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# A Rational Post-*Booker* Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions

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## I. INTRODUCTION

In this article we propose a solution to one of the more vexing problems in current federal sentencing jurisprudence: applying the sentencing

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enhancements for one of the most commonly-prosecuted federal crimes—reentry after deportation, in violation of 8 U.S.C. § 1326.<sup>1</sup> The penalty for deported aliens who are caught re-entering the United States is driven, under the existing Federal Sentencing Guidelines (Guidelines), virtually entirely by the aliens' predeportation criminal history: if an alien has a predeportation conviction for a crime in a particular category, his sentence is enhanced—usually a lot. However, despite the serious sentencing consequences of the various felony enhancements, the current reentry guideline is vague and unduly difficult to apply, leading to penologically unjustifiable results and unwarranted sentencing disparities. For the purposes of this article, we do not address the fairness or the wisdom of the general principle that criminal penalties for reentry should vary depending on the seriousness of the defendant's worst prior criminal conviction.<sup>2</sup> We merely argue that the guideline is currently vague, difficult to apply, and fails to achieve its own policy objectives. We call on the U.S. Sentencing Commission (Com-

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1. See 8 U.S.C. § 1326 (2006). There were at least 25,927 felony immigration cases successfully prosecuted federally in fiscal year 2009, which amounted to 31.9% of all federal felony prosecutions. U.S. SENTENCING COMM'N, *Final Quarterly Data Fiscal Year 2009*, 41 tbl 21 (Mar. 11, 2010), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2009\\_Quarter\\_Report\\_Final.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2009_Quarter_Report_Final.pdf). Illegal reentry cases constitute the vast majority of immigration related cases. *Criminal Immigration Prosecutions Are Down, But Trends Differ by Offense*, SYRACUSE UNIV. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Mar. 17, 2010) <http://trac.syr.edu/immigration/reports/227/>. Most reentry cases plead out under "fast-track" programs authorized by the Justice Department for border districts, allowing charge bargains where reentry defendants plead to illegal entry under 8 U.S.C. § 1325, but the terms of the plea are driven by the expected enhancement if the case was tried under § 1326. Thus the guideline at issue in this article drives virtually all immigration sentencing. For simplicity's sake, for the remainder of this article, we will refer to reentry when referring to the crime covered by USSG section 2L1.2, even though someone convicted for felony illegal entry under § 1325 would also be sentenced pursuant to USSG section 2L1.2. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2010).

2. While we accept the general premise that the societal interest in expelling serious criminal aliens is stronger than its interest in expelling non-criminal aliens, we also recognize that there is much room for debate about whether any particular sentencing regime is justified by that premise. See, e.g., Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-entry Cases Are Unjust and Unjustified (And Unreasonable, Too)*, 51 B.C. L. REV. 719 (2010); Lynn Adelman & Jon Deitrich, *Improving the Guidelines through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 589-90 (2009); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (vacating 52-month reentry sentence based on properly applied 16-level section 2L1.2 (B)(1)(a)(ii) as substantively unreasonable under *Booker*). And we acknowledge—and address herein—the legitimacy of arguments directed at the uncritical use of the felony/misdemeanor distinction as a basis for sentencing enhancements, in light of the seemingly endless expansion of the "felony" category. For a historical overview, see Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461 (2009).

mission) to conduct the sort of empirical survey the Commission is expressly mandated to conduct.<sup>3</sup> If the Commission takes seriously the need to reconstruct the Guidelines on a firmer empirical basis in the wake of *Kimbrough v. United States*,<sup>4</sup> this is the place to start.

And the Guidelines must be reconstructed. Sentencing discretion under *Booker* cannot on its own solve the problems created by the United States Sentencing Guidelines (“USSG”) section 2L1.2 at issue in this paper.

