Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing

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Recidivist sentencing enhancements, which increase criminal sentences for defendants with prior convictions, are a prominent feature of the federal criminal justice system. This Article considers the policy rationales supporting recidivist enhancements and reexamines them in light of two recent Supreme Court cases, United States v. Booker *and* Shepard v. United States. *Recidivist enhancements are traditionally justified based on rationales of retribution, deterrence, and incapacitation; proponents justify recidivist enhancements on the theory that people who reoffend are more culpable and more likely to recidivate. There is considerable doubt, however, regarding whether these rationales support the expansive federal enhancements currently tied to prior drug convictions. The Supreme Court's decisions in* Booker *and* Shepard, *which provide judges with additional sentencing discretion, allow judges to reexamine these rationales in the cases before them.* Booker *rendered the sentencing guidelines advisory, and judges may now decline to apply guidelines enhancements on policy grounds.* Shepard *limits the types of evidence that a judge may consider in determining whether a prior state conviction triggers a federal sentencing enhancement and allows judges to avoid applying statutory and guideline enhancements in many cases. Innovative* Shepard *litigation in the District of Connecticut has recently led to a*

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marked reduction in the number of enhancements based on drug convictions applied by judges in the District. Judges nationwide can apply this Shepard *analysis. Although rigorous application of* Shepard *increases sentencing discretion and may lead to more just and effective sentences in individual cases,* Shepard *can also create sentencing disparities for similarly situated defendants. Under* Shepard, *the application of an enhancement may depend solely on factors such as the availability of court transcripts or whether the defendant's state conviction precisely matches the language of a federal enhancement. Given the potential for unwarranted disparities — and the serious doubts as to whether the enhancements further any of the purposes of sentencing — Congress and the U.S. Sentencing Commission should reduce the magnitude of enhancements based on prior drug convictions or even eliminate them altogether.*

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INTRODUCTION

Sentencing enhancements increase criminal sentences based on the details of an offense or the characteristics of a defendant. For example, assaults that seriously injure a victim or assaults motivated by race might qualify a defendant for an enhancement.[1] Likewise, a defendant may face an enhancement for a drug offense if the defendant has a prior drug conviction.[2] All fifty states have some form of enhancement statutes, and state sentencing guidelines regimes across the country contain enhancement provisions.[3] Numerous statutory enhancements

[1] The federal sentencing guidelines, which judges must consider in federal criminal cases, provide enhancements for offenses involving these circumstances. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (2009) (enhancement for aggravated assault if victim sustained bodily injury); *id.* § 3A1.1 (enhancement for any federal crime if defendant intentionally selected victim because of "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" of person).

[2] In the federal system, a defendant convicted of a drug distribution offense with a prior felony drug offense can face twice as long a mandatory minimum sentence. *See* 21 U.S.C. §§ 841(b)(1)(A), 851 (2006).

[3] *See* NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 3-6 (2008); Michael G. Turner et al., "*Three Strikes and You're Out*"

also exist within the federal system, and the federal sentencing guidelines contain enhancement provisions for virtually every type of federal offense.[4]

One category of enhancements is the recidivist enhancements, which increase sentences for defendants with prior criminal convictions.[5] These enhancements can cause defendants with prior records to face dramatically higher sentences. Proponents of the enhancements argue that tougher sentences are necessary to deter and incapacitate recidivists, and to send a message to others that the law will punish them harshly if they reoffend. Some also take the view that a subsequent offense is itself a more serious one or that the repeat offender is more culpable and deserving of punishment.[6]

Within the federal system, defendants with prior drug convictions face much longer sentences. For example, in federal drug distribution cases, defendants previously convicted for a felony drug possession offense may have their sentences increased from a mandatory minimum sentence of ten years' imprisonment to twenty years.[7] In a case of gun possession, the presence of a qualifying drug conviction can mean the difference between no minimum sentence and a fifteen-year mandatory minimum sentence.[8] These enhancements are not limited to statutory provisions; the federal sentencing guidelines significantly increase sentencing ranges for drug, firearm, and immigration offenses based on prior drug convictions.[9] Although enhancements based on prior drug convictions make an enormous

Legislation: A National Assessment, 59 FED. PROBATION 16, 17 (1995).

[4] *See, e.g.*, John Gleeson, *The Road to* Booker *and Beyond: Constitutional Limits on Sentence Enhancements*, 21 TOURO L. REV. 873 (2006) (providing overview of different forms of sentencing enhancements).

[5] For an overview of the history, purposes, and prevalence of recidivist enhancements, see Julian V. Roberts, *The Role of Criminal Records in the Sentencing Process*, 22 CRIME & JUST. 303 (1997).

[6] The U.S. Sentencing Commission, which promulgates the federal sentencing guidelines, has expressed the view that recidivist enhancements are justified by goals of incapacitation, deterrence, and retribution. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.1, introductory cmt. *See generally* JULIAN ROBERTS, PUNISHING PERSISTENT OFFENDERS: COMMUNITY AND OFFENDER PERSPECTIVES (2008) (considering justifications and public support for recidivist enhancements). Part I.C.2 discusses the purposes of recidivist enhancements.

[7] This Article and commentators refer to this enhancement as the second offender enhancement or the 851 enhancement. *See* 21 U.S.C. §§ 841(b)(1)(A), 851. Offenses that involve certain quantities of particular drugs trigger these penalties. *Id.* § 841(b)(1)(A).

[8] This enhancement applies under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006).

[9] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, §§ 2K2.1, 2L1.2, 4B1.1.

difference in federal sentencing, the history, purposes, and application of these enhancements has received little attention from courts and scholars.

Empirical studies cast serious doubt on whether the rationales of sentencing — deterrence, incapacitation, retribution, and rehabilitation — support the magnitude of these federal enhancements. These studies suggest that longer prison terms do not significantly reduce recidivism and may even be counterproductive.[10] Indeed, some studies suggest that alternatives to incarceration, such as drug treatment for repeat drug offenders, can be more effective than long prison terms at reducing recidivism and promoting public safety.[11] Moreover, from a retributive standpoint, it is debatable whether a defendant's status as a recidivist is at all relevant to determining the just punishment for a subsequent offense.[12] Perhaps most significantly, there is clear evidence that enhancements based on prior drug convictions exacerbate racial disparities in the criminal justice system.[13]

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[10] *See, e.g.*, DON M. GOTTFREDSON, NAT'L INSTIT. OF JUSTICE, U.S. DEP'T OF JUSTICE, EFFECTS OF JUDGES' SENTENCING DECISIONS ON CRIMINAL CAREERS (1999) (concluding based on examination of criminal careers of felony offenders sentenced in New Jersey that sentence length had little effect — other than that of incapacitation — on recidivism); TIM RIORDAN, PARLIAMENTARY INFORMATION AND RESEARCH SERVICE (CANADA), SENTENCING PRACTICES AND RECIDIVISM (2004) (concluding that available research suggests that sentencing practices do not have significant effect on recidivism); U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORY (1994) (finding that short prison sentences are just as likely as long sentences to deter low-level drug offenders with minimal criminal histories from future offending); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329 (2002) (comparing recidivism rates of felony offenders sentenced in Kansas City and finding that offenders sentenced to prison have higher recidivism rates than those sentenced to probation). This Article discusses these studies and others *infra* notes 87-89 and accompanying text.

[11] Spohn & Holleran, *supra* note 10, at 349-53.

[12] Some scholars take this view. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 460-66 (1978) (questioning whether prior record is relevant to an offender's culpability); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67-74 (1979) (arguing that recidivists are not more culpable than first offenders because harm caused by offense is equivalent).

[13] *See, e.g.*, 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 133-34 (2004) [hereinafter FIFTEEN YEAR REPORT] (describing how career offender provision in federal sentencing guidelines, which enhances sentences based on prior drug convictions, is imposed disproportionately on African Americans).

Two recent Supreme Court decisions — *United States v. Booker*[14] and *Shepard v. United States*[15] — provide federal judges with additional sentencing discretion and allow them to reexamine the rationales supporting recidivist enhancements in individual cases. In *Booker*, the Supreme Court held that the federal sentencing guidelines are advisory rather than mandatory.[16] Thus, judges no longer need to apply the enhancements that the sentencing guidelines call for and can decline to do so when those enhancements conflict with sound sentencing policy.[17] Although some judges utilize the flexibility *Booker* allows,[18] federal judges still impose sentences within the ranges recommended by the guidelines in the majority of cases.[19] Careful analysis of whether the enhancements serve the purposes of sentencing should cause more judges to decline to impose these enhancements.

Both statutory provisions and sentencing guidelines govern sentencing in federal cases. *Booker* rendered the guidelines advisory, but did not affect mandatory statutory provisions. Thus, even when judges do take advantage of *Booker* discretion, statutory recidivist enhancement may still mandate excessive penalties, particularly in drug and firearm cases. Enter *Shepard*, a lesser-known Supreme Court case decided several weeks after *Booker*. *Shepard* comes into play when a defendant has a prior state conviction under a statute that is not a perfect match for a federal enhancement. *Shepard* gives judges discretion in some cases to avoid applying both statutory enhancements and guidelines enhancements and, as a result, has the potential to reduce greatly the reflexive use of recidivist enhancements in the federal system.

At issue in *Shepard* was whether a state burglary conviction triggered the Armed Career Criminal Act ("ACCA"), a federal recidivist statute.[20] The ACCA, like most federal recidivist statutes,

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[14] 543 U.S. 220 (2005).

[15] 544 U.S. 13 (2005).

[16] *Booker*, 543 U.S. at 245.

[17] *Id.*; *see also* Kimbrough v. United States, 552 U.S. 85, 90-91 (2007); Gall v. United States, 552 U.S. 38, 47 (2007); Rita v. United States, 551 U.S. 338, 356-57 (2007).

[18] These judicial opinions are discussed *infra* notes 213-15, 268-69 and accompanying text.

[19] In 2008, judges imposed sentences within the guidelines ranges in 59.4% of cases. In 1.5% of cases, judges imposed above-range sentences. Judges imposed government-sponsored below-range sentences in 25.6% of cases and imposed sentences below range without government support in only 13.4% of cases. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2008) [hereinafter U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS].

[20] *Shepard*, 544 U.S. at 15-17.

uses federal definitions for its triggering offenses.[21] Therefore, in order to qualify for the ACCA, the defendant's prior conduct must have satisfied the federal definition of burglary; a state's decision to label an offense a "burglary" does not necessarily suffice. Similar circumstances arise with state drug statues, which vary widely and often do not correspond with federal enhancements.[22] In *Shepard*, the Court placed strict limits on the types of evidence a federal sentencing court may consider in determining whether a defendant's prior conviction involved conduct triggering an enhancement. Because of the Sixth Amendment jury trial right, a sentencing judge may not assume the role of a jury and conduct an open factual inquiry about a defendant's prior conduct. Rather, an enhancement applies only when a defendant admitted in a prior plea — or a jury found — the facts supporting the enhancement.[23]

The *Shepard* analysis allocates the burden of proof in a way that, in many cases, makes it difficult for prosecutors to prove that a defendant's prior conduct fits the federal enhancement. This can be an impossible task if records from the prior conviction are unavailable or when the records do not contain factual admissions by the defendant.[24] In practice, rigorous application of *Shepard* allows judges to avoid applying mandatory sentencing enhancements in many cases and, thus, gives them greater discretion to craft sentences. As a result, *Shepard*, like *Booker*, allows judges to think critically about whether enhancements based on prior drug convictions actually serve any sentencing purpose. Judges may still decide to increase a sentence based on a defendant's record — and indeed remain free to impose a substantial increase — but judges are no longer required to do so.

Judges rarely utilize the freedom that *Shepard* grants them, however. Many judges and lawyers simply assume that prior state drug offenses automatically trigger enhancements of federal sentences. This assumption is often incorrect. The District of Connecticut provides an excellent case study for the potentially wide-reaching effects of a rigorous *Shepard* approach.[25] Before 2007, defendants with prior convictions under Connecticut's drug distribution statute routinely had their sentences doubled or tripled by federal enhancement

[21] 18 U.S.C. § 924(e) (2006).

[22] This Article discusses these variations *infra* Part III.D. This Article represents the first effort to catalog the differences among federal enhancement provisions and state drug statutes nationwide.

[23] *Shepard*, 544 U.S. at 20-21, 26.

[24] *See* discussion *infra* Part III.E.

[25] Part III.C discusses the impact of *Shepard* in the District of Connecticut.

provisions. Connecticut's drug distribution statute, however, is broader than federal enhancement provisions. In particular, the Connecticut drug statute criminalizes mere "offers" to sell drugs,[26] as well as conduct involving several drugs that federal law does not prohibit.[27] The Office of the Federal Defender noticed these differences and developed an innovative approach to challenging enhancements using *Shepard*. Based on these *Shepard* arguments, district courts in Connecticut and the Second Circuit found enhancements inapplicable.[28] As a result, prosecutors seek and obtain significantly fewer enhancements based on prior drug convictions in the District of Connecticut.[29] Similar reductions in the application of enhancements are possible around the country using the novel analysis presented in this Article.

Using *Shepard* to avoid enhancements provides judges with increased discretion and can lead to more just and effective sentences in individual cases. For example, judges could decline to apply sentencing enhancements based on prior drug convictions when they are excessive and counterproductive. Yet application of *Shepard* raises serious concerns about disparities. Whether a prior conviction triggers a mandatory enhancement can depend solely on whether evidence permitted under *Shepard* is available or whether the defendant's conviction is from a state with a broader drug statute than the federal enhancement. Thus, the sentences received by similarly situated defendants may differ substantially.

Accordingly, *Shepard* and *Booker* provide an opportunity to rethink the purposes of sentencing provisions. Enhancements based on prior drug convictions generally do not serve the rationales of sentencing, and concerns about disparities now exist given the operation of *Shepard*. The enhancements contribute significantly to the growing federal prison population and impose substantial costs on society. Because of the risk of disparities, and the fact that the enhancements

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[26] CONN. GEN. STAT. §§ 21a-277, 21a-240 (2009) (criminalizing offers to provide drugs).

[27] CONN. AGENCIES REGS. § 21a-243-7(a)(10), (52) (2009) (criminalizing benzylfentanyl and thenylfentanyl, which are not criminalized under federal law).

[28] *See, e.g.*, United States v. Savage, 542 F.3d 959, 964-65 (2d Cir. 2008) (holding that prior drug conviction under Connecticut law was not "controlled substance offense" under guidelines); United States v. Lopez, 536 F. Supp. 2d 218 (D. Conn. 2008) (concluding that prior Connecticut drug conviction did not trigger enhancement under ACCA); United States v. Madera, 521 F. Supp. 2d (D. Conn. 2007) (same); United States v. Cohens, No. 3:07CR195, 2008 U.S. Dist. LEXIS 62542 (D. Conn. Aug. 13, 2008) (same).

[29] *See infra* notes 324-26 and accompanying text.

are excessive in most cases, Congress and the U.S. Sentencing Commission should eliminate the provisions or reduce the extent of the sentencing increases caused by prior drug convictions. These reforms would eliminate the disproportionate effect of prior drug convictions but still provide judges with the discretion to consider criminal history in sentencing.

This Article proceeds in four Parts. Part I introduces the concepts and theories behind enhancements, and considers the history and purposes of recidivist enhancements. Part II examines federal sentencing enhancements that result from prior drug convictions, considers the effect of *Booker*, and explores whether the rationales of sentencing support the magnitude of these enhancements. Part III analyzes the impact of *Shepard* on federal enhancements triggered by prior state drug convictions. While Part III uses the District of Connecticut as a case study, it also considers the differences among federal enhancements and state drug statutes nationwide, and explores the consequence of a rigorous application of *Shepard* on the operation of federal enhancements. Part IV both considers the benefits of the *Shepard* approach and explores some of the challenges and disparities that can arise through *Shepard*. The Article concludes by discussing possible interventions by the U.S. Sentencing Commission and Congress.

I. OVERVIEW OF SENTENCING ENHANCEMENTS

A. *Enhancements and Their Purposes*

An enhancement is a provision that increases the length of a sentence for a crime. There are two basic categories of enhancements: nonrecidivist enhancements and recidivist enhancements. Nonrecidivist enhancements stem from the particular circumstances of an offense. For example, a defendant may face a higher sentence for a bank robbery if the offense involved a gun or if someone suffered an injury during the crime.[30] A recidivist enhancement, in contrast, increases a sentence based on a defendant's prior criminal history. Like nonrecidivist enhancements, recidivist enhancements appear in

[30] Under the federal bank robbery statute, a defendant convicted of simple bank robbery faces a maximum sentence of twenty years' imprisonment. 18 U.S.C. § 2113(a) (2006). If he "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," the maximum sentence increases to twenty-five years. *Id.* § 2113(d). If he kidnaps or kills anyone during the offense, he faces a minimum sentence of ten years and a maximum sentence of death or life imprisonment. *Id.* § 2113(e).

state and federal systems.[31] A well-known example is California's three strikes law, which requires a life sentence if the defendant has three qualifying convictions. In the federal system, a felon who possesses a firearm ordinarily faces a statutory sentencing range of zero to ten years in federal court.[32] If a defendant has three prior convictions for serious drug offenses or violent felonies, however, that defendant faces a mandatory minimum sentence of fifteen years and a maximum of life in prison.[33]

Enhancements can appear either in statutes or in sentencing guidelines. Statutory enhancements are typically mandatory in that courts must apply them when the facts support them. Some statutory enhancements increase the maximum sentence that judges may impose, while others trigger mandatory minimum sentences.[34] Although statutory enhancements are typically mandatory, enhancements under guideline systems are typically discretionary, as the federal guidelines — and most state guidelines regimes — are now advisory.[35]

A defendant's prior criminal history is relevant under all guideline regimes in state and federal systems. Guidelines provide sentencing ranges based on circumstances relating to the offense and the defendant's prior criminal convictions.[36] For example, under the federal sentencing guidelines, which provide sentencing ranges in federal cases, courts determine sentencing ranges based on a grid that contains an "adjusted offense level" on one axis and a "criminal history category" on the other axis.[37] The offense of conviction provides a "base offense level."[38] Courts increase this level to the "adjusted offense level" based on a variety of circumstances, such as whether the defendant possessed a gun during commission of the offense or played a leadership role in the offense.[39] These offense-

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[31] *See* Roberts, *supra* note 5, at 304-05. Many foreign countries use enhancements as well. *See id.* at 309.

[32] 18 U.S.C. §§ 922(d), (a)(2).

[33] *Id.* § 924(e)(1).

[34] *Id.*

[35] United States v. Booker, 543 U.S. 220, 245 (2005); *see* NAT'L CTR. FOR STATE COURTS, *supra* note 3, at 3 (providing survey of state guidelines systems).

[36] *See* NAT'L CTR. FOR STATE COURTS, *supra* note 3, at 3-6; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, PART A.

[37] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 1B.1.1, ch. 5, pt. A.

[38] *Id.* § 1B1.1.

[39] *See id.* ch. 3. Chapter 3 of the federal sentencing guidelines provides a number of enhancements that apply generally in federal cases. Some enhancements relate to the victim — i.e., enhancements apply when the offense involved a hate crime motivation, concerned a vulnerable victim, or when the offender restrained the victim

based enhancements increase the ultimate sentencing range. Judges count prior convictions to determine the defendant's criminal history category, and higher categories carry higher sentencing ranges.[40] Some types of prior convictions, such as drug and violent offenses, can also increase the offense level for certain federal offenses.[41] Thus, these convictions have a particularly large effect because they can increase both the criminal history category and the offense level.

Legislatures and sentencing commissions justify enhancements on several grounds. Retributive goals support offense-based enhancements; the victim's injury makes the offense more serious or the defendant more culpable. Incapacitation goals can also support the enhancements because, arguably, an offender who commits an aggravated offense is more likely to recidivate and necessitate incapacitation. Similarly, such an offender may need a harsher sentence to deter further misconduct, and the enhancement sends a message to others that the aggravated offense carries severe penalties.[42]

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during the offense, or the victim was a government employee. Other enhancements relate to the defendant's role in the offense — enhancements apply when a defendant acted as a leader or abused a position of trust. Enhancements also apply in circumstances such as when the defendant intended the offense to promote terrorism, when the defendant used a minor to commit a crime, and when the defendant obstructed justice. The guidelines also provide specific enhancements for particular types of offenses. For example, if a defendant possesses a gun in connection with a drug offense, an enhancement applies. *Id.* § 2K2.1. Enhancements apply in child pornography cases based on the number of images possessed and when the images portrayed sadistic or masochistic conduct or other depictions of violence. *Id.* §§ 2G2.2(b)(4), (7).

[40] *See id.* ch. 4.

[41] *See, e.g.*, *id.* § 2K2.1 (providing enhancements in gun possession cases for defendants with prior controlled substance offenses or crimes of violence); *id.* § 4B.1.1 (career offender enhancement applies in drug and violent cases for defendants with two or more prior crimes of violence or controlled substances offenses).

[42] Some of the federal sentencing guidelines enhancements explicitly reference the purposes of the provisions. For example, the commentary to the enhancement based on a defendant's leadership in the offense states:

> This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

Id. § 3B1.1 cmt.

Moreover, the expressive theory of punishment can justify enhancements because, by enacting enhancements, legislators express moral condemnation for particular types of conduct.[43] For example, many jurisdictions punish assaults motivated by racial or other group-based animus more harshly, and defend these enhancements in expressive terms.[44]

Regarding recidivist enhancements, proponents justify them based on goals of deterrence, incapacitation, and retribution. As to specific deterrence, one can argue that recidivists have already proven themselves more likely to reoffend and need stiffer penalties to deter future misconduct. Likewise, some claim that enhanced penalties for recidivists serve a general deterrence purpose by preventing others from reoffending. In addition, recidivists' likelihood of reoffending can justify a longer sentence on incapacitation grounds because incarceration prevents people from committing additional crimes. Finally, regarding retributive goals, some view an offense committed by a recidivist as being itself a more serious offense, or the recidivist offender as being more culpable.[45] Before exploring these arguments further, it is important to understand how and when courts apply these enhancements.

B. Enhancements and the Sixth Amendment Jury Trial Right

During the past several decades, a vigorous debate has evolved over whether a judge or a jury should determine the facts of a defendant's case that trigger sentencing enhancements. The Supreme Court has drawn a clear distinction between recidivist and nonrecidivist enhancements in its jurisprudence regarding the Sixth Amendment's jury trial right. Simply put, a judge may find the fact of a prior conviction that triggers a recidivist enhancement.[46] In other words,

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[43] For more on the expressive theory of punishment, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996), and Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1199-1204 (2004).

[44] Dan Kahan explores the expressive claims made in the hate crime debate — both by proponents and by opponents of enhanced penalties. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 465 (1999) ("Proponents defend enhanced punishment for such crimes in expressive terms as well. Hate crime laws 'send the message' that the offender was wrong to see the victim as lower in worth by virtue of his group commitments. In this way, they assure the victim and those who share his commitments that they are full members of society.") (footnote omitted).

[45] This Article discusses these arguments and criticisms of them, *infra* subpart I.C.2.

[46] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998). Despite the views of some Justices, the

judges rather than juries may determine whether a defendant was in fact previously convicted of a particular offense. In contrast, facts that trigger nonrecidivist enhancements and increase the defendant's maximum sentence — such as whether a defendant possessed a gun during the offense — must be found by a jury.[47]

A series of Supreme Court cases beginning in 2000 with *Apprendi v. New Jersey* changed the landscape with respect to nonrecidvist sentencing enhancements.[48] The Court held in *Apprendi* that "other than the fact of a prior conviction, 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."[49] Following *Apprendi*, juries rather than judges must find facts beyond the existence of a prior conviction that increase the otherwise applicable maximum sentence for an offense.[50] Thus, a nonrecidivist enhancement is essentially an element of an aggravated version of a crime.

Prior to the Supreme Court's decision in *Blakely v. Washington*[51] and *Booker*,[52] many guidelines regimes were mandatory. In the federal system, the sentencing ranges recommended by the guidelines were binding on federal judges; judges could depart upward or downward from the ranges only in certain extraordinary circumstances. In *Blakely*, however, the Supreme Court considered the State of Washington's mandatory guidelines regime and held that a jury must find beyond a reasonable doubt any fact that increased the top of the sentencing range provided by the guidelines.[53] Shortly thereafter, in *Booker*, the Court held that imposing sentencing enhancements under the federal guidelines based on factual findings by judges (other than

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Supreme Court has declined to overrule the prior conviction exception established in *Almendarez-Torres*. *See* United States v. Shepard, 544 U.S. 13, 25-26 (2005).

[47] Blakely v. Washington, 542 U.S. 296, 301 (2004).

[48] United States v. Booker, 543 U.S. 220, 244 (2005) (holding mandatory federal sentencing guidelines unconstitutional because they required judges to find facts that triggered higher sentences); *Blakely*, 542 U.S. at 301 (holding Washington State sentencing guidelines unconstitutional because factual findings by judges triggered higher sentences); *Apprendi*, 530 U.S. at 490 (holding that juries must find any facts — other than the fact of a prior conviction — that trigger sentences above other applicable statutory maximums).

[49] *Apprendi*, 530 U.S. at 490.

[50] *Blakely*, 542 U.S. at 303-04. The Supreme Court has not extended *Apprendi* to facts that trigger mandatory minimum sentences but do not permit a sentence above the otherwise applicable maximum sentence. Harris v. United States, 536 U.S. 545, 567 (2002).

[51] 542 U.S. at 301.

[52] 543 U.S. 220.

[53] *Blakely*, 542 U.S. at 303-04.

the fact of prior conviction) violated the Sixth Amendment's jury trial right.[54] As a remedy, the Court held that the federal guidelines would be merely advisory, and only statutory provisions would constrain sentences. This remedy eliminated the Sixth Amendment problem, as judges were no longer required to increase sentences above otherwise applicable maximum sentences based on their factual findings.[55]

Following *Blakely* and *Booker*, many states with mandatory guidelines regimes adopted advisory systems. Other states "*Blakely*-ized" their systems by submitting facts intended to increase sentencing ranges to juries.[56] In these guideline systems, the enhancements operate as they do with statutory provisions. Judges may determine the fact of the prior conviction, but a jury must find other facts triggering enhancements.[57] In advisory guideline regimes, such as in the federal system, judges must calculate and consider the range recommended by the guidelines, but the guideline range is not binding. In calculating the range, judges may find facts triggering both nonrecidivist and recidivist enhancements.[58]

Advisory guidelines and the enhancement provisions that appear in them continue to have a major effect on sentences. For example, despite *Booker*'s holding that the federal guidelines are advisory, federal judges impose sentences within the ranges recommended by the guidelines in the majority of cases. This Article discusses possible reasons for these trends below.[59]

C. Recidivist Enhancements

Recidivist enhancements play a central role in the federal sentencing guidelines[60] and appear in many federal statutes as well.[61] State guideline systems also provide harsher penalties for repeat offenders,

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[54] *Booker*, 543 U.S. at 244.

[55] *Id.* at 245-68.

[56] Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-*Blakely *Era*, 4 OHIO ST. J. CRIM. L. 27, 29-30 (2006).

[57] For example, Washington State has *Blakely*-ized its guidelines system. *See* WASH. REV. CODE § 9.94A.537(1)-(2) (2010).

