controlled substance.

A more detailed description of the federal drug trafficking statute, 21 U.S.C. § 841, is useful to understand the sentencing impact of *Alleyne* on defendants convicted of federal drug trafficking offenses. Titled “Unlawful acts,” subsection 841(a) defines the outlawed conduct: knowing or intentional

113. An admission by the defendant is sufficient to satisfy *Alleyne* and the Sixth Amendment because the defendant is free to waive her right to a trial by jury. *See* *United States v. Yancy*, 725 F.3d 596, 601 (6th Cir. 2013) (“[W]hen a defendant knowingly admits the facts necessary for a sentence enhancement in the context of a plea, simultaneously waiving his Sixth Amendment right to trial by jury, no *Apprendi* problem arises.”); *United States v. Harris*, No. 12-3875, 2013 WL 5755249, at *1 (7th Cir. Oct. 24, 2013) (order) (“By pleading guilty and admitting the [drug] amounts alleged, [the defendant] waived his right to a jury determination and also established those amounts beyond a reasonable doubt.”).

114. *United States v. Claybrooks*, 729 F.3d 699, 708 (7th Cir. 2013) (“After *Alleyne*, [the defendant’s] mandatory minimum sentence must be determined by the drug quantity described in the jury’s special verdict form The district judge cannot raise the mandatory sentencing floor based on its own determination that [the defendant’s] offense involved additional amounts of narcotics beyond those determined by the jury.”); *see also* *United States v. Jordan*, Nos. 10-13702, 10-13703, 2013 WL 5345524, at *1 (11th Cir. Sept. 25, 2013) (per curiam) (holding that the district court ran afoul of *Alleyne* by basing the defendants’ mandatory minimum sentences on a drug quantity found by the judge at sentencing); *United States v. Mubdi*, No. 10-5008, 2013 WL 4517026, at *2 (4th Cir. Aug. 27, 2013) (per curiam) (same).

115. *See Alleyne*, 133 S. Ct. at 2159-60 (discussing the longstanding rule that all elements of an offense must appear in the indictment). As the Attorney General instructed federal prosecutors after *Alleyne*, “for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.” Memorandum from Attorney General Eric Holder, Jr. on Charging Mandatory Minimum Sentences and Recidivist Enhancement in Certain Drug Cases to United States Attorneys and Assistant Attorney General for the Criminal Division at 1 (Aug. 12, 2013), available at <http://www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> (last visited Jan. 4, 2014) [hereinafter Holder Memorandum].

manufacture, distribution, dispensation, or possession with the intent to do so of a controlled or counterfeit substance.¹¹⁶ Titled “Penalties,” subsection 841(b) sets forth ranges of punishment that vary depending on a number of aggravating circumstances: the type of controlled substance involved, the quantity of the substance, whether the offense occurred after a prior conviction for a felony drug offense had become final, and whether death or serious bodily injury resulted from the use of the controlled substance.¹¹⁷ These offense characteristics may alter the statutory minimum, the statutory maximum, or both. For most schedule I and schedule II controlled substances, the statutory penalties (in the absence of death, serious injury, or a prior felony drug conviction) increase depending on the quantity of the controlled substance involved: a term of imprisonment of zero to twenty years for any unspecified or minimal quantity,¹¹⁸ a term of imprisonment of five to forty years for an amount over an intermediate specified quantity,¹¹⁹ and a term of imprisonment of ten years to life for an amount over a higher specified quantity.¹²⁰ For example, a cocaine distribution conviction of five or more kilograms triggers the lengthiest statutory range, 500 or more grams triggers the intermediate statutory range, and less than 500 grams (or an unspecified quantity) triggers the lowest statutory range.¹²¹

Before *Alleyn*, the federal courts of appeals were split on the issue of whether the minimum punishments in subsection 841(b) could be de-linked from the maximum punishments or whether each sentencing range set forth in subsection 841(b) was an inviolate whole.¹²² The circuits that permitted

116. 21 U.S.C. § 841(a) (Supp. 2011).

