

NOTE*

QUANTITY, ROLE, AND CULPABILITY IN THE FEDERAL SENTENCING GUIDELINES

I. INTRODUCTION

The United States Sentencing Guidelines (“the Guidelines”) have had and continue to have a tremendous impact on federal sentencing practice. Because the Guidelines factor into every sentencing decision in the federal system,¹ it is important to the personal liberty of thousands of defendants and to the working of the federal criminal justice system as a whole that the Guidelines operate in a just way. Unfortunately, for the many narcotics offenders who come through the federal system every year, the Guidelines do not serve the ends of justice as effectively as they could.

The portion of the Guidelines that informs narcotics offense sentencing is Chapter 2, part D, Section 1.1 (“Section 2D1.1”).² Under Subsection (a)(5) of Section 2D1.1, the sentencing judge determines the type and quantity of controlled substances attributable to the defendant and plugs them into the Drug Quantity Table. The Table is a list of different quantity ranges for several controlled substances that correspond to different base offense levels. Base offense levels correspond to partially overlapping sentencing ranges on the Sentencing Table.³ As a result, higher quantities of a particular kind of controlled substance tend to lead to higher base offense levels and to higher sentences. The Drug Table previously held the infamous hundred-to-one ratio for crack cocaine sentencing⁴ that resulted in widely criticized harsh sentences and racially disparate impact.⁵

¹ See *Nelson v. United States*, 555 U.S. 350, 351 (2009) (“[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors.”).

² U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2013).

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

⁴ This ratio derives from instances in which possessing one gram of cocaine base, or crack cocaine, could have been equivalent to up to 100 grams of cocaine for sentencing purposes. In the reverse, an offender could possess 100 times the amount of cocaine as another defendant convicted of possession of cocaine base, and have the same base offense level, which would determine the advisory sentences of the two offenders. This discrepancy in sentencing was a reaction to the perceived dangerousness of crack cocaine around the time the Guidelines were first promulgated, but had the effect of having a disparate impact on black defendants and communities. See *United States v. Lewis*, 90 F.3d 302, 306 (8th Cir. 1996); *United States v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994) (finding evidence of racially disparate impact of hundred-to-one ratio but declining to hold disparate impact grounds for departure from the Guidelines). While in 2010 the ratio was lowered, Fair Sentencing Act, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010), an eighteen-to-one ratio still exists in Section 2D1.1.

⁵ See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 97 (2007); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v–ix, (2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine

An often-overlooked aspect of Section 2D1.1 is its focus on the quantity of controlled substances as the primary sentencing factor for most narcotics offenders. The focus on quantity is a problem because quantity is a poor proxy for the seriousness of the crime committed, and differentiating between defendants who have committed crimes of different seriousness is one of the purposes of sentencing.⁶ In order to achieve fairness in sentencing, the Guidelines must be able to differentiate between defendants of differing culpability in addition to creating advisory sentences that are “not greater than necessary.”⁷ Changing the focus of Section 2D1.1 to the role the defendant played in the offense could properly differentiate offenders by culpability and reduce the harshness of the current quantity-anchored narcotics sentencing regime.

The United States Sentencing Commission (“the Commission”) is the independent agency responsible for formulating and promulgating the Guidelines.⁸ Since the first set of Guidelines was introduced to Congress in April 1987 and later made law,⁹ the Guidelines have fluctuated in the degree to which they bind judges’ sentencing decisions.¹⁰

Though today the Guidelines are advisory,¹¹ judges are still required to calculate and consider the proper Guidelines range for each defendant.¹² Perhaps for this reason the ranges prescribed by the Guidelines continue to have

_and_Federal_Sentencing_Policy.pdf, archived at <http://perma.cc/M9RE-WDAQ>; Paul J. Hofer, Statement of Paul J. Hofer, J.D. Ph.D.[,] Before the ABA Justice Kennedy Commission 14–17 (Nov. 13, 2003), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_paulhofer.authcheckdam.pdf, archived at <http://perma.cc/PH7E-VPJZ>.

⁶ 18 U.S.C. § 3553(a)(2)(A) (2012).

⁷ 18 U.S.C. § 3553(a) (2012).

⁸ See U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf, archived at <http://perma.cc/D4J7-GDTU>.

⁹ U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2013). The promulgation of the Guidelines is different from other agency rulemaking. The Commission promulgates a set of Guidelines, submits them to Congress, and absent their rejection by Congress within 180 days of submission, they become law. The Commission is not subject to the notice and comment requirements or arbitrary and capricious review under the Administrative Procedure Act. See 5 U.S.C. §§ 553, 706 (2012).

¹⁰ The Guidelines were presumptively mandatory at the outset. See U.S. SENTENCING COMM’N, OVERVIEW, *supra* note 8 (noting that 18 U.S.C. § 3553(b)(1) (2012) made the Guidelines mandatory until the provision was severed by the Supreme Court in 2005 in *United States v. Booker*, 543 U.S. 220 (2005)).

¹¹ *Booker*, 543 U.S. at 246 (landmark decision in which the Court decided to “make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct” on Sixth Amendment grounds); see also U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2013) (acknowledging both that the Guidelines were rendered advisory by *Booker* and the continuing importance of the Guidelines despite their advisory nature).

¹² *Nelson v. United States*, 555 U.S. 350, 351 (2009); *Kimrough v. United States*, 552 U.S. 85, 87 (2007) (“The federal sentencing statute, as modified by *Booker*, requires a court to give respectful consideration to the Guidelines.”).

a significant anchoring effect on judges,¹³ meaning that judicial sentences in the aggregate tend to follow the Guidelines, despite the fact that the Guidelines are advisory. This makes a functional Guidelines regime important because sentencing judges are influenced by the Guidelines, even if they are not obligated to follow them.

Jurists have criticized Section 2D1.1 since the first iteration of the Guidelines. Much of the focus has been on the overall severity of Section 2D1.1 and the racially disparate impact of some of its provisions. For instance, the provision that deals with cocaine base—crack cocaine—has received significant attention for its racially disparate impact on black communities generally and on young black males specifically.¹⁴ These issues have led to calls for various reforms, some of which have been partially implemented. These include reducing the use of mandatory minimum sentences for narcotics violations¹⁵ and reducing or eliminating the infamous hundred-to-one ratio for cocaine base sentencing.¹⁶

These changes are excellent stop-gap measures on the path to deeper reform for narcotics violations sentencing. However, these steps do not address the most profound issue with Section 2D1.1: the focus on quantity of controlled substances as the main sentencing factor in narcotics violations. Given a certain type of drug in a particular case, using quantity as the primary sentencing factor is misguided because this focus fails to differentiate between defendants based on culpability. This Note proposes a role-oriented revision to the Guidelines that has the potential to mitigate many of the issues associated with the current Guidelines' failure to account effectively for culpability.

¹³ U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART A, 5 (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf, archived at <http://perma.cc/EJJ4-XESV> (“[T]rends in average sentences generally have followed average Guideline minimums over time. For offenses in the aggregate, when the average Guideline minimum has increased or decreased due to changes in the seriousness of the offense, the criminal history of the offenders, or amendments to the Guidelines, the average sentence also has increased or decreased in like proportion. In drug trafficking [cases] . . . the influence of the Guidelines has remained stable over time. For these offenses, average sentences have increased or decreased in response to increases and decreases in average Guideline minimums, resulting in a consistent parallel relationship over time.”).

¹⁴ See, e.g., Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?* 25 FED. SENT'G REP. 311 (2013).

¹⁵ See, e.g., *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *9, 18 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (calling for a one-third decrease in narcotics violations sentences); Dan Levine & David Ingram, *U.S. moves to curb long, mandatory drug sentences*, REUTERS, Aug. 12, 2013, available at <http://www.reuters.com/article/2013/08/12/us-usa-crime-sentencing-idUSBRE97B03320130812?irpc=932>, archived at <http://perma.cc/X8VU-C27D> (reviewing Department of Justice policy decision “to charge defendants in certain low-level drug cases in such a way that they would not be eligible for mandatory sentences now on the books”).