[58] *Booker*, 543 U.S. at 245-68.

[59] *See infra* notes 133-34 and accompanying text.

[60] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 4.

[61] *See, e.g.*, 8 U.S.C. § 1326 (2006) (providing for recidivist enhancement in illegal reentry cases); 18 U.S.C. § 924(e) (2006) (providing for recidivist enhancement in firearm cases); 18 U.S.C. § 3559 (federal three strikes law); 21 U.S.C. § 851 (2006) (providing for recidivist enhancement in drug cases).

and all states have recidivism statutes.[62] This Article both provides an overview of recidivist enhancements and examines the purposes of these enhancements.

1. Overview of Recidivist Enhancements

Enhancing sentences for recidivists is an ancient concept.[63] Examples of special punishment for repeat offenders appear in the Bible.[64] In the 1600s in Massachusetts, exiled Quakers who returned to the colony had one ear cut off for the first reentry offense, the other ear cut off for the second offense, and their tongues bored through with a hot iron for the third offense.[65] In Connecticut in the late 18th century, a robber or burglar faced imprisonment and hard labor for ten years for a first offense and a life sentence for a second offense.[66] At around the same time, New York enacted a law requiring that courts sentence individuals convicted of their second felony to prison "at hard labor or in solitude, or both, for life."[67] Six states enacted habitual offender laws in the 1920s,[68] and by 1968, all states had some form of habitual offender provisions.[69] States enacted another wave of recidivist enhancements in the early 1990s; between 1993 and 1995, twenty-four states and the federal government enacted "three strikes laws."[70] Today, all states and the federal system have statutory recidivism enhancements,[71] and sentencing guideline regimes universally use criminal history as a primary factor — along with the seriousness of the offense — in calculating sentencing ranges.[72]

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[62] Roberts, *supra* note 5, at 304.

[63] Several scholars have traced the history of recidivist enhancements. *See* Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 616-18 (1987); Roberts, *supra* note 5, at 308-09; Turner et al., *supra* note 3, at 17.

[64] As Durham observes, *Leviticus 26* establishes a series of rules and warns of punishments if they are not obeyed. If after all these punishments there is still not obedience, "then [God] will punish you seven times more for your sins." *See* Durham III, *supra* note 63, at 616 (citing *Leviticus* 26:18).

[65] *Id.* at 617 (citing K. ERIKSON, WAYWARD PURITANS 117 (1966)).

[66] *Id.* (citing *Connecticut Public Records* 207 (May 1773)).

[67] Susan Buckley, Note, *Don't Steal a Turkey in Arkansas — the Second Felony Offender in New York*, 45 FORDHAM L. REV. 76, 80 n.39 (1976).

[68] Turner et al., *supra* note 3, at 17.

[69] *Id.*

[70] Ewing v. California, 538 U.S. 11, 15 (2003).

[71] Turner et al., *supra* note 3, at 16-17.

[72] *See generally* NAT'L CTR. FOR STATE COURTS, *supra* note 3 (surveying all state guideline systems around country).

Indeed, recidivist enhancements are not limited to the United States but appear in statutes around the world.[73]

In the U.S. federal system, enhancements appear in both statutes and the federal sentencing guidelines. A common statutory enhancement is the ACCA, which requires imposition of a fifteen-year mandatory minimum sentence for felons who possess a firearm after conviction of three "serious drug offenses" or "violent felonies."[74] Judges also frequently impose the second offender drug enhancement provision (the "851 enhancement"), which doubles the mandatory minimum sentences for drug distribution offenses committed after a prior felony drug conviction and requires a mandatory life sentence if the defendant has two prior felony drug convictions.[75] Under the federal sentencing guidelines, courts use prior convictions to calculate a defendant's criminal history category, and higher categories result in higher recommended sentencing ranges.[76] In addition, with regard to some offenses, prior convictions can also increase the offense level. These offense-level enhancements can lead to much lengthier sentences.[77]

2. Purposes of Recidivist Enhancements

Proponents of recidivist enhancements support them by reference to various theories of punishment. Indeed, the federal sentencing guidelines, which rely on criminal history to determine a defendant's sentencing range, explicitly state that a defendant's past criminal conduct is relevant to the four purposes of sentencing set forth by federal statute: retribution, deterrence, incapacitation, and rehabilitation.[78]

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[73] Roberts cites recidivist statutes in India, Ghana, Turkey, and China as examples. *See* Roberts, *supra* note 5, at 309.

[74] 18 U.S.C. § 924(e) (2006).

[75] 21 U.S.C. §§ 841(b)(1)(A), 851 (2006).

[76] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 4.

[77] One example of an offense-level enhancement is the firearm enhancement, which increases the offense level in cases involving firearms if the defendant has a prior "controlled substance offense" or "crime of violence." *Id.* § 2K2.1. The career offender guideline applies when the federal offense of conviction is a violent crime or a drug offense and the defendant has two prior convictions for a "controlled substance offense" or a "crime of violence." *Id.* The career offender provision raises the defendant's criminal history category to the highest category and also increases the offense level significantly. *Id.* § 4B1.1.

[78] The guidelines explain:

> The Comprehensive Crime Control Act sets forth four purposes of sentencing. A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is

Regarding retributive goals, some maintain that an offense committed by a recidivist is itself a more serious offense or that a repeat offender is more culpable.[79] Commentaries to some state guidelines also take this position.[80] One can argue, however, that a defendant's status as a recidivist should not affect a measure of the seriousness of the crime committed or what the appropriate punishment for that offense should be. Regardless of whether an offender committed previous offenses, the seriousness of an offense should depend only on the seriousness of the illicit act. Some scholars do in fact argue that prior convictions are wholly irrelevant to a retributivist analysis.[81] Other retributivist scholars argue that first offenders deserve a sentencing discount.[82]

> more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

Id. § 4A1.1, introductory cmt. (citation omitted).

[79] Roberts finds that the public (1) assigns harsher sentences to repeat offenders; (2) rates crimes as more serious if the offender has previous convictions; and (3) assigns higher culpability scores to repeat offenders. ROBERTS, *supra* note 6, at xi-xii; *see also* Julian V. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 AM. BEHAV. SCIENTIST 488, 491 (1996). Roberts argues that offenders with previous convictions should be considered more blameworthy and therefore are worthy of harsher punishments. *See generally* Julian V. Roberts, *Punishing Persistence*, 48 BRIT. J. CRIMINOLOGY 468 (2008).

[80] The federal guidelines state without further explanation that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.1, introductory cmt. Oregon's guidelines state: "From a 'just deserts' perspective, repeat criminal conduct after punishment for prior convictions warrants increasingly severe responses . . . . Historically and logically, an offender with a criminal record deserves more punishment for a subsequent crime than an offender without a record." OREGON CRIMINAL JUSTICE COUNSEL 50 (1989). North Carolina's guidelines state that criminal history is "viewed as a measure of culpability or blameworthiness and also as a predictor of future criminal conduct." NORTH CAROLINA SENTENCING AND POLICY ADVOCACY COMMITTEE 17 (1993).

[81] *See* FLETCHER, *supra* note 12, at 460-66; SINGER, *supra* note 12, at 67-74. *See generally* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008) (analyzing whether prior convictions — and prior good acts — are relevant to retributivist sentencing purposes); Roberts, *supra* note 5 (reviewing arguments by retributivist scholars).

[82] Andrew von Hirsch, *Previous Convictions*, *in* PAST OR FUTURE CRIMES 81-91 (1985); Martin Wasik, *Guidance, Guidelines and Criminal Record*, *in* SENTENCING REFORM: GUIDANCE OR GUIDELINES? 118 (M. Wasik & K. Pease eds., 1987).

The specific deterrence rationale for recidivist enhancements is that those who reoffend are more likely to recidivate and, therefore, must face harsher punishment to deter them from committing future crimes.[83] Critics counter that there is little evidence that longer sentences actually promote specific deterrence. A number of studies conclude that the length of time spent in prison does not affect recidivism rates.[84] Some criminologists have found that offenders sentenced to prison have *higher rates* of recidivism and recidivate more quickly than offenders who receive probation, particularly with respect to those who have committed drug offenses.[85]

[83] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.1, introductory cmt. ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.").

[84] A 1999 National Institute of Justice report studied the criminal careers of felony offenders from New Jersey sentenced in 1976 and 1977 and found that "[w]hether the offender was confined or given noncustodial sanctions made no difference" and "[t]he length of time the offender actually was confined made little difference." GOTTFREDSON, *supra* note 10, at 2. The report concluded that the study offered "little support, aside from incapacitation, for increased use of confinement, emphasis on longer terms, or more acceptance of specific deterrence as a crime control strategy." *Id.* An earlier study by the Department of Justice concluded:

> The great majority of recidivism studies of State prison releasees and all studies of Federal prison releasees report that the amount of time inmates serve in prison does not increase or decrease their likelihood of recidivism, whether recidivism is measured as a parole revocation, rearrest, reconviction, or return to prison. . . .
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> . . . Since at least the 1950s, the Federal Bureau of Prisons Office of Research and Evaluation has continually examined recidivism predictors, including time served, for Federal prison releasees. Time served in prison has never been found to decrease, or increase, the likelihood of recidivating when time served is examined alone in relation to recidivism, or when controls are introduced for demographic variables (including age), education, work experience, prior arrests, convictions, and incarcerations, drug and alcohol dependency, and post-arrest living arrangements.

U.S. DEP'T OF JUSTICE, *supra* note 10, at 41; *see also* RIORDAN, *supra* note 10, at 8 ("The available research suggests that sentencing practices do not have a significant impact on recidivism.").

[85] Spohn & Holleran, *supra* note 10, at 329. Another interesting view is offered by David A. Dana, who argues that "[c]ontrary to the assumptions in the existing literature, probabilities of detection increase for repeat offenders. As a result, the optimal-deterrence model dictates declining, rather than escalating, penalties for repeat offenders." David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 783 (2001).

General deterrence is another aim of recidivist enhancements. The rationale is that treating recidivist offenders more harshly than first time offenders will deter others from reoffending. Although some question the morality of punishing one individual to deter others,[86] most judges and policymakers accept general deterrence as a valid rationale of sentencing. Many question whether general deterrence works, however, arguing that most people are either unaware of penalties or do not think they will be caught when they commit a crime.[87] A number of studies suggest that increasing the length of sentences does not achieve significant, if any, general deterrent effects.[88]

[86] *See, e.g.*, IMMANUEL KANT, THE SCIENCE OF RIGHT 195 (W. Hastie trans., 1790) ("Juridical punishment can never be administered merely as a means for promoting another Good either with regard to the criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another.").

[87] *See, e.g.*, Gary Kleck et al., *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623 (2005) (stating that perceptions of punishment levels do not match actual levels and increases in penalties do not achieve general deterrent effects); Amy Baron-Evans, Sentencing by the Statute (Apr. 29, 2009) (unpublished manuscript, on file with the Office of Defender Services Training Branch) [hereinafter Baron-Evans, Sentencing by the Statute] ("Indeed, while many believe that the higher the sentence, the greater the effect in deterring others, the empirical research shows no relationship between sentence length and deterrence. The general research finding is that 'deterrence works,' in the sense that there is less crime with a criminal justice system than there would be without one. But the question for the judge is 'marginal deterrence,' i.e., whether any particular quantum of punishment results in increased deterrence and thus decreased crime. Here the findings are uniformly negative: there is no evidence that increases in sentence length reduce crime through deterrence.") (collecting citations).

[88] *See generally* ALFRED BLUMSTEIN ET AL., CRIMINAL CAREERS AND "CAREER CRIMINALS" (1986) (concluding that increases in severity of punishment do not produce significant deterrent effects); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176 (2008) ("The failure of crime rates to decline commensurately with increases in the rate and severity of punishment reveals a paradox of punishment: higher incarceration rates resulted in stable if not higher levels of crime.") (collecting studies); *see also* ALFRED BLUMSTEIN ET AL., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 95 (1978); Philip Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, *in* 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 213 (Norval Morris & Michael Tonry eds., 1980); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH 143 (Michael Tonry ed., 2003); Daniel Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH, *supra*, at 1; Daniel Nagin, *Deterrence and Incapacitation*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 345 (Michael Tonry ed., 1988); Lawrence W.

Proponents of recidivist enhancements also argue that the societal benefits of incapacitation support enhanced sentences. By detaining someone, you prevent that person from committing a crime for a certain period. Incapacitation was the primary goal behind the enactment of three strikes laws, which provide lengthy prison terms to repeat offenders. In fact, some scholars argue that the three strikes laws of the 1990s reflected a widespread, philosophical shift from retributivist justifications to incapacitation-based rationales.[89] Most of the political rhetoric around the California three strikes law focused on incapacitation and deterrence as the purposes of the statute.[90] Similar to the argument about whether general deterrence should affect sentencing, scholars debate the morality of using predictions about future dangerousness to justify incapacitation.[91]

Over the years, the Supreme Court has expressed varying, and sometimes inconsistent, views on the purposes of recidivist enhancements. In 1980, *Rummel v. Estelle* held that sentencing a three-time offender to life in prison without the possibility of parole did not violate the Eighth Amendment.[92] The Court stated that the goals of recidivist statutes are "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time."[93] The Court observed that "[t]his segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has

Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 453 (1993); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME AND JUSTICE 1, 28-29 (2006) (collecting citations). Studies do suggest that increasing the frequency of prosecution — i.e., the likelihood that law enforcement will detect the crime — can be effective at achieving general deterrence. *See* ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 45 (1999) (finding correlations between certainty of punishment and crime rates but not sentence severity and crime rates).

[89] *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 397 (1997) ("Renewed interest in multiple offender statutes like the Three Strikes legislation signals another dramatic shift from retribution to incapacitation and, to a lesser degree, deterrence as the primary justifications for punishment.").

[90] Vitiello, *supra* note 89, at 428 n.195, 429 n.206.

[91] *See, e.g.*, FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 42-75 (1995) (discussing debate about morality of incapacitation); Jacqueline Cohen, *Selective Incapacitation: An Assessment*, 1984 U. ILL. L. REV. 253, 253 (arguing that incapacitation based on future dangerousness is inconsistent with "just deserts" theory of punishment).

[92] Rummel v. Estelle, 445 U.S. 263, 264-65 (1980).

[93] *Id.* at 284-85.

demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."[94]

More recently in *Ewing v. California*, the Supreme Court upheld California's three strikes law against an Eighth Amendment challenge.[95] The plurality opinion observed that legislatures enacting three strikes laws around the country have "made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety."[96] The plurality cited *Rummel*, observing that the Court has "long viewed both incapacitation and deterrence as rationales for recidivism statutes."[97]

Curiously, the Supreme Court's most recent opinion on the topic expressed a very narrow view of the purposes of recidivist enhancements. At issue in *United States v. Rodriquez*[98] was whether judges should consider state recidivist enhancements in determining whether a prior state conviction had a sufficiently high maximum sentence to be a "serious drug offense" and, thus, trigger the ACCA.[99] The defendant in *Rodriquez* argued that the state recidivist statute was irrelevant to the assessment of whether a prior conviction was a "serious drug offense" because a defendant's status as a recidivist does not bear on whether the offense committed by the defendant was a serious one.[100] The Supreme Court rejected this view, observing that an offense committed by a repeat offender is "often thought to reflect greater culpability and thus to merit greater punishment."[101] The

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[94] *Id.*

[95] Ewing v. California, 538 U.S. 11, 30-31 (2003).

[96] *Id.* at 24-27.

[97] *Id.*

[98] 553 U.S. 377 (2008).

[99] ACCA provides a fifteen-year mandatory minimum sentence for defendants convicted of possessing a firearm or ammunition if they have three or more prior "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. § 924(e) (2006). In order to qualify, as a "serious drug offense," the state offense must have carried a maximum sentence of ten years or more. *Id.* The issue in *Rodriquez* was whether the maximum was determined based only on the elements of the prior offense of conviction or also based on recidivist provisions.

[100] *Rodriquez*, 553 U.S. at 1788. I worked on the Respondent's brief in *Rodriquez* with Yale Law School's Supreme Court Advocacy Clinic.

[101] *Id.* at 1789 ("When a defendant is given a higher sentence under a recidivism statute — or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history — 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' ").

Court reasoned that if a defendant's prior record has no bearing on the seriousness of the offense, "then it would follow that any increased punishment imposed under a recidivist provision would not be based on the offense of conviction but on something else — presumably the defendant's prior crimes or the defendant's 'status as a recidivist.' " Oddly, the Court said that it had rejected this understanding of recidivism statutes.[102] The Court reasoned that when a judge increases a sentence based on prior criminal history, then the punishment is 100% for the offense of conviction and not based on the defendant's "status as a recidivist."[103] Instead, "[t]he sentence 'is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.' "[104]

Thus, according to the Court, defendants receive punishment only for the offense of the conviction and not for their status as recidivists. The enhancement applies only because the subsequent offense itself is more serious. In other words, the Supreme Court in *Rodriquez* appears to take the view that recidivist enhancements serve only a retributive purpose.

Although *Rodriquez* characterizes this enhanced punishment as being solely for the seriousness of the latest crime,[105] the legislators and drafters of sentencing guidelines do not create recidivist enhancements to punish only the latest convicted offense. Legislatures and sentencing commissions generally point to deterrence and incapacitation as rationales for recidivist enhancements on the theory that a defendant's "status as a recidivist" makes him more likely to reoffend, and a harsher sentence will serve to incapacitate and deter.[106] Regarding the length of sentences for repeat offenders, the Court itself in *Rummel* stated that "[t]his segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."[107] Regarding retributive goals, legislatures and commissions sometimes express that a defendant's "status as a recidivist" makes him more deserving of

[102] The Court quoted *Nichols v. United States*, 511 U.S. 738, 747 (1994) (quoting Baldasar v. Illinois, 446 U.S. 222, 232 (1980)) (citations omitted), for the proposition that "[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant."

[103] Roberts, *supra* note 5, at 314.

[104] *Rodriquez*, 553 U.S. at 1789.

[105] Gryger v. Burke, 334 U.S. 728, 732 (1948).

[106] Roberts, *supra* note 5, at 320.

[107] Rummel v. Estelle, 445 U.S. 263, 270 (1980).

punishment.[108] Despite the fact that legislatures and sentencing commissions rarely justify enhancement provisions on the ground that the *offense* committed by a recidivist is itself more serious, *Rodriquez* appears to elevate this justification as the sole rationale of the enhancements.

This Article focuses on federal enhancements based on prior drug convictions. Although proponents of these provisions support them based on the various purposes of punishment — including retribution, deterrence, and incapacitation — the prior drug conviction enhancements do not further these goals in many cases.

II. FEDERAL ENHANCEMENTS BASED ON PRIOR DRUG CONVICTIONS

The remainder of this Article focuses on a common form of recidivist enhancements in the federal system: provisions that enhance sentences based on prior drug convictions.[109] Although a number of articles explore the purposes of recidivist enhancements, these studies rarely address federal enhancements based on prior drug offenses.[110] These enhancements have a large influence on federal sentences and contribute significantly to the growing federal prison population. In a prosecution for a federal drug offense, for example, a prior drug conviction can double or even triple the sentence.[111] In addition, the presence of prior drug convictions often increases sentences for people convicted in firearm and immigration cases.[112] This interaction is

[108] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.1, introductory cmt.

[109] *See, e.g.*, 18 U.S.C. § 924(e) (2006) (ACCA); 21 U.S.C. §§ 841(b), 851 (2006) (851 enhancement); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2K2.1 (enhancement in firearm cases for defendants with prior drug convictions); *id.* § 2L2.1 (enhancement in illegal reentry cases for defendants with prior drug convictions); *id.* § 4B1.1 (career offender provision).

[110] There is some literature analyzing the rationales for using prior convictions in sentencing. *See, e.g.*, Roberts, *supra* note 5 (considering history of recidivist provisions and how theories of punishment relate to provisions); Vitiello, *supra* note 89 (focusing on purposes of three strikes laws). However, scholars have not focused specifically on rationales for enhancements based on prior drug conviction in the federal system and the impact of *Booker* and *Shepard*.

[111] This Article explains these enhancements in detail below. *See, e.g.*, 21 U.S.C. §§ 841(b)(1)(A), 851 (851 enhancement); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.1 (career offender provision).

[112] 18 U.S.C. § 924(e) (requiring fifteen-year mandatory minimum sentence in firearm cases if defendant has qualifying convictions); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2K2.1 (providing enhancement in firearm cases for defendants with prior drug convictions); *id.* § 2L2.1 (providing enhancement in illegal reentry cases for defendants with prior drug convictions).

especially problematic because drug, firearm, and immigration offenses are the three most frequently prosecuted offenses in the federal system.[113] The rationales of sentencing do not justify the magnitude of these enhancements.

A. *Overview of Sentencing in the Federal System: Statutes and the Guidelines*

When sentencing defendants convicted of federal offenses, judges must abide by the statutory provisions that set minimum and maximum penalties. Some statutory provisions require mandatory minimum sentences or increase mandatory minimums if a defendant has a prior drug conviction.[114] Other provisions increase the maximum statutory sentence permitted.[115] Across the board, however, statutory enhancements remain mandatory post-*Booker*.[116]

Judges must also determine the sentencing range provided by the federal sentencing guidelines. Unlike statutory provisions, guideline ranges are no longer mandatory after *Booker*. Instead, judges must consider the guidelines' recommended range along with various statutory factors. The guidelines use prior convictions to calculate a defendant's criminal history category. Higher categories result in higher recommended sentencing ranges.[117] In addition, some types of prior convictions — such as prior drug convictions — can increase both the criminal history category and the offense level. These offense-level enhancements can lead to much lengthier sentences.[118]

[113] One-third of the federal criminal prosecutions are for drug offenses. U.S. SENTENCING COMM'N, THE CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 8 (2009) [hereinafter THE CHANGING FACE]. Drug crimes are the most frequently prosecuted offenses in the federal system. *Id.* Immigration offenses are the second most frequently prosecuted offenses and account for 24.2% of cases. *Id.* Firearm cases are third and account for 11.5% of cases. *Id.*

[114] Under the drug trafficking statute, a prior felony drug conviction triggers a mandatory minimum sentence and raises the statutory maximum. *See* 21 U.S.C. §§ 841(b)(1)(A), 851.

[115] Under the illegal reentry statute, a prior drug conviction that qualifies as an aggravated felony raises the statutory maximum. 8 U.S.C. § 1326(b) (2006).

[116] Kimbrough v. United States, 552 U.S. 85, 107 (2007) ("[S]entencing courts remain bound by the mandatory minimum sentences prescribed in the [statutes].").

[117] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 4.

[118] *Id.* § 2K2.1 (enhancement in firearm cases for defendants with prior drug convictions); *id.* § 2L2.1 (enhancement in illegal reentry cases for defendants with prior drug convictions); *id.* § 4B1.1 (career offender provision).

Ultimately, however, judges must impose a sentence that is sufficient, but not greater than necessary, to serve the purposes of sentencing.[119]

The U.S. Sentencing Commission created the federal sentencing guidelines pursuant to Congressional directives. Congress instructed the U.S. Sentencing Commission to write guidelines that would carry out the purposes of sentencing set forth in 18 U.S.C. § 3553(a).[120] Under the statute, the Commission must seek to "provide certainty and fairness" in sentencing to: "avoi[d] unwarranted sentencing disparities;" to "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;" and to "reflect, to the extent practicable [sentencing-relevant] advancement in [the] knowledge of human behavior."[121] Congress intended that the Commission would constantly refine the guidelines to reflect the study of empirical data and to incorporate the views of judges around the country.[122] The Commission itself viewed its original guidelines as a first step in an "evolutionary process."[123] By incorporating the Commission's "research, experience, and analysis"[124] and by developing a sentencing common law under which judges could disagree with guidelines, the Commission could revise and refine the guidelines to incorporate judicial views.[125] Unfortunately, the Commission has not always lived up to expectations.[126] The vast majority of guidelines amendments increase sentences,[127] and the Commission has for the most part not responded to criticism from judges, practitioners, and scholars about enhancements based on prior drug convictions.

Fortunately, judges enjoy a great deal more flexibility regarding guidelines enhancements post-*Booker*. Indeed, subsequent Supreme

[119] *Id.* § 101; 18 U.S.C. § 3553(a) (2006) (providing that court shall impose sentence that is "sufficient, but not greater than necessary" to comply with purposes of sentencing).

[120] 28 U.S.C. § 991(b) (2006).

[121] *Id.*

[122] *Id.*

[123] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 1.

[124] *Id.*

[125] Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 29-30 (1999).

[126] Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker, 30 CHAMPION 32, 33-36 (Sept./Oct. 2006) [hereinafter Baron-Evans, *Continuing Struggle*].

[127] *Id.* at 34 & n.39.

Court cases, including *Rita v. United States*,[128] *Gall v. United States*,[129] *Kimbrough v. United States*,[130] and *Spears v. United States*,[131] emphasize that the Court meant what it said in *Booker*; federal sentencing guidelines are merely advisory. These Supreme Court decisions establish that judges may disagree with the guidelines' recommended sentencing range in particular cases. Moreover, at least where a guideline is not the product of "empirical data and national experience," judges may disagree with the guideline as a matter of policy and impose a lower sentence even in ordinary, "mine-run" cases.[132]

Despite their now-advisory nature, the guidelines continue to have a substantial influence on federal sentences. In the majority of cases, judges still sentence within the ranges recommended by the guidelines. Following *Booker* and before the Supreme Court's decisions in *Gall* and *Kimbrough*, judges imposed sentences within the guidelines ranges in 61.3% of cases. Judges imposed below-range sentences without government support in only 12.2% of cases.[133] Following the Supreme Court's emphasis in *Gall* and *Kimbrough* that the guidelines are truly advisory even in "the mine-run" cases, the rate of non-government sponsored below-range sentences increased only a small amount to 13.8% of cases.[134]

Although judges continue to follow the guidelines in most cases, there are exceptions. Some judges criticize particular guideline provisions, such as the career offender guideline and the illegal reentry guideline.[135] Advocates, such as the lawyers with the National Federal Defender Sentencing Resource Counsel, have written persuasive articles "deconstructing" particular guidelines and demonstrating how empirical evidence and the purposes of sentencing do not support the guidelines.[136]

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[128] 551 U.S. 338, 347, 350-52 (2007).

[129] 552 U.S. 38, 46 (2007).

[130] 552 U.S. 85, 90 (2007).

[131] 129 S. Ct. 840, 842 (2009).

[132] *Kimbrough*, 552 U.S. at 109-10. In *Kimbrough* the Court found that the crack-cocaine guidelines "do not exemplify the Commission's exercise of its characteristic institutional role" because they did not take into account "empirical evidence and national experience." *Id.*

[133] U.S. SENTENCING COMM'N, POST-*KIMBROUGH*/*GALL* DATA REPORT 2, tbl.1 (2008) [hereinafter U.S. SENTENCING COMM'N, POST-*KIMBROUGH*/*GALL*].

[134] *Id.*

[135] *See infra* notes 213-15, 268-69 and accompanying text.

[136] Articles and other resources from the National Federal Defender Sentencing Resource Counsel are available at http://www.fd.org/odstb_SentencingResource3.htm.