117. § 841(b). Subsections 841(b)(1)(A)-(D) set forth the punishments applicable to offenses involving schedule I or II controlled substances, subsections (b)(1)(E)(i)-(iii) set forth the punishments applicable to offenses involving schedule III controlled substances, subsection (b)(2) sets forth the punishments applicable to offenses involving schedule IV controlled substances, and subsection (b)(3) sets forth the punishment applicable to offenses involving schedule V controlled substances. *Id.* Within subsection 841(b)(1)(A), the statute sets forth the ranges applicable for offenses involving the distribution of relatively high quantities of eight specific substances. *Id.* Subsection 841(b)(1)(B) sets forth the ranges applicable to offenses involving intermediate quantities of the same eight specific substances. *Id.* Subsection 841(b)(1)(C) sets forth the ranges applicable to offenses involving all schedule I and II controlled substances, as well as to gamma hydroxybutyric acid and a certain quantity of flunitrazepam. *Id.* Subsection 841(b)(1)(D) sets forth the ranges applicable to offenses involving relatively small quantities of marijuana, hashish, or hashish oil. *Id.*

118. § 841(b)(1)(C).

119. § 841(b)(1)(B).

120. § 841(b)(1)(A).

121. § 841(b)(1)(A)-(C).

122. See Benjamin J. Priester, *The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wagging*, 60 SMU L. REV. 209, 250 n.186 (2007); see also Lindsay Calkins, Note, *Is Drug Quantity an Element of 21*

“mixing and matching” among the sentencing ranges held that the failure to include a triggering drug quantity in the indictment limited only the ceiling of the sentencing range under *Apprendi*, but permitted the sentencing judge to find that the drug quantity increased the mandatory minimum sentence under *Harris*.¹²³ Other circuits found that the structure of the statute prohibited such mixing and matching among statutory ranges and held that the failure to allege a triggering drug quantity in the indictment forbid the sentencing court from applying a more severe minimum sentence to the defendant.¹²⁴

USC § 841(b)? Determining the Apprendi Statutory Maximum, 78 U. CHI. L. REV. 965, 966, 978-85 (2011).

123. See *United States v. Goodine*, 326 F.3d 26, 32-34 (1st Cir. 2003) (even though the jury’s verdict authorized a sentence of five to forty years, a minimum sentence of twenty years was required based on a judge-found determination of drug quantity); *United States v. Hernandez*, 330 F.3d 964, 980-82 (7th Cir. 2003) (where sentencing court relied on a mandatory minimum based on judge-found drug quantity, appellate court found no *Apprendi* error because the sentence actually received by the defendant was below the maximum authorized by the jury’s verdict); *United States v. Copeland*, 321 F.3d 582, 605 (6th Cir. 2002) (“That the district court considered drug quantities established by a mere preponderance in subjecting [the defendant] to a mandatory minimum sentence is irrelevant; because the district court remained within the confines of § 841(b)(1)(C), [the defendant’s] due process and jury trial rights under *Apprendi* were not offended.”); see also *United States v. Clark*, 538 F.3d 803, 811-12 (7th Cir. 2008) (same). But see *United States v. Jackson*, 419 F. App’x 666, 672 (7th Cir. 2011) (finding district court’s use of the “mix-and-match approach” to statutory minimums and maximums under subsection 841(b)(1) could not be plain error because it remained an open question in the circuit); *United States v. Washington*, 558 F.3d 716, 719-20 (7th Cir. 2009) (reaffirming *Clark*’s finding of no *Apprendi* error under similar facts, but noting that the “pure statutory question” of whether mixing and matching is permissible under subsection 841(b)(1) was an open question that had not been squarely confronted by any court).