¹⁶ *Kimbrough*, 552 U.S. at 111, 128 (2007) (recognizing the Commission's and others' rejection of the hundred-to-one ratio). This ratio has recently been reduced to about eighteen-to-one. See *supra* note 4.

Part II of this Note offers an overview of the relevant portions of the Guidelines and examines some of the features of quantity calculations. Part III critiques the current Guidelines from a criminal justice standpoint. Part IV proposes a revision to the Guidelines, and addresses potential administrative and legal issues regarding proposed changes to the Guidelines. Part V provides a brief conclusion summarizing the merits of focusing on role instead of quantity in narcotics sentencing.

II. OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES FOR NARCOTICS VIOLATIONS

Though the Supreme Court rendered the Guidelines advisory in *United States v. Booker*,¹⁷ they still factor into every sentencing decision.¹⁸ Because the Guidelines remain an important sentencing factor even post-*Booker*, it is critical that the Guidelines function to serve the interests of justice. In the realm of narcotics violations, an examination of the application of the Guidelines to classes of defendants is a good starting place to analyze whether or not the Guidelines serve these interests.

The most important portion of the Guidelines with respect to narcotics violations is Section 2D1.1.¹⁹ This Section covers almost every factor a district court judge will need to take into account in order to calculate an offender's Guidelines sentence, including the base offense level, specific offense characteristics, drug equivalency conversion tables, and finally the Drug Quantity Table. Once the defendant has been convicted of a narcotics violation, the judge will begin with Subpart (a), which is a series of base offense levels, the greatest applicable of which is assigned to the defendant.²⁰ For the purposes of this Note, Numbers 1–4 of Subpart (a) will be ignored since they only apply in cases in which “death or serious bodily injury resulted from the use of the substance,” and because they do not invoke the Drug Quantity Table.²¹ Therefore, the remainder of the analysis will center on Number 5 of Subpart (a), which serves as a catch-all to Numbers 1–4, does not have a “death or serious bodily injury” requirement, and always invokes the Drug Quantity Table.²²

Once a defendant's conviction falls under Number 5 of Subpart (a), the sentencing judge is directed to refer to the Drug Quantity Table.²³ This Table

¹⁷ 543 U.S. 220, 245 (2005) (Stevens, J.) (“[We find] the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised [This] makes the Guidelines effectively advisory.”).

¹⁸ See cases cited *supra* note 12 and accompanying text.

¹⁹ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2013).

²⁰ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a) (2013).

²¹ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(1–4) (2013).

²² U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(5) (2013).

²³ While the proportion of cases in which defendants are sentenced under (a)(5) relative to (a)(1–4) is uncertain, the “death or serious bodily injury” requirement of 1–4 and the prior

sets out ranges of quantities for nineteen types of controlled substances.²⁴ As one might imagine, the larger the quantity of drugs the defendant is found to have possessed, the higher the base offense level, and, all other things being equal,²⁵ the higher the sentencing range applicable to the defendant.

This Drug Quantity Table raises two points of inquiry regarding the workings of the Guidelines. The first is what happens when the defendant is convicted and found to have possessed a controlled substance not listed in the Drug Quantity Table. The second is how the quantity of the controlled substance is measured, since this will have an impact on the length of time to which a defendant is sentenced.

If a defendant is convicted and found to have possessed a controlled substance not listed in the table, the sentencing judge is directed to the Drug Equivalency Table, under which dozens of substances are assigned a “marihuana equivalency” (i.e. one gram of mescaline is equivalent to ten grams of marihuana).²⁶ This also can be done with volume measurements of controlled substances or units (i.e. one milliliter of gamma-hydroxybutyric acid (GHB) is equivalent to 8.8 grams of marihuana; one unit of ketamine is equivalent to one gram of marihuana).²⁷ Equivalencies can range from negligible quantities of marihuana (one unit of a “Schedule V Substance” is equivalent to 0.00625 grams of marihuana) to large quantities of marihuana (one gram of LSD is equivalent to 100,000 grams of marihuana).²⁸ The Drug Equivalency Table creates a marihuana equivalency value that is then plugged into the Drug Quantity Table to determine the base offense level for drugs not explicitly accounted for in the Drug Quantity Table.

The Guidelines contemplate an inclusive system for measurement of controlled substance quantities. In addition to weighing the controlled substances directly in the defendant’s possession at the time of arrest, this measurement system includes four features that allow prosecutors to tack on additional quantities of drugs at the sentencing phase. These features are: (1) the inclusion of the entire quantity of the controlled substance involved in the culpable transactions; (2) the discretion of the executive branch over when to terminate a given investigation; (3) the approximation of unknown quantities of controlled substances; and (4) the “mixture or substance” rule, by which the quantity of the drugs is measured by the weight of the entire

similar felony conviction requirement of (1) and (3) likely leave few defendants eligible for sentencing under these provisions.

²⁴ The Table accounts for fifteen types of controlled substances for the highest offense level on the Table (offense level thirty-eight) and nine types at the lowest offense level (offense level six). Base offense level 12 contains quantity ranges for eighteen controlled substance types, more than any other base offense level. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2013).

²⁵ For the sake of simplicity in comparing ranges, it is assumed that the defendant being sentenced has a Criminal History Category score of one. See U.S. SENTENCING GUIDELINES MANUAL § 5A (2013).

²⁶ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n. 8(D) (2013).

²⁷ *Id.*

²⁸ *Id.*

medium in which the controlled substance is conveyed. Each of these features can lead to a higher Guidelines calculation of the controlled substance quantity, which results in higher base offense levels and therefore longer sentences.

The first feature, the rule that a defendant is responsible for the entire quantity of the controlled substance found relevant to the conviction, leads to higher sentences. This is so because in cases where a defendant is found to be involved with a higher quantity of a controlled substance than he or she physically possessed at the time of arrest, that quantity will be added to the quantity calculation under Subsection (a)(5). As a result, defendants may be found responsible for drug quantities that are beyond their control or about which they were unaware.²⁹ This can happen at least three different ways. First, a defendant may be held liable for the entire quantity of a conspiracy of which he or she formed only a small part. For example, a defendant convicted after unloading several kilos of a controlled substance may be charged with all of the controlled substance involved in the conspiracy, which could be in the hundreds or thousands of kilos.³⁰ Second, a defendant may be held liable for the entire quantity of a controlled substance on his or her person or in his or her luggage, whether or not he or she is aware that such substances may be there in that quantity.³¹ Third, a defendant may be held responsible for additional quantities of controlled substances found on others with whom he or she has interacted.³² These ways in which additional quantities may be tacked on at the sentencing phase lead to higher sentences in many types of situations.

Second, the executive branch of the government has discretion over whether, when, and how to terminate an investigation of an alleged narcotics

²⁹ Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT'G REP. 63, 64 (1990) (“[C]ouriers often are unaware of the quantity or value of the drugs they are carrying, or even the type, such as crack rather than cocaine powder,” which can dramatically affect the sentence they receive.); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 921 (1991).

³⁰ Carrie Legus, *Quantitative Justice: Have the Federal Sentencing Guidelines Forsaken Quality?* 21 VT. L. REV. 1145, 1157 (1997) (“The defendant is accountable at sentencing for the entire ton of marijuana aboard the ship, regardless of how many bales he unloaded and regardless of foreseeability.” (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. 2 (1995))).

³¹ Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121 (1994) (discussing a case in which a courier was held responsible for the entire contents of luggage they received, even though it contained more than the defendant was aware of, and a case where a defendant “drug mule” who had ingested baggies of a controlled substance was also held responsible for the drugs that the drug dealers had enclosed in her shoes without her knowledge).