These arguments persuade some judges, who, in turn, decline to follow the guidelines.[137] Nonetheless, sentencing judges appear to continue to feel constrained by the ranges recommended by the guidelines or believe that the guidelines recommend appropriate sentences. What accounts for these trends remains unclear. Judge Nancy Gertner argues that "[g]uidelines were likely to figure prominently in post-*Booker* sentencing because of what cognitive researchers call 'anchoring.' "[138] She explains:

> Anchoring is a strategy used to simplify complex tasks, in which "numeric judgments are assimilated to a previously considered standard." When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction. In effect, the 300-odd page Guideline Manual provides ready-made anchors.[139]

The reluctance of federal judges to impose sentences below the guidelines may come from other sources as well. Some may be concerned about reversal. Indeed, many judges who imposed sentences below the guidelines after *Booker* had their decisions reversed.[140] Reversal rates, however, should diminish since the *Gall* and *Kimbrough* decisions.

In addition to fear of reversal, some judges expressed concern after the *Booker* decision that dramatic deviations from the guidelines could generate large disparities across the country and cause Congress to react by enacting more mandatory minimum sentences or a mandatory guidelines regime.[141] This concern may also explain some sentencing trends.[142] In sum, although judges now have the ability to disregard sentencing enhancement guidelines, these guidelines continue to play a large role in federal sentencing.

Next, this Article considers the most common statutory and guideline provisions that enhance sentences based on prior drug

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[137] *See infra* notes 213-15, 268-69 and accompanying text.

[138] Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. 137, 138 (2006) (in pocket part of journal).

[139] *Id.* (footnote omitted).

[140] James R. Dillon, *Doubting Demaree: The Application of* Ex Post Facto *Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033, 1089-94 (2008) (analyzing reversal rates).

[141] *See* Douglas Berman, *Clairborne and Rita –* Booker *Cleanup or Continued Confusion?*, 19 FED. SENT'G REP. 151, 152 (2007).

[142] *Id.*

convictions. Part II.B below examines the rationales provided for the enhancements by Congress and the Sentencing Commission, and explores whether the purposes of sentencing support the magnitude of the enhancements. The culmination of this study suggests that enhancements are largely not furthering their intended purposes and may in fact be counterproductive. Federal judges now have the power in light of *Booker* to reconsider whether guidelines enhancements fulfill the purposes of sentencing. Until Congress takes action, judges remain bound by mandatory statutory enhancements. As discussed in Part III, however, a rigorous application of *Shepard* allows judges to avoid imposing statutory enhancements based on drug offenses in many cases. In these cases, judges can now consider the extent to which a prior drug conviction should enhance a sentence.

B. Federal Enhancements Based on Drug Convictions

Enhancements based on prior drug convictions appear in statutes and in the guidelines. Below is an analysis of enhancements commonly applied in the most frequently prosecuted offenses in the federal system: drug distribution offenses, firearm offenses, and immigration offenses.[143]

1. Drug Enhancements for Drug Offenses

Approximately one-third of the federal criminal prosecutions are for drug offenses,[144] and the majority of federal prisoners serve sentences for drug offenses.[145] In the past twenty-five years, the percent of the federal prison population serving time for a drug offense has increased from twenty-five percent to fifty-five percent.[146] The percentages are even higher for women and minorities.[147] People convicted of federal

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[143] THE CHANGING FACE, *supra* note 113, at 8.

[144] *Id.*

[145] THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1 (2006), *available at* http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf [hereinafter THE SENTENCING PROJECT, PRISON POPULATION].

[146] THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 1 (2006) [hereinafter THE SENTENCING PROJECT, EXPANDING PRISON POPULATION].

[147] Between 1994 and 2002, the average time served by African Americans for a drug offense increased by seventy-three percent as compared to an increase of twenty-five percent for white drug offenders. THE SENTENCING PROJECT, PRISON POPULATION, *supra* note 145, at 2. In 2003, 65.5% of white female federal prisoners were serving drug sentences — for black women the figure was 63.3%, and for "other" women the figure was 48.2%. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE 515 (2003), http://www.albany.edu/sourcebook/pdf/t656.pdf.

drug offenses often receive substantially increased sentences based on prior drug convictions. This Article will discuss both the statutory 851 enhancement and the career offender enhancement in detail below.

a. 851 Enhancement

The 851 enhancement, which refers to 21 U.S.C. § 851, is a statutory provision that doubles the mandatory minimum sentences applicable in federal drug distribution offenses when the defendant committed a prior "felony drug offense."[148] The enhancement also raises the maximum possible sentence. Under § 851, the government has discretion to seek an enhanced sentence through filing a notice.[149] If a prosecutor seeks the 851 enhancement, the judge must apply it. The effect of this decision is staggering: it increases a five-year mandatory minimum sentence to ten years and a ten-year mandatory minimum to twenty years.[150] The presence of two such convictions can result in a mandatory life sentence for a nonviolent drug offense.[151]

Under the Bush Administration, the filing of 851 notices became much more common.[152] A memorandum issued by John Ashcroft in 2003 sets forth Department of Justice policy regarding 851 enhancements.[153] Prosecutors must file enhancements unless narrow

[148] 21 U.S.C. §§ 841(b), 851 (2006). Under § 851, penalties for federal drug possession cases may also be increased. *Id.* § 844(a); *see also infra* note 375.

[149] *Id.* § 851(a)(1) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . .").

[150] The highest penalties arise for convictions under 21 U.S.C. § 841(b)(1)(A). This provision applies when the offense involved particular quantities of specific drugs. A first-time drug offender convicted under § 841(b)(1)(A) faces a statutory sentence range of ten years to life. With a prior felony drug conviction, the mandatory minimum increases to twenty years. With two prior felony drug convictions, a mandatory life sentence applies. *Id.* § 841(b)(1)(A). Section 841(b)(1)(B) applies to offenses involving somewhat lower quantities of drugs. A five-year mandatory minimum applies with no prior felony drug convictions. With a prior conviction, it increases to ten years.

[151] *Id.*

[152] While it appears that this trend has continued, the evidence is anecdotal, as there do not appear to be current statistics available. The Sentencing Commission reported data from 1995 and 2000 in its 2004 report, *Fifteen Years of Guidelines Sentencing*. The data showed that the government filed 851 enhancements in 6.5% of eligible cases in 1995 and in 6.7% in 2000. FIFTEEN YEAR REPORT, *supra* note 13, at 89. The Commission has not updated the data.

[153] *See* Memorandum from John Ashcroft, U.S. Att'y Gen., to All Federal Prosecutors (Sept. 22, 2003) (on file with Author) [hereinafter Ashcroft Charging Memo] (regarding "Department Policy Concerning Charging Criminal Offenses,

exceptions exist.[154] The DOJ has not revised the memorandum under the new Administration.

A wide range of prior convictions trigger the 851 enhancement. For example, a conviction for simple possession of drugs qualifies as a "prior felony drug offense," as long as it was punishable by more than one year of imprisonment.[155] Moreover, there is no restriction on the use of old convictions. For example, a fifty-year-old defendant convicted of distributing fifty grams or more of crack cocaine faces a mandatory minimum sentence of ten years' imprisonment.[156] Even a simple drug possession conviction from when the defendant was

Disposition of Charges, and Sentencing").

[154] The memorandum provides:

> The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district. Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but only in the context of a negotiated plea agreement, and subject to the following additional requirements:
>
> > a. Such authorization must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys' Manual. In the context of a statutory enhancement that is based on prior criminal convictions, such as an enhancement under 21 U.S.C. § 851, such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.

Id.

[155] The statute defines the term "prior felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (2006).

[156] *Id.* § 841(b)(1)(A). Defendants convicted of powder cocaine offenses are treated much less harshly — a defendant must distribute 5,000 grams of powder cocaine to face the same penalties. *Id.*

eighteen years old could spike the mandatory minimum sentence to twenty years. Additionally, the mandatory minimum sentence doubles only when defendants have prior drug convictions. A recent robbery or murder conviction, for example, would not trigger this doubling enhancement.

Congress provided little justification for this remarkable increase. Congress originally enacted the relevant statutory provisions as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[157] which attempted to provide "an overall balanced scheme of criminal penalties for offenses involving drugs."[158] Deterrence and incapacitation rationales were central goals of the law.[159] Under the original statute enacted in 1970, only prior federal offenses triggered enhanced penalties.[160] Congress did not provide a specific rationale for these enhancements, but stated simply that "second offenses carry double the penalty of first offenses."[161]

In 1984, Congress expanded the second offender provision to include state and foreign offenses as well.[162] With the 1984

[157] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). Prior to the 1970 Act, scattered laws punished acts regarding drugs and there was no comprehensive scheme. *See* H.R. REP. NO. 91-1444, pt. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4571 ("Since 1914 the Congress has enacted more than 50 pieces of legislation relating to control and diversion, from legitimate channels, of those drugs referred to as narcotics and dangerous drugs. This plethora of legislation has necessarily given rise to a confusing and often duplicative approach to control of the legitimate industry and to enforcement against the illicit drug traffic. This bill collects and conforms these diverse laws in one piece of legislation . . . .").

[158] H.R. REP. NO. 91-1444, at 1. The Act purported to accomplish its goal of dealing with the growing drug problem: "(1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." *Id.*

[159] *See* S. REP. NO. 91-613, at 10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 (referring to § 408, later codified as § 841: "This section . . . is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation.").

[160] 84 Stat. 1236, 1261 (1970).

[161] H.R. REP. NO. 91-1444, at 1. Before Congress enacted this provision in 1970, a prosecutor was required to file an information "setting forth [any] prior convictions." *See* United States v. Noland, 495 F.2d 529, 530 (5th Cir. 1974); *see also* 26 U.S.C. § 7237(c)(2) (1964). The district court was then required to sentence the defendant to recidivist penalties unless the defendant demonstrated the absence of a prior conviction. *See* 26 U.S.C. § 7237(c)(2).

[162] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068

amendments, Congress responded to the concern that "[i]llicit trafficking in drugs is one of the most serious crime problems facing the country, yet the present penalties for major drug offenses are often inconsistent or inadequate."[163] Congress intended the amendments "to provide a more rational penalty structure for the major drug trafficking offenses."[164] One major change was to make punishment dependent on the quantity of the controlled substance involved.[165] Congress did not specifically address the purposes of expanding the prior conviction definition, although presumably the change was to further the general purpose of increasing penalties and providing for more consistency among sentences.[166]

In many cases, the doubling of the mandatory minimum sentence for a recidivist drug offender does not serve the purposes of sentencing. Even accepting the view that a repeat offender has committed a more serious offense and is more culpable than a first offender, the degree of enhancement under the 851 enhancement appears greater than that necessary to provide just punishment for the later offense. In addition, overall, there is little evidence that longer sentences actually achieve specific deterrence goals, and some studies find that incarcerating drug offenders increases rather than reduces recidivism.[167] Studies for the most part find no significant general

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(1984).

[163] H.R. REP. NO. 98-1030, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3437.

[164] S. REP. NO. 98-225, at 255 (1983).

[165] *Id.*

[166] Regarding the changes to the prior conviction definition, the Senate Report observed simply:

> These maximum penalties would be doubled where the defendant has a prior felony drug conviction. The amendment's description of the prior offense which may trigger the more severe penalty does, however, differ from the description used in current law. In current law, this enhanced sentencing is available only in the case of a prior federal felony drug conviction. The amendment would permit prior state and foreign felony drug convictions to be used for this purpose as well.

Id. at 258-59.

[167] *See supra* notes 87-89 and accompanying text; *see also* Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, *in* DRUGS AND CRIME 188 (Doris L. MacKenzie & Craig D. Uchida eds., 1994). In addition, studies reveal that sending repeat drug offenders to mandatory drug treatment programs results in lower rates of recidivism than imposing prison sentences. Steven Belenko et al., *Recidivism Among High-Risk Drug Felons: A Longitudinal Analysis Following Residential Treatment*, 40 J. OFFENDER REHABILITATION 105, 106 (2004). This study assessed the long-term effects of diversion to a long-term residential community treatment program for repeat felony drug offenders charged with drug sales and facing mandatory incarceration in state prison.

deterrent effect from long prison sentences,[168] and there is a strong argument that incapacitation of drug dealers does not reduce the prevalence of drug offenses.[169]

To achieve an overall reduction in drug trade, particularly in urban areas, there are strategies that appear much more effective than imposing long prison sentences on a small percent of individual drug dealers. For example, Professor David Kennedy has employed strategies to shut down open drug markets in communities by directly engaging drug dealers and offering them a way out of their behavior, helping community members establish new norms, and promising and delivering law enforcement sanctions if their behavior continues. His projects have resulted in major reductions in crime.[170] Some scholars

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Offenders who completed the 18-24 month program had all their charges dismissed. Dropouts returned to court for prosecution and received state prison sentences. The study concluded:

> Compared with a closely matched sample of offenders sentenced to prison, Drug Treatment Alternative to Prison (DTAP) program participation generally reduced the prevalence and annual rate (adjusting for time in the community) of recidivism, and delayed time to first rearrest. In multivariate models of rearrest prevalence and adjusted annual rearrest rate, DTAP program participation was related to lower recidivism at significance levels between .05 and .10, after controlling for criminal history and other covariates. These findings suggest that diverting high-risk, prison-bound felony drug sellers to long-term treatment can yield significant, long-term reductions in recidivism.

Id.

Given this data, there is significant cause to doubt that doubling sentences for drug offenders with prior drug convictions furthers the goal of specific deterrence. Indeed, the long sentences may even be counterproductive to the goal of specific deterrence.

[168] *See supra* notes 91-93 and accompanying text.

[169] *See, e.g.*, FIFTEEN YEAR REPORT, *supra* note 13, at 134 (Sentencing Commission found support for the view that "[i]ncapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else").

[170] *See generally* TERRELL HAYES, ASSESSING THE HIGH POINT CRIME INITIATIVE: A CASE STUDY IN COMMUNITY-POLICE COLLABORATION (1997) (assessing Kennedy's initiative in High Point, NC, which resulted in a reduction of crime); David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention*, NAT'L INST. OF JUST. J. 262, 262 (2009). David Kennedy describes his High Point Intervention as follows:

> A particular drug market is identified; violent dealers are arrested; and nonviolent dealers are brought to a 'call-in' where they face a roomful of law enforcement officers, social service providers, community figures, ex-offenders and 'influentials' — parents, relatives and others with close, important relationships with particular dealers. The drug dealers are told that (1) they are valuable to the community, and (2) the dealing must stop. They are offered social services. They are informed that local law enforcement has worked up cases on them, but that these cases will be

maintain that "legitimacy-based" law-enforcement policies can do much more to reduce crime than stiff penalties.[171]

Federal judges, who see up-close individuals facing these sentences, mostly think that the drug sentencing laws are too severe. A 2004 survey found that 73.7% of district court judges and 82.7% of circuit court judges believe that "drug punishments are greater than appropriate to reflect the seriousness of drug trafficking offenses."[172] Indeed, federal judges have spoken out against mandatory minimum sentences,[173] and several prominent judges have even stepped down from the bench citing their opposition to mandatory minimum sentences in drug cases.[174] Public opinion as a whole may be moving

> 'banked' (temporarily suspended). Then they are given an ultimatum: If you continue to deal, the banked cases against you will be activated.

Id. Some commentators have criticized Kennedy's methods. *See, e.g.*, John Seabrook, *Don't Shoot*, NEW YORKER, June 22, 2009, at 32-41. Critics argue that Kennedy's strategy does not ensure that the drug dealers ultimately leave behind the life of crime, as, potentially, "[n]one of the root-cause problems behind drugs and crimes were solved; drug dealing may have moved indoors, or to other neighborhoods, or to nearby cities." *Id.*

[171] *See* Fagan & Meares, *supra* note 88, at 656-60; Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 657 (2009).

[172] *Id.* at 52.

[173] In August 2003, U.S. Supreme Court Justice Anthony M. Kennedy said in remarks before the American Bar Association, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust." *See* Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, http://www.mandatorymadness.org/speech-at-the-american-bar.html (last visited Mar. 21, 2010). Other judges have criticized mandatory minimum sentences. For example, Spencer Letts, U.S. District Judge in the Central District of California, said: "Statutory mandatory minimum sentences create injustice because the sentence is determined without looking at the particular defendant. . . . It can make no difference whether he is a lifetime criminal or a first-time offender. Indeed, under this sledgehammer approach, it could make no difference if the day before making this one slip in an otherwise unblemished life the defendant had rescued 15 children from a burning building or had won the Congressional Medal of Honor while defending his country." *See* John Nichols, *Judge Resigns over Congressional Meddling*, NATION (blog posting) (June 23, 2003) http://www.thenation.com/blogs/thebeat/780/judge_resigns_over_congressional_meddling (last visited Mar. 21, 2010).

[174] In 2003, Judge John S. Martin, U.S. District Judge in the Southern District of New York, resigned from the bench. In a *New York Times* opinion piece he described the distress he felt at "being part of a sentencing system that is unnecessarily cruel and rigid" and cited the crack-cocaine sentencing disparity as an example. He wrote: "Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant's incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that

away from support for three strikes laws and other laws that punish harshly based on prior convictions. A 1997 study of public opinion by the Sentencing Commission found that "there was little support for sentences consistent with most habitual offender legislation."[175] A more recent study of the three strikes law in California found that support for the penalties was substantially lower if the prior offenses were drug crimes rather than violent crimes.[176] In addition, there is increasing public support for alternatives to incarceration for nonviolent drug offenders.[177]

In addition, the 851 enhancement furthers racial disparities. The enhancement doubles the already severe sentences required in cases involving crack cocaine, the vast majority of which involve African American defendants.[178] The disparities between the sentences received in crack and powder cocaine cases have been widely criticized as unjust.[179] Under the current drug statutes, a 100:1 ratio exists. This means that the quantity of drugs needed to trigger a

has been a hallmark of the American system of justice." John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31. Judge Paul G. Cassell resigned from the bench in 2007, and shortly thereafter wrote an op-ed in the *Washington Post* criticizing federal sentencing law relating to crack cocaine penalties. *See* Paul G. Cassell, *Repairing a Crack in the System*, WASH. POST, Nov. 12, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/12/AR2007111201543.html. Prior to that, he called a mandatory sentence he had to impose "unjust, cruel and irrational." *See* Sasha Abramsky, *The Dope Dealer Who Got 55 Years: Even the Judge Called It Cruel, Unusual and Irrational*, PROGRESSIVE (June 2006).

[175] U.S. SENTENCING COMM'N, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES, Executive Summary (1997).

[176] THE SENTENCING PROJECT, AGING BEHIND BARS: "THREE STRIKES" SEVEN YEARS LATER 8 (2001). As of March 31, 2001, 57.9% of "third strike" cases in California were for non-violent offenses. And although ninety-three percent of those surveyed in California do support three-strike sentencing for those convicted of three violent, serious felonies, only sixty-five percent supported such a sentence structure for those with three serious drug violations, and only forty-seven percent supported the sentencing structure for serious property crimes. As the crimes become less serious, support for the legislation decreases, and the majority of third-strike cases in California were for less serious offenses. *Id.*

[177] *See generally* THE SENTENCING PROJECT, CHANGING DIRECTION? STATE SENTENCING REFORMS 2004-2006 (2007) (outlining reforms by states to increase drug treatment options and diversion in drug cases).

[178] In 2002, 81.4% of crack cocaine defendants were African American, while about two-thirds of crack cocaine users in the general population are white or Hispanic. THE SENTENCING PROJECT, PRISON POPULATION, *supra* note 145, at 2. The average sentence for a crack cocaine offense in 2002 (119 months) was more than three years greater than for powder cocaine (78 months). *Id.*

[179] *See, e.g.*, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* (2006) (discussing criticism of crack and cocaine disparities).

mandatory minimum sentence for a powder cocaine offense is 100 times greater than the quantity of crack cocaine that triggers the same offense. For example, someone convicted of distributing five grams of crack cocaine (about the weight of two sugar packets) faces a mandatory minimum sentence of five years. To be subject to the same sentence, a defendant needs to distribute 500 grams of powder cocaine. The 851 enhancement doubles the sentence if the defendant has a prior conviction, and, thus, the penalties for crack offenses can become even longer.[180]

After criticizing the 100:1 ratio for many years,[181] the Sentencing Commission recently promulgated an amendment that somewhat reduces the disparity in treatment of crack and powder offenses under the guidelines.[182] This amendment, however, did nothing to change the statutory penalties that apply in crack cocaine cases. The Obama Administration has called for Congress to amend the drug laws to treat crack cocaine and powder cocaine equivalently,[183] and bills addressing the disparity are pending in Congress.[184] Yet despite the

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[180] A defendant convicted of distributing five grams of crack is subject to a five-year mandatory minimum sentence. With a prior drug conviction, the mandatory sentence is ten years. 21 U.S.C. § 841(b)(1)(B) (2006). Similarly, a 50-gram crack offense is punishable by ten years but the punishment doubles to twenty years if the defendant has a prior conviction. *Id.* § 841(b)(1)(A). For powder cocaine offenses, the quantity needed to trigger these mandatory minimum sentences is 100 times more than that for crack cocaine offenses. Thus, 500 grams of powder cocaine triggers a five-year sentence (and a ten-year one if the defendant has a prior drug conviction), and 5 kilograms triggers the ten-year sentence. *See* 18 U.S.C. § 841(b) (2006).

[181] *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6 (2007); U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90-103 (2002); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at xii-xv (1995) [hereinafter U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS 1995].

[182] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2D1.1.

[183] Lanny A. Breuer, the chief of the Criminal Division in the Justice Department, testified before the Crime and Drugs Subcommittee of the Senate Judiciary Committee in April of 2009, in what the *New York Times* observed as "the first time such a high-level law enforcement official has endorsed legislation to eliminate inequities in cocaine sentencing." Solomon Moore, *Justice Dept. Seeks Equity in Sentences for Cocaine*, N.Y. TIMES, Apr. 29, 2009, at 17. A copy of Lanny Breuer's testimony is available at http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf.

[184] On March 17, 2010 the Senate approved a bill that reduced the ratio to 18:1. Jim Abrams, *Senate Votes to Change Cocaine Sentencing Rules*, WASH. POST, Mar. 17, 2010. A bill equalizing treatment of the substances passed through the House Judiciary Committee in July 2009. Carrie Johnson, *Senate Bill Would Reduce Sentencing Disparities in Crack, Powder Cocaine Cases*, WASH. POST, Mar. 13, 2010, at A3.

Administration's position, Assistant United States Attorneys ("AUSAs") throughout the country continue to file second offender notices under § 851 in crack cocaine cases. Nothing in the statute requires them to do so — filing enhancements is wholly subject to prosecutorial discretion.[185] The Department of Justice has a means for lessening the impact of the crack/powder cocaine disparity without congressional action. The DOJ could simply instruct AUSAs to cease filing second offender notices in crack cases.[186]

In sum, there is considerable doubt as to whether the 851 enhancement furthers the rationales of sentencing, and there is growing evidence that it is instead undermining those purposes and furthering racial disparities. The Article later considers both means for avoiding the 851 enhancement under current doctrine and possible interventions by Congress.

b. Career Offender Enhancement

Similar to statutory drug enhancements, application of the career offender guideline can drastically increase a defendant's sentence. Because the career offender enhancement is a guidelines provision, this enhancement is advisory for judges. The career offender guideline applies when: (1) a defendant was at least eighteen years old at the time he committed the federal offense of conviction; (2) the federal offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[187]

Once classified as career offenders, defendants' base offense levels increase substantially and their criminal history scores increase to the

[185] Courts may only decline to impose the enhancement if vindictiveness motivated the filing of the notice. *See, e.g.*, United States v. Jenkins, 537 F.3d 1, 3 (1st Cir. 2008) (holding that there was no showing of vindictiveness and enhancement applied).

[186] The threat of filing 851 enhancements provides strong leverage for prosecutors to obtain cooperation from defendants, as the only way a judge can impose a sentence under the mandatory minimum is if the government files a motion stating that a defendant provided substantial assistance to the government. 18 U.S.C. § 3553(e) (2006). Many prosecutors would be reluctant to give up this tool in crack cases.

[187] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.1(a). Under the guidelines, "controlled substance offense" means an offense under federal or state law "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." *Id.* § 4B1.2.

maximum category: category VI.[188] This can have the effect of doubling, tripling, or even quadrupling a defendant's recommended guidelines range. For example, consider a defendant who has pleaded guilty to possessing with intent to distribute five grams of crack. This defendant has two prior state drug convictions, both of which resulted in a sentence of probation. If the career offender guideline does not apply (and assuming no other enhancements or reductions apply), the defendant's sentencing range will be fifty-one to sixty-three months' imprisonment.[189] If the prior drug convictions count as "controlled substance offenses" under the guidelines, however, the guidelines classify the defendant as a career offender and increase the sentencing range to 188 to 235 months' imprisonment.[190]

Application of the career offender provision has grown over the years. In 2008, courts applied the provision in 2,321 cases, 1,740 of which were drug cases.[191] By contrast, in 1996, courts applied this provision in only 949 cases, and 616 of these cases were drug prosecutions.[192]

The Sentencing Commission promulgated the career offender guideline provision in response to a provision of the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984. The provision, 18 U.S.C. § 994(h), directed the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized by statute" for offenders who are at least eighteen years old, who have been convicted of a crime of violence or particular forms of drug trafficking offenses, and who previously have been convicted of two or more such offenses.[193]

Over the years, the Commission has added state and other drug offenses not initially listed in § 994(h) to the career offender

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[188] *Id.* § 4B1.1(b).

[189] *Id.* § 2D1.1, ch. 5, pt. A.

[190] *Id.* § 4B1.1., ch. 5, pt. A.

[191] U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.22 (2008) [hereinafter U.S. SENTENCING COMM'N, 2008 SOURCEBOOK].

[192] U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.22 (2006) [hereinafter U.S. SENTENCING COMM'N, 2006 SOURCEBOOK]. 1996 was the first year that the Sentencing Commission began collecting this information.

[193] 28 U.S.C. § 994(h) (2006). A comprehensive examination of the history of the career offender guideline and a persuasive argument for why the guideline fails to further the purposes of sentencing is contained in Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline* (Aug. 29, 2008), *available at* http://www.fd.org/odstb_SentDECON.htm.

guideline's definition of "controlled substance offenses."[194] Some courts of appeals held that the Commission exceeded its authority under § 994(h) by expanding the list of drug offenses.[195] The Commission responded by stating that the expansion was justified because it relied not only on § 994(h) as authority for the guideline but also on its general guideline promulgation authority under 28 U.S.C. §§ 994(o) and (p).[196] Thus, the Commission has taken the position that the career offender provision is not simply a response to Congressional mandate, but reflects the considered judgment and expertise of the Commission.

Yet despite this statement, and its expansion of the career offender guideline over the years, the Commission has also observed problems with the provision. The Commission stated in a 2004 report that the career offender provision of the guidelines, at least with respect to its application to repeat drug dealers, has unwarranted adverse effects on minority defendants without clearly advancing a purpose of sentencing.[197] The report found that although only twenty-six percent of the offenders sentenced in 2000 were African American offenders, African American offenders constituted fifty-eight percent of the offenders subject to the career offender provision. According to the

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[194] *See* Baron-Evans et al., *supra* note 193, at 24-28 (detailing these additions).

[195] *See id.* at 25 (collecting cases).