124. See *United States v. Gonzalez*, 686 F.3d 122, 133 (2d Cir. 2012) (because indictment did not sufficiently charge a specific drug quantity, the defendant “should have been sentenced under § 841(b)(1)(C), which deals with indeterminate quantities of narcotics and which, in [the defendant’s] case, did not require the imposition of a minimum prison term.”); *United States v. Gonzalez*, 420 F.3d 111, 121 (2d Cir. 2005) (“Nothing in the structure of [21 U.S.C. § 841(b)(1)] suggests that these corresponding minimums and maximums, or any of the others prescribed in the statute, can be delinked to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress.”); *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003) (“[T]he district court erred when it determined by a preponderance of the evidence that because [the defendant] was responsible for more than 50 kilograms of marijuana, he must be sentenced pursuant to § 841(b)(1)(B) to a minimum of five-years.”); see also *United States v. Graham*, 317 F.3d 262, 274-75 (D.C. Cir. 2003) (reading subparagraphs (A), (B), and (C) of subsection 841(b)(1) as “three separate offenses” and holding that a defendant must be sentenced under a particular subparagraph); *United States v. Martinez*, 277 F.3d 517, 530 (4th Cir. 2002) (stating that defendant “faced no mandatory minimum sentence” where indictment

Since *Alleyne*, however, a defendant's statutory minimum or maximum punishment may not be enhanced based on a drug quantity found by the judge at sentencing.¹²⁵ Even if the sentencing judge finds the defendant responsible for a drug quantity that would otherwise trigger a higher mandatory minimum (and potential maximum) sentence, that finding does not affect the sentencing range to which the defendant is exposed. In order to expose the defendant to a higher sentencing range on the basis of drug quantity, the triggering drug quantity must be pleaded in the indictment and proven beyond a reasonable doubt or included in the guilty plea.

To illustrate, a jury may find a defendant guilty beyond a reasonable doubt of distribution of fifty grams of cocaine, thus authorizing a custodial sentence of zero to twenty years.¹²⁶ But, at sentencing, the judge may find by a preponderance of the evidence that the defendant was actually responsible for the distribution of five kilograms of cocaine. Under the statute, a drug distribution of five kilograms of cocaine would trigger a sentencing range of ten years to life imprisonment.¹²⁷ But, under *Alleyne*, the sentencing judge's factual finding at sentencing cannot raise either the minimum or the maximum sentence. Thus, the defendant's sentencing range remains zero to twenty years' imprisonment despite the sentencing judge's finding.

In August 2013, Attorney General Eric Holder directed federal prosecutors to use *Alleyne* to structure indictments for certain low-level, non-violent drug traffickers in such a way so as to avoid the operation of mandatory minimum sentences.¹²⁸ According to the Attorney General, the application of mandatory minimum penalties on such offenders has resulted in some cases in "unduly harsh sentences" that do not "promote public safety, deterrence, and rehabilitation."¹²⁹ By declining to charge drug quantities in the indictment for offenders who meet the Attorney General's requirements,¹³⁰

made no reference to drug quantity but sentencing court found sufficient drug quantity to trigger subsection 841(b)(1)(A)).

125. See cases cited *supra* note 123 and accompanying text.

126. 21 U.S.C. § 841(b)(1)(C).

127. § 841(b)(1)(A)(ii)(II).

128. See Holder Memorandum, *supra* note 115.

129. *Id.* at 1.

130. The memorandum directs:

[P]rosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:

- The defendant's relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- The defendant is not an organizer, leader, manager, or supervisor of others within a criminal organization;
- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and

the executive branch has essentially created its own “safety valve” to place additional low-level drug offenders beyond the reach of mandatory minimum sentences.

B. Pure Offense Guidelines for Drug Distribution Offenses

Actual fairness demands that if an offender is to be sentenced without regard to a mandatory minimum sentence, the Guidelines range for that offense should not incorporate the mandatory minimum in any way. Neither the wholesale extrapolation approach nor the cliffs approach fairly reflects the Commission’s expertise when it comes to sentencing such an offender. Because the sentences of some defendants convicted of controlled substance offenses can be totally unyoked from mandatory minimums either through the safety valve or the failure to adequately charge or prove the triggering drug quantity, actual fairness demands the promulgation of a pure offense guideline to aid in sentencing these defendants.