³² See Alschuler, *supra* note 29, at 921–22 (discussing several cases in which defendants were charged with possessing vastly higher quantities of controlled substances than they could have been aware of, including *U.S. v. Joyner*, 924 F.2d 454 (2d Cir. 1991), in which the defendant was sentenced under a calculation that included the controlled substances found in his dealer’s hat).

offender.³³ This can lead to increased sentences if an investigation continues over months, during which time an offender can engage in multiple transactions with an undercover agent. Instead of arresting the offender after the first transaction, the investigators can allow further transactions to occur, increasing the quantity of drugs the defendant will be held responsible for at sentencing. This discretion results in a base offense level that is higher than if the defendant had been arrested after the first transaction.

The third feature of the Guidelines that leads to higher sentences for individual defendants is the approximation of unknown quantities of controlled substances.³⁴ Under this rule the court can approximate the relevant quantity of drugs through induction. For example, if the defendant in a case is found with few drugs but a lot of money, the court can incorporate the money into the Guidelines calculation. To do so the court can estimate the sale price of a unit of the controlled substance in question and then divide the amount of money seized from the defendant by that price. This gives an approximation of the quantity of the controlled substance involved in the transaction. This mechanism can significantly increase sentences when “the amount seized does not reflect the scale of the offense,”³⁵ because the quantity of drugs attributed to the defendant will always be higher than the quantity with which the defendant is caught.

The “mixture or substance” rule, which attributes the weight of the whole substance (controlled substance plus carrier medium) rather than the weight of the controlled substance alone to the defendant,³⁶ leads to higher sentences for narcotics violations. This rule has the effect of increasing a defendant’s sentence based on the weight of non-controlled substances, such as moisture or filler substances.³⁷ At first glance these four features seem to

³³ See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-27.200 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm, archived at <http://perma.cc/SZ9M-PAYM> (“If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to . . . [r]equest or conduct further investigation . . .”).

³⁴ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n. 5 (2013) (“Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.”).

³⁵ *Id.*

³⁶ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) n.(A) (2013) (“Unless otherwise specified, the weight of a controlled substance set forth in the [Drug Quantity Table] refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.”).

³⁷ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2013) (moisture only removed from calculation if it renders the controlled substance “unsuitable for consumption without drying”). One serious critique of previous iterations of the Guidelines involved the wildly harsh results that would occur under this rule in cases involving LSD. See Alschuler, *supra* note 29, at 919 (explaining how quickly Guidelines sentences could escalate if the de-

be clarifying rules by which to calculate an unclear quantity of controlled substances in a given case. In effect, however, they provide many opportunities for the quantity calculation to be inflated at the sentencing phase, leading to higher sentences.

Once the base offense level has been determined by measuring the controlled substance and locating it within one of the Drug Quantity Table ranges, the sentencing judge then moves on to Section 2D1.1(b), which contains fifteen specific offense characteristics. Thirteen of these specific offense characteristics involve offense level increases (for example, the use of a firearm or the distribution of an anabolic steroid to an athlete), and only two involve offense level decreases, namely augmentations of the “minimal participant” reduction of Chapter Three³⁸ and the “safety valve” portion of Chapter Five.³⁹ The judge moves down the list and either adds or subtracts offense levels from the base offense level if a particular characteristic applies to the crime or to the defendant. The final tally, after accounting for reductions in level due to adjustments for mitigating role⁴⁰ and departures for substantial assistance,⁴¹ is the offense level.

fendant was convicted when using heavier carrier media, such as sugar cubes). In the latest version of the Guidelines, the Commission seems to have responded to these types of criticisms by relaxing the rule in LSD cases but preserving it for other controlled substances and for statutory mandatory minimum calculations, including for LSD. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.26 backg'd (2013) (“[T]he Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights).”). *But see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.10 (2013) (“In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.”).

³⁸ *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(a) (2013).

³⁹ The safety valve provision in the Guidelines, U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2013), allows the sentencing judge to ignore the statutorily imposed mandatory minimum sentence that attaches to many crimes and to impose a lower sentence consistent with the Guidelines. In order to be eligible for this provision a defendant must meet five conditions: “the defendant does not have more than 1 criminal history point . . . ; the defendant did not use violence . . . ; the offense did not result in death or serious bodily injury . . . ; the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . ; [and] the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” *Id.* *But see* Kate Stith and José A. Cabranes, FEAR OF JUDGING; SENTENCING GUIDELINES IN THE FEDERAL COURTS 64 (1998) (“[The safety valve provision] did not greatly alter *the Guidelines’* formulae for drug offense severity.” (emphasis in original)). *See also* United States v. Diaz, No. 11-CR-00821-2 JG, 2013 WL 322243, at *13 n.124 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (“[T]he safety valve . . . do[es] little to significantly lower a qualifying offender’s sentencing range below the mandatory minimum.”).

⁴⁰ *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2013). Under this guideline the offense level can be decreased two to four levels if the defendant was found to have played a minimal or minor role in the offense.

⁴¹ *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2013); *see also* Diaz, No. 11-CR-00821-2 JG, 2013 WL 322243 at *7 (“The mitigating role cap helps very few defendants. Roughly 13% of those convicted of drug trafficking offenses in Fiscal Year 2011 received a mitigating role adjustment to begin with, and not all of them qualified for the cap. In Fiscal Year 2011, only approximately 7% of all drug trafficking offenders received the cap.” (footnotes omitted)).

After the offense level and the criminal history category are determined,⁴² the judge is directed to the Sentencing Table, a grid composed of 258 cells (forty-three possible offense levels multiplied by six criminal history levels). At the lowest offense levels the judge has discretion to sentence a defendant to probation or to a prison sentence up to six months. For middle levels the judge is given a six-month window of sentence length within which to exercise discretion. At the highest levels, the judge's discretion is abridged on the low and high ends, but the range of the recommended sentence expands.⁴³

Armed with the Guidelines sentence, the judge can then consider whether⁴⁴ and to what extent⁴⁵ to vary from the Guidelines in light of *Booker*.⁴⁶ Despite the responsibilities the Supreme Court gave to district judges in *Booker* and *Gall*, it seems that some judges are not comfortable sentencing outside of Guidelines ranges.⁴⁷

III. PROBLEMS STEMMING FROM A QUANTITY BASED SENTENCING REGIME

The current form of the Guidelines suffers from various problems. Perhaps most apparent to the American public are the issues of severity and racial disparity that underlie the quantity-based narcotics sentencing regime.⁴⁸ This Part acknowledges these issues as serious, and in need of re-

⁴² Again, let us assume a Criminal History Category I offender for simplicity.

⁴³ U.S. SENTENCING GUIDELINES MANUAL § 5A (2013).

⁴⁴ See *Gall v. United States*, 552 U.S. 38, 46 (2007) (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.”).

⁴⁵ *Id.* at 47 (“[A]ppellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.”).

⁴⁶ See *United States v. Booker*, 543 U.S. 220, 246 (2005) (rendering the Guidelines advisory and allowing for variance from the Guidelines based on policy considerations, especially a specific Guideline's failure to comport with the ideals expressed in 18 U.S.C. § 3553).

⁴⁷ See Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 537 (2007) (discussing judges' negative reactions to the now-advisory Guidelines, noting that some judges felt incompetent to sentence outside the Guidelines). *But see Gall*, 552 U.S. at 50–51 (no presumption of reasonableness of sentence within Guidelines, same level of appellate review for sentences within and not within Guidelines).