[196] The Commission stated:

> Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute. ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. REP. NO. 225, 98th Cong., 1st Sess. 175 (1983)).

See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 528 (1995); *id.* § 4B1.1 cmt.

[197] FIFTEEN YEAR REPORT, *supra* note 13, at 134.

report, most of these African American offenders were subject to the guideline because of the inclusion of drug crimes in the criteria qualifying offenders for the guideline.[198] The Commission offered a possible explanation for these statistics: "Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods, which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers."[199] Thus, it appears that African Americans are more likely to have prior drug convictions on their records than White offenders who engaged in the same type of prior conduct.[200]

The Commission has also questioned whether the career offender guideline actually serves its intended purpose.[201] In particular, the Commission reasoned that incapacitation rationales provided little support for the lengthy sentences. According to the report:

> Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission note that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[202]

Finally, the Commission's report analyzed recidivism statistics and concluded that the career offender guideline makes criminal history category VI (the category assigned to all career offenders) "a *less* perfect measure of recidivism risk than it would be without the

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[198] *Id.* at 133. Studies of recidivism enhancements in state systems have found similar disparities. *See, e.g.*, Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, CRIM. JUST. POL'Y REV. 63-83 (2008) (finding that odds of African Americans being sentenced as habitual offenders (i.e., "habitualized") in Florida were twenty-eight percent greater than Whites' odds of being habitualized, and that greatest disparity between Whites and racial and ethnic minorities existed for drug offenses).

[199] FIFTEEN YEAR REPORT, *supra* note 13, at 134.

[200] *See, e.g.*, MARC MAUER, THE RACE TO INCARCERATE 118-41 (1999) (discussing disparate policing and prosecution of African Americans); VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL'Y INST., RACE AND INCARCERATION IN MARYLAND (2003) (analyzing racial disparities among those convicted of drug crimes in Maryland).

[201] The report stated: "The question for policymakers is whether the career offender guideline, especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing." FIFTEEN YEAR REPORT, *supra* note 13, at 134.

[202] *Id.*

inclusion of offenders qualifying only because of prior drug offenses."[203] The Commission based this conclusion on analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions. This analysis showed that their recidivism rates are much lower than that of other offenders assigned to criminal history category VI. The overall rate of recidivism for category VI offenders two years after release from prison is fifty-five percent, and the rate for offenders qualifying for the career criminal guideline based on one or more violent offenses is approximately fifty-two percent. However, the rate for offenders qualifying for the career offender provision based only on prior drug offenses is only twenty-seven percent. Thus, the recidivism rate for career offenders with drug convictions is actually closer to the rates for offenders in the lower criminal history categories in which the normal criminal history scoring rules would place defendants.[204]

Some courts have also recognized the problems with the career offender guideline and have declined to apply it post-*Booker*, particularly when the prior convictions were minor or remote in time. In *United States v. Moreland*,[205] the defendant's prior convictions involved distribution of one marijuana cigarette in 1992 and distribution of 6.92 grams of crack in 1996, which the court noted "hardly constitute the type and pattern of offenses that would indicate Mr. Moreland has made a career out of drug trafficking." The court observed that the career offender guideline provides no means for the court to take into account the relative seriousness of the underlying prior convictions.[206] Other courts have agreed and similarly declined to apply the provision.[207]

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[203] *Id.*

[204] *Id.*

[205] 568 F. Supp. 2d 674, 687 (S.D. W. Va. 2008).

[206] *Id.* at 688. The court reasoned: "Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs courts to substitute an artificial offense level and criminal history in place of each individual defendant's precise characteristics. This substitution ignores the severity and character of the predicate offenses." *Id.*

[207] *See, e.g.*, United States v. Pruitt, 502 F.3d 1154, 1167-70 (10th Cir. 2007) (McConnell, J., concurring) (collecting cases), *vacated*, 128 S. Ct. 1869 (2008); United States v. Malone, No. 04-80903, 2008 WL 6155217, at *4 (E.D. Mich. 2008) (declining to apply career offender provision and relying on Sentencing Commission's *Fifteen Year* report); United States v. Fernandez, 436 F. Supp. 2d 983, 989-90 (E.D. Wis. 2006) (noting guideline fails to satisfy sentencing purposes especially when priors are minor and remote); United States v. Serrano, No. 04CR.424-19(RWS), 2005 WL 1214314, at *8 (S.D.N.Y. May 19, 2005) (declining to impose career offender provision because prior convictions were old, defendant served little time for them,

In sum, the Commission itself recognizes that the career offender provision — at least to the extent that it is triggered by prior drug convictions — may contribute to racial disparity and is not clearly justified by the purposes of sentencing. Since *Booker*, an increasing number of courts have declined to apply the provision, recognizing that it recommends sentences that are excessive.

2. Drug Enhancements in Firearm Cases

Prior drug convictions can also trigger enhancements in cases with little or no relation to drug distribution or use. For example, it is a federal crime for a person previously convicted of a felony to possess a firearm or ammunition.[208] Cases involving firearms or ammunition are the third most-frequently prosecuted cases in federal court.[209] A defendant's prior drug convictions may trigger statutory and guideline enhancements in these prosecutions. The discussion below considers the ACCA statutory enhancement and the enhancements under the firearms guideline.

a. Armed Career Criminal Act

The ACCA provides a statutory mandatory minimum sentence for defendants convicted of possession of a firearm or ammunition with qualifying prior convictions. Under the ACCA, if defendants have three prior convictions for "violent felonies" or "serious drug offenses," they face a mandatory minimum sentence of fifteen years and a maximum of life. [210] Without the qualifying convictions, their

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and they resulted from his drug addiction).

[208] 18 U.S.C. § 922(g) (2006).

[209] THE CHANGING FACE, *supra* note 113, at 9.

[210] The ACCA provides:

> [A] person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1). The ACCA defines "serious drug offense" in pertinent part as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

sentencing range is zero to ten years.[211] The mandatory minimum sentence applies even in cases of mere possession; the government does not need to prove that the defendant used the firearm or that a threat of violence existed. Convictions qualify regardless of age.[212] The number of ACCA sentences imposed has risen over the years. In 1996, courts applied the ACCA in 250 firearm cases nationwide.[213] In 2008, the number was 647.[214]

Incapacitation and deterrence goals motivated the enactment of the ACCA. When originally enacted in 1984, robbery and burglary were the only predicate offenses under the ACCA.[215] The ACCA responded to the view that a relatively small number of people were committing numerous violent crimes, and state authorities were often unable to obtain long sentences.[216] Congress intended the ACCA to provide a means for incapacitating these individuals for a long period, specifically those individuals whose prior convictions indicated an "increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger."[217]

In 1986, Congress expanded the predicate offenses that trigger the ACCA by replacing burglary and robbery with three broad categories of crime: violent felonies involving the use, attempted use, or threatened use of physical force; crimes involving a serious risk of physical injury to another; and serious drug offenses.[218] An offense qualifies as a "serious drug offense" if it involves "manufacturing,

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . . .

Id. § 924(e)(2)(A).

[211] *Id.* §§ 922(g), 924(a)(2).

[212] *Id.* § 924(e)(2)(A) (providing no time limit).

[213] U.S. SENTENCING COMM'N, 1996 SOURCEBOOK, *supra* note 192, tbl.22.

[214] U.S. SENTENCING COMM'N, 2008 SOURCEBOOK, *supra* note 191, tbl.22.

[215] Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185 (1984).

[216] Taylor v. United States, 495 U.S. 575, 581 (1990) ("The Act was intended to supplement the States' law enforcement efforts against 'career' criminals. The House Report accompanying the Act explained that a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage of repeat offenders,' and that robbery and burglary are the crimes most frequently committed by these career criminals.").

[217] Begay v. United States, 128 S. Ct. 1581, 1587 (2008).

[218] Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3239-40 (1986).

distributing, or possessing with intent to manufacture or distribute, a controlled substance" and carries a maximum penalty of at least ten years' imprisonment.[219]

The goals of the 1986 ACCA amendments were the same as that of the original act: deterrence and incapacitation.[220] With the amendments, Congress sought to expand the reach of the statute, which prosecutors had used infrequently since its enactment in 1984.[221] The legislative history of the ACCA amendments contains little discussion of the rationales for adding drug crimes to the list of predicate offenses. The House Report simply noted that at a hearing on expanding the ACCA's predicate offenses, a "consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses."[222] Congressional Hearing testimony on the amendments cited examples of drug-related violence, i.e., violent crimes committed in the course of drug dealing or for drug-related motivations.[223] Under the ACCA, however, prosecutors do not even need to show a connection between gun possession and drug dealing

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[219] 18 U.S.C. § 924(e)(2)(A) (2006).

[220] *Taylor*, 495 U.S. at 583 ("Similarly, during the House and Senate hearings on the bills, the witnesses reiterated the concerns that prompted the original enactment of the enhancement provision in 1984: the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem."). *See Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary*, 99th Cong. 7 (1986) (statement of Rep. McCollum) [hereinafter *ACCA House Hearing*] ("Studies show that the relatively small population of career criminals commit an inordinate number of crimes. When the Federal Government can assist local prosecutors upon their request in keeping these violent career offenders off the streets, it does a great service to the public."); *The Armed Career Criminal Act Amendments: Hearing Before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 99th Cong. 6 (1986) (statement of David Dart Queen, Deputy Ass't Sec'y, U.S. Dep't of the Treasury) [hereinafter *ACCA Senate Hearing*] ("But except for armed robbers and burglars, the same level of deterrence does not exist for other violent criminals or drug traffickers who have armed themselves to continue a proven career of crime.").

[221] In 1985, prosecutors convicted only eleven defendants under the statute. *See ACCA House Hearing*, *supra* note 220, at 1-2 (statement of Rep. Hughes).

[222] H.R. REP. NO. 99-849, at 3 (1986).

[223] *See ACCA House Hearing*, *supra* note 220, at 10-11 (statement of Rep. Wyden) ("In Oregon and across the country, illicit trafficking in narcotics relentlessly fuels a spiraling violent crime rate. Prosecutors believe that at least 80 percent of all the murders in Oregon stem from drug use of one kind or another. Additionally, the FBI has estimated that 80 per cent of the 210 bank robberies in Oregon last year were drug related. Strengthening the Career Criminal Act in this manner will allow federal officials to play a more effective role in helping to rid our streets and neighborhoods of these insidious criminals, the habitual, violent offenders who use and peddle illegal drugs — and will stop at nothing to further their habit or their business.").

to trigger the ACCA's fifteen-year mandatory minimum sentence. In fact, a separate federal statute provides an enhancement when a person uses or carries a firearm during or in relation to a drug trafficking crime or possesses the gun in furtherance of the drug crime.[224] The legislative history of the ACCA cited examples of that type of conduct. The hearings and reports contained no analysis or data about the likelihood that people with prior drug convictions will commit violent crimes with firearms.

There is certainly a basis for concluding that drugs and guns are dangerous in combination and that it may be more dangerous for a former drug offender to have a gun than someone with a prior fraud conviction.[225] A defendant with a prior violent history, however, is more of a threat with a gun than a defendant with a drug history. At least among federal prisoners, it appears that people with prior violent convictions are more likely to recidivate then those with prior drug convictions.[226] In addition, those with prior drug offenses are much less likely to commit violent offenses than those with a history of violence.[227] Thus, these categories of people should not face the same mandatory sentence. Sentencing reform in the 1980s, which led to the enactment of the federal guidelines, focused on the idea of avoiding

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[224] 18 U.S.C. § 924(c) provides a five-year consecutive sentence for:

> any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . .

[225] Among arrestees in a 1997 study conducted by the National Institute of Justice, twenty-three percent of those who owned a gun said they had used one to commit a crime; when narrowed to juvenile drug sellers who owned a firearm, the percentage climbed to forty-two percent of arrestees who reported using a gun in a crime. SCOTT H. DECKER ET AL., NAT'L INST. OF JUST., ILLEGAL FIREARMS: ACCESS AND USE BY ARRESTEES 3 (1997).

[226] For example, in the career offender guideline context, those who qualify for the career criminal guideline based on one or more violent offenses recidivate at a rate of fifty-two percent. The rate for offenders qualifying for the career offender provision only based on prior drug offenses is only twenty-seven percent. FIFTEEN YEAR REPORT, *supra* note 13, at 134. However, in a 2002 study of state and federal prisoners released in 1994, conducted by the U.S. Department of Justice, Bureau of Justice Statistics, violent offenders and drug offenders had roughly equivalent recidivism rates. Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, 15 FED. SENT'G REP. 58, 62 (2002).

[227] The Bureau of Justice Statistics reported that released drug offenders accounted for 18.4% of re-arrests for violent offenses, while released violent offenders accounted for 27.5% of re-arrests for violent offenses. Langan & Levin, *supra* note 226, at 64.

"unwarranted disparities."[228] However, "unwarranted consistency" is also a problem in sentencing and indeed was a practice criticized by courts in the 1970s.[229] The ACCA is an example of unwarranted consistency because it treats people with three drug convictions identically to those with three violent convictions.

In addition, as commentators observe, Congress did not tailor the ACCA to target the riskiest offenders.[230] Because the ACCA applies regardless of the age at which the prior drug convictions occurred, and regardless of the circumstances of the gun possession, a 60-year-old man with drug convictions from his 20s who possesses a gun for hunting faces a mandatory fifteen years. In addition, convictions qualify as predicates if the court could have imposed a ten-year sentence, rather than considering the actual length of the sentence imposed.[231] Thus, a defendant who merely received probation for three prior drug offenses could be subject to the ACCA's penalties. Using the actual length of the sentence imposed, rather than the maximum possible sentence, would be a better indicator of the actual seriousness of the underlying prior offense. In sum, although some cases of gun possession may justify a fifteen-year sentence, most do not.

[228] 18 U.S.C. § 3553(a)(6) (2006) (requiring sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) (discussing history leading to creation of guidelines).

[229] *See, e.g.*, United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) ("[T]he court employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis."); Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (examining district court records and finding unwarranted consistency in sentencing judge's past treatment of selective service offenders).

[230] *See* Krystle Lamprecht, *Formal, Categorical, But Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Crimnal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1408-12 (2008); Stephen R. Sady, *The Armed Career Crimnal Act – What's Wrong with Three Strikes, You're Out?*, 7 FED. SENT'G REP. 69, 69-70 (1994); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Towards Consistency*, 46 HARV. J. ON LEGIS. 537, 538-39 (2009).

[231] *See* Ethan Davis, Comment, *The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act*, 118 YALE L.J. 369, 370 (2008) (arguing that statute should be amended to consider sentence imposed rather than statutory maximum).

b. Firearm Guidelines Enhancements

Prior drug convictions can also lead to sentencing enhancements under the guidelines in cases where a defendant receives a sentence for being a felon in possession of a firearm or ammunition.[232] Section 2K2.1 of the guidelines, which applies to cases involving the unlawful receipt, possession, or transportation of firearms or ammunition, provides the offense level for these defendants.

As with various other guideline provisions, Section 2K2.1 sets different "base offense levels" depending on particular circumstances of the offense. The base offense level is fourteen for a defendant who possesses a firearm or ammunition after conviction for a felony.[233] The offense level increases to twenty if the defendant has a prior conviction for a "controlled substance offense" or "crime of violence." This offense-level increase results in approximately a doubling of the sentencing range.[234] The offense level increases to twenty-four (and triples the sentencing range) if the defendant has two prior controlled substance offenses or crimes of violence.[235]

The original, 1987 version of Section 2K2.1 set a base offense level of nine and included no offense-level enhancements based on prior convictions.[236] The enhancements came about through the recommendations of the 1990 Firearms and Explosive Materials Working Group Report.[237] The Working Group concluded that the original guidelines ranges for firearm offenses were too low, because data showed that judges were upwardly departing in 8.4% of firearm cases, and were sentencing at the upper end of the guidelines ranges in twenty-five percent of the cases.[238] Notably, the Working Group did not find that judges imposed higher sentences for defendants with

[232] In 2008, 10.8% of federal offenders were sentenced under the firearm guideline. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS, *supra* note 19, tbl.3. Data is not available regarding the number of defendants who received enhancements under this guideline based on prior drug convictions.

[233] Offense levels under the guidelines range from zero to 43. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 5, pt. a.

[234] For someone at criminal history category II, the sentencing range at offense level 14 is 18-24 months. *Id.* At level 20, it is 37-46 months. *Id.* At level 24, it is 57-71 months. *Id.*

[235] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (1987).

[236] *Id.* § 2K2.1.

[237] A thorough review of this history appears in a brief by the Federal Defenders in the District of New Jersey. *See* Mem. in Supp. of John Doe's Position on Sentencing, http://www.fd.org/pdf_lib/2K2.1%20Sentmemo.pdf (last visited Mar. 21, 2010).

[238] U.S. SENTENCING COMM'N, FIREARMS AND EXPLOSIVE MATERIALS WORKING GROUP REPORT 8-11 (1990).

prior convictions for drug crimes or crimes of violence. The Group nonetheless recommended increasing the base offense level for defendants with prior convictions to achieve greater consistency with sentences imposed under the ACCA.[239] In promulgating the amendment in 1991, the Commission simply noted: "This amendment consolidates three firearms guidelines and revises the adjustments and offense levels to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses."[240]

The firearm guideline enhancement is another example of unwarranted consistency. Empirical evidence does not support the guideline; the Commission promulgated the enhancement to achieve consistency with the ACCA. Rather than considering whether the ACCA served the purposes of sentencing, the Commission simply keyed the firearm guideline to the statute so that the sentences imposed under the guidelines would be proportionate to those under the ACCA. Yet this rationale — which the Commission also used when it constructed the drug guidelines to match the statutory mandatory minimums in drug cases[241] — means subjecting people to a sentencing scheme without consideration of whether the sentences are just. As described above, ACCA penalties are overly harsh in many circumstances, especially when courts view prior drug convictions as predicate offenses.

The guidelines provisions do improve upon the ACCA in that convictions do not qualify under the guidelines if they are remote in time.[242] Yet the guidelines definition of "controlled substances offense" is broader than the ACCA's "serious drug offense." Drug crimes are ACCA offenses only if the maximum penalty for the prior offense was ten years or more. The guidelines contain no such limitation.[243] Thus, despite the stated purpose of consistency with the ACCA, the adopted guideline amendments provide for enhancements based on a broader range of drug offenses than the offenses triggering the ACCA penalties.

The firearm guidelines enhancements led to a large increase in the average sentences for firearm offenders. In 1989 — before Congress added the prior-conviction enhancements to the firearm guidelines —

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[239] *Id.* at 19-23.

[240] U.S. SENTENCING GUIDELINES MANUAL app. C (1991 Amendments).

[241] *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS 1995, *supra* note 181, at 146.

[242] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.1, cmt. n.1.

[243] 18 U.S.C. § 924(e) (2006); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.1.

the average sentence for firearm offenses was approximately twenty-eight months. In 2008, firearm offense sentences averaged to approximately eighty-four months.[244] The departure rate in firearm cases post-*Booker* confirms that many judges find the sentences recommended by the guidelines too harsh. In 2007, 14.5% of sentences in possession of a firearm cases were below the guidelines in cases without a government-sponsored departure. Following *Gall* and *Kimbrough*, the rate rose to 17.3%.[245] As discussed next, the presence of drug convictions also greatly impacts sentences in immigration cases.

3. Drug Enhancements in Immigration Cases

a. Statutory Enhancements

Immigration cases are the second most commonly prosecuted offenses in federal court.[246] The statutory penalties for illegal reentry of a noncitizen after removal are set forth in 8 U.S.C. § 1326(b). A defendant removed after conviction for an "aggravated felony" (which includes various types of drug offenses), is subject to a maximum penalty of twenty years. The maximum sentence is ten years if removal occurs after conviction for a felony that is not an aggravated felony, or after three or more misdemeanor convictions involving drugs or crimes against the person. Otherwise, the maximum is two years.[247]

Enacted in 1988, Congress intended § 1326 to respond to the problem of people repeatedly returning to the United States after deportation.[248] The central purpose of § 1326 was to deter reentry of aliens after they had been deported.[249] Congress later amended the statute to allow longer sentences for aliens deported after conviction of certain crimes.[250]

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[244] U.S. SENTENCING COMMISSION, FEDERAL SENTENCING STATISTICS, *supra* note 19, tbl.13.

[245] See U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK ON FEDERAL SENTENCING STATISTICS tbl.28 (2007). U.S. SENTENCING COMMISSION, POST-*KIMBROUGH/GALL*, *supra* note 133, tbl.4.

[246] THE CHANGING FACE, *supra* note 113, at 7.

[247] 8 U.S.C. § 1326(b) (2006).

[248] Anti-Drug Abuse Act, Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (1988); *see also* 134 CONG. REC. 27429 (1988); *id.* at 27445 (statement of Sen. D'Amato); *id.* at 27462 (statement of Sen. Chiles); 133 CONG. REC. 28840-41 (1987) (statement of Rep. Smith).

[249] 133 CONG. REC. 8771 (1987).

[250] Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023, 130001 (1994).

Whereas the 851 and ACCA statutory enhancements require imposition of mandatory minimum sentences, the illegal reentry statutory enhancements simply raise the maximum penalty and do not trigger mandatory minimums. Thus, judges have discretion to impose sentences well below the maximum permitted. Indeed, under the statute, they may impose no prison time at all.

b. Guidelines Enhancements

The guidelines that apply in illegal reentry cases also provide for increased penalties if a defendant has prior convictions. The offense level in illegal reentry cases is determined under Section 2L1.2(a). If a defendant has a prior conviction for particular offenses, he faces a sixteen-level enhancement. Qualifying offenses include: "(i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense."[251] If a defendant has a "drug trafficking offense," but had a sentence imposed of thirteen months or less for the crime, that defendant faces a twelve-level increase.[252] If the defendant's conviction is an "aggravated felony," but does not qualify for a sixteen- or twelve-level increase, an eight-level enhancement applies.[253] If the conviction does not qualify for the other enhancements but is nonetheless a felony, a four-level enhancement applies.[254] A four-level enhancement also applies if the defendant has three or more misdemeanor convictions for drug trafficking offenses or crimes of violence. In terms of sentencing length, the sixteen-level enhancement results in a roughly seven-fold sentencing range increase from the base offense level whereas the twelve-level enhancement increase results in a roughly four-fold sentencing range increase.[255]

The Commission adopted these enhancements with little debate and without empirical support. The Commission originally set the offense level for illegal reentry offenses at six based on past sentencing practices.[256] In 1988, the Commission increased the offense level to

[251] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2L1.2(b)(1)(A).

[252] *Id.* § 2L1.2(b)(1)(B).

[253] *Id.* § 2L1.2(b)(1)(C).

[254] *Id.* § 2L1.2(b)(1)(D).

[255] For someone at criminal history category II, the sentencing range at offense level 8 is 4-10 months. At level 20, it is 37-46 months. At level 24, it is 57-71 months. *Id.*

[256] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1987).

eight.[257] One year later, the Commission provided that a four-level enhancement would apply for defendants previously convicted of certain felonies.[258] The Commission added a more dramatic increase in 1991. The 1991 amendment added the sixteen-level enhancement for defendants with prior "aggravated felonies," which it defined to include drug-related offenses. As a justification for this large increase, the Commission provided no explanation other than to state that the increased offense level was "appropriate to reflect the serious nature of the[] offense[]."[259] Commentators criticized the Commission's actions in promulgating the sixteen-level enhancement, noting that "no research supports such as drastic upheaval" and the Commission "did no study to determine if such sentences were necessary or desirable from any penal theory."[260] Instead, "Commissioner Michael Gelacak suggested the sixteen-level increase and the Commission passed it with relatively little discussion."[261]

In 2001, after years of criticism about this enhancement, the Commission finally promulgated a modest modification and limited the offenses that qualify for a sixteen-level increase. The Commission explained that the amendment responded to concerns that the sixteen-level enhancement could result in disproportionate penalties, such as a defendant with a prior conviction for murder facing the same increase

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[257] *Id.* app. C (Amendment 38).

[258] *Id.* (Amendment 193).

[259] *Id.* (Amendment 375). The entire explanation was:

> This amendment adds a specific offense characteristic providing an increase of 16 levels above the base offense level under § 2L1.2 for defendants who reenter the United States after having been deported subsequent to a conviction for an aggravated felony. Previously, such cases were addressed by a recommendation for consideration of an upward departure. This amendment also modifies § 2L1.1 to provide a base offense level of 20 for a defendant who is convicted under 8 U.S.C. § 1327 for an offense involving the smuggling, transporting, or harboring of an alien who was deported after a conviction for an aggravated felony. The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.

Id.

[260] Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 FED. SENT'G REP. 275, 276 (Mar./Apr. 1996); *see also* United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005) (reviewing history of provision); Amy Baron-Evans, *Continuing Struggle*, *supra* note 126, 34-37 (same); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 FED. SENT'G REP. 264, 268 (Mar./Apr. 1996) (same).

[261] McWhirter & Sands, *supra* note 260, at 276.

as one convicted of simple assault.[262] To respond to these concerns — and to eliminate the ad hoc departures occurring under the regime — the Commission provided "a more graduated sentencing enhancement of between eight levels and sixteen levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant."[263] One specific change was to provide that a twelve-level increase applied with respect to drug trafficking offenses for which the sentence imposed was less than thirteen months.[264]

In 2008, the Commission's most recent amendments expanded the scope of the enhancements for drug convictions.[265] In particular, the amendments provided that an "offer to sell" a controlled substance is a "drug trafficking offense." In addition, the Commission explained that cases where the conviction involved possessing or transporting a large quantity of drugs might warrant an upward departure.[266]

Thus, the illegal reentry guideline continues to provide drastic increases in sentences for defendants with prior drug convictions. These enhancements — like those applicable to firearm cases — apply in addition to the increases to the criminal history score that the convictions cause. As observed by courts and commentators, one can put a sixteen-level increase in perspective by analyzing other guideline provisions. For example, the theft guideline calls for a sixteen-level enhancement if the defendant stole $5 million to $10 million, and the

[262] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, app. C (Amendment 632).

[263] *Id.*

[264] *Id.*

[265] *Id.* (Amendment 722).

[266] As explanation for the amendment, the Commission stated:

> [T]he amendment addresses the concern that in some cases the categorical enhancements in subsection (b) may not adequately reflect the seriousness of a prior offense. The amendment adds a departure provision that may apply in a case "in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction." The amendment provides two examples of cases that may warrant such a departure. The first example suggests that an upward departure may be warranted in a case in which "subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use." The second example suggests that a downward departure may be warranted in a case in which "subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)."

Id. (Amendment 722).

fraud guideline calls for sixteen levels if the offense caused a loss of $20 million to $40 million.[267]

The purposes of sentencing do not justify the magnitude of the illegal reentry enhancements. In general, empirical data does not support the view that longer sentences actually promote specific or general deterrence, and general deterrence is even less likely with respect to illegal reentry crimes because the deterrent message must reach people in foreign countries to be effective. Moreover, there is a diminished need for incapacitation in illegal reentry cases. The government is certain to deport illegal reentry defendants after a conviction, and thus incapacitates them by virtue of their removal to other countries.[268] Finally, retributive goals do not support such a large sentencing increase for reentry offenders with prior convictions.[269]

Post-*Booker*, some courts have declined to apply the illegal reentry guideline's sixteen-level enhancement.[270] Although there is a high rate

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[267] United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 958 (E.D. Wis. 2005); Fleissner & Shapiro, *supra* note 260, at 268.