No amount of judicial discretion can correct a defective guideline, because *Booker* discretion only kicks in *after* the Guidelines have been correctly calculated. *Booker* discretion is the discretion to decline to apply a correctly-calculated Guideline range. Judges must still calculate Guideline ranges, and must still get them right. The judge who rules that a given state offense does or does not trigger a section 2L1.2 enhancement is *not* exercising *Booker* sentencing discretion; errors in classification are still per se reversible.<sup>5</sup>

If meaningful exercise of sentencing discretion in § 1326 cases is our goal, what we need is an explicit, nationally uniform list of the triggering offenses for the enhancement. *Then* all sentencing judges will be starting from the same baseline when it comes time to exercise their discretion. Under the current regime, the Commission merely gives broad definitions of what warrants the various felony enhancements. The Commission has thus punted to the courts the task of deciding which particular statutes actually warrant an enhancement. And the courts are in no position to conduct broad empirical analysis of current interstate and intrastate criminal practice; they have to rely on the briefing of the parties instead of rigorous, neutral data. The lack of a clear guideline has led to absurd results, circuit splits, regional disparities, unnecessary litigation, and wasted recourses.

First, we urge the Commission to conduct systematic empirical surveys of crime definitions and prosecution practice, on both the interstate

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3. *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM’N, [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited Mar. 2, 2011).

4. *See* *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007). *Kimbrough* and *Gall v. United States* established the proposition that the Guidelines provisions are to be treated as more or less reasonable in accordance with their degree of empirical justification. *See Kimbrough*, 552 U.S. at 109-10; *Gall v. United States*, 552 U.S. 38 (2007).

5. That is to say, if a judge gets a section 2L1.2 classification wrong, the sentence remains per se reversible. *See, e.g.*, *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006) (citing *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006)) (“When we review a sentence, the first step is to determine if the district court made a material error in its Guidelines calculation that serves as the starting point for its sentencing decision. If there was material error in the Guidelines calculation, we will remand for resentencing, without reaching the question of whether the sentence as a whole is reasonable.”) (citation omitted).

and intrastate level. The Commission should use those surveys to determine which specific statutes of conviction should trigger the relevant enhancements. For example, the Commission would decide which state statutes it wants to receive the enhancement for “burglary.” The reentry guideline would then be changed to list each state statute that qualifies as “burglary” for purposes of determining the proper enhancement.

On the interstate level, the surveys would allow the Commission to identify state codes that are out of sync with the national norm. On the intrastate level, the surveys would allow the Commission to determine whether a particular facially nongeneric statute was in fact being applied to nongeneric predicate facts. Presumably, if the answer is “no,” or “almost never,” the Commission would assign the nongeneric statute to the same enhancement as its generic counterparts. The Commission can make its own decisions about where to draw those lines; our claim is simply that the Commission should make those decisions, and do so based on empirical evidence. Neither is the case at present.

Second, we urge the Commission to think seriously about the relative severity of the diverse group of crimes listed in the section 2L1.2 top enhancement category, or “plus-sixteen.”<sup>6</sup> The Commission may employ any of a variety of rubrics for assessing relative severity—but it should make *some* assessment. Currently it makes none. Murder, robbery, burglary, arson, statutory rape, and alien smuggling, are currently treated as identical for purposes of the enhancement. That is arbitrary and unjust.

Finally, we propose a procedure by which the new, empirically-grounded guideline could accommodate the hypothetical injustice of a defendant getting an enhancement for conduct that does not fit the generic definition of the predicate enhancement offense. We propose that a facially nongeneric statute that is applied to nongeneric facts fewer than five percent of the time should presumptively trigger the enhancement. However, in order to allay the potential injustice of overbroad application, we propose that the guideline include a “safety valve” application note by which a defendant whose prior conviction was allegedly based on nongeneric offense conduct could argue under 18 U.S.C. § 3553(a) that, despite the applicability of the guidelines enhancement, he should receive a departure or variance because his actions did not meet the generic definition of the offense.

We argue that our proposed solution will make sentencing under section 2L1.2 more rational, more just, and more efficient.

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6. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2010).

## II. THE REENTRY GUIDELINE

Under USSG section 2L1.2, illegal reentry starts at a level eight (0-6 months in Criminal History Category I). If the defendant has a prior felony conviction for a “drug trafficking offense,”<sup>7</sup> “crime of violence,” “firearms offense,”<sup>8</sup> “child pornography offense,” “national security or terrorism offense,” “human trafficking offense,” or “alien smuggling offense,” his Guideline range is increased by sixteen levels<sup>9</sup>—the biggest single upward adjustment in the entire Guidelines.<sup>10</sup> A “crime of violence” is further defined as a laundry list of twelve types of crimes, such as robbery, murder, et cetera, with no further definitions or clarifications given of what those crimes are.<sup>11</sup> Approximately forty percent of § 1326 offenders receive a +16 enhancement.<sup>12</sup>

7. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (2010) (“[A] drug trafficking offense for which the sentence imposed exceeded 13 months . . .”).