⁴⁸ That the Guidelines produce severe results in many cases is not seriously in dispute. See *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (“[The Guidelines] produce[] ranges that are excessively severe across a broad range of cases . . .”). On the issue of racial disparity, however, experts disagree as to the precise measure of disparity in sentencing and as a result contrasting conclusions have been reached. Compare M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 3 (U. of Mich. Law Sch. Prog. in Law & Econ. Working Paper Series, Paper No. 12-002, 2012), available at <http://ssrn.com/abstract=1985377>, archived at <http://perma.cc/Z2J9-6KYL> (“[R]emaining sentence gaps can be explained by prosecutors' initial charging decisions—particularly the choice to bring mandatory minimum charges.”), with U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, PART A, *supra* note 13, at 3

form. However, another set of problems with the current Guidelines deserves equal attention, both because it presents issues regarding criminal justice generally and because dealing with these problems may go far towards resolving the severity and racial justice issues previously mentioned.

The Guidelines are seriously flawed in that the basis of the sentence is derived from the quantity of the drugs present in the particular case. This is a poor foundation upon which to base a sentence for many reasons, most importantly because quantity does not track culpability in many cases.⁴⁹ If culpability is not being tracked by the main sentencing factor for a category of offenses, then in the aggregate Section 2D1.1 will fail to properly differentiate between defendants of differing culpabilities.⁵⁰ If Section 2D1.1 is not capable of differentiating in that way, then much of the fairness in sentencing is lost.

The problems started at the outset of the Sentencing Commission's efforts to construct a sentencing guideline for narcotics. Two initial errors caused Section 2D1.1's severity and its inability to account for culpability. First, and perhaps in response to the tragic overdose of soon-to-be NBA athlete Len Bias in 1987:

Congress promptly enacted the Anti-Drug Abuse Act of 1986 ("ADAA"), which established a two-tiered scheme of mandatory minimum and enhanced maximum sentences that have now become central features of the federal drug sentencing landscape. The ADAA's five-year mandatory minimum, with a maximum enlarged from twenty to forty years, was specifically intended for the managers of drug enterprises, while the ten-year mandatory minimum, with a maximum of life, was intended for the organizers and leaders.⁵¹

("[D]emographic characteristics are now more strongly correlated with sentencing outcomes than during previous periods . . .").

⁴⁹ See Catharine M. Goodwin, *Sentencing Narcotics Cases where Drug Amount is a Poor Indicator of Relative Culpability*, 4 Fed. Sent'g Rep. 226, 226 (1992) ("[T]he drug computation can present problems in distinguishing between offenders with substantially different culpability."); Young, *supra* note 29, at 63 ("The logical link between the quantity of drugs and sentence severity is far less clear for couriers and other low level participants."); Alschuler, *supra* note 29, at 915 ("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."); Diaz, 2013 WL 322243 at *1 ("[The Guidelines] are driven by drug type and quantity, which are poor proxies for culpability.").

⁵⁰ U.S. SENTENCING GUIDELINES MANUAL Ch. 1 Pt. A at 2–3 ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

⁵¹ Diaz, 2013 WL 322243 at *4; see also Adam Liptak, *A Tough Judge's Proposal for Fairer Sentencing*, N.Y. TIMES, May 29, 2012, at A17, available at <http://www.nytimes.com/2012/05/29/us/sidebar-a-judges-proposal-to-curb-prosecutors-sentencing-power.html>, archived at <http://perma.cc/367A-EMP3>.

In practice these mandatory minimums are applied to many narcotics violations defendants⁵² due to the linkage of the Guidelines with the ADAA. Instead of differentiating between defendants with different roles, the Sentencing Commission used the ADAA's mandatory minimums as baselines for sentencing ranges.⁵³ This linkage increased the penalties for many narcotics violations defendants, collapsing the least culpable defendants' sentences upward into those originally reserved for kingpins and organizers.⁵⁴ "As a result, the vast majority of federal drug offenders who are neither managers nor leaders are subjected to the harsh sentencing scheme that Congress intended only for those who occupy such roles."⁵⁵ Given these facts, it is clear that the Guidelines fail in many cases to further the goals envisioned by Congress when they passed the ADAA and the Sentencing Reform act of 1987.⁵⁶

More importantly for this Note, the Sentencing Commission used controlled substance type and quantity as proxies for role in the formulation of Section 2D1.1. By coupling severe sentences with a lack of consideration of role, the Sentencing Commission created a regime that "accepted the ADAA's flawed premise that drug quantity is the predominant factor in determining a defendant's true culpability."⁵⁷

A. *Over-Inclusivity and Under-Inclusivity*

The Guidelines in their current form allow for both under-inclusivity and over-inclusivity at the sentencing phase. According to the Commission, the measure of a sentence should be the culpability of an individual defen-

⁵² Liptak, *supra* note 51. ("About 74 percent of defendants charged with crimes involving crack cocaine faced a mandatory minimum sentence in the year that ended in September, according to statistics compiled by the United States Sentencing Commission. But only 5 percent of them led or managed a drug business.").

⁵³ Despite the fact that "empirical data on drug trafficking offenses were gathered . . . they had *no* role in the formulation of the Guidelines ranges for drug trafficking offenses." *Diaz*, 2013 WL 322243 at *4.

⁵⁴ *Diaz*, 2013 WL 322243 at *6 ("The Commission's linkage of the Guidelines ranges for drug trafficking offenses to the ADAA's weight-driven regime has resulted in a significantly more punitive sentencing grid than Congress intended in passing the ADAA."). *But see* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 90 ("The legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers created by the 1986 [Anti-Drug Abuse] Act.").

⁵⁵ *Diaz*, 2013 WL 322243 at *6.

⁵⁶ The Commission itself has recognized this failure in crack cocaine sentencing as early as 2002: "Contrary to the general objective of the 1986 [Anti-Drug Abuse] Act to target federal law enforcement and prosecutorial resources on "serious" and "major" traffickers, two-thirds of federal crack cocaine offenders were street-level dealers. . . . [These figures] indicate that the current penalties exaggerate the culpability of most crack cocaine offenders, based solely on trafficking function." U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5 at vii.

⁵⁷ *Diaz*, 2013 WL 322243 at *12.

dant as measured by the severity of their conduct.⁵⁸ If this culpability is based on a defendant's role in the illegal market of controlled substances, or based on the harms a defendant's actions cause to society, then the current weight-based regime excludes some defendants society may want to punish more severely and includes some defendants society may want to punish less severely. Let us compare the fates of two defendants under the current Guidelines. Suppose defendant A is caught deplaning at JFK airport and is found to have ingested eighty grams of heroin, and is then found to have an additional two kilos of heroin in the lining of her suitcase, when she believed she was only carrying an additional ounce of heroin in her suitcase. Let us also assume the most sympathetic possible motivations for her choosing to partake in this venture. Under the Guidelines she will be found to have a base offense level of thirty-two due to the quantity of heroin involved, for a Guidelines range of 121-151 months⁵⁹ (had she only been charged with the eighty grams she knowingly ingested her base offense level would be twenty-four, or fifty-one to sixty-three months).

Now suppose defendant B is a first-time manufacturer with very few connections to drug distribution rings. She plans to manufacture methamphetamine and to sell it to other locals and some friends of hers, and perhaps use it as well. On her first try she successfully produces 200 grams of useable product. She is also busted on her first sell by an undercover agent. She will (and rightfully so) be charged with all 200 grams of methamphetamine, and will have a base offense level of twenty-eight. This results in a seventy-eight to ninety-seven month sentencing range, representing a maximum difference of seventy-three months between her and defendant A, and at least a twenty-four month difference. It would seem by many measures that defendant B is more culpable than defendant A: B willfully created and introduced new drugs into her community,⁶⁰ whereas A is acting as a (semi-unwitting) agent of a more responsible, B-like party. Yet in no case under the Drug Table can her sentence be less than defendant A's. From a relative standpoint, either the Guidelines have resulted in an improperly harsh sentence to A, an improperly lenient sentence to B, or both. An improved sentencing guide would be able to correct the differentiation issues presented by a plausible case like this one, and not simply rely on

⁵⁸ See U.S. SENTENCING GUIDELINES MANUAL Ch. 1 Pt. A, at 4 (2013).