[268] In addition, to the extent that incapacitation is the goal of the enhancement, the degree of danger presented by a defendant with a prior drug conviction appears quite small. Recall that the present offense does not relate to resuming drug-related or violent conduct, but simply involves reentering the United States.

[269] It seems tenuous at best to suggest that a defendant is more blameworthy for reentering the country after a previous conviction than for reentering without a criminal record. To the extent that courts look beyond the act of reentry in assessing the defendant's culpability for the offense, motives for reentering appear much more relevant than criminal history to an analysis of culpability. For example, courts should treat a defendant who reenters to rejoin his wife and children and work to support them differently from one who returns to engage in gang activity. Yet the guidelines for the most part do not incorporate consideration of motive, and courts have specifically held that motive is irrelevant under the guidelines in illegal reentry cases. *See, e.g.*, United States v. Kaminski, 501 F.3d 655, 668 (6th Cir. 2007) (collecting cases holding that defendants' motives for illegally reentering did not support departures).

[270] *See, e.g.*, United States v. Salazar-Hernandez, 431 F. Supp. 2d 931, 934 (E.D. Wis. 2006) (declining to impose full enhancement despite fact that conviction qualified for 16-level increase); United States v. Carballo-Arguelles, No. Crim. 05-81166, 2006 WL 2189861, at *3 (E.D. Mich. Aug. 1, 2006) (declining to apply full enhancement); United States v. Santos-Nuez, No. 05CR1232, 2006 WL 1409106, at *6 (S.D.N.Y. May 22, 2006) (imposing non-guidelines sentence, noting that "[n]owhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction"); United States v. Santos, 406 F. Supp. 2d 320, 328 (S.D.N.Y. 2005) (declining to apply 16-level increase because conviction occurred in 1998); United States v. Zapata-Trevino, 378 F. Supp. 2d 1321, 1327 (D.N.M. 2005) (declining to impose sentence resulting from 16-level increase because "imposing a 16 level enhancement . . . seems far out of proportion with any reasonable assessment of Defendant's dangerousness or propensity to commit crimes in the future") (internal

of downward departures in illegal reentry cases[271] and the guideline has been subject to repeated criticism,[272] the Commission has not reduced the magnitude of the enhancement provision.

After the decision in *Booker*, judges are free to disregard enhancements under the guidelines. Judges should rethink whether the enhancements based on drug convictions serve the goals of sentencing in particular cases. Judges remain bound by the statutory enhancements and must apply them even if they conclude that the enhancements do not serve the goals of sentencing or are counterproductive. However, as explored next, a novel application of *Shepard* allows judges to avoid applying statutory enhancements based on drug convictions in many cases. Freed from mandatory statutory enhancements in these cases, judges should carefully analyze the degree to which prior drug convictions should affect the sentences.

III. *SHEPARD V. UNITED STATES* AND ENHANCEMENTS

Shepard,[273] decided just several weeks after *Booker*, limits the evidence a court can consider in determining the applicability of sentencing enhancements. *Shepard* has the potential to decrease dramatically the number of enhancements applied nationwide based on prior drug convictions.

quotation marks omitted); United States v. Perez-Nunez, 368 F. Supp. 2d 1265 (D.N.M. 2005) (declining to apply 16-level increase; finding that "[t]he Guidelines as applied in this case do not promote uniformity, rather, they produce a result contrary to the spirit of the Guidelines"); *Galvez-Barrios*, 355 F. Supp. 2d at 964 (holding that "the 16 level enhancement was excessive" because it was based on prior conviction that "did not reflect the degree of dangerousness that could justify such a dramatic increase").

[271] In 2006, 36.5% of illegal reentry sentences were below the guidelines. This number includes government-sponsored departures, not based on cooperation. *See* U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2006). The high rate continues post *Gall* and *Kimbrough*. *Accord* Baron-Evans, *supra* note 87, at 57; *see* U.S. SENTENCING COMM'N, POST-*KIMBROUGH*/*GALL* DATA REPORT, *supra* note 133, tbl.4.

[272] As examples of criticism, Baron-Evan cites the following: Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Comments on Proposed Amendments 2-3 (Mar. 6, 2008); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn Before the U.S. Sentencing Commission Re: Proposed Immigration Amendments (Mar. 6, 2006), all available at http://www.fd.org/pub_SentenceLetters.htm.

[273] Shepard v. United States, 544 U.S. 13, 19-21 (2005).

As in *Booker*, the Court in *Shepard* was motivated by Sixth Amendment concerns about increasing sentences based on facts found by judges rather than juries. Also as in *Booker*, rigorous application of the *Shepard* rule has the effect of increasing judicial discretion in federal sentencing. In many cases, *Shepard* allows courts to find mandatory statutory enhancements inapplicable. Freed from these mandatory sentences, judges have greater discretion to fashion sentences.

Shepard addresses instances where a previous conviction is pursuant to a statute that covers some conduct that triggers a federal sentencing enhancement and some conduct that does not. Federal recidivist enhancement provisions rely on federal definitions. For example, the guidelines specifically define what constitutes a "controlled substance offense" and, therefore, triggers the career offender guideline and the enhancement in firearm cases.[274] A state's decision to label an offense a controlled substance offense does not mean an enhancement will apply. Rather, the prior conduct underlying the offense must meet the federal definition. When a state's definition of an offense perfectly matches the federal enhancement's definition, then mere proof of the defendant's prior state conviction triggers the federal enhancement. *Shepard* deals with instances where there is not such a match.

The Court in *Shepard* placed strict limits on the types of evidence that a federal sentencing court can consider in determining whether a defendant's prior convictions trigger federal sentencing enhancements. For example, the sentencing court may not conduct an open factual inquiry when it considers whether a defendant's prior conviction involved conduct that triggers an enhancement. This means that the court may not find facts from police reports, live testimony, or written witness statements. Rather, the court is limited to facts that the defendant actually admitted with his prior plea or that the jury was required to find to convict.[275]

There is enormous variation in state regulation of drugs. States vary in the specific substances that they criminalize. In addition, certain acts — such as "offering" to provide drugs — are criminal in some states but not in others.[276] Significantly, state offenses are often not perfect matches for federal enhancements.

Thus, a defendant may be convicted of a state offense that covers some conduct that would trigger a federal enhancement but also covers conduct that would not. This is where *Shepard* comes into play.

[274] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.2.

[275] *Shepard*, 544 U.S. at 26.

[276] *See infra* note 344 and accompanying text.

Where a defendant has a prior conviction under a state statute that is broader than the federal enhancement, the government has the burden to prove that the defendant admitted with his plea — or the jury found — conduct triggering the enhancement.[277] This often proves to be an impossible task for the government. In these cases, *Shepard* allows courts to avoid applying the enhancements.

A *Shepard* revolution has been underway in the District of Connecticut. Innovative *Shepard* litigation by the Office of the Federal Defender in Connecticut has led to a number of opinions by district court judges and the Second Circuit that limit the use of prior drug convictions to enhance sentences under statutory and guidelines provisions.[278] Indeed, since these opinions, judges have enjoyed greater discretion in federal sentencing and there has been a significant reduction in the number of defendants facing enhancements.[279]

Currently, federal cases in Connecticut are the exception rather than the rule; it appears that advocates and courts have underutilized *Shepard* around the country. Many advocates and judges simply assume that state drug convictions trigger federal enhancements. However, courts can apply the novel *Shepard* arguments developed in Connecticut in federal criminal cases around the country. In addition, a similar analysis applies in civil immigration cases in determining whether a drug conviction qualifies as an aggravated felony.

Shepard allows judges to avoid applying mandatory statutory enhancements in many cases. In these cases, judges now have the opportunity to think carefully about what role a prior drug conviction should play in a defendant's sentence. Judges may well reach more just results in cases where they are able to use *Shepard* to avoid enhancements. Applying *Shepard* does not mean that judges will ignore criminal history in calculating sentences. Instead, it means that

[277] *Shepard*, 544 U.S. at 26.

[278] I developed these arguments along with Terence Ward, Assistant Federal Defender. We litigated the cases in the District of Connecticut and Second Circuit along with other members of the Office of the Federal Defender.

[279] A March 2010 survey of cases handled by the Office of the Federal Defender in Connecticut shows the impact of these cases. The survey considered the number of cases where courts applied enhancements based on prior drug convictions, and the cases where defendants specifically avoided the enhancements based on these *Shepard* arguments. Using these arguments, defendants have avoided the ACCA in 100% of cases where courts would have otherwise applied the enhancement based on a prior drug conviction; defendants have avoided the career offender provision in 60% of cases; the firearm enhancement in 66.7% of cases; and the 851 enhancement in 87.5% of cases. See *infra* note 325 and accompanying text for a discussion of this survey.

prior drug convictions can have a more proportional impact on the sentence.

Despite the major benefits of a careful application of *Shepard*, concerns about disparities exist. Variations in state law — in terms of both recordkeeping practices and definitions of offenses — cause these disparities. Whether an enhancement applies may depend not on the actual seriousness of a defendant's prior record, but on whether a transcript is missing or the state regulates more substances than those covered by the enhancement. By creating federal definitions for enhancements, Congress and the Sentencing Commission explicitly tried to avoid these types of variations.[280] This consequence should cause Congress and the Commission to rethink the utility of the enhancements.

A. Enhancements, Federal Definitions, and Federalism

In enacting federal recidivist provisions, Congress has expressed concern about federalism and maintained that it is not interfering with "traditional" state authority in the field of criminal law.[281] For example, when Congress enacted and later expanded the ACCA, members of Congress emphasized that the statute respected local prosecutors because they alone could initiate ACCA prosecutions by referring cases to the U.S. Attorney's offices. Thus, according to Congress, ACCA prosecutions were a cooperative process and in no way undermined state authority.[282]

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[280] *See infra* note 344 and accompanying text.

[281] For example, the House Report to the 1986 ACCA amendments noted strong opposition by the National District Attorneys' Association to a proposed bill that would have created new substantive federal offenses of burglary and robbery in cases involving the carrying of a gun when the defendant had two prior convictions. *See* H.R. REP. No. 99-849, at 2 (1986) (noting that Association's view that bill "represented an unwarranted Federal intrusion into offenses more appropriately left to state prosecution"). The Report stated that the amendments would improve ACCA "while at the same time preserve a strong concept of Federalism as well as an appreciation for the relative law enforcement resources available at the State and Federal level." *Id.* at 3. For a critique of this form of "categorical" thinking about what is "traditionally federal" and what is "traditionally state," see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620-24 (2001).

[282] *See ACCA House Hearing*, *supra* note 220, at 8 (statement of Rep. Wyden) ("With the career criminal approach, the local prosecutor and the Federal prosecutor can join hands and target those very worst offenders . . . ."); *id.* at 12 ("The local prosecutors have one more tool should they wish to do it, but nothing is taken away from them at all."); *ACCA Senate Hearing*, *supra* note 220, at 1 (statement of Sen. Specter) (noting that ACCA's predicates were limited to robberies or burglaries with original 1984 Act because of "the inherent resistance in some quarters to bring the

Despite rhetoric of deference to states, however, the ACCA and other federal statutory enhancements rely on *federal* definitions for the conduct triggering the enhancements. The sentencing guidelines follow the same framework; only conduct meeting the federal definition will trigger an enhancement. Congress and the Commission deliberately determined that enhancements would not turn on how states labeled offenses. For example, a burglary triggers the ACCA but only if it meets the federal definition of burglary. A state's decision to label an act "burglary" does not control. The Supreme Court addressed this issue in *Taylor*, noting that the original ACCA statute defined "robbery" and "burglary" and did not leave these terms to the "vagaries of state law."[283] Indeed, the Senate Report for the ACCA stated:

> Because of the wide variation among states and localities in the ways that offenses are labeled, the absence of definitions raised the possibility that culpable offenders might escape punishment on a technicality. For instance, the common law definition of burglary includes a requirement that the offense be committed during the nighttime and with respect to a dwelling. However, for purposes of this Act, such limitations are not appropriate. Furthermore, in terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.[284]

The Supreme Court recently considered whether federal or state definitions of a crime should control the 851 enhancement. *United States v. Burgess*[285] dealt with a defendant convicted of a crime that,

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Federal Government into the fight against street crime"; stating that "the experience in the past year-and-a-half with the career criminal bill has been excellent, and it has allayed fears in some quarters that there would be undue interference with the approaches of the local district attorneys"). In practice, many ACCA referrals do come from local prosecutors. However, a federal prosecutor can prosecute under the ACCA without a referral.

[283] Taylor v. United States, 495 U.S. 575, 602 (1990). According to the *Taylor* Court, Congress intended ACCA to be triggered "by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction." *Id.* The Court found that the 1986 ACCA amendments used this same categorical approach, providing that crimes with certain common characteristics would qualify as ACCA predicates "regardless of how they were labeled by state law." *Id.*

[284] S. REP. NO. 98-190, at 5 (1983).

[285] 128 S. Ct. 1572 (2008).

despite being a misdemeanor under South Carolina law, carried a punishment of more than one year in prison. Because the federal definition of "felony drug offense" requires only that the offense be punishable by more than one year of imprisonment, the Supreme Court held that a state misdemeanor offense could qualify as a felony for purposes of the 851 enhancement regardless of what label the state might attach to such an offense.[286] The state could call it a misdemeanor, but the federal definition applied for 851 purposes.

In fact, Congress previously amended the definition at issue in *Burgess* to ensure that a federal definition controlled. The 1988 definition of "felony drug offense" was "an offense that is a felony under any . . . Federal law . . . or . . . any law of a State or a foreign country" prohibiting or restricting conduct relating to certain types of drugs. In 1994, Congress amended the definition, replacing "an offense that is a felony under . . . any law of a State," with "an offense that is punishable by imprisonment for more than one year under any law . . . of a State." The Supreme Court reasoned that "[b]efore 1994, the definition of 'felony drug offense' depended on the vagaries of state-law classifications of offenses as felonies or misdemeanors." The 1994 amendments replaced that definition with "a uniform federal standard based on the authorized length of imprisonment." The Court explained that "an evident purpose of the 1994 revision" was "to bring a measure of uniformity to the application of § 841(b)(1)(A) by eliminating disparities based on divergent state classifications of offenses."[287]

Thus, unlike in contexts where Congress has insisted on deference to state courts,[288] Congress has not deferred to state definitions in regards to the triggering federal enhancements. Rather, Congress has insisted that prior conduct meet federal definitions to trigger federal enhancements.[289] With that in mind, this Article now considers the

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[286] *Id.* at 1577-79.

[287] *Id.* at 1579-80 (footnote omitted).

[288] One example of deference to state courts by federal courts is in habeas cases. For discussions on federalism and habeas, see Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254 (d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 681-716 (2003); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TULSA L. REV. 443, 453-57 (2007); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TULSA L. REV. 385, 394-407 (2007).

[289] There are some instances where federal criminal provisions do defer to state law definitions. For example, to be convicted of being a felon in possession of a firearm without the ACCA enhancement, the government must prove only that the defendant was convicted of a crime punishable by more than one year. The crime need not be a felony under federal law, or even be a crime under federal law. *See* Wayne A. Logan,

impact of *Shepard*-based litigation in the District of Connecticut and explores how this approach is applicable nationwide.

B. Shepard v. United States *and the Categorical Approach*

1. The Supreme Court's Holding in *Shepard*

As discussed earlier, *Shepard* considered whether the defendant's prior Massachusetts burglary conviction was a "violent felony" that could be used to enhance the defendant's sentence under the ACCA.[290]

The Supreme Court had held previously in *Taylor v. United States*,[291] that ACCA makes burglary a "violent felony" only if the offense was committed in a building or enclosed space, not in a boat or motor vehicle. The Court labeled statutes that limit burglary to buildings or enclosed spaces as "generic burglary" statutes and broader statutes as "nongeneric burglary" statutes.[292] The *Taylor* Court considered whether, in applying the ACCA, the sentencing court must use a categorical approach and look only to the statutory definitions of the prior offense, or whether the court may consider other evidence concerning the defendant's prior conduct. The Court adopted the categorical approach and held that the trial court generally may "look only to the fact of conviction and the statutory definition of the prior offense."[293] The sentencing court may "go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."[294] In determining the facts that the jury necessarily had to find to convict, courts may look only at the indictment and the jury instructions from the state trial.[295]

In *Shepard*, the Court addressed situations where the defendant's prior conviction resulted from a guilty plea rather than a trial. This is a much more common scenario, as prosecutors obtain most convictions through pleas rather than trial.[296] In *Shepard*, the defendant had a prior

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Creating a "Hydra in Government:" Federal Recourse to State Law in Crime Fighting, 86 B.U. L. REV. 65, 79-83 (2006) (discussing this provision and others and arguing that provisions show cooperative, multidimensional form of federalism).

[290] 18 U.S.C. § 924(e)(2)(A) (2006); Shepard v. United States, 544 U.S. 13, 15 (2005).

[291] 495 U.S. 575, 599 (1990).

[292] *Id.* at 599-600.

[293] *Id.* at 602.

[294] *Id.*

[295] *Id.*

[296] Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (stating that rate of guilty pleas from 1991 to 2001 went

conviction for burglary under a Massachusetts' burglary statute. The statute was a nongeneric one and extended to boats and motor vehicles. Thus, the defendant's conviction in *Shepard* was under a statutory provision that covered conduct constituting a "violent felony" under the ACCA, but that also criminalized conduct not covered by the ACCA definition.

The Supreme Court explained in *Shepard* that, under *Taylor*, a sentencing court generally cannot "delv[e] into particular facts disclosed by the record of conviction, thus leaving the court normally to 'look only to the fact of conviction and the statutory definition of the prior offense.' "[297] *Shepard* carved out a narrow exception to the general rule in cases involving pleas: when a defendant has admitted certain facts through his plea, the court may use those facts to apply an enhancement.[298] To determine what facts the defendant admitted, the court "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[299] *Shepard* held that the sentencing court may not consider other documents, such as police reports, in determining whether the defendant's prior conviction involved conduct triggering the enhancement. Courts often call this process of looking at limited documents the "modified categorical approach."[300]

Shepard's reasoning stemmed from concerns about the Sixth Amendment's jury trial right. The Court's expansion of the Sixth Amendment jury trial right in the sentencing context began with *Apprendi v. New Jersey*[301] and continued with *Blakely v. Washington*[302] and *United States v. Booker*.[303]

The Court held in *Apprendi* that "other than the fact of a prior conviction, 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."[304] Thus, following *Apprendi*,

from 85.4% to 96.6%).

[297] Shepard v. United States, 544 U.S. 13, 17 (2005) (quoting *Taylor*, 495 U.S. at 602).

[298] *Id.* at 20-21, 26.

[299] *Id.* at 26.

[300] United States v. Savage, 542 F.3d 959, 964 (2d Cir. 2008) (describing process as "modified categorical approach").

[301] 530 U.S. 466, 490 (2000).

[302] 542 U.S. 296, 303 (2004).

[303] 543 U.S. 220, 244 (2005).

[304] *Apprendi*, 530 U.S. at 490. *Apprendi* declined to overrule the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998), and thus carved out this

judges could still impose sentences in excess of otherwise applicable statutory maximums based on factual findings that defendants had prior convictions. In *Blakely v. Washington*, the Court expanded the reach of *Apprendi* by applying it to Washington State's sentencing guidelines. The Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[305] "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."[306] Thus, Sixth Amendment violations occur when a judge imposes a sentence in excess of the maximum sentence allowed without additional factual findings.

Booker followed *Blakely* and held that mandatory application of the U.S. Sentencing Guidelines violated the Sixth Amendment where the Guidelines required increased sentences based on judicial fact-finding. However, the Court in *Booker* maintained the prior conviction exception, stating "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[307]

Shepard addressed the scope of the prior conviction exception. Justice Souter authored the *Shepard* decision in which Justices Stevens, Scalia, and Ginsburg joined. Justice Thomas joined the opinion, except as to Part III. In Part III of the opinion, Justice Souter wrote that allowing a sentencing court to make a "disputed finding of fact" about the conduct underlying the defendant's prior conviction would raise significant Sixth Amendment concerns.[308] Justice Souter stated that the rule that statutes are to be read "to avoid serious risks of unconstitutionality . . . counsels us to limit the scope of judicial fact finding on the disputed generic character of a prior plea."[309] These Sixth Amendment concerns caused the Court to place strict limits on the types of evidence a sentencing court may consider regarding the conduct underlying a defendant's prior conviction. Thus, under *Shepard*, where defendants' prior convictions resulted from pleas,

"prior conviction" exception. *Id.*

[305] *Blakely*, 542 U.S. at 303.

[306] *Id.* at 303-04.

[307] *Booker*, 543 U.S. at 244.

[308] Shepard v. United States, 544 U.S. 23, 24-26 (2005).

[309] *Id.*

judges may consider in support of sentencing enhancements only facts that the defendants admitted about their conduct through their pleas. Enhancing defendants' sentences based on facts they admitted about prior conduct causes no Sixth Amendment problem.[310]

Justice Thomas would have gone even further than the plurality decision. In a concurring opinion, Justice Thomas stated that judicial fact finding about conduct underlying prior convictions would not simply raise constitutional *concerns*, but would violate the Sixth Amendment.[311] Justice Thomas also expressed his view that the Court had wrongly decided and should overrule *Almendarez-Torres*, which held that courts rather than juries can find "the fact of prior conviction."[312]

In sum, federal sentencing courts must now follow the categorical approach of *Taylor* and *Shepard* when they determine whether a prior conviction triggers an ACCA enhancement. Although *Shepard* specifically addressed the use of prior convictions for purposes of the ACCA, courts have extended the categorical reasoning to determinations regarding prior convictions made under other statutory provisions[313] as well as the sentencing guidelines.[314]

Lower courts have also extended *Taylor* and *Shepard*'s categorical approach to civil immigration cases. However, in *Nijhawan v. Holder*,[315] the Supreme Court held that the categorical approach did not apply to determining whether a prior conviction was a fraud offense within the meaning of the immigration law's aggravated felony definition. The statute provides that the aggravated felony definition includes "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000." [316] The Court in *Nijhawan* asked whether the definition referred to a generic crime (the categorical

[310] *Booker*, 543 U.S. at 232.

[311] *Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring).

[312] *Id.*

[313] *See generally* United States v. Nelson, 484 F.3d 257 (4th Cir. 2007) (using categorical approach to analyze applicability of 851 enhancement).

[314] *See, e.g.*, United States v. Green, 480 F.3d 627 (2d Cir. 2007) (applying categorical approach to analysis of guideline provision); United States v. Aguilar-Ortiz, 450 F.3d 1271, 1274 (11th Cir. 2006) (same); United States v. Galloway, 439 F.3d 320, 323-24 (6th Cir. 2006) (same); United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir. 2005) (same); United States v. Gutierrez-Ramirez, 405 F.3d 352, 359 (5th Cir. 2005) (same); United States v. Lewis, 405 F.3d 511, 514-15 (7th Cir. 2005) (same); United States v. Smith, 422 F.3d 715, 721-22 (8th Cir. 2005) (same); United States v. Paxton, 422 F.3d 1203, 1205 (10th Cir. 2005) (same); United States v. Washington, 404 F.3d 834, 842 (4th Cir. 2005) (same).

[315] 129 S. Ct. 2294, 2300 (2009).

[316] 8 U.S.C. § 1101(a)(43)(M)(i) (2006).

reading), or to "the specific way in which an offender committed the crime on a specific occasion" (the circumstance-specific reading).[317] The Court held the latter to be the case.

Following *Nijhawan*, courts must still apply the categorical approach in determining whether convictions trigger the ACCA. Courts are unlikely to extend *Nijhawan* to other criminal sentencing enhancements such as the 851 enhancement and guidelines enhancements based on drug convictions. These provisions, like the ACCA and unlike the definition at issue in *Nijhawan*, describe generic drug crimes such as possession or distribution of drugs. The provisions do not refer to specific non-element circumstances of the offenses, as was the case of the fraud amount in the statute at issue in *Nijhawan*. In addition, *Nijhawan* involved a civil immigration proceeding rather than a criminal proceeding where the standard of proof is beyond a reasonable doubt.[318] Criminal cases raise the constitutional concerns that motivated the Court's holding in *Shepard*. Accordingly, courts will likely continue to apply the categorical and modified categorical approach in considering guidelines and statutory sentencing enhancements.

2. Applying the Categorical Approach

To recap, the first step of the categorical approach is to look at the language of the statute under which the defendant was previously convicted. The court must determine whether the statute covers a broader range of conduct than the conduct covered by the sentencing enhancement. In other words, courts must ask whether it is possible that the defendant's prior conduct violated the statute without triggering the sentencing enhancement.

If the statute covers a broader range of conduct than the sentencing enhancement, the court applies the "modified categorical approach." Where the prior conviction resulted from a jury trial, the court may look only to what the jury was "actually required to find."[319] In determining the facts that the jury necessarily had to find to convict,

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[317] *Nijhawan*, 129 S. Ct. at 2298.

[318] Immigration courts should continue to use *Shepard* in determining whether a drug conviction qualifies as an "aggravated felony" under the immigration statute. The aggravated felony definition provides that "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)" constitutes an aggravated felony. This definition — unlike the subsection at issue in *Nijhawan* — describes generic drug offenses and does not refer to non-element circumstances of the offenses.

[319] Taylor v. United States, 495 U.S. 575, 602 (1990).

courts may look only at the indictment and the jury instructions from the prior trial. In cases of a plea, the court may consider only what the defendant admitted through his plea. To determine what facts the defendant admitted, the court "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[320]

For example, imagine a federal sentencing enhancement that applies only when a defendant has a prior narcotics conviction. The defendant has a state conviction under a statute that criminalizes both marijuana and narcotics. Under these circumstances, mere proof of the fact of the defendant's conviction for the state offense does not trigger the enhancement because the defendant's conduct might have involved marijuana and not a narcotic. If the conviction resulted from a plea, the government would have to produce a transcript from the plea proceeding showing that the defendant admitted that the drug involved in his crime was a narcotic, or a charging document showing that the prosecutor specifically charged the defendant with narcotics and not marijuana. As is discussed below, the government is often unable to carry its burden of proof because state records are unavailable. Even where documents are available, the charging documents often fail to narrow a charge, and defendants frequently enter pleas of *Alford* or no contest, meaning that they refuse to admit any facts through their pleas.[321] In these instances, the enhancement does not apply.[322] The result can be a large difference in the defendant's sentence.

C. Shepard *in the District of Connecticut*

Until recently, federal defendants in firearm, drug, and immigration cases in the District of Connecticut routinely had sentencing enhancements applied if they had prior convictions for violating Connecticut's drug distribution statute. Following *Shepard*, close examination of Connecticut's drug statute revealed that the statute is

[320] Shepard v. United States, 544 U.S. 13, 26 (2005).

[321] North Carolina v. Alford, 400 U.S. 25, 37 (1970) (holding that defendant may "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even [though] he [was] unwilling or unable to admit his participation in the acts constituting the crime").