Unlike defendants who benefit from a sentence reduction premised on substantial assistance to the government, defendants who are eligible for the safety valve are sentenced without any regard for the otherwise applicable statutory minimum sentences. Thus, for safety valve defendants, the district courts should have the benefit of a pure offense guideline based on the Commission’s approximation of the most fitting sentencing range. Currently, the Guidelines reward controlled substance traffickers or manufacturers who meet the safety valve criteria with a reduction of two offense levels.¹³¹ This reduction, however, is only the crudest of approximations of fairness because the offense level from which this reduction is taken is still fundamentally determined through the operation of an offense guideline that is keyed to statutory minimum sentences.¹³²

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- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

Id. at 2.

131. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(16), 2D1.11(b)(6) (2013). This two-level reduction is available even to defendants who are not subject to a mandatory minimum sentence. *See* § 2D1.1 cmt. n.20 (stating that the applicability of the reduction “shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment.”); § 2D1.11 cmt. n.7 (noting that the applicability of the reduction “shall be determined without regard to the offense of conviction.”); *see also* United States v. Feingold, 454 F.3d 1001, 1013-14 (9th Cir. 2006) (listing cases).

132. Partially on this basis, Judge John Gleeson of the United States District Court for the Eastern District of New York recently lodged a “policy disagreement” with the drug trafficking offense guideline in an artfully crafted explanatory memorandum apparently directed at the Sentencing Commission. United States v. Diaz, No. 11-CR-00821-2 JG, 2013 WL 322243, at *8 (E.D.N.Y. Jan. 28, 2013) (mem.) (“[S]afety

Defendants who are not actually subject to mandatory minimum sentences are treated even less fairly by the drug distribution guideline. This class of defendants is only growing in the wake of *Alleyne* and the Attorney General's directive to federal prosecutors to structure indictments to purposefully avoid the operation of mandatory minimum sentences on certain low-level, non-violent drug offenders.¹³³ Because these defendants are not subject to quantity-driven mandatory minimum penalties, they should receive the benefit of a research-based pure offense guideline that was not extrapolated from the mandatory minimum penalties.

Under the constitutional interpretation set forth in *Alleyne*, even if a sentencing court holds a defendant accountable for a drug quantity that would have otherwise triggered a mandatory minimum sentence, the defendant is exempted from the operation of the mandatory minimum unless the triggering drug quantity is charged in the indictment and proven beyond a reasonable doubt.¹³⁴ Therefore, the defendant should not be sentenced under an offense guideline that is keyed to the non-applicable mandatory minimum. Because the drug distribution offense guideline is a wholesale extrapolation of the drug quantities that trigger the statutory minimums, these offenders' guidelines ranges are often identical to the ranges that would have been applicable had they been subject to mandatory minimum sentences.¹³⁵ As a result, the relief from the operation of the mandatory minimum means little at sentencing unless the judge is willing to deviate from the Guidelines. To combat this result, the Attorney General advised federal prosecutors to consider advocating for below-guidelines sentences for drug offenders to whom mandatory minimums do not apply.¹³⁶ Extrapolating the mandatory minimums across the drug distribution guideline furthers relative fairness but only at the cost of hindering actual fairness. This approach effectively fuses the Guidelines ranges of defendants who are not subject to a mandatory minimum to the

valve relief from a mandatory minimum does no more than relegate the defendant to a Guidelines range that matches, and even exceeds, the mandatory minimum. Even with the Commission's corresponding two-level safety valve adjustment, the defendant still has a range that embraces the mandatory minimum.”).

133. See *supra* notes 128-130 and accompanying text.

134. See *supra* Part V.A.3.

135. Returning to the betel nut hypothetical, a judge may find a defendant accountable for the distribution of 400,000 betel nuts at sentencing. However, because the nut quantity was not pleaded in the indictment (or, alternatively, not found by a jury beyond a reasonable doubt), the 400,000 nut quantity does not trigger the ten year mandatory minimum. If the ten year mandatory minimum was rotely written into the Guidelines (either as a cliff or as a proportional extrapolation), the applicable Guidelines range would be 121 to 151 months despite the fact that no statutory minimum actually applied. This result is problematic because the hypothetical commission, based on its research and judgment, found that the proper imprisonment range applicable to the distribution of 400,000 betel nuts is only 78 to 97 months. See *supra* Figure 1; *infra* App. A, Table 1.