⁵⁹ This is, of course, not accounting for adjustments for Specific Offense Characteristics or for departures under U.S. SENTENCING GUIDELINES MANUAL § 5K1.1, so the final sentence could vary from this one by several months or years, but a raw offense level calculation should be sufficient for comparison of two fictional defendants.

⁶⁰ U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 36 ("Offenders higher in the drug distribution chain generally are thought to be more culpable based on their greater responsibilities and higher levels of authority.").

prosecutorial discretion to omit the extra controlled substances found in A's suitcase.⁶¹

B. *Lack of Judicial Discretion in Sentencing Decisions*

Another issue with the quantity based-regime is that under it judges lack discretion to set sentences without departing or varying from the Guidelines.⁶² Judicial discretion is important at sentencing because the sentencing judge is the only actor capable of rendering a sentence after hearing all of the facts and circumstances of an individual case.⁶³ The lack of judicial discretion at this level leads to a lack of differentiation between defendants of varying culpability.⁶⁴

It will be helpful to distinguish between several different types of discretion available in varying degrees to sentencing judges. The Guidelines at issue here, specifically Section 2D1.1, do not have much impact on a judge's discretion to depart or vary from the Guidelines; the balancing of this discretion takes place in other portions of the Guidelines and in judicial opinions.⁶⁵ Rather, the types of judicial discretion at stake in the formulation of Section 2D1.1 are what this Note will refer to as vertical and horizontal discretion. Vertical discretion refers to a judge's discretion to decide the offense level in a particular case. Horizontal discretion refers to a judge's discretion to choose the exact place within the range set out by the offense level.

Given the way the Guidelines are written, vertical discretion is important because moving the offense level up and down along the Sentencing Table makes for large changes in sentencing ranges with only small overlap

⁶¹ It is not clear whether Attorney General Eric Holder's proposed reforms to federal narcotics charging practice were meant to have any effect on federal sentencing practice other than taking mandatory minimum sentences off the table for low level offenders. See Dan Levine & David Ingram, *supra* note 15 ("Prosecutors would [avoid mandatory minimum sentences] by omitting from official charging documents the amount of drugs involved in a case By doing so, prosecutors would ensure that nonviolent defendants without significant criminal history would not get long sentences."). Despite what this text seems to say about low sentences, if judges are still free to consider the whole amount of drugs at the sentencing phase then the offense levels for Defendant A will remain the same—that is, very high—even if the mandatory minimum is not in place. Given that judges are freer to depart from Guidelines ranges than they are from statutorily-imposed minimum sentences, this change is still an improvement from a defendant's standpoint.

⁶² See *supra* notes 44–47.

⁶³ *Gall v. United States*, 552 U.S. 38, 51 (2007) ("The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.") (citation omitted) (internal quotation marks omitted).

⁶⁴ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1683 (1992) ("To achieve the requisite level of quality, a guidance system must contemplate multiple levels of [judicial] discretion.").

⁶⁵ See *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *3 & n. 9 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (citing several cases in which judges have varied from the Guidelines based on policy reasons, and making special note of *United States v. Kimbrough*, 552 U.S. 85 (2007), in which the Court upheld a variance from the Guidelines based on disagreement with the hundred-to-one cocaine base to cocaine ratio).

between adjacent ranges. Horizontal discretion, on the other hand, matters less in terms of the final sentence given. This is because once cabined in by the offense level, the Guidelines provide a range of several months—often only six months—within which to account for the whole spectrum of culpability of defendants with that base offense level.⁶⁶ If for narcotics violations the base offense level is set by the quantity of controlled substances then the Guidelines give judges very little room within which to account for a variety of other factors bearing on culpability—such as the role the defendant played in the market for controlled substances—before the judge has to vary or depart from the Guidelines.

Under the current sentencing regime for narcotics violations, a sentencing judge has virtually no vertical discretion. Aside from upward adjustments in Subsection (b),⁶⁷ the judge only has two opportunities to depart downward, both of which are dependent on considerations independent of Section 2D1.1.⁶⁸ This is nominal vertical discretion. As a result, the judge is almost entirely boxed-in by the weight of the controlled substances found to be involved in a particular case. Furthermore, the narrow ranges involved in each offense level render the judge's horizontal discretion nearly meaningless.⁶⁹ An improved guideline for narcotics violations sentencing will provide the judge with a reasonable amount of both vertical and horizontal discretion, which will allow the judge to properly differentiate between offenders of varying culpability who nonetheless are found to possess the same or similar quantities of controlled substances.

The balance of sentencing discretion is currently in the hands of prosecutors.⁷⁰ The Assistant United States Attorney has an arsenal of tools at his or her disposal to limit the judge's discretion, including the invocation of mandatory minimums,⁷¹ the use or non-use of a Substantial Assistance to Authorities motion under Section 5K1.1,⁷² and of course the quantity-based

⁶⁶ U.S. SENTENCING GUIDELINES MANUAL § 5A Sentencing Table (2013). For the sake of simplicity, it is assumed that the defendants all being sentenced are in the same Criminal History Category.

⁶⁷ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b) (2013).

⁶⁸ See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(15–16) (2013).

⁶⁹ Freed, *supra* note 64, at 1696–97 (“The judge is the nominal sentencer in every case . . . Guidelines are administrative handcuffs that are applied to judges and no one else.”).

⁷⁰ *Id.* at 1697 (“[T]o the extent that the Guideline parameters diminish the power of the judge, they correspondingly enhance the power of the prosecutor.”); *id.* at 1696 (“[M]ore often than before the Guidelines, the prosecutor shares and often overshadows the judge's function.”).

⁷¹ 21 U.S.C. § 841 (2012).

⁷² U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2013). While filing a motion under Section 5K1.1 certainly gives the judge more discretion in sentencing than he or she would otherwise have, it is the prosecutor's decision whether to file the motion to the judge, so in effect the prosecutor has the power to limit or to increase the judge's discretion in cases where a Section 5K1.1 motion is on the table. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL 9-27.400, PLEA AGREEMENTS GENERALLY (2000) (“Authority to approve such [Section 5K1.1] pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals.”).

sentencing guideline itself.⁷³ Because a judge is essentially faced with a yes-or-no type of question regarding the quantity of controlled substances at sentencing, a judge effectively has no discretion to adjust the sentencing range after the prosecutor has dictated the quantity of controlled substances involved in the case.⁷⁴ Put another way, a sentencing judge is not free to see evidence that a defendant possessed eight grams of cocaine base (for a base offense level of eighteen) and find that he really had 5.5 grams (for a base offense level of sixteen),⁷⁵ though the judge may well believe that a lower offense level is appropriate based on the defendant's culpability. An improved sentencing guideline will place more discretion in the hands of judges by allowing them to make factual determinations at sentencing that bear directly on a defendant's culpability, such as the role the defendant played in the market for controlled substances.

C. *Lack of Mens Rea for the Quantity and Type of the Controlled Substance*

From the defendant's perspective, the Guidelines can seem unfair because they are essentially a set of strict liability rules that do not include a *mens rea* element.⁷⁶ Because "[q]uantity and type of drugs are not generally essential elements of drug offenses and therefore are not relevant at the conviction stage,"⁷⁷ the prosecutor does not have to prove type, quantity, or the defendant's awareness of possession to a jury beyond a reasonable doubt.⁷⁸ As a result the government can side-step proving what will eventually become a crucial factual determination for the final sentence.⁷⁹ As explained

⁷³ Some scholars have suggested a more serious problem with prosecutorial discretion over sentencing centering on the issue of racial disparity in the application of mandatory minimums. See Rehavi & Starr, *supra* note 48, at 26 ("[P]rosecutors appear to be nearly twice as likely to use the laws against black defendants when doing so is a discretionary choice. This suggests that calls by policymakers to respond to post-*Booker* sentencing disparity by expanding mandatory sentencing rules in an attempt to constrain judicial discretion could be counterproductive.").