[322] *See* United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008).

broader than federal enhancement provisions in subtle but significant respects.[323]

First, a study of the Connecticut drug statute shows that it criminalizes several substances not criminalized under federal law. In *United States v. Madera*, the court agreed with the defendant's argument that conduct involving these substances does not trigger the ACCA provision.[324] Two other district courts in the District of Connecticut subsequently published opinions applying *Madera*'s reasoning.[325] The government has not pursued the issue on appeal and now concedes the issue in district court cases.

Second, the Connecticut drug statute, like statutes in a number of other states, criminalizes simple "offers" to distribute drugs.[326] In *United States v. Savage*, the defendant argued that an offer to provide drugs is not a "controlled substance offense" under the guidelines and does not trigger the enhancement applicable in firearm cases. The Second Circuit agreed.[327] This holding applies to the career offender guideline as well because that provision uses the same definition.[328] Thus, mere proof that a defendant has a conviction for the Connecticut drug statute does not suffice to trigger the enhancements. The government needs to prove that the defendant actually admitted, or the jury found, that the defendant's conduct fell within the enhancement provision (i.e., the offense was *not* an offer).

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323 I developed these arguments with Terence Ward, Assistant Federal Defender.

324 United States v. Madera, 521 F. Supp. 2d 149, 152 (D. Conn. 2007).

325 United States v. Lopez, 536 F. Supp. 2d 218, 222 (D. Conn. 2008); United States v. Cohens, No. 3:07CR195, 2008 U.S. Dist. LEXIS 62542, at *6-14 (D. Conn. Aug. 13, 2008).

326 CONN. GEN. STAT. § 21a-277(b) (2009) ("Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, *offers*, gives or administers to another person any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned . . . .") (emphasis added). Subsection 21a-277(a) also criminalizes "offers." In addition, Connecticut's definition of "sale" itself includes offers to provide drugs. *Id.* § 21a-240(50) (" 'Sale' is any form of delivery[,] which includes barter, exchange or gift, or *offer therefor* . . . .") (emphasis added); *see also Savage*, 542 F.3d at 965 (noting "the statute plainly criminalizes, *inter alia*, a mere offer to sell a controlled substance"). A number of other states criminalize mere "offers" of drugs. *See infra* note 344.

327 *Savage*, 542 F.3d at 964-65.

328 Both the firearm guideline and the career offender guideline use the definition found in section 4B1.2 of the guidelines. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.2.

Third, in *United States v. Jackson*, the defendant argued that a conviction for violating Connecticut's drug distribution and possession statutes does not automatically trigger the 851 repeat-offender enhancement.[329] Because Connecticut criminalizes some substances not covered by the federal enhancement, the government conceded the issue and withdrew the second offender notice in that case as well as in numerous cases across the District.

Savage, *Madera*, and *Jackson* have led to a considerable reduction in the number of enhancements applied in the District of Connecticut. A 2010 survey of lawyers at the Office of the Federal Defender in Connecticut reveals the impact these cases.[330] Since the *Madera* decision in March 2007, no ACCA enhancements have been applied based on prior drug convictions in cases handled by the federal defenders. In six cases, federal defenders specifically avoided the ACCA enhancement based on *Madera* arguments.[331] Since the 2008 *Savage* decision, courts applied the career offender provision based on prior drug convictions in two cases and avoided it in three cases involving prior drug convictions.[332] In addition, courts applied the firearm enhancement in three cases based on prior drug convictions and avoided it in six cases. Finally, since the government's June 2009 concession in *Jackson*, federal defenders avoided 851 enhancements in seven out of eight cases handled by the office. In sum, 100% of the cases decided post-*Madera* avoided the ACCA enhancement. Further, in cases involving prior drug convictions, defendants avoided the career offender provision in sixty percent of cases, the firearm enhancement in 66.7% of cases, and the 851 enhancement in 87.5% of cases.

Connecticut is not unique in having a drug statute that is broader in subtle but significant respects from the federal enhancements. Numerous other states have drug statutes criminalizing "offers" to provide drugs or criminalizing substances that do not trigger federal enhancements.[333] Although there has been some litigation about whether state statutes that cover "offers" trigger various federal enhancements, these arguments have been underutilized.[334] Moreover, there have been no reported cases outside of Connecticut challenging

[329] Def.'s Sentencing Mem., United States v. Jackson, 3:06-CR151 (MRK) (2009).
[330] *See supra* note 279 and accompanying text.
[331] This includes the *Madera* case itself.
[332] This number includes the *Savage* case.
[333] *See infra* note 349 and accompanying text.
[334] There are cases addressing the California, Texas, and New York statutes that criminalize "offers" but not the numerous other statutes nationwide that criminalize this conduct. *See infra* note 344 and accompanying text.

the application of the 851 and ACCA enhancements based on the type of analysis presented here.

Courts and advocates can use the type of *Shepard* analysis applied in Connecticut nationwide and can diminish the prevalence of enhancements based on prior convictions. This Article considers the specific *Shepard* arguments available for common federal sentencing enhancements. This form of comprehensive analysis has not been undertaken elsewhere.

D. Shepard*'s Impact on Specific Enhancements*

As discussed above, in determining whether a prior conviction triggers an enhancement, courts apply the categorical approach set forth in *Shepard* and *Taylor*. The first step of the categorical approach is to determine whether the state statute of conviction is broader than the federal enhancement. Careful reading of state statutes reveals that many are broader than federal enhancements in one of two ways: (1) the state statute criminalizes a broader set of substances than the substances that trigger the federal enhancement; or (2) the state statute covers conduct such as transporting drugs or offering drugs that is not covered by the language of the federal enhancement. These differences are not obvious. As a result, judges and advocates often erroneously assume that a prior conviction triggers an enhancement when in fact it does not.

The analysis in this section describes the common federal sentencing enhancements that rely on prior drug convictions and shows how drug statutes in many states are broader than these enhancements. Identifying a discrepancy between the state statute and the federal enhancement is crucial; whether judges can utilize *Shepard* at all will turn on whether a difference exists. Under *Shepard*, if a discrepancy exists, the government bears the burden of producing documents from the prior case and establishing that the defendant admitted or the jury found that the offense involved conduct triggering the enhancement. The government often does not meet this burden.

This Article is the first effort to uncover and document these discrepancies among state drug statutes and federal enhancement provisions. The Article considers each federal enhancement in turn because the enhancement provisions differ from each other in subtle respects that bear on the *Shepard* analysis.

1. Federal Statutory Enhancements

Statutory enhancements — provisions that trigger or increase a mandatory minimum sentence or increase a statutory maximum sentence — were not affected by the Supreme Court's holding in *Booker* that the sentencing guidelines are now advisory. Rather, statutory enhancements remain mandatory. The following analysis shows how state drug statutes often cover a broader range of conduct than common federal statutory enhancements. To show these discrepancies, a detailed examination of the language of the federal enhancements is required.

a. Armed Career Criminal Act

The ACCA provides a fifteen-year mandatory minimum sentence in cases of possession of a firearm or ammunition where a defendant has three qualifying convictions for a "violent felony or a serious drug offense, or both."[335] Close analysis of the ACCA definition of "serious drug offense" and state drug statutes reveals that many state drug convictions will not automatically qualify as predicate ACCA offenses. Under the ACCA a prior state drug conviction must meet three requirements to qualify as a "serious drug offense": (1) the conviction must be for an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance;" (2) the conviction must be for an offense involving a "controlled substance" as that term is defined by section 102 of the federal Controlled Substances Act; and (3) the offense of conviction must carry a maximum term of imprisonment of ten years or more.[336]

Thus, the ACCA does not merely provide that a prior state offense relating to drugs qualifies as a predicate. Rather, the offense qualifies

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[335] The ACCA provides:

> a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (2006).

[336] The ACCA defines "serious drug offense" in pertinent part as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A).

only if it meets the specific federal definition. Many state drug statutes are not a perfect fit for the ACCA and, in such cases, defendants are often able to avoid application of the enhancements.

(1) Differences Among the Types of Drugs Criminalized by State and Federal Law

For a state drug conviction to qualify as an ACCA predicate, the government must show that the offense involved a "controlled substance" as defined by the Controlled Substances Act (CSA).[337] The CSA defines "controlled substance" as a drug included in the federal schedules of controlled substances.[338] Accordingly, a state drug conviction is an ACCA predicate only where the state offense involved a substance criminalized under federal law.

Where a particular state statute criminalizes the same substances as federal law — or a narrower set of substances — it is easy for the government to meet its burden: mere proof of conviction under the state statute suffices to trigger the enhancement. However, many state statutes criminalize a broader set of substances than those that federal law criminalizes. In those cases, the government must establish through *Shepard*'s modified categorical approach the specific substance involved in the prior offense.[339] In these instances, it is more difficult for the government to meet its burden.

Several district courts in Connecticut ruled on this issue after the Federal Defenders raised it. At issue in *Madera* was whether Victor Madera's prior conviction for a violation of a Connecticut drug statute qualified as an ACCA predicate.[340] The District Court concluded that the statute of conviction, Section 21a-277(a) of the Connecticut General Statutes, criminalized two drugs — benzylfentanyl and

[337] The statute refers to "Section 102" of the Controlled Substances Act, which is codified in 21 U.S.C. § 802 (2006).

[338] Specifically, the statute states that a "controlled substance" is "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). The schedules are codified in the United States Code and may be amended through regulation. The schedules appear at 21 U.S.C. § 812, and may be amended through the procedures set forth in § 811. The schedules are contained in the Code of Federal Regulations at 21 C.F.R. §§ 1308.11-1308.15 (2009).

[339] In addition, even if a particular state statute currently criminalizes the same substances as federal law, there may have been discrepancies in the past. If the prior state offense occurred at a time when the state law covered a broader set of substances than federal law, then the modified categorical approach applies and the government must prove that the offense involved a substance criminalized under federal law.

[340] United States v. Madera, 521 F. Supp. 2d 149, 151 (D. Conn. 2007).

thenylfentanyl — that were not criminalized under the Federal CSA.[341] The Court ultimately concluded that the government could not prove under *Shepard* the particular substance involved in Madera's prior state offense. Accordingly, the Court held that the ACCA's fifteen-year mandatory minimum sentence did not apply. Other courts within the Second Circuit have agreed with the decision in *Madera*.[342] This type of ACCA challenge appears to be the first of its kind nationwide.[343]

Many states criminalize substances not criminalized under federal law. For example, more than a dozen states, like Connecticut, criminalize benzylfentanyl and thenylfentanyl,[344] which are not

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[341] The government conceded in *Madera* that federal law does not criminalize these substances. While the substances were on the federal schedules on a temporary, emergency basis in 1985, this temporary scheduling expired in 1986. *See Madera*, 521 F. Supp. 2d at 154-55 & n.4.

[342] United States v. Lopez, 536 F. Supp. 2d 218, 225 (D. Conn. 2008); United States v. Cohens, No. 3:07CR195, 2008 U.S. Dist. LEXIS 62542, at *21 (D. Conn. Aug. 13, 2008).

[343] Courts have considered analogous arguments in civil immigration cases. In *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 (9th Cir. 2007), the Ninth Circuit considered a statute that provided:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21 [Section 102 of the CSA]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (2006). The Ninth Circuit noted that "[t]he plain language of this statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102" of the CSA. Concluding that "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA," the court concluded that the government had to prove the substance involved under the modified categorical approach. The Ninth Circuit noted that apomorphine, geometrical isomers, Androisoxazole, Bolandiol, Boldenone, Oxymestrone, Norbolethone, Quinbolone, Stanozolol, and Stebnolone were regulated by California but not by the federal Controlled Substances Act. *Ruiz-Vidal*, 473 F.3d at 1078 & n.6. The court found that the Government "failed to establish unequivocally that the particular substance which Ruiz-Vidal was convicted of possessing in 2003 is a controlled substance as defined in section 102 of the Controlled Substances Act" and found that he did not qualify for deportation. *Id.* at 1079; *see also* Morales-Trejo v. Holder, 340 F. App'x 398 (9th Cir. 2009) (citing *Madera* and noting that Arizona criminalizes benzylfentanyl and thenylfentanyl, which are not criminalized under federal law).

[344] *See* ARIZ. REV. STAT. ANN. § 13-3401(20) (2008); FLA. STAT. ANN. § 893.03(1)(a) (West 2008); GA. CODE ANN. § 16-13-25(4) (2007); HAW. REV. STAT. ANN. § 329-14(b) (LexisNexis 2008); IND. CODE ANN. § 35-48-2-4(b) (West 2008); IOWA CODE ANN. § 124.204(9) (West 2008); KAN. STAT. ANN. § 65-4105(g) (2007); MD. CODE ANN., CRIM.

criminalized by federal law. States such as California criminalize other substances not criminalized by federal law.[345] In these states, if the government is unable to prove through state court records that the defendant admitted the substance involved in the offense, the conviction cannot serve as a predicate offense.

(2) State Statutes Criminalizing Transportation of Drugs, Offers to Provide Drugs, and Other Non-Qualifying Conduct

A state conviction qualifies as an ACCA predicate only where the prior offense "involve[ed] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance."[346] Many state drug statutory provisions cover a range of conduct, some of which falls within this definition, and some of which does not. In these states, mere proof of a defendant's prior conviction under the statutory provision will not suffice to trigger the enhancement.

California's drug statutes are examples of provisions covering a broad range of conduct. Section 11352(a) of the California Health and Safety Code criminalizes the sale of drugs, but also covers, *inter alia*, mere transportation of drugs, attempts to transport drugs, and offers to transport drugs.[347] Merely transporting drugs, offering to transport drugs, or attempting to transport drugs are not offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" within the meaning of the ACCA. Intent to distribute drugs is not an element of these offenses. Rather, prosecutors can obtain a conviction even if the defendant was merely transporting drugs for his personal use.[348]

LAW § 5-402(e)(1) (West 2008); MO. ANN. STAT. § 195.017 (West 2008); NEB. REV. STAT. § 28-405(a) (2007); R.I. GEN. LAWS § 21-28-2.08(e) (2008); TENN. CODE. ANN. § 39-17-406(g) (2008); UTAH CODE ANN. § 58-37-4(2)(a)(iv) (2008); VA. CODE ANN. § 54.1-3446(5) (West 2008). These two substances also appear in the temporary or emergency controlled substances schedules of a number of states. *See* IDAHO CODE ANN. § 37-2705(g) (2008); 720 ILL. COMP. STAT. 570/204 (2008); MONT. CODE ANN. § 50-32-222(8) (2007); OHIO REV. CODE ANN. § 3719.41(F) (West 2008); W. VA. CODE § 60A-2-204(g) (2008); WYO. STAT. ANN. 1977 § 35-7-1014 (2008).

[345] *See Ruiz-Vidal*, 473 F.3d at 1078 & n.6.

[346] 18 U.S.C. 924(e) (2006).

[347] The statute provides in pertinent part that "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport" particular controlled substances shall be punished. CAL. HEALTH & SAFETY CODE § 11352(a) (West 2010). California has other statutory provisions that criminalize the same conduct relating to different sets of drugs, and these statutes have the same broad language. *Id.* §§ 11360, 11379, 11379.5.

[348] People v. Rogers, 486 P.2d 129, 132 (Cal. 1971) (en banc); People v. Eastman,

Like the drug statutes in Connecticut and in a number of other states,[349] California's statutes also criminalize a mere "offer" to sell drugs.[350] An offer to provide drugs, however, should not be considered an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" within the meaning of the ACCA. With regard to a similar definition under the sentencing guidelines, courts have held that an "offer" to provide drugs does not trigger the enhancement.[351]

An offer to provide drugs is a distinct offense from the distribution of drugs.[352] The offense of offer is complete when a person makes the offer regardless of whether the offer is accepted and a distribution later occurs.[353] In addition, an offer to provide drugs is not equivalent to possession of drugs with intent to distribute within the meaning of the ACCA. One need not actually possess the drugs in order to complete the crime of offering drugs.[354] Moreover, although courts have interpreted the ACCA's language to include conspiring, attempting, or aiding and abetting the distribution of drugs,[355] an offer to provide drugs is not equivalent to these acts.[356]

13 Cal. App. 4th 668, 671 (Ct. App. 1993).

[349] *See* ARIZ. REV. STAT. § 13-3405 (2010) (criminalizing offers to sell drugs); COLO. REV. STAT. § 18-18-405(1)(a) (2009) (same); CONN. GEN. STAT. §§ 21a-277, 21a-240 (2010 Supp.) (same); FLA. STAT. § 817.563 (2009) (same); HAW. REV. STAT. § 712-1240 (2009) (same); NEV. REV. STAT. § 372A.070 (2008) (same); N.Y. PENAL LAW § 220.00 (McKinney's 2010) (same); OHIO REV. CODE ANN. § 2925.03 (West 2010) (same); TEX. HEALTH AND SAFETY CODE § 481.112 (Vernon 2009) (same); WASH. REV. CODE § 69.50.4012 (2010) (same).

[350] CAL. HEALTH & SAFETY CODE § 11352(a) (West 2010).

[351] United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008).

[352] An offer is "[t]he act or instance of presenting something for acceptance," or "[a] promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance." BLACK'S LAW DICTIONARY (8th ed. 2004).

[353] *See, e.g.*, People v. Encerti, 130 Cal. App. 3d 791, 800-01 (Ct. App. 1982) ("[T]he offense of [offer to sell the drug] is complete when an offer is made with the accompanying requisite intent; neither delivery of the drug, an exchange of money, nor a direct, unequivocal act toward a sale are necessary elements of the offense."); Porter v. Sheriff, Clark County, 485 P.2d 676, 676 (Nev. 1971) ("It is clear that the intent of the legislature was not to require an actual delivery or transfer of possession of narcotics in order to violate the provisions of [the statute]. The statute is explicit. Here all that is required to constitute a sale of narcotics is 'an offer' to exchange the substance.").

[354] State v. Brown, 163 Conn. 52, 62 (1972) ("[T]here is no requirement that one be in possession of goods or have control over them in order to sell them.").

[355] *See, e.g.*, United States v. Smith, 33 F. App'x 462, 466 (10th Cir. 2002) (noting ACCA "does not distinguish between principals and accessories"); United States v. Presley, 52 F.3d 64, 69 (4th Cir. 1995) (same); United States v. Groce, 999 F.2d 1189,

Thus, an offer to provide drugs should not fall within the ACCA's definition of a "serious drug offense."[357] The Fifth Circuit has

1191-92 (7th Cir. 1993) (holding that conviction of aiding and abetting commission of predicate felony is itself predicate felony conviction for purposes of ACCA because aider and abettor is treated same as principal for criminal punishment purposes); *cf.* United States v. King, 325 F.3d 110, 113 (2d Cir. 2003) ("[T]he word 'involving' itself suggests that the subsection [defining serious drug offenses] should be read expansively.").

[356] First, in order to establish aiding and abetting, the government must prove that the substantive offense has been committed. *See* 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL, Instruction 11-2, 11-4 (Matthew Bender & Co. 2009) ("[Y]ou may find the defendant guilty of [aiding and abetting] if you find beyond a reasonable doubt that the government has proven that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense."). Offering to provide drugs is not equivalent to aiding and abetting the distribution of drugs because a defendant can be convicted of offering drugs without proof that the substantive offense of distribution was in fact committed by anyone else.

Second, an offer to provide drugs is not equivalent to a conspiracy to distribute drugs. Conspiracy requires an agreement between two or more people. *Id.* at 19-11. An offer, unlike a conspiracy, is one-sided. Defendents commit the crime when they offer to sell regardless of whether the parties reach an agreement.

Third, an offer to provide drugs is not equivalent to an attempt to distribute drugs. "A person is guilty of attempt to commit a crime if he or she (1) had the intent to commit the crime, and (2) engaged in conduct amounting to a 'substantial step' toward the commission of the crime . . . ." United States v. Delvecchio, 816 F.2d 859, 861 (2d Cir. 1987) (internal quotation marks omitted). "[A] substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime." *Id.* (internal quotation marks omitted). An offer, without more, does not in itself constitute a substantial step toward the commission of the crime. *See Encerti*, 130 Cal. App. 3d at 800-01; *see also* People v. Brown, 357 P.2d 1072, 1075 (Cal. 1960). Indeed, even a verbal agreement regarding the exchange of drugs, without more, is insufficient to support a conviction for attempt. *See Delvecchio*, 816 F.2d at 862; *see also* United States v. Rosa, 11 F.3d 315, 338 (2d Cir. 1993). A mere offer to provide drugs is one step further removed from a verbal agreement regarding the exchange of drugs because the crime of offer is complete even if the offer is not accepted by another party. Accordingly, an offer to provide drugs is not equivalent to an attempted distribution of drugs.

[357] From a policy perspective, it makes sense that Congress would intend the ACCA to include conspiracy, aiding and abetting, and attempting to distribute drugs, but would exclude from the definition an offer to provide drugs. The offenses of conspiracy, aiding and abetting, and attempt are more serious than an offer. A conspiracy is more serious because the parties have agreed to commit the crime and in some cases have taken an overt act towards commission of the crime. The law punishes conspiracy because an agreement between two parties increases the chance that the crime will actually occur. An offer to provide drugs, however, is one step further removed from a conspiracy. Rejection by the other party prevents any exchange of drugs. With regard to aiding and abetting, the substantive crime of distribution of drugs has actually occurred, and the defendant has contributed to its success. This is a more serious crime than an offer to provide drugs. Finally, an

disagreed, holding that the ACCA's use of the word "involving" encompassed offers.[358] However, the better approach is to read "involving" less expansively. To the extent that there is any ambiguity in the language, courts should strictly construe the language in favor of the defendant, given the serious penalties that attach.[359]

As this discussion demonstrates, some states criminalize in the same statutory provision some conduct that meets the ACCA's definition of a "serious drug offense," and some conduct that does not. If a defendant has a prior conviction under one of these state statutes, mere proof of that conviction under the statutory provision will not suffice to trigger the enhancement.[360] A similar analysis may be used with respect to the federal three strikes law[361] and federal death penalty statute.[362]

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attempt to distribute drugs is more serious than an offer to provide drugs because an attempt requires proof of a substantial step toward commission of a crime. With an attempt, the chances of success of the crime are greater than with a simple offer.

358 United States v. Vickers, 540 F.3d 356, 356-66 (5th Cir. 2008).

359 *See, e.g.*, United States v. Liranzo, 944 F.2d 73, 79 (2d Cir. 1991) (holding that defendant's prior conviction for criminal solicitation of narcotics offense was not prior "controlled substance offense" for purposes of career offender provision of guidelines and noting that provision is to be "interpreted strictly" in light of the "drastically enhanced sentences applied to 'career offenders' ").

360 There is an alternative approach to avoid enhancements in some cases. The ACCA defines a "serious drug offense" as an "offense under State law . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law." Thus, prosecutors cannot use a prior conviction if the maximum potential penalty for the prior offense was less than ten years. The Supreme Court held in *United States v. Rodriquez* that federal sentencing courts can consider state recidivist enhancements in determining the maximum sentence prescribed for the prior state offense. 128 S. Ct. 1783, 1793 (2008). The *Rodriguez* holding arguably applies if a judge in a prior state case could have applied an enhancement, even if it is not clear from court records whether the judge in fact did so. In light of *Rodriquez*, *Shepard* should limit the scope of evidence that federal courts can consider in determining whether a state enhancement could have applied to a state sentence. States have a wide variety of different rules about what types of prior convictions will trigger enhancements of sentences in state drug cases. Prior convictions — particularly those from other jurisdictions — will often not automatically enhance a state sentence. Rather, the applicability of the enhancement may turn on particular facts underlying the prior conviction. In determining whether a state enhancement could have applied, *Shepard* constrains federal courts, and courts cannot resolve disputed facts about the defendant's earlier conviction. Thus, in some cases, *Shepard* will prevent a federal sentencing court from deciding that a state recidivism statute could have applied and increased the statutory maximum for the state offense. In these instances, the conviction will not count as an ACCA predicate.

361 The federal "three strikes law" provides that a defendant convicted in federal court of a "serious violent felony" is subject to a mandatory life sentence if he has two or more prior convictions for "serious violent felonies" or one or more "serious violent

b. Section 851 Enhancement

As discussed above, the 851 enhancement applies when a defendant with a "prior felony drug offense" is convicted of a federal drug distribution offense.[363] Courts and advocates generally assume that any state felony offense relating to drugs automatically meets this definition and triggers the enhancement. A careful review of the language of the federal enhancement provision and state drug statutes reveals that state and federal drug offenses are often not a perfect match.

felonies" and one or more "serious drug offenses." 18 U.S.C. § 3559(c) (2006); *id.* § 3559(c)(2)(H). A "serious drug offense" includes "an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. § 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. § 960(b)(1)(A))." *Id.* § 3559(c)(2)(H). Courts most commonly find that a conviction is a predicate because it could have been prosecuted under Section 401(b)(1)(A) of the Controlled Substances Act. Courts must perform the analysis carefully.

Section 401(b)(1)(A) of the Controlled Substances Act, codified at 21 U.S.C. § 841(b)(1)(A), provides for mandatory minimum sentences where a defendant is convicted of § 841(a) and the offense involved a particular type and quantity of drugs. Section 841(a) provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 802 defines "controlled substance" and includes only those substances on the federal schedules.

Thus, as with the ACCA, if a state drug conviction is for a provision that criminalizes a broader set of drugs than federal law, then the conviction is a predicate under the federal three strikes law only if the government can prove the type of drug involved in the prior offense. Under the three strikes law, the government must show that the defendant could have been convicted for a federal drug offense under § 841(b)(1)(A) if prosecuted in federal court. Thus, if the defendant's prior offense could have involved a substance not criminalized under § 841(b)(1)(A), then the conviction is not a predicate.

Drug quantity is also an issue under this provision. A defendant can be convicted under § 841(b)(1)(A) only if the prior offense involved drug quantities in excess of certain amounts specified by that statute. Many state drug statutes do not include particular quantity requirements. If a defendant has such a prior state conviction, or if the state statute's quantity requirements are in excess of the federal requirements under § 841(b)(1)(A), then the government must prove consistent with *Shepard* the particular quantity involved in the offense.

[362] Under 18 U.S.C. § 3592(d)(3), an aggravating factor in drug-related death penalty cases is if "[t]he defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute." Thus, to establish this factor, the government would need to show that the prior conviction involved a substance criminalized by the federal CSA.

[363] 21 U.S.C. § 841(b)(1)(A) (2006). Under § 851, the government has discretion to seek an enhanced sentence through filing a notice. *Id.* § 851.

The term "felony drug offense" has a particular federal definition. The statutory definition of a felony drug offense is "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances."[364] Unlike the ACCA law described above, the 851 provision does not link to those substances appearing on the federal schedules of controlled substances. Instead, the conviction qualifies if it fits within the federal definition of the terms "narcotic drugs," "marihuana," "anabolic steroids," or "depressant or stimulant substances." Each of these categories of substances has a particular federal definition.[365]

A defendant may have a conviction under a state statute that criminalizes substances that do not fit within any of these definitions. In these instances, mere proof of the fact of a defendant's conviction for a violation of the statute will not suffice to trigger the enhancement. Rather, the government will have the burden to show that the substance involved in the prior state offense fits one of the federal definitions. In other words, a state's decision to label an offense a narcotics offense is not sufficient. The government must show that the offense involved a substance that meets the federal definition of "narcotic."