136. Holder Memorandum, *supra* note 115, at 3.

Guidelines ranges of defendants who are subject to a mandatory minimum. But, because the offense guideline was drafted based on mandatory minimums rather than on the Commission's own judgment, this system sacrifices actual fairness to further relative fairness.

Were all drug offenders relieved of statutorily-mandated minimum sentences, chances are good that the Commission would amend the drug distribution offense guideline. Thus, the subset of defendants who are currently relieved of mandatory minimums should receive the benefit of the Commission's expertise and be sentenced pursuant to the purest Guidelines possible. By tying the drug distribution ranges to statutory limits that may or may not actually apply in a given case, the Commission has fallen short of fulfilling its duty to promulgate Guidelines that reflect its reasoned judgment.¹³⁷

Thus, Guidelines section 2D1.1, the offense guideline applicable to offenses involving the manufacture, importation, exportation, or distribution of controlled substances, makes a singularly poor candidate for either the wholesale extrapolation or cliffs approach.¹³⁸ Because both approaches are keyed in some respect to statutory sentencing limits, an offense guideline devised under either approach would deviate from the Commission's best judgment regarding the fair punishment for the offense. Such deviation works actual unfairness on defendants who are not subject to the statutory minimum sentence either through the operation of the safety valve or because the drug quantity was not sufficiently pleaded in the indictment or proven beyond a reasonable doubt. To avoid such unfairness, section 2D1.1 should be amended to reflect the Commission's independent judgment regarding fair punishment for drug offenders.¹³⁹ That judgment need not replicate Congress's use

137. See 28 U.S.C. § 991(b)(1)(A), (C) (2006) (the Commission must establish sentencing policies and practice that "assure the meeting of the purposes to sentencing set forth in" 18 U.S.C. § 3553(a), including the requirement to "provide just punishment for the offense," and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); see also Barkow, *supra* note 63, at 1616-17. The Commission is also required to "periodically review and revise" the Guidelines "in consideration of comments and data coming to its attention." 28 U.S.C. § 994(o) (2006).

138. Section 2D1.1 of the Guidelines is the operative offense guideline for offenders convicted under 21 U.S.C. § 841(a), (b)(1)-(3) (manufacture or distribution of controlled substances) and 21 U.S.C. § 960(a), (b) (importation or exportation of controlled substances). See U.S. SENTENCING GUIDELINES MANUAL app. A (2013).

139. Admittedly, a drawback of a pure section 2D1.1 offense guideline is that greater significance would be placed on the government's charging decision and therefore shift increasingly more power to the prosecution. An offender's sentence would be greatly impacted by whether the government elected to charge a threshold controlled substance quantity in the indictment. Thus, an offender may be strongly incentivized to plead guilty should the government be willing to reduce the charge to the distribution of an unspecified quantity of a controlled substance.

Another drawback is that those unfamiliar with the relevant statutory limits on sentencing may be misled by looking solely at the Chapter Two offense guidelines.

of drug quantity as the driving force behind offense level enhancements. Should the Commission determine, as it already has, that drug quantity is a poor proxy for the offender's role in the offense,¹⁴⁰ it should craft a drug distribution guideline that places less emphasis on drug quantity and more emphasis on whatever specific offense characteristics the Commission deems more relevant.