⁷⁴ Freed, *supra* note 64, at 1697 ("The judge's sentencing range is now tethered to the prosecutor's choice of charges and facts . . .").

⁷⁵ See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 Drug Quantity Table (2013).

⁷⁶ Weinstein & Bernstein, *supra* note 31, at 121 ("Consideration of *mens rea* as to type or quantity is not required by the Guidelines. In 1989, a provision stating that the court should take into account the defendant's 'state of mind, intent, motive and purpose in committing the offense' was deleted from the Guidelines as unnecessary.").

⁷⁷ Legus, *supra* note 30, at 1162.

⁷⁸ See *Jones v. United States*, 526 U.S. 227, 232 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.").

⁷⁹ Legus, *supra* note 30, at 1162–63 ("[T]he factual determination [of quantity and type] is delayed until sentencing at which stage the standard of proof is merely preponderance of the evidence, information need not be admissible under the Federal Rules of Evidence, and no *mens rea* requirement is imposed for quantity and type. Under the current Guidelines regime, i.e., according to § 1B1.2(a)(1)(A), defendants are strictly liable for the actual quantity and type of drugs possessed.") (footnotes omitted).

earlier, this means that a defendant can be charged with a type or quantity of controlled substances that is different or greater than the defendant was aware of and he or she will not have the opportunity to rebut that assertion at trial. The lack of a need to prove *mens rea* with respect to type and quantity at sentencing is a serious flaw in the sentencing process because it represents a two-step attenuation from reaching a just result in a case: not only is quantity a bad proxy for culpability, the measurement of this bad proxy is then artificially inflated by the lack of a *mens rea* requirement at sentencing. An improved sentencing guideline will account for the *mens rea* of an individual defendant, which will better distinguish between differently-situated defendants⁸⁰ and will lead to less severe sentences overall.

D. The Problems Associated with a Quantity-Based Regime Lead to Unwarranted Disparity in Sentencing Outcomes

The base offense levels have no empirical grounding.⁸¹ This creates a situation where a particular defendant's conduct may not match the severity of the punishment that results from the quantity of controlled substances he or she is found to have at the sentencing phase. Furthermore, grouping defendants together based primarily on quantity has the double-edged effect of creating disparity in sentences between similarly culpable defendants while maintaining the appearance of equality.⁸²

Here an important distinction must be made between grouping defendants based on the crimes of which they are convicted and grouping defend-

⁸⁰ Weinstein & Bernstein, *supra* note 31, at 122 (“Stripping [*mens rea*] protections from the person who has crossed some invisible border into ‘federal narcotics land’ avoids the fundamental Anglo-American legal understanding that two individuals can commit the same act under very different circumstances.”).

⁸¹ *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (“The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act’s weight-driven scheme.”); *United States v. Hubel*, 625 F. Supp. 2d 845, 849 (D. Neb. 2008) (“For policy reasons, and to conform to statutory mandatory minimum sentences, the Commission did not employ its characteristic empirical approach when setting the Guidelines ranges for drug offenses.”) (citing *Kimbrough*); *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *1, *4 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (“[T]he Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. . . . [E]mpirical data on drug trafficking offenses were gathered, but they had *no* role in the formulation of the Guidelines ranges for drug trafficking offenses.”); *contra* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2013) (“[F]urther refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces”).

⁸² Alschuler, *supra* note 29, at 916 (“Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases. Excessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality.”).

ants based on culpability.⁸³ One may note the similarity with which the Guidelines treat defendants who have been found to possess the same quantity (or marihuana-equivalent value) of a controlled substance, but that is not equality in a meaningful sense, since the basis of the aggregation is not grounded in empirics or experience.

The Guidelines' focus on seemingly objective factors, such as quantity,⁸⁴ as well as the use of finely-sliced sentencing ranges, creates an illusion of equality.⁸⁵ Rather than fostering equality in sentencing, however, these Guidelines allow for defendants of different culpability to receive similar sentences (or for an arguably more culpable defendant to receive a lower sentence than an arguably less culpable defendant; see Part III(A), *supra*) based in large part on the fortuitous condition of how much of a controlled substance is found to be relevant to the conviction. Improved Guidelines will eliminate both the disparity and the appearance of equality by grouping defendants based on their relative culpability.

IV. IMPROVING THE NARCOTICS VIOLATIONS GUIDELINES BY FOCUSING ON ROLE INSTEAD OF QUANTITY

Shifting the principal sentencing consideration to narrative, or role-based, factors has the potential to significantly mitigate many of the issues caused by the quantity-based narcotics sentencing regime discussed in Parts I and II. This is because a defendant's role in a narcotics conspiracy is strongly correlated to his or her culpability.⁸⁶

⁸³ *Id.*

⁸⁴ See Stith & Cabranes, *supra* note 39, at 69 ("Quantification of harm was an attractive approach for the Commission, at least initially, because it permitted the agency to distinguish among defendants on the basis of *apparently* objective and precisely measured criteria.") (emphasis added).

⁸⁵ Scholars have criticized the capriciousness of the quantity-based sentencing scheme by analogizing it to obviously absurd alternative rule schemes:

Even very narrow rules can be capricious. A rule might, for example, determine every offender's punishment on the basis of his or her maternal grandmother's astrological sign. The consistent application of this rule would not produce equal justice. Equality refers to a sense that like cases are treated alike; and we perceive "likeness" in terms of principles, standards and values. These values need not always be our own, but they must be close enough that we consider them coherent. We cannot conclude that like cases are treated alike when we cannot discover a more plausible organizing principle than Grandma's birthday.

Alschuler, *supra* note 29, at 916. Cf. *United States v. Marshall*, 908 F.2d 1312, 1333 (1990) (Posner, J., dissenting). ("To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.").

⁸⁶ *United States v. Cabrera*, 567 F. Supp. 2d 271, 272 (D. Mass. 2008) ("[T]he Federal Sentencing Guidelines[] focus largely on the quantity of drugs the defendant had, minimizing the significance of other relevant—and important—questions, like the defendant's real role in the offense or his background."); *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *2, *13 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) ("The Commission should make the drug trafficking offense Guideline more sensitive to factors directly relevant to culpability, including the defendant's role in the offense, and less sensitive to drug type and quantity. . . . A

There are many different ways in which the Guidelines could be revised to weigh role more heavily than quantity when sentencing for narcotics violations. Below are two possibilities that would leave Section 2D1.1 structurally intact while shifting the sentencing judge's focus to better account for culpability at sentencing.

A. *Examples of a Role-Based Guideline*

As mentioned above, base offense levels linked to quantity apply when a defendant is sentenced under Section 2D1.1(a)(5). Eliminating this provision will effectively stop quantity-based sentencing, but a replacement catch-all provision is still needed, especially for first-time, non-violent offenders. One possible way to do this would be to revise Section 2D1.1(a)(5) to focus on role. An example might look like:

- (a) Base Offense Level (Apply the greatest):
 [§§ (1)–(4)]
- (5) **Base Offense X.** Apply the greatest:
- (A) If the defendant is found to be a kingpin, increase by **Y** levels.
 - (B) If the defendant is found to be a manager or leader, increase by **Y-minus-two** levels.
 - (C) If the defendant is found to be a manufacturer, increase by **Y-minus-four** levels.
 - (D) If the defendant is found to be a distributor, increase by **Y-minus-six** levels.
- . . .

This scheme will cause the judge, prosecutor and defense counsel to meaningfully assess culpability at the sentencing phase by shifting their focus to the role the defendant played, rather than quantity of the controlled substance involved. The judge, instead of referring to the Drug Quantity Table, will instead focus on the conduct of the individual defendant to determine where along the base offense level spectrum he or she ought to fall.