For example, Connecticut's drug statute criminalizes several substances — including benzylfentanyl, thenyfentanyl, TFMPP,[366] and chorionic gonadotropin[367] — that do not fall within the federal definitions of "narcotic drugs," "marihuana," "anabolic steroids," or "depressant or stimulant substances."[368] Other states criminalize these

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[364] *Id.* § 802(44).

[365] *Id.* § 802(9) (depressant or stimulant substances); *id.* § 802(16) (marihuana); *id.* § 802(17) (narcotic drugs); *id.* § 802(41A) (anabolic steroids).

[366] TFMPP is a Schedule I substance in Connecticut. CONN. AGENCIES REGS. § 21a-243-7(c)(36) (2009).

[367] Chorionic gonadotropin is a hormone listed on Schedule IV of Connecticut's drug schedules. *See id.* § 21a-243-9(g) (2009).

[368] Benzylfentanyl and thenyfentanyl are treated as narcotics or opiates in some states, but they do not meet the federal definition of "narcotic drugs." "Narcotic drug" under federal law includes "opiates," 21 U.S.C. § 802(17), which are defined as "any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability. *Id.* § 802(18). Benzylfentanyl and thenyfentanyl do not have "an addiction-forming or addiction-sustaining liability similar to morphine." Indeed, although the federal government at one time scheduled benzylfentanyl and thenyfentanyl as narcotics on a temporary basis, the federal government ultimately chose not to control these drugs at all. After examination and

substances: twelve states criminalize benzylfentanyl and thenyfentanyl;[369] eleven states criminalize chorionic gonadotropin;[370]

testing, the federal government concluded that benzylfentanyl and thenyfentanyl, as opposed to the other fentanyl analogs similarly scheduled on a temporary basis, did not merit control. This was the result of their "lack of significant morphine-like activity." Scheduling Recommendation for Acetyl-alpha-methylfentanyl, Alpha-methylthiofentanyl, Beta-hydroxyfentanyl, Beta-hydroxy-3- methylfentanyl, 3-Methylthiofentanyl, Para-fluorofentanyl and Thiofentanyl prepared by the Drug Control Section, Office of Diversion Control, Drug Enforcement Administration (October 1986); *see also* Letter from James M. Tolliver to James R. Smart, Assistant U.S. Att'y (Nov. 30, 2007) (on file with author). The federal government, having concluded that those two drugs lacked morphine-like addictive properties, allowed the temporary regulation of benzylfentanyl and thenylfentanyl to expire, and federal law no longer prohibits these two substances.

Chorionic gonadotropin is a "gonad-stimulating polypeptide hormone obtained from the urine of pregnant women." UNITED STATES PHARMACOPOEIA 2085 (31st ed. 2008). It is used legitimately to treat naturally occurring hypogonadism, but it is also consumed illicitly by users of anabolic steroids to counteract the side effects of prolonged anabolic steroid use. *See* U.S. DEP'T OF JUSTICE, DRUGS OF ABUSE, STEROIDS ch. 10, http://www.usdoj.gov/dea/pubs/abuse/10-steroids.htm (last visited March 21, 2010); G.V. Gill, *Anabolic Steroid Induced Hypogandism Treated with Human Chorionic Gonadotropin*, POST GRADUATE MED. J., 45-46 (1998), *available at* http://pmj.bmj.com/cgi/content/abstract/74/867/45; Expert Column, Androgenic Anabolic Steroids, *available at* http://www.medscape.com/viewarticle/408595_5. Chorionic gonadotropin is not listed on the federal schedules, and more importantly, for the purposes of the analysis under § 851, it is not a "narcotic drug," "marihuana," an "anabolic steroid," or a "depressant or stimulant substance" within the meaning of § 802(44). *See* 21 U.S.C. § 802(9) (defining depressant or stimulant substances); *id.* § 802(16) (defining marihuana); *id.* § 802(17) (defining narcotic drugs); *id.* § 802(41A) (defining anabolic steroids). Chorionic gonadotropin is none of these things; it is a hormone. UNITED STATES PHARMACOPOEIA 2085.

TFMPP is an abbreviation for trifluoromethylphenylpiperazine. The federal government initially regulated TFMPP on an emergency basis in 2002. On March 19, 2004, the Attorney General allowed the emergency scheduling of TFMPP to expire, and the DEA removed the drug from its lists of controlled substances. In electing not to schedule TFMPP, the DEA thoroughly examined whether people actually abuse the drug and whether it had a potential for abuse. The DEA concluded that it should not be a controlled substance. 69 Fed. Reg. 12795 (Mar. 18, 2004). TFMPP is plainly not a narcotic drug, marihuana, or anabolic steroid. It would only qualify as a "depressant or stimulant substance" if it was "any drug . . . which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its . . . hallucinogenic effect." 21 U.S.C. § 802(9)(D). The Attorney General declined to designate TFMPP. 69 Fed. Reg. 12794 (Mar. 18, 2004).

[369] *See supra* note 344.

[370] In addition to Connecticut, a number of states criminalize this substance, including California, Colorado, Delaware, Florida, Idaho, Louisiana, New York, North Carolina, Oklahoma, and Pennsylvania. *See* CAL. HEALTH & SAFETY CODE § 11056 (West 2010); COLO. REV. STAT. § 18-18-102 (2009); DEL. CODE ANN. tit. 16, § 4701 (2010); FLA. STAT. § 893.03 (West 2008); IDAHO CODE ANN. § 37-2709 (2008); LA. REV. STAT. ANN. § 40:1239 (2009); N.Y. PUB. HEALTH LAW § 3306 (McKinney 2010); N.C.

and five states criminalize TFMPP.[371] In addition, federal law and the laws of virtually all states criminalize fenfluramine — the "fen" in the diet drug Fen-Phen — that does not fit within one of the categories provided by 851. In other words, fenfluramine, although regulated by federal law, does not meet the definitions of narcotic drug, marihuana, anabolic steroid, or depressant or stimulant substance.[372]

In *United States v. Jackson*, the Government conceded that a violation of Connecticut's drug distribution and possession statutes does not automatically trigger the 851 enhancement because the statutes criminalize substances not covered by 851. The government was unable to prove that the defendant's prior offense involved a substance covered by 851 and withdrew the enhancement in *Jackson*.[373] Following this case, the government withdrew numerous 851 enhancements throughout the District of Connecticut.[374] Similar analysis regarding the applicability of the 851 enhancement is relevant in civil immigration cases and may be increasingly important

GEN. STAT. ANN. § 90-91 (2009); OKLA. STAT. ANN. tit. 63, § 2-210 (2009); 35 PA. STAT. ANN. § 780-104 (West 2009).

[371] In addition to Connecticut, states include Georgia, Hawaii, South Dakota, and Texas. GA. CODE ANN. § 16-13-25 (2007); HAW. REV. STAT. § 329-14 (LexisNexis 2008); S.D. CODIFIED LAWS § 34-20B-14 (2009); TEX. HEALTH & SAFETY CODE ANN. § 481.103 (Vernon 2009).

[372] Fenfluramine is "an anorectic indicated for the management of exogenous obesity." 62 Fed. Reg. 24,620 (May 6, 1997). The federal government initially regulated this drug because "fenfluramine was determined to be chemically and pharmacologically similar to amphetamine and other anorectic drugs controlled under the CSA." *Id.* This drug is best known as the "fen" in the diet drug Fen-Phen, which was a frequently prescribed drug in the mid-1990s. *See id.* Fenfluramine was initially regulated by the federal government in 1973. *Id.* In 1997, the federal government moved to deregulate the drug after studies persuaded the DEA that the drug did not have a significant potential for abuse. *Id.* at 24,620-24,621. While that application to deregulate was pending, the government discovered that the drug was causing heart valve defects in the people who were taking prescribed doses of the drug to lose weight. For public safety reasons — not because the Attorney General reached the conclusion that the drug had a potential for abuse — the petition to deregulate was withdrawn. 68 Fed. Reg. 26,247 (May 15, 2003). Fenfluramine is a regulated substance under federal law, 21 C.F.R. § 1308.14(d) (2010), but it is not one of the substances that would trigger 21 U.S.C. § 802(44)'s provisions. It is not a narcotic drug, marihuana, or an anabolic steroid. Finally, it is not a "depressant or stimulant substance" because the Attorney General has not designated it by regulation as habit forming or having a potential for abuse. *See id.* § 802(9). The Attorney General actually reached the opposite conclusion. 62 Fed. Reg. 24,620 (May 6, 1997).

[373] Gov't Sentencing Mem., United States v. Jackson, 3:06-CR151 (MRK) (2009).

[374] Anecdotally, the Government has withdrawn the 851 enhancement in a few dozen cases since *Jackson*. In addition, since *Jackson*, the Government has declined to file 851 enhancements in many cases where it would have previously sought them.

depending on the outcome of the Supreme Court's decision in *Carachuri-Rosendo v. Holder*.[375]

2. Guidelines Enhancements

As discussed above, the federal sentencing guidelines provide sentencing ranges in federal cases. Despite their now-advisory nature,

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[375] Carachuri-Rosendo v. Holder, No. 09-60 (cert. granted Dec. 14, 2009). At issue in *Carachuri-Rosendo* is whether a recidivist drug offender convicted under state law for simple drug possession — an offense that would be a misdemeanor under federal law — has been convicted for an "aggravated felony" within the meaning of the Immigration and Nationality Act ("INA"). The INA defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18." 8 U.S.C. § 1101(a)(43)(B) (2006). Section 924(c) in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c). That definition applies regardless of whether the offense is "in violation of Federal or State law." 8 U.S.C. § 1101(a)(43)(B). Thus, a state drug offense is an aggravated felony if the conduct is punishable as a felony under federal law. *See* Lopez v. Gonzales, 549 U.S. 47, 60 (2006). Possession of substances other than crack are misdemeanors under federal law. 21 U.S.C. § 844(a). However, if a defendant has a prior conviction under the federal CSA, or "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State," the prosecutor may file an enhancement under 21 U.S.C. § 851 and subject the defendant to an enhanced punishment of up to two years' imprisonment (i.e., the enhancement makes the offense a felony). *Id.*

In *Carachuri-Rosendo*, the Supreme Court is considering whether an immigrant convicted for a state possession offense, who has a prior drug offense that would have triggered an enhancement under § 851 had the conduct been prosecuted federally, has been convicted of an "aggravated felony" — even if there was no charge or finding of a prior conviction in his prosecution for the possession offense. The Government argues that because the immigrant *could have* been subject to an 851 enhancement had the conduct been prosecuted under federal law, the offense constitutes an "aggravated felony." Should the Government prevail, advocates for immigrants can challenge conclusions that convictions are aggravated felonies using an argument similar to that presented above with respect to challenges to 851 enhancements in drug distribution cases. In particular, advocates can argue that an immigrant's prior drug conviction in fact would not have triggered an enhancement under § 851 because it is not "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State." *Id.* That provision restricts enhancements based on prior state offenses to offenses involving substances criminalized under federal law. *See id.* § 844(c) ("As used in this section, the term 'drug, narcotic, or chemical offense' means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter."). Thus, if the Government fails to establish that the prior state drug offense involved a substance criminalized under federal law, then an enhancement could not have applied, and the more recent possession offense cannot be considered conduct criminalized as a felony under federal law. Accordingly, the possession offense is not an aggravated felony.

the guidelines continue to have a substantial influence on federal sentences. Discussed below are common guideline provisions that include significant adjustments when a defendant has a prior drug conviction. State drug convictions often will not automatically trigger these enhancements.

a. Career Offender Guideline

The career offender guideline applies only in cases when the defendant was at least eighteen years old at the time he committed the federal offense of conviction, and that offense is a felony that is a crime of violence or a controlled substance offense. In these cases, defendants trigger the enhancement if they have at least two prior felony convictions of either a crime of violence or a controlled substance offense.[376] If the guidelines classify a defendant as a career offender, the result is a very substantially increased sentencing range.[377]

Many state drug statutory provisions cover a broader range of conduct than the conduct that fits the guidelines' definition of "controlled substance offense." The guidelines provides that a "controlled substance offense" means an offense under federal or state law "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[378] Thus, as with the ACCA, violations of state statutes criminalizing conduct beyond that contained within this guidelines definition of "controlled substance offense" do not trigger enhancements. For example, a violation of Section 11352(a) of the California Health and Safety Code will not automatically count as a "controlled substances offense."[379] Although the statute criminalizes the sale of drugs, it also covers, *inter alia*, mere transportation of drugs, attempts to transport drugs, and offers to transport drugs. These transportation offenses do not meet the guidelines definition of "controlled substance offenses." In addition, California's drug statutes — and statutes from numerous

[376] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.1.

[377] The defendant's base offense level increases substantially, and the criminal history score increases to the maximum category, category VI. *Id.* The sentencing range can be tripled or even quadrupled because of the enhancement.

[378] *Id.* § 4B1.2(b).

[379] *See* United States v. Kovac, 367 F.3d 1116, 1118 (9th Cir. 2004) ("The district court correctly concluded, and the government does not dispute, that a generic conviction under California Health & Safety Code § 11352(a) does not qualify facially as a predicate conviction under the career offender Sentencing Guideline.").

other states, such as Connecticut — criminalize mere offers to sell drugs. An offer to provide drugs does not fall within the guidelines definition of a "controlled substance offense."[380] Finally, many statutes criminalize solicitation to sell drugs or criminal facilitation, and these acts do not constitute a "controlled substance offense" under the guidelines.[381]

b. Felon in Possession Guideline

Prior drug convictions can also lead to sentencing enhancements under the guidelines in cases where a court sentences a defendant as a felon in possession of a firearm or ammunition. Section 2K2.1 of the guidelines provides the offense level for these defendants. The offense level increases if the defendant has one, two, or more "controlled substance offenses."[382] Section 4B1.2 defines "controlled substance offense"; this is the same definition used for the career offender guideline. Accordingly, the same arguments described above apply in these cases. Many state drug convictions will not automatically trigger the enhancement in firearm cases.

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[380] United States v. Savage, 542 F.3d 959, 959 (2d Cir. 2008). As described above, an offer to provide drugs is a distinct offense from delivery or distribution of drugs, and is not equivalent to possession of drugs with intent to distribute or dispense within the meaning of Section 4B1.2(b). Application Note 1 of Section 4B1.2 provides that the term "controlled substance offense" includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offense." U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.2 cmt. n.1. However, as explained, an offer to deliver drugs is not equivalent to aiding and abetting the distribution of drugs, a conspiracy to distribute drugs, or an attempt to distribute drugs. *See supra* note 357. *But see* United States v. Bryant, 571 F.3d 147, 156-58 (1st Cir. 2009) (holding that conviction under New York statute criminalizing offers to sell drugs constituted a "controlled substance offense" under the guidelines).

[381] United States v. Dolt, 27 F.3d 235, 236 (6th Cir. 1994) (holding that defendant's conviction for criminal solicitation of narcotics offense was not "controlled substance offense" under U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.2); United States v. Liranzo, 944 F.2d 73, 79 (2d Cir. 1991) (holding that defendant's conviction for criminal facilitation of narcotics offense was not "controlled substance offense" under U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4B1.2 and emphasizing that " 'the prior convictions' requirement of the Guidelines' 'career offender' provision is to be interpreted strictly"); *see also* United States v. Aguilar-Ortiz, 450 F.3d 1271, 1276 (11th Cir. 2006) (holding that defendant's conviction for criminal solicitation was not "drug trafficking offense" under illegal reentry guideline, U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2L1.2(b)(1)(B)).

[382] A defendant with one prior conviction for a "crime of violence" or "controlled substance offense" has a base offense level of 20, and a defendant with two such convictions has a base offense level of 24. A defendant with no such convictions has a base offense level of only 14.

c. *Illegal Reentry Guideline*

The guidelines that apply in illegal reentry cases also depend on the presence of prior drug convictions. The presence of a prior "drug trafficking offense" can cause a twelve- or sixteen- level increase, depending on the length of the sentence imposed for the prior conviction.[383] If a conviction is an "aggravated felony" but not a "drug trafficking offense," an eight-level enhancement applies.[384] Prior state drug convictions will not always meet these definitions. The guidelines define a "drug trafficking offense" somewhat differently than a "controlled substance offense." A drug trafficking offense is "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[385] Convictions under statutes like California's that criminalize transportation of drugs do not automatically qualify as drug trafficking offenses.[386] However, in light of the "offer to sell" language that the Commission added in 2008,[387] convictions under statutes that criminalize offers would trigger this enhancement.

An eight-level increase applies under the guidelines if a defendant's removal was after conviction for an "aggravated felony."[388] The term includes "illicit trafficking in a controlled substance (as defined in

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[383] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2L1.2(b)(1)(A)-(B).

[384] *Id.* § 2L1.2(b)(1)(C).

[385] *Id.* § 2L1.2 cmt. n.1(B)(iv).

[386] Numerous courts have held that a conviction for a violation of California Health & Safety Code section 11352(a) does not automatically trigger an enhancement under the guidelines. Indeed, the government has conceded as much in other cases. *See* United States v. Gutierrez-Ramirez, 405 F.3d 352, 359 (5th Cir. 2005) ("[T]he government does not challenge the proposition that section 11352(a) could be violated by conduct that would not qualify as a 'drug trafficking offense' under the Guidelines."); United States v. Navidad-Marcos, 367 F.3d 903, 908 (9th Cir. 2004) (noting government's concession that violation of § 11379(a), which contains identical language to section 11352(a) in relevant part, was not automatically "drug trafficking offense" under U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 2L1.2). Prior to the Commission's amendment, the Fifth Circuit held that a conviction under a Texas statute that criminalizes offers to deliver drugs is not a "drug trafficking offense" under this definition. United States v. Morales-Martinez, 496 F.3d 356, 358 (5th Cir. 2007).

[387] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, app. C (Amendment 722). Although the Commission modified the illegal reentry guideline to include offers to sell drugs, it has not added this language to the definition of a "controlled substance" offense, which applies to the career offender and firearm guidelines.

[388] *Id.* § 2L1.2(b)(1)(C).

section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)."[389] Title 18, Section 924(c) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." Title 8, Section 1101(a)(43) provides further that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law."[390]

The Supreme Court has held that, for purposes of the "drug trafficking crime" portion of the aggravated felony definition, a state drug offense constitutes "a felony punishable under the Controlled Substances Act" only if it prescribes conduct that is punishable as a felony under federal law.[391] Thus, a state drug conviction qualifies as an aggravated felony if it either: (1) constitutes "illicit trafficking" in a controlled substance;[392] or (2) involves conduct that would be punishable as a felony under the federal Controlled Substances Act, the Controlled Substances Import and Export Act, or Title 46, Chapter 705, of the United States Code.

A state drug conviction may not qualify under this definition in several ways. This analysis is relevant not only to guidelines enhancements, but also to determinations regarding whether drug convictions trigger the civil immigration consequences that result from conviction for aggravated felonies. First, as the Ninth Circuit has held, prior state convictions will not automatically qualify as aggravated felonies if the state statute criminalizes substances not criminalized under federal law.[393] Second, convictions under state statutes that criminalize transportation of drugs or offers to provide drugs do not automatically constitute aggravated felonies, as those acts are not criminalized under federal law[394] and do not constitute "illicit

[389] The commentary to the guidelines provides that the term "aggravated felony" "has the meaning given that term in 8 U.S.C. § 1101(a)(43), without regard to the date of conviction for the aggravated felony." *Id.* § 2L1.2 cmt. n.3(A). Title 8, United States Code section 1101(a)(43) provides a lengthy list of offenses constituting "aggravated felonies." 8 U.S.C. § 1101(a)(43) (2006).

[390] 8 U.S.C. § 1101(a)(43).

[391] Lopez v. Gonzales, 549 U.S. 47, 60 (2006).

[392] The aggravated felony definition does not specifically define "illicit trafficking." In *Lopez*, however, the Supreme Court noted that "ordinarily 'trafficking' means some sort of commercial dealing." *Lopez*, 549 U.S. at 53-54. The Court cited *Black's Law Dictionary*, which defines "traffic" as to "trade or deal in (goods, esp. illicit drugs or other contraband)." *Id.*; BLACK'S LAW DICTIONARY 1534 (8th ed. 2004).

[393] Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1077 (9th Cir. 2007).

[394] The criminal violation provisions of the Controlled Substances Act are contained in 21 U.S.C. §§ 841, 842, 843, 844, 846, 848, 849, 854, 855, 856, 859, 860,

trafficking of drugs."[395] In sum, although the aggravated felony definition encompasses many forms of state drug convictions, some state statutes are broader than the aggravated felony definition. This provides an opportunity to utilize *Shepard*.

E. The Government's Burden of Proof

As set forth above, many state drug statutes cover a broader range of conduct than the conduct that triggers federal drug-related sentencing enhancements. Under these circumstances, a sentencing court must apply the modified categorical approach of *Shepard* and *Taylor* in determining whether the conviction qualifies for the enhancement.[396] If the prior conviction resulted from a trial, a judge may enhance a

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861, 863, 864. The criminal violation provisions of the Controlled Substances Import and Export Act are contained in §§ 952, 953, 955, 959, 960, 961, 963. These provisions do not criminalize offers. In addition, federal law does not criminalize all forms of transportation of drugs. *See* United States v. Harrison, No. 03CR875, 2004 WL 434624, at *9 (S.D.N.Y. Mar. 9, 2004). At least in California, a defendant can be guilty of transportation of drugs under California law without being guilty of possession of drugs. The Ninth Circuit has concluded that the California statute criminalizes transportation of drugs even where the defendant is not guilty of possession of the drugs. *Accord* United States v. Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001); People v. Watterson, 286 Cal. Rptr. 13, 15-16 (Cal. Ct. App. 1991); *see also* People v. Rogers, 486 P.2d 129, 134 (Cal. 1971). Moreover, even to the extent that transportation of drugs encompasses possession of drugs, a first offense for mere possession of drugs (other than cocaine base) is not punishable as a felony under federal law. *See* 21 U.S.C. § 844 (2006). Under *Lopez v. Gonzales*, 549 U.S. 47, a state drug offense is a "drug trafficking crime" under the "aggravated felony" definition only if it prescribes conduct that is punishable as a felony under federal law. Thus, even if transportation of drugs under a state statute necessarily encompasses possession of drugs, a conviction for the offense will not automatically qualify as an aggravated felony — unless the statute covers only cocaine base possession. 21 U.S.C. § 844 (criminalizing only cocaine base possession as federal felony).

[395] Some courts have held that violations of California's drug statutes — which criminalize transportation and offers — do not automatically constitute aggravated felonies. *See Rivera-Sanchez*, 247 F.3d at 908. The Ninth Circuit reasoned that the California statute criminalizes "offers" to transport, import, sell, furnish, administer, or give away drugs, and concluded that the federal Controlled Substances Act did not criminalize such conduct. *See id.* at 909. The Court also noted that section 11360(a) "criminalizes transportation of marijuana even if the defendant is not guilty of possession of the marijuana." *Id.* at 908 (citing People v. Watkins, 214 P.2d 414, 416 (Cal. Ct. App. 1950). Moreover, "[a] violation [of section 11360(a)] does not depend on a profit motive: The statute also proscribes purely nonprofit activities." *Id.* (citing People *ex rel.* Lungren v. Peron, 70 Cal. Rptr. 2d 20, 25-27 (Cal. Ct. App. 1997)); *see also Harrison*, 2004 WL 434624, at *9 (holding that violation of section 11360 was not automatically "aggravated felony" for purposes of enhancement under U.S. Sentencing Guidelines Manual § 2L1.2).

[396] United States v. Shepard, 544 U.S. 13, 17 (2005).

sentence if the charging paper and jury instructions actually required the jury to find all the elements of the enhancement.[397] A conviction that resulted from a plea may trigger an enhancement if the defendant "necessarily admitted" the elements of the enhancement through his plea.[398] To determine what facts the defendant "necessarily admitted," the court "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[399]

Thus, for the government to meet its burden under the modified categorical approach of *Shepard* and *Taylor*, it must produce state court records that show that the defendant admitted — or the jury found — the facts that trigger the enhancement. For the reasons described below, the government often cannot meet its burden.[400]

1. Destruction of Records

At times, the government is unable to meet its burden because state court records have been destroyed. For a conviction that resulted from a plea, it may be critical for the government to obtain the charging document and transcript from the plea proceeding. For a conviction after trial, the government needs to obtain the charging document and jury instructions. In *Shepard*, the Supreme Court flatly rejected the government's argument that the rules for counting a conviction should not depend on "happenstance of state court record-keeping practices."[401] Thus, where records are unavailable, the enhancement simply does not apply.

Many states destroy records after a particular period.[402] Even if some records remain available, transcripts from proceedings frequently are not. These transcripts are often necessary to prove what the defendant admitted or the jury was required to find. The government often seeks enhancements based on old convictions, as statutory enhancements

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[397] Taylor v. United States, 495 U.S. 575, 602 (1990).

[398] *Shepard*, 544 U.S. at 21, 26.

[399] *Id.* at 26.

[400] The government bears the burden of showing the applicability of an enhancement under the Guidelines. *See* United States v. Desimone, 119 F.3d 217, 228 (2d Cir. 1997); United States v. Butler, 970 F.2d 1017, 1026 (2d Cir. 1992).

[401] *Shepard*, 544 U.S. at 22.

[402] Ross E. Cheit, *The Elusive Record: On Researching High Profile 1980s Sexual Abuse Cases*, 28 JUST. SYS. J. 79, 81 (2007) (providing chart detailing rules regarding destruction of records in all fifty states).

apply under the ACCA, the Three Strikes Law, and Section 851 regardless of the age of the prior conviction.[403] The older the defendant's conviction, the greater the likelihood that records will be unavailable for the government's use.

2. Charging Documents

At times, the government can produce a charging document, such as an indictment or information that narrows the offense to cover only conduct that triggers an enhancement. In those circumstances, courts will likely hold that proof that a defendant pleaded guilty to the charge alleged in the charging document would suffice to trigger the related enhancement.

However, a charging document alone is not sufficient to carry the government's burden. The Ninth Circuit has explained that a charging document "is insufficient alone to prove the facts to which [the defendant] admitted."[404] Often, a defendant will have in fact pleaded guilty to a charge other than the one contained in the charging document. In these cases, the charging document does not narrow the offense of conviction.[405] The Ninth Circuit has held — at least with regard to California convictions — that an enhancement does not apply even where the sentencing court has a charging document that charges only conduct that triggers the enhancement *and* the court has a document stating that the defendant pleaded guilty to the general statutory provision that state prosecutors specified in the charging document. Rather, for the enhancement to apply there must be a

[403] The guidelines contain various restrictions on the use of old convictions. For convictions where a defendant received a sentence of imprisonment exceeding one year and one month, the conviction does not trigger a guidelines enhancement if it was imposed more than fifteen years before the defendant committed the federal offense — unless the sentence resulted in the defendant's incarceration during any part of such fifteen-year period. For convictions where the defendant received a shorter sentence, the convictions count only when the sentence was imposed within ten years of the defendant's commencement of the federal offense. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 4A1.2(e).

[404] United States v. Snellenberger, 493 F.3d 1015, 1019 (9th Cir. 2007).