8. *Id.* § 2L1.2(b)(1)(A)(iii). The commentary clarifies that not every “firearms offense” actually is a “firearms offense.” *See id.* at § 2L1.2 application n.(1)(B)(v). Only firearms trafficking offenses and other serious types of firearms offense actually qualify as a “firearms offense.” *See id.*

9. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2010). In all but one case, the length of a defendant’s sentence does not factor into deciding whether the given felony warrants a +16. *See id.* That one exception is for drug trafficking offenses. *See id.* For drug trafficking offenses, the enhancement drops to +12 if the defendant was sentenced to 13-months incarceration or less. *Id.* § 2L1.2(b)(1)(B). In contrast, the statutory definition of “aggravated felony” often requires a jail sentence of at least one year. *See* 8 U.S.C. § 1101(a)(43) (2006).

10. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2010). There is no other single enhancement that triggers a sixteen-level increase. *See id.* The vast majority of enhancements in other guidelines are for two or four levels. *See id.* The theft guidelines, for example, can result in an increase of sixteen or more levels (indeed up to +30 if you steal more than \$400 million), but they provide for a graduated scale of enhancements going up by twos, starting at +2 (for \$5,000 to \$10,000). *See id.* at § 2B1.1(b)(1). That sort of sliding scale is precisely what we are arguing for here, and its absence is what makes the section 2L1.2 adjustment unique—and irrational. *See, e.g.,* 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 (1996). We should note that Fleissner & Shapiro’s proposal included the “crime of violence” adjustment just as it stands, so we are arguing here that in that respect, their proposal turned out to be neither simple nor principled. *See id.*

11. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 application n.1(B)(iii) (2010). The definition also includes a residual clause incorporating part of the analogous definition in 18 U.S.C. § 16 (“[A]n offense that has an element the use, attempted use, or threatened use of physical force against the person of another . . .”). *See id.*

12. U.S. SENTENCING COMM’N, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, 22 (2006), available at [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Immigration/20060120\\_Immigration\\_Report.pdf](http://www.ussc.gov/Research/Working_Group_Reports/Immigration/20060120_Immigration_Report.pdf). A defendant with a prior conviction not in the above categories, but covered by the broader definition of “aggravated felony” in 8 U.S.C. 1101(a)(43), gets an 8-level

A glance at the guidelines sentencing tables shows how much the enhancements matter.<sup>13</sup> Take two paradigmatic hypothetical defendants, both in Criminal History Category IV (which is where a defendant would probably be if he had two priors). Defendant 1 and Defendant 2 are both caught reentering after deportation, and both decide to plead guilty and take a fast track plea offer, as almost all reentry defendants decide to do in practice.<sup>14</sup> Defendant 1 is lucky: his worst conviction is not in the +16 or +8 categories, so he gets only a +4 enhancement. Defendant 2 is not so lucky: his worst conviction warrants a +16 enhancement. Defendant 1's resulting guideline range would be ten to sixteen months, and Defendant 2's resulting guideline range would be forty-six to fifty-seven months.<sup>15</sup> One would hope that Defendant 2 poses a significantly greater danger to society than Defendant 1, and that the question of their respective dangers based on their priors had been the subject of serious empirical study and reflection by policy-makers.

But it hasn't. Despite the high stakes of the re-entry enhancements, the Sentencing Guidelines do not define the enhancement categories with any degree of precision, nor do they enumerate the specific state crimes that should trigger the enhancements.<sup>16</sup> Lacking a clear statement from the

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enhancement, and a defendant with a felony conviction that is neither a +16 nor a +8 gets a 4-level enhancement. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2010). A defendant with no felony convictions, but who has three misdemeanor convictions involving violence or drug trafficking, also receives a 4-level enhancement. *Id.* at § 2L1.2(b)(1)(E).

13. See U.S. SENTENCING GUIDELINES MANUAL § 5A (2010).

14. In the Southern District of California, there are projected to be over 3,000 illegal entry/reentry prosecutions in fiscal year 2009. See *supra* note 3. Of these, perhaps fifty will go to trial.