The United States Sentencing Commission has already contemplated a system of classification for various roles in the drug distribution network. In their 2002 report to Congress the Commission gathered sentencing data for federal cocaine and crack cocaine offenses in the years 1995 and 2000, and categorized them by “offender function.”⁸⁷ Offender functions included, for

more useful factor in determining culpability is not quantity, but role Rational sentencing policies will favor lengthier sentences for managers and leaders than for low level workers because of their respective roles, not because of the quantities of drugs that happen to be involved in their offenses.”); Alschuler, *supra* note 29, at 941 (“The better way is to focus on what sociologists have called ‘normal crimes’—recurring paradigmatic cases.”).

⁸⁷ U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 36–51.

example, “importer,” “organizer,” “pilot,” “bodyguard,” “courier,” and “user.” The Commission was able to apply definitions of these and other offender functions to classify defendants using the defendants’ own pre-sentence reports.⁸⁸ With this information the Commission was able to calculate, among many other things, the proportion of offenders found to have performed each function⁸⁹ and the average sentences for each offender function.⁹⁰ This shows that it is possible both to define offender functions, or roles, for narcotics offenses and to apply these definitions in a meaningful way to individual defendants for sentencing purposes.

Replacing the Drug Quantity Table with a Role Table will have much the same effect as re-writing Section 2D1.1(a)(5) with respect to directing a judge’s focus towards culpability. It could look like this:

(c) ROLE TABLE

Defendant’s Role in Drug Conspiracy	Base Offense Level
(1) If the defendant is found to be a kingpin	Level X
(2) If the defendant is found to be a manager or leader	Level X-minus-two
(3) If the defendant is found to be a manufacturer	Level X-minus-four
(4) If the defendant is found to be a distributor	Level X-minus-six

In both of these examples the Commission can decide the starting base offense level and the variations in level between roles,⁹¹ ideally using the decades of research on narcotics violations and expertise available to them. The success of this scheme, or any sentencing guideline, depends on the parity between the sentence range imposed by the offense level and the perceived fairness of this range as applied to each case. Because quantity improperly aggregates cases, no amount of offense level tweaking will lead to just results over the long run of quantity-based sentencing. Role-based sentencing, on the other hand, has the potential to achieve just results in many cases, given that the offense levels are properly adjusted to reflect societal attitudes towards a given role.

B. Criminal Justice Implications of Role-Based Sentencing

The most apparent change that will take place between a quantity-based and a role-based sentencing regime is that judicial discretion will be en-

⁸⁸ *Id.* at 36 n.105 (“The most serious function performed by the offender was determined from the narrative in the Offense Conduct section of the Presentence Report using the definitions that appear in Appendix C, table C1, at C4.”).

⁸⁹ *Id.* at 37, fig. 4.

⁹⁰ *Id.* at 43, fig. 9.

⁹¹ Under the current Drug Quantity Table the Commission seems to have set up tiers spaced by two offense levels; however, they could decide that there should be, say, a four-offense-level difference between the manufacturer and distributor roles, as well as the relative positions of the roles themselves.

hanced through an augmentation of the sentencing judge's vertical discretion. Regardless of whether a particular defendant pleads guilty or not, the prosecution will still have to prove to a judge by a preponderance of the evidence that the defendant fits into one or another of the categories spelled out in a role-based guideline or a Role Table. Whereas under the current regime judges are hamstrung by the weight of a controlled substance displayed on the seemingly objective scale or quantity calculation, a role-based regime would allow a judge to meaningfully disagree with the prosecutor's suggested base offense level based on evidence that relates to culpability, if the prosecutor does not meet his or her burden of proof regarding role through the Pre-Sentence Report.

This change shifts the balance of sentencing discretion back in favor of the judicial branch in a way that will benefit most defendants.⁹² The shift will also serve the interests of criminal justice by empowering judges to exercise meaningful vertical discretion. Vertical discretion under a role-based regime would allow the judge to find that the defendant played a particular role in the market for controlled substances. Developing a role-focused base offense level would more effectively differentiate between defendants of differing culpability without having to depart or vary from the Guidelines.

Shifting to a focus on role also could have the potential to reduce the severity of sentences in the aggregate for those who play only a small role in the distribution of controlled substances, but who nevertheless were involved with large quantities of controlled substances or with controlled substances that carry a heavy penalty even at small quantities. Research suggests that most of the offenders who pass through the federal system are in fact these types of defendants.⁹³ Reserving the harshest penalties for the small percentage of narcotics offenders who fit leadership profiles will, other things being equal, have a net effect of shortening the length of sentences for most defendants.

⁹² It certainly will not benefit all defendants, as this system may be more capable of imposing severe sentences on kingpins, who previously might have been able to insulate themselves by distancing themselves from the controlled substances that control their sentences under the current regime. See *United States v. Vasquez*, No. 09-CR-259 (JG), 2010 WL 1257359, at *2 (E.D.N.Y. Mar. 30, 2010) (Gleeson, J.) ("Most people, including me, agree that the kingpins, masterminds, and mid-level managers of drug trafficking enterprises deserve severe punishment.").

⁹³ *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *6 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) ("The overwhelming majority of drug trafficking offenders are neither managers or leaders—in Fiscal Year 2011, roughly 93% of drug trafficking offenders did not fall into either of those leadership categories."); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 39, fig. 6 (showing that importers, high-level suppliers, organizers, leaders, growers, manufacturers, financiers, money launderers, wholesalers, and managers *combined* accounted for only 24.8% and 21.1% of powder and crack cocaine offenses, respectively, in the year 2000. This is compared to 28.5% and 66.5% for street-level dealers for powder and crack cocaine, respectively.).

C. Does Quantity Still Matter?

The short answer is yes. Given that a sentencing judge can and should assess all relevant offender conduct when employing his or her horizontal discretion (which is to say, determining an appropriate sentence within a properly calculated Guidelines range),⁹⁴ quantity and type still matter to the extent that they will affect the point within the Sentencing Table range at which the defendant is sentenced. They should still be considered to differentiate between offenders with similar roles operating in conspiracies of different magnitudes:

Drug quantity is not irrelevant in assessing a drug trafficking defendant's culpability, and there is nothing inherently wrong in the Guidelines taking drug quantity into account. If all else is equal, a dealer who sells 50 kilograms of heroin inflicts more harm on society, and deserves greater punishment, than one who sells one kilogram. But two drug trafficking cases are rarely alike in all respects except quantity. Numerous factors distinguish one drug offender's culpability from another. What was the defendant's role? What was his compensation? Did he have a proprietary interest in the drugs? How long was he involved in drug trafficking? Why did he get involved to begin with? Did he stop because he was arrested or for some other reason?⁹⁵

Placing quantity considerations within the scope of a judge's horizontal discretion is beneficial because, as mentioned above, the judge's horizontal discretion is much less meaningful than her or his vertical discretion, where quantity is currently located. Making quantity a horizontal discretionary factor will mitigate the unjust inflation, approximation, and improper aggregation issues that symbolize the current quantity measuring system. This will occur because a judge's ability to take them into account will be both optional—assuming the judge is sentencing within the Guidelines—and limited in scope. Whereas now a difference of a few grams of a controlled substance could mean a difference of years in a defendant's sentence,⁹⁶ under a role-based sentencing regime such a difference in quantity will be but one factor to consider once the offense level range is properly calculated.

⁹⁴ U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2013) (“In determining the sentence to impose within the Guideline range, or whether a departure from the Guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.”) (citing 18 U.S.C. § 3661 (2012)).

⁹⁵ *Diaz*, 2013 WL 322243 at *12.