[405] Martinez-Perez v. Gonzales, 417 F.3d 1022, 1029 (9th Cir. 2005) ("Based on this record, we cannot determine whether Martinez necessarily pled guilty to all of the elements of a theft offense as generically defined. Martinez pled guilty to an offense different from the one charged in the information. The information therefore is not the sort of 'generically limited charging document' indicating that the plea necessarily rested on the fact identifying the burglary as a generic theft offense . . . .").

record that the defendant pleaded guilty *as charged in the charging document*.[406]

In addition, the charging document often will not actually narrow the offense. A charging document may simply mirror the language of the general statute and charge acts that trigger the enhancement but also acts that do not. Prosecutors may have phrased these acts in the conjunctive or the disjunctive. The Fifth Circuit has held that where a charging document charges in the conjunctive, a conviction after a trial or a plea to the charge does not necessarily trigger an enhancement because offenses can be pleaded in the conjunctive but proved in the disjunctive.[407] The Ninth Circuit has held that a conviction that results from a defendant's guilty plea to a charging document that phrases conduct in the disjunctive does not trigger an enhancement, but a plea to a conjunctive charge might suffice to trigger the enhancement.[408]

Other times, a charging document might appear to narrow an offense, but is in fact simply providing a shorthand for the title of the statutory provision. For example, charging documents in Connecticut alleging a violation of Section 21a-277(a) of the Connecticut General Statutes will often state "sale of hallucinogen/narcotic." Section 21a-277(a) criminalizes sales *and* offers to sell drugs. It appears that the use of the word "sale" in such charging documents is not a purposeful narrowing of the charge by the prosecutor, but rather is a shorthand phrase that a computer generates automatically upon entry of the statutory provision.[409]

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[406] United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007).

[407] United States v. Morales-Martinez, 496 F.3d 356, 359-60 (5th Cir. 2007) (plea under Texas law to conjunctive charge did not trigger enhancement); United States v. Gonzales, 484 F.3d 712, 715-16 (5th Cir. 2007) (conjunctive charge resulting in conviction after trial did not trigger enhancement).

[408] United States v. Almazan-Becerra, 482 F.3d 1085, 1090 (9th Cir. 2007) ("Because Almazan-Becerra pled to the disjunctive 'either transport[ing] or sell[ing] or offer[ing] to sell marijuana,' he could have pled to transporting marijuana for personal use, which does not qualify for the enhancement. A plea to selling marijuana is only one possible interpretation of these statements. We therefore hold that this disjunctive guilty plea does not 'unequivocally establish' that Almazan-Becerra committed a drug trafficking crime."); United States v. Smith, 390 F.3d 661, 665 (9th Cir. 2004), *amended by* 405 F.3d 726 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 252 (2005) ("[W]hen a defendant pleads guilty . . . to facts stated in the conjunctive, each factual allegation is taken as true.") (internal quotations and citation omitted). However, if the charging document states a charge in the conjunctive, if it is stated in the disjunctive at the plea proceeding, it appears the Ninth Circuit would hold that the conviction does not trigger an enhancement. *Almazan-Becerra*, 482 F.3d at 1090.

[409] The government conceded this in the appeal in *United States v. Savage*, 542 F.3d 959, 963 (2d Cir. 2008). In addition, some documents that are similar to charging

3. Plea Transcripts

The government often tries to meet its burden by producing a transcript from a plea proceeding. Under *Shepard*, the court may rely upon an "explicit factual finding by the trial judge to which the defendant assented" or a "colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant."[410] Plea transcripts many times reveal admissions by defendants that trigger enhancements. Sometimes, however, they do not. A mere statement of facts about the offense by the prosecutor or judge at the plea proceeding does not suffice. If the defendant has not admitted these facts, courts may not use them as the basis for an enhancement.

Not infrequently, the defendant will enter a plea under the *Alford* doctrine, or a plea or *nolo contendere* or no contest, and, thus, will not admit any facts. One study found that 6.5% of state defendants entered *Alford* pleas and 11% pleaded *nolo contendere*.[411] In some jurisdictions, the rate is much higher.[412] With a *nolo* plea, the defendant does not

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documents will not suffice to narrow the offense under *Shepard*. The Second Circuit held in *United States v. Rosa*, 507 F.3d 142, 154-55 (2d Cir. 2007) that courts cannot consider a bill of particulars in applying the modified categorical approach when the prior conviction resulted from a plea. The court reasoned:

> We assume for purposes of this discussion that the Bill of Particulars may best be characterized as a "charging document." We are not convinced, notwithstanding the *Shepard* Court's reference to "charging document[s]" as potentially reliable indicia of the nature of prior convictions, that the Bill is therefore "*Shepard* evidence" for our purposes. *See Shepard*, 544 U.S. at 26. Rosa did not stand trial. The Bill of Particulars did not help define the crime of which he was convicted, *see Taylor*, 495 U.S. at 602, or serve to limit the charges that he could have pleaded guilty to, *see Shepard*, 544 U.S. at 21. At most, the Bill of Particulars limited only what the State would have been allowed to prove against Rosa had the case gone to trial.
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> . . . .
>
> On the facts before us, even accepting that the Bill of Particulars was a "charging document," as we do for these purposes, we do not think that Rosa pleaded guilty to, or otherwise admitted the allegations contained in the Bill; thus, he did not necessarily plead to a charge involving a firearm.

Rosa, 507 F.3d at 154-55.

[410] United States v. Shepard, 544 U.S. 13, 26 (2005).

[411] Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1375 (2003).

[412] In some jurisdictions such as the G.A. state court in New Haven, a substantial percent of pleas are entered under the *Alford* doctrine.

admit guilt but also does not deny it.[413] An *Alford* plea usually involves an explicit denial of guilt.[414] Many states do not permit *Alford* or *nolo* pleas to be used against a defendant as an admission in a subsequent case.[415]

In cases of an *Alford* or a *nolo* plea, even where the prosecutor presents a factual basis for the plea, the court may not use the prosecutor's facts to support the enhancement because the defendant did not confirm them. Of course, *Alford* and *nolo* pleas may support an enhancement where the plea is to a statutory provision that is no broader than the conduct covered by the enhancement. However, if the statutory language is broader and the court is using a modified categorical approach, the court may not rely on a prosecutor's statement of facts during a plea proceeding if the defendant does not admit that statement.

The Second Circuit squarely held in *Savage* that when a defendant enters an *Alford* plea, he does not confirm the factual basis for the plea described by the prosecutor.[416] In *Savage*, the Second Circuit explained that "[b]ecause Savage entered an *Alford* plea in which he refused 'to admit his participation in the acts constituting the crime,' Savage did not, by design, confirm the factual basis for his plea."[417] Significantly,

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[413] *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "nolo plea" as "[a] plea by which the defendant does not contest or admit guilt").

[414] *See* Burrell v. United States, 384 F.3d 22, 24, 28 (2d Cir. 2004) (noting that "an *Alford* plea often asserts innocence whereas a nolo contendere plea refuses to admit guilt").

[415] The Second Circuit has noted that "Connecticut considers any 'tacit admission' implicit in nolo contendere and *Alford* pleas as too 'inconclusive and ambiguous' to be given 'currency beyond the particular case' in which the plea was entered." *Id.* at 30 (citing Lawrence v. Kozlowski, 372 A.2d 110, 115 n.4 (Conn. 1976)); *see also* Groton v. United Steelworkers of Am., 757 A.2d 501, 506-07 (Conn. 2000) (noting that "the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case"). Connecticut law does not even require parties to provide a factual basis for a judge to accept an *Alford* plea. Baillargeon v. Comm'r of Corr., 789 A.2d 1046, 1056 (Conn. App. Ct. 2002).

[416] United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008).

[417] *Id.* (citation omitted). The court in *Savage* noted: "The state judge carefully explained this, by reassuring Savage that the plea would be accepted even though Savage did not 'agree with the facts.' " *Id.*

Prior to *Savage*, the district court in *United States v. Madera* reached the same conclusion. 521 F. Supp. 2d 149, 154 (D. Conn. 2007). In *Madera*, at issue was whether the Government could prove through the modified categorical approach that the defendant's prior conviction involved a substance criminalized under federal law. *Id.* at 152. The government submitted a transcript of the plea proceeding. *Id.* at 153. During the proceeding, the prosecutor stated that the substance tested positive for heroin. *Id.* The defendant entered an *Alford* plea. *Id.* at 154. Under these

the court held that "the government cannot rely on any factual admissions during the plea colloquy to establish the predicate nature of [the defendant's] conviction."[418] The D.C. Circuit recently reached the same conclusion with respect to *nolo* pleas.[419]

Focusing on the facts actually admitted by the defendant is central to *Shepard*'s analysis. Four Justices in *Shepard* noted that allowing a sentencing court to make a "disputed finding of fact" about the conduct underlying the defendant's prior conviction would raise significant Sixth Amendment concerns.[420] The four Justices stated that the rule that courts should read these statutes "to avoid serious risks of unconstitutionality . . . counsels us to limit the scope of judicial fact finding on the disputed generic character of a prior plea."[421] A fifth

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circumstances, the district court found that the defendant had not admitted the substance involved, and the enhancement would not apply. *Id.* The court reasoned:

> In the January 1997 plea proceeding, before accepting his plea, the state court informed Madera "[w]hen you plead under the *Alford* doctrine, that means that you don't agree with the facts as stated by the prosecutor." While the state court found that there was a factual basis for the plea and accepted it, the transcript of the plea colloquy does not contain any explicit factual findings by the court, and certainly none to which the defendant assented. Instead, Madera's plea reveals that he did not confirm that the substance was heroin. In the face of an explicit statement by the state court that Madera was disputing the prosecutor's facts and under Connecticut's law governing *Alford* pleas, Madera's entering an *Alford* plea to the crime of possession of unspecified narcotics with the intent to distribute does not amount to an admission that the prosecutor correctly identified the substance. Accordingly, based on this transcript the Court cannot determine the substance involved in Madera's 1997 conviction.

Id.

[418] *Savage*, 542 F.3d at 966.

[419] *See* United States v. De Jesus Ventura, 565 F.3d 870, 878-79 (D.C. Cir. 2009) ("The question, then, is whether the factual proffer is within the limited set of evidence that we may look to under *Shepard*'s modified categorical approach. The government argues that it is, because by entering a *nolo* plea Ventura admitted the truth of this factual proffer and, therefore, the elements of generic kidnapping. The government maintains that the pleading defendant admits the truth of any facts alleged by the prosecution. But this argument misconstrues the effect of a *nolo* plea under Virginia law. In Virginia, a defendant who pleads *nolo contendere* admits only the truth of the charge — that is, the crime charged in the indictment. Thus Ventura was necessarily convicted of any facts charged in the Virginia indictment. But that indictment charged only that Ventura abducted the victim with the intent to deprive her of personal liberty. Like the abduction statute itself, that description embraces conduct that does not amount to generic kidnapping.") (footnote and citations omitted).

[420] Shepard v. United States, 544 U.S. 13, 24-26 (2005) (Souter, J., plurality op.).

[421] *Id.* at 26.

Justice, Justice Thomas, stated that such judicial fact-finding about conduct underlying prior convictions would not just raise constitutional concerns, but would violate the Sixth Amendment.[422] *Shepard* avoids the constitutional problem by focusing on admitted facts — there is no Sixth Amendment error when a court enhances a sentence based on a fact admitted by the defendant about the conduct underlying the prior conviction.[423]

Accordingly, under the rule adopted by the Supreme Court in *Shepard*, the relevant inquiry is on the facts admitted by the defendant. With an *Alford* or *nolo* plea, the defendant does not admit the facts proffered by the prosecutor, and, as a result, sentencing courts cannot use these facts to trigger the enhancement.

A more complicated question occurs when the charging document narrows the offense of conviction, but the defendant enters an *Alford* or *nolo* plea. This scenario presents a closer question that may depend on state law procedures and case law. One could argue that a defendant in this situation is merely accepting a conviction for the general statutory provision charged, and is not admitting any particular facts regarding his conduct, even if particular facts are set forth in the charging document. In the Ninth Circuit, the question appears to turn on whether the defendant acknowledged he was pleading to the offense *as charged in the indictment*.[424]

Some commentators argue that *Alford* pleas should be avoided on the ground that they are counter to a truth-seeking purpose of the criminal justice system.[425] One could view the advantage gained under *Shepard* by defendants who entered *Alford* pleas as further support for avoiding *Alford* pleas. However, given the severity of the enhancements, it may

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[422] *Id.* at 27-28.

[423] *See* United States v. Booker, 543 U.S. 220, 232 (2005).

[424] United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007) ("In order to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain the critical phrase as charged in the Information.") (internal quotation marks omitted); *see also* United States v. Vigil, No. CR-070086, 2008 WL 1730092, at *4 (E.D. Wash. Apr. 10, 2008) ("The fact that Defendant entered an *Alford* plea to the charge is of no consequence with regard to use of the modified categorical approach. The legal implications of a plea are the same, that being an admission of the facts charged in the Information, whether or not the defendant maintains his innocence. Defendant pled guilty to an Amended Information specifically charging him with use of force upon others by means of a deadly weapon.") (citations omitted).

[425] Bibas, *supra* note 411, at 1402-03; Curtis J. Shipley, *The* Alford *Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1075 (1987).

be that the resulting sentences for these defendants are in fact more consistent with the purposes of sentencing.

4. Abstracts of Judgment

The government often tries to meet its burden under *Shepard* by producing documents created by a clerk, such as "abstracts of judgment," instead of documents produced by a judge. The Ninth and Fifth Circuits both held that sentencing courts cannot use abstracts of judgment in conducting the modified categorical approach.[426] Both courts also explained that the abstract can prove the simple fact of a conviction for purposes of an enhancement. In other words, if the state statute does not cover a broader range of conduct than the enhancement, the court may use the abstract of judgment as proof of the defendant's conviction for the offense. However, where a statute covers a broader range of conduct than the enhancement, the sentencing court may not consider the abstract of judgment to determine whether the defendant admitted — or the jury found — that the defendant committed the conduct triggering the enhancement.The Second Circuit took a different approach in *United*

[426] United States v. Narvaez-Gomez, 489 F.3d 970, 977 (9th Cir. 2007) (citing United States v. Navidad-Marcos, 367 F.3d 903, 908-09 (9th Cir. 2004)); *see also* Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1078-79 (9th Cir. 2007); Martinez-Perez v. Gonzales, 417 F.3d 1022, 1029 (9th Cir. 2005). In *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 358 (5th Cir. 2005), the Fifth Circuit explained:

> Under California law, as the Supreme Court of California has recently reminded us: "An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." People v. Mitchell, 26 Cal. 4th 181, 109 Cal. Rptr. 2d 303, 26 P.3d 1040, 1042 (Cal. 2001). Preparation of the abstract of criminal judgment in California is a clerical, not a judicial function. People v. Rodriguez, 152 Cal. App. 3d 289, 299, 199 Cal. Rptr. 433 (Cal. Ct. App. 1984). Indeed, in California, "[a]ppellate courts routinely grant requests on appeal of the Attorney General to correct errors in the abstract of judgment." People v. Hong, 64 Cal. App. 4th 1071, 1075, 76 Cal. Rptr. 2d 23 (Cal. Ct. App. 1998). Under California law, the form of the abstract of judgment is promulgated by the Judicial Council of California. People v. Sanchez, 64 Cal. App. 4th 1329, 1331, 76 Cal. Rptr. 2d 34 (Cal. Ct. App. 1998); Cal. Penal Code § 1213.5. The form simply calls for the identification of the statute of conviction and the crime, and provides a very small space in which to type the description. It does not contain information as to the criminal acts to which the defendant unequivocally admitted in a plea colloquy before the court.

Id.

States v. Green.[427] In *Green*, the court held that a Certificate of Disposition — a document generated by the clerk's office through accessing a computer database — was usable under the modified categorical approach. The court held that a New York Certificate of Disposition is the type of "judicial record" that *Shepard* permits a court to rely upon in determining the nature of a prior conviction. The court ultimately remanded the case for further fact finding, however, because there was a question about whether the subsection noted in the certificate was purposeful or was a default field code entered by a computer.[428]

In sum, the government will often be unable to meet its burden of proof in establishing the applicability of an enhancement because documents are missing, defendants entered *Alford* or *nolo* pleas, or state prosecutors were not precise in their charging documents or statement of facts at a plea.

IV. *SHEPARD*'S PROMISE AND PROBLEMS

Pursuit of the *Shepard* arguments described above will lead to fewer federal sentencing enhancements based on drug prior convictions. Application of *Shepard* has led to a substantial drop in the number of statutory and guidelines enhancements applied in the District of Connecticut, and reductions are possible nationwide.[429]

When judges avoid applying statutory enhancements under *Shepard*, they greatly increase their discretion in fashioning sentences. Avoiding an enhancement is a desirable result in many cases because drug recidivist enhancements often result in increases to sentences that are disproportionate and not justified by the purposes of punishment. For example, in a drug distribution case, a sentencing court might use *Shepard* analysis and find an 851 enhancement inapplicable. Rather than a twenty-year mandatory minimum sentence, a ten-year minimum applies. Now the court can determine what sentence within the range of ten years to life the circumstances warrant. Studies show that judges typically find the mandatory minimum sentences in drug cases too harsh[430] and, thus, we can expect courts generally to impose lower sentences. This is a better result in many cases for the reasons described in Part II of this Article. *Shepard* moves some of the control

[427] 480 F.3d 627 (2d Cir. 2007).
[428] *Id. at* 635.
[429] *See supra* note 325 and accompanying text.
[430] *See supra* note 171-73 and accompanying text.

over sentencing in drug cases away from prosecutors — who have discretion to file 851 enhancements — and towards judges.

Shepard also reduces the number of prior drug convictions that will trigger enhancements under the guidelines, and thus leads to lower guideline range calculations. Although these guideline ranges are advisory, they continue to substantially impact sentencing decisions. Judges generally impose lower sentences when the guideline range is lower. Thus, again, rigorous *Shepard* analysis will reduce the impact of prior drug convictions on sentences. This is a good result given that empirical evidence does not support these guideline enhancements and, for the most part, the enhancements provide for excessive sentences. It bears emphasizing that avoiding enhancements based on prior drug convictions through *Shepard* analysis does not mean that judges will not consider criminal history at all in sentencing. Rather, it means that prior drug convictions may have a more proportionate impact on the sentence.

However, although widespread application of the *Shepard* analysis may lead to just results in individual cases, it may also cause disparities among the sentences received by similarly situated federal criminal defendants. The applicability of an enhancement may turn on fortuitous circumstances such as the availability of a transcript from an old state proceeding, the particular phrasing of a state indictment, or whether a state regulates a broader range of drugs than federal law. None of these factors relate to the culpability of the defendant or his risk of recidivism.

One response to these disparities would be for the Supreme Court to retreat from its holding in *Shepard*. By allowing judges to cast a wider evidentiary net in determining a defendant's conduct in a prior case, the government would be able to prove applicability of enhancements more frequently. Indeed, the Supreme Court began a retreat from *Shepard* in civil immigration cases with *Nijhawan v. Holder*.[431] Yet criminal cases raise different concerns because of the Sixth Amendment right to a jury trial. As a majority of Justices in *Shepard* recognized, it would raise significant Sixth Amendment concerns to permit a judge to impose a higher sentence based on a finding about a disputed fact relating to the conduct underlying a prior conviction. The Supreme Court has held that prosecutors need not prove the mere *fact* of a prior conviction to a jury beyond a reasonable doubt.[432] Retreating from *Shepard*, however, would mean expanding this limited

[431] 129 S. Ct. 2294, 2299, 2303 (2009).

[432] Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998).

prior conviction exception and allowing judges to resolve disputed facts relating to the conduct underlying the conviction.[433]

In addition to the Sixth Amendment concerns raised by abandoning *Shepard*, there are efficiency and reliability concerns. Resolving disputed facts through mini-trials at sentencing proceedings would be time consuming and could produce unreliable results: a defendant's conviction may be quite old and the memory of witnesses — if they are even available — stale.

Although retreating from *Shepard* is undesirable, the potential for disparities after *Shepard* remains troubling. A danger is that Congress and the Sentencing Commission would react to the disparities by expanding the language of federal enhancements so that more convictions under state drug statutes will automatically trigger the enhancements. The Commission did just that when it amended the illegal reentry guideline to include offers to provide drugs.[434]

Indeed, over the years, Congress and the Commission typically have responded to disparities by increasing rather than decreasing sentences.[435] The sentencing guidelines themselves were a reaction to concerns about disparities,[436] and the guidelines increased the length of federal sentences considerably.[437] The Commission has similarly broadened the types of convictions that trigger the career offender provision, citing concerns about disparities as a rationale for the amendments.[438]

With regard to enhancements based on prior drug convictions, it would be a serious mistake to try to reduce disparities by making enhancements broader or by deferring to state definitions of offenses. Federal enhancements already result in sentences that are too harsh in many cases. Broadening the scope of enhancements would mean including people who engaged in less culpable prior conduct (i.e., merely offering a drug, possessing a drug, or distributing a drug that is legal under federal law). Deferring to state labeling of offenses could create precisely the type of disparities that Congress and the Commission wanted to avoid. Defendants would face the same

[433] Of course, Sixth Amendment concerns are no longer present with regard to enhancements under the sentencing guidelines — which are now advisory. Courts theoretically could continue to apply *Shepard* with regard to statutory enhancements but cease to do so in calculating the guidelines.

[434] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, app. C (Amendment 722).

[435] Amy Baron-Evans, *Continuing Struggle*, *supra* note 126, at 32 & n.39.

[436] STITH & CABRANES, *supra* note 228.

[437] *Id.*

[438] *See supra* note 201 and accompanying text.

enhancement based on dissimilar prior conduct. For example, a defendant's sentence could double based on a prior conviction for possessing a substance that is not even criminal under federal law or the laws of many states.

Another potential reform would be for states to conform their drug statutes to federal definitions. States could criminalize only substances regulated by federal law, and could eliminate acts such as offers from their drug distribution statutes. Indeed, over the years, there have been efforts at creating uniform state drug statutes.[439] However, states may have little interest in amending their laws simply to match federal law. States have an interest in deciding themselves which substances they deem dangerous enough to criminalize and which acts they want to prohibit within their borders. In fact, states and the federal government have clashed recently about the criminalization of some substances. For example, while the federal government prohibits marijuana, some states allow it for medicinal purposes or decriminalize altogether possession of small amounts of the substance.[440] Many states have different views about what penalties are appropriate for drug crimes; federal penalties are much harsher than the penalties provided in most states.[441] These states may not view facilitating federal enhancements as a worthy goal.

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[439] *See* National Conference of Commissioners on Uniform State Laws, Uniform Controlled Substances Act (1994) (proposing legislation designed to create uniform controlled substances laws in all fifty states); National Conference of Commissioners on Uniform State Laws, Uniform Controlled Substances Act (1990) (same); Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973) (same); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (same); National Conference of Commissioners on Uniform State Laws, Uniform State Narcotic Act (1932) (same).

[440] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 21-22 (2005) (holding that federal government had authority under Commerce Clause to criminalize the manufacture, distribution, and possession of marijuana to intrastate growers and users of marijuana for medical purposes — despite California's choice to legalize these acts under the California Compassionate Use Act); David Abel, *Mass. Voters OK Decriminalization of Marijuana*, BOSTON GLOBE, Nov. 4, 2008 (describing new law decriminalizing possession of small quantities of marijuana in Massachusetts); Vikram David Amar, *The Clash Between Federal Drug Law and California's "Medical Marijuana" Law: How Two Interesting Recent Events Illustrate Their Interplay*, http://writ.news.findlaw.com/amar/20071109.html, Nov. 9, 2007 (describing California's medical marijuana laws and tensions with federal law).

[441] *See, e.g.*, Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 731-32 (2002) ("Nationwide, federal sentences for drug and gun offenses result in prison time that is three times greater, on average, than comparable state sentences.").

Instead of broadening enhancements or deferring to state definitions of offenses, the Sentencing Commission and Congress should consider eliminating enhancements based on prior drug convictions or at least reducing the magnitude of these sentencing increases. To eliminate these enhancements would not mean removing criminal history from the sentencing calculus. Under the guidelines, judges would still use prior drug convictions to calculate criminal history scores; the criminal history provisions of the guidelines would count these drug convictions just as ordinary convictions.[442] In addition, prior criminal history is a relevant factor under the sentencing statute, 18 U.S.C. 3553(a).[443] Rather, eliminating the enhancements based on prior drug convictions would simply mean that offense levels under the guidelines would not increase based on these convictions, and prior drug convictions would not trigger increased mandatory minimum sentences under the various statutes.

Eliminating federal enhancements based on prior drug convictions, or at least decreasing the magnitude of these enhancements, would also go a long way towards reducing the federal prison population. During the past twenty-five years, the federal prison population has grown by more than 500%.[444] Indeed, although the growth of the prison population has slowed in some states and even declined in a few, the federal prison population continues to expand rapidly.[445] The majority of federal prisoners are serving sentences for drug offenses.[446] The large size of the federal prison population is due in substantial part to the impact that prior drug convictions have on federal sentences.

There are signs that public views are beginning to change about the incarceration rates of nonviolent drug offenders, particularly in light of the current economic climate. Some states, faced with dramatic budget deficits, are beginning to slow or even reverse prison population growth.[447] Reducing the impact of enhancements based on prior drug convictions could lead to more just results in individual cases and could help reduce the federal prison population without jeopardizing public safety.

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[442] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, ch. 4.

[443] 18 U.S.C. § 3553(a) (2006) (stating that in imposing sentence, courts shall consider "the nature and circumstances of the offense and the history and characteristics of the defendant").

[444] THE SENTENCING PROJECT, EXPANDING PRISON POPULATION, *supra* note 146, at 1.

[445] *Id.*

[446] *Id.*; *see also* THE SENTENCING PROJECT, PRISON POPULATION, *supra* note 145, at 2.

[447] *See, e.g.*, Jennifer Steinhauer, *To Cut Costs, States Relax Prison Policies*, N.Y. TIMES, Mar. 24, 2009 (describing recent changes in state incarceration practices).

CONCLUSION

Recidivist enhancements based on prior drug convictions make an enormous difference in federal sentencing. Yet the history and purposes of these enhancements have received little attention from courts or scholars. Congress and the Sentencing Commission enacted the federal enhancements based on prior drug convictions without empirical support, and in most cases these enhancements fail to further the goals of sentencing. The Supreme Court's decisions in *Booker* and *Shepard* provide an opportunity to rethink the purposes of these enhancements. Post-*Booker*, judges now have discretion to disregard enhancements provided under the guidelines in individual cases. Moreover, using the novel *Shepard* analysis presented in this Article, judges can avoid statutory enhancements in many cases and thus have greater discretion in fashioning appropriate sentences. Judges should be grappling with questions about what role, if any, prior drug convictions should play in determining an appropriate sentence.

Shepard will likely lead to a more just result in individual cases. Where enhancements are inapplicable under *Shepard*, judges will typically impose lower sentences that better serve the purposes of sentencing. However, although *Shepard* can cause these good results in some cases, *Shepard* also introduces concerns about unwarranted disparities. Similarly situated defendants with similar criminal histories may face dramatically different sentences. Given the lack of persuasive justifications supporting enhancements based on prior drug convictions — and the concerns about disparities — Congress and the Sentencing Commission should eliminate these enhancements or at least reduce the magnitude of the sentencing increases.