VI. CONCLUSION

The Sentencing Commission's overriding goal should be to fashion Guidelines that achieve actual fairness for defendants. Thus, the Commission should incorporate statutory limitations on sentences into the Guidelines only to the minimum extent necessary. Because the Guidelines already account for applicable statutory minimum or maximum sentences through section 5G1.1, the Commission need not skew its Chapter Two offense guidelines to incorporate mandatory minimums or statutory maximums. Mandatory minimums should never be extrapolated wholesale across an entire offense guideline, as the Commission has done with the drug distribution guideline, because the extrapolation does not reflect the Commission's independent judgment as to fair punishment. Where no actual unfairness results because mandatory minimums are applicable to every defendant, such minimums should be written into the offense guidelines as cliffs accompanied by trailing plateaus. The mandatory minimums applicable to drug distribution offenses should not be incorporated into the drug distribution guideline at all, however, because some defendants sentenced pursuant to the drug distribution guideline are not subject to any mandatory minimum. Thus, the Commission should amend the drug distribution offense guideline to reflect its independent judgment regarding fair punishment. Otherwise, mandatory minimum sentences will continue to be replicated in the Guidelines ranges of defendants to whom no mandatory minimums apply. Such unwarranted replication amounts to actual unfairness.

A prospective offender could consult Chapter Two, calculate the applicable guidelines, and decide that the potential payoff from the offense is worth the risk of punishment at that level. The would-be offender would not be notified in Chapter Two that the true punishment may be greatly affected by a five or ten year statutory minimum. Although transparency of the Guidelines is a concern, that goal need not be achieved solely in Chapter Two. It is not unfair to put the burden on Guidelines users to consult the entire Manual and learn in Chapter Five that the guideline range is constrained by any applicable statutory limits on sentencing.

140. See *supra* note 40 and accompanying text.

APPENDIX A

Table 1: Data underlying Figure 1, Betel Nut Offense Guideline, Pure Offense Guideline

Quantity of nuts distributed	Offense Level	Guidelines range in months ¹⁴¹	Mean Guidelines sentence in months
1	6	0-6	3
250	8	0-6	3
1000	10	6-12	9
2500	12	10-16	13
5000	14	15-21	18
10,000	16	21-27	24
20,000	18	27-33	30
40,000	20	33-41	37
60,000	22	41-51	46
80,000	24	51-63	57
100,000	26	63-78	70.5
400,000	28	78-97	87.5
700,000	30	97-121	109
1,000,000	32	121-151	136
3,000,000	34	151-188	169.5
10,000,000	36	188-235	211.5
30,000,000	38	235-293	264

Table 2: Data underlying Figure 2, Betel Nut Offense Guideline, Wholesale Extrapolation Approach

Quantity of nuts distributed	Offense Level	Guidelines range in months ¹⁴²	Mean Guidelines sentence in months
1	6	0-6	3
100	8	0-6	3
250	10	6-12	9
500	12	10-16	13
750	14	15-21	18
1000	16	21-27	24
2500	18	27-33	30
4000	20	33-41	37
6000	22	41-51	46
8000	24	51-63	57
10,000	26	63-78	70.5
40,000	28	78-97	87.5
80,000	30	97-121	109
400,000	32	121-151	136
700,000	34	151-188	169.5
1,000,000	36	188-235	211.5
3,000,000	38	235-293	264

141. Assumes Criminal History category I.

142. Assumes Criminal History category I.

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Table 3: Data underlying Figure 3, Betel Nut Offense Guideline, Cliffs Approach

Quantity of nuts distributed	Offense Level	Guidelines range in months ¹⁴³	Mean Guidelines sentence in months
1	6	0-6	3
250	8	0-6	3
1000	10	6-12	9
2500	12	10-16	13
5000	14	15-21	18
10,000	24	60-63	61.5
20,000	24	60-63	61.5
40,000	24	60-63	61.5
60,000	24	60-63	61.5
80,000	24	60-63	61.5
100,000	26	63-78	70.5
400,000	30	120-121	120.5
700,000	30	120-121	120.5
1,000,000	32	121-151	136
3,000,000	34	151-188	169.5
10,000,000	36	188-235	211.5
30,000,000	38	235-293	264

143. Where applicable, the Guidelines range is constricted by the operation of section 5G1.1, which limits a defendant's Guideline range to the permissible bounds of any applicable statutory minimum or maximum. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 (2013). Guidelines range assumes criminal history category I.