⁹⁶ The current difference between one gram and six grams of cocaine base is four offense levels, so assuming that a defendant is sentenced at the bottom of the relevant range in each case, this difference in weight leads to a difference of fifteen months of imprisonment. See U.S. SENTENCING GUIDELINES MANUAL § 5A Sentencing Table (2013).

D. Is a Role-Based Regime Administrable?

For any sentencing Guideline to function it must be administrable by the judges that operate using them. For all of its flaws, the quantity-based regime is fairly administrable; as stated above, the judge can “count the stolen dollars, weigh the drugs, and forget about more important things.”⁹⁷ A role-based sentencing scheme can still be administrable while preserving the benefits elaborated above. For more than twenty years jurists, and the Commission itself, have been able to identify factors that make up “paradigmatic” or “normal” roles in the realm of narcotics violations.⁹⁸ In fact, the current quantity-based regime already allows for limited departures based on the minimal role of the defendant in the crime charged.⁹⁹ Furthermore, since narcotics violations make up such a large portion of federal courts’ dockets,¹⁰⁰ judges will be able to develop, through sheer repetition of fact patterns, a sense of whether a defendant fits into a particular role.

Though administering a role-based sentencing guideline may require the expenditure of more judicial resources than simply adding up quantities of controlled substances, there are still powerful utilitarian and justice-based arguments for making the change:

When rules impose severe personal deprivation and moral stigma, the utilitarian objectives of prophylaxis and simplified administration [of quantity-based regimes] may seem unimportant. Every unnecessary year of imprisonment imposes heavy costs on both the public treasury and the prisoner, and inadequate punishment can cost potential crime victims still more. Even from a purely utilitarian perspective, these stakes are high enough that careful, individualized inquiry is likely to be worth the burden.¹⁰¹

Even though it may be more costly to determine the role of an individual defendant than to simply detail the quantity and type of controlled substances at the sentencing phase, focusing on role will pay off in the long run by leading to shorter sentences for defendants who do not need additional

⁹⁷ Alschuler, *supra* note 29, at 915.

⁹⁸ For an example, see Young, *supra* note 29, at 64 (“Factors indicating a limited involvement participant might include: a flat payment for a delivery, rather than a percentage of the profits after the drugs are sold; one way delivery of drugs, with no return delivery of money; receipt of a pre-packed bag; delivery to an individual not previously known to the courier; close supervision by the supplier or distributor; and lack of prior experience in drug distribution.”). See discussion in *supra* note 56.

⁹⁹ U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2013) (allowing for up to a four point reduction in the offense level “[i]f the defendant was a minimal participant in any criminal activity”).

¹⁰⁰ U.S. SENT’G COMM’N, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, *supra* note 13, at 5 (“[D]rug trafficking, firearms, and immigration, [were the] three offense types which comprised more than two-thirds of federal offenses in fiscal year 2011 . . .”).

¹⁰¹ Alschuler, *supra* note 29, at 905.

time and by saving the justice system the substantial costs that those additional years served would have imposed. Because a role-based guideline is both possible from a practical standpoint, and potentially less costly to the justice system from a monetary standpoint, there are strong administrability arguments in favor of implementing such a system.

E. Is It Legally Permissible to Base Offense Levels on Role?

None of the due process challenges that could be levied against a role-based guideline for narcotics violations are likely to invalidate a role-based sentencing regime. The main due process issues with such a guideline stem from raising an offender's sentencing range based on evidence presented to the judge post-conviction which the defendant may not have an adequate opportunity to rebut. With respect to these challenges, the role-based scheme either presents an improvement over the current Guidelines or does not pose an issue at all.

The Court in *Apprendi v. New Jersey*¹⁰² made clear that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹⁰³ There is no violation of this portion of *Apprendi* so long as the relevant sentencing ranges set forth in the Guidelines for a particular role are beneath the statutorily-imposed maximum punishment.

One possible difficulty may be the subsequent line of the *Apprendi* opinion, originally written in Justice Stevens' concurrence in *Jones v. U.S.*¹⁰⁴ but embraced by the majority, which states that "it is unconstitutional for a legislature [and hence the Commission] to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."¹⁰⁵ In a pre-*Booker* mandatory sentencing scheme this rule would have posed a difficulty for role-based sentencing Guidelines. Because the "prescribed range of penalties" would have been the relevant range prescribed by the offense level, any increase in offense level due to role determinations which were "not found by a jury or admitted by the defendant"¹⁰⁶ would effectively have been an increase in the range of penalties to which a defendant was exposed and therefore unconstitutional. An advisory Guidelines regime largely obviates this problem because the judge is ultimately allowed to sentence anywhere within the statutorily prescribed range. Since a particular defendant is exposed to the entire statutory range of penalties before any role determinations are made, no increase in range is possible and therefore the rule in *Apprendi* is not violated.

¹⁰² 530 U.S. 466 (2000).

¹⁰³ *Id.* at 490.

¹⁰⁴ 526 U.S. 227 (1999).

¹⁰⁵ *Apprendi*, 530 U.S. at 490 (citing *Jones*, 526 U.S. at 252 (Stevens, J., concurring)).

¹⁰⁶ *Cunningham v. California*, 549 U.S. 270, 275 (2007) (citing *Apprendi*, 530 U.S. 466 and others).

Making role determinations also avoids the due process criticisms surrounding the lack of *mens rea* in quantity-based sentencing. Role, like quantity, would probably not be an element of a statutory offense and the sentencing judge would likely determine both by a preponderance of the evidence. From a *mens rea* standpoint, however, role is very different from quantity. While it is possible that a defendant may have no *mens rea* towards a large portion of the quantity of drugs for which he or she is held responsible, it is next to impossible to have no *mens rea* with respect to one's role in a narcotics violation or conspiracy. For example, the defendant mentioned above who is aware of the eighty grams of controlled substances she ingested but not fully aware of the two additional kilograms of controlled substances in her suitcase has the requisite *mens rea* towards the eighty grams, and therefore will be convicted. While it is often the case that a defendant such as this will lack the requisite *mens rea* towards the additional quantities, it is highly unlikely that a defendant convicted for a narcotics offense will be unaware of his or her *role* in the conspiracy. Put another way, it is highly unlikely that a defendant will be a buyer, manufacturer, distributor or kingpin in a narcotics conspiracy and not know it.

Finally, to the extent that there are due process concerns based on the risk that a defendant will receive a higher than necessary sentence based on role confusion by the courts—say, a distributor is mistaken for and sentenced as a kingpin—these risks are small compared to the sentence inflation that currently takes place under the quantity-based regime. While it would require a huge misjudgment to make a mistake that would result in a change in multiple offense levels under the role-based regime,¹⁰⁷ under the current regime prosecutorial discretion and incidental details can increase attributed quantities and thus a defendant's offense level.¹⁰⁸

V. CONCLUSION

This Note proposed a revision to the portion of the United States Sentencing Guidelines that uses quantity and type of controlled substance as the primary factors in determining offenders' sentences for narcotics offenses. The proposed solution was a revision of the current quantity-based Guidelines, which focused on role as a primary sentencing factor. Such a change has the potential to significantly mitigate many of the issues surrounding the current Guidelines. Although there are some possible administrability and due process concerns that could be raised against a role-based sentencing scheme, ultimately a role-based regime presents an improvement from the current Guidelines with respect to these concerns.

¹⁰⁷ For example, it would be nearly impossible for the court to mistake a convicted purchaser for a manufacturer; the defendant would lack the equipment necessary to manufacture the controlled substances he or she possesses.

¹⁰⁸ See *supra* Part II.

Because there are so many problems with the current quantity-based Guidelines from a criminal justice perspective, and because focusing on role has the potential to mitigate these issues in an administrable and legal way, revising the Guidelines to focus on role as the primary sentencing factor would be a significant improvement in sentencing practices for narcotics offenses and would create a better, more just Guidelines.

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