15. Each would have a base offense level of 8. Defendant 1 would then receive the +4 enhancement, -2 for acceptance of responsibility (the Government could not recommend a third point for acceptance since the offense level at this point in the calculations is below 16), and -2 for fast track, a final offense level of 8. Defendant 2 would receive the 16-level enhancement, -3 for acceptance of responsibility, and -2 for fast track, a final offense level of 19.

16. Indeed, the genesis of the 16-level enhancement is somewhat unclear. The offense level for reentry was originally set at 6; in 1988, it was raised to 8, and then in 1991 the 16-level adjustment was added. See U.S. SENTENCING GUIDELINES MANUAL Application n.C., vol. I, 241, amend. 375 (2010). The Commission gave no public explanation of the basis for its decision, beyond the following: "The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses." *Id.* Judge Adelman—famous in sentencing circles for his vigorous approach to post-*Booker* discretion—has criticized the adjustment as lacking any empirical basis. See *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961-62 (E.D. Wis. 2005) (quoting Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felony Re-Entry Cases*, 8 FED. SEN. REP. 275, 276 (1996) ("I examined the history of § 2L1.2 to try to determine its rationale and whether such rationale was applicable in the present case . . . . 'The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies



Commission, the courts have proceeded through case-by-case litigation, following a methodology, the “categorical approach,” established by the Supreme Court in *United States v. Taylor*.<sup>17</sup> The Commission itself has acknowledged the frustration the current regime has caused practitioners.<sup>18</sup> We argue that the categorical approach is a poor solution to the classification problem created by section 2L1.2. It is unnecessary and time-consuming, and it produces absurd results. Under the current regime, there is too great a chance that our Defendant 2 poses no greater threat to public safety than Defendant 1. The mess is not, however, the courts’ fault. It is the product of an inexplicable reluctance on the part of the Commission to specify which state crimes it has in mind as “crimes of violence,” “drug trafficking offenses,” and so on. That decision is wholly within the purview of the Commission, and the Commission has the resources and the mandate to conduct the kind of empirical research needed to make it intelligently. It is high time it did so.

Exacerbating the problem, section 2L1.2 also relies heavily on its residual definition of “crime of violence,” which is based on the statutory definition of “crime of violence.” In Title 18 of the United States Code<sup>19</sup> However, section 2L1.2 does not incorporate the entire statutory definition.<sup>20</sup> This means that courts are unable to automatically determine whether a statute is a crime of violence under section 2L1.2 by simply following the results in other contexts. The Commission identified this as a commonly reported complaint about the current system.<sup>21</sup> Our proposal will solve this problem as well.

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recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion.”)).

17. See *United States v. Taylor*, 495 U.S. 575, 600-01 (1990).

18. See U.S. SENTENCING COMM’N, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, 24 (2006), available at [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Immigration/20060120\\_Immigration\\_Report.pdf](http://www.ussc.gov/Research/Working_Group_Reports/Immigration/20060120_Immigration_Report.pdf) (“Many guidelines users have expressed concern regarding the ‘categorical approach’ analyses that are required when sentencing illegal reentry defendants.”).

19. See 18 U.S.C. § 16 (2006) (“The term ‘crime of violence’ means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”).

20. See *id.* 18 U.S.C. § 16 gives two possible definitions of “crime of violence,” one at subsection (a) and one at subsection (b). *Id.* However, USSG section 2L1.2 only incorporates subsection (a). U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2010).

21. See U.S. SENTENCING COMM’N, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, 22 (2006), available at [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Immigration/20060120\\_Immigration\\_Report.pdf](http://www.ussc.gov/Research/Working_Group_Reports/Immigration/20060120_Immigration_Report.pdf).



### A. DEFINING CRIMES

Current sentencing law requires that district courts begin their sentencing determinations with an accurate calculation of the Guidelines.<sup>22</sup> The Guidelines are written and updated by the Commission. Amendments proposed by the Commission become law automatically, absent affirmative congressional veto.<sup>23</sup> The Guidelines say that reentry after deportation is not that serious (Offense Level 8),<sup>24</sup> unless the alien has a prior conviction in one of several enumerated categories, in which case the offense is very serious (Offense Level 24).<sup>25</sup> Chief among these categories are “crime of violence” and “drug trafficking” offenses.<sup>26</sup>

Ninety-five percent of criminal convictions are state crimes—violations of state statutes punished in state courts.<sup>27</sup> In our federalist nation, there are fifty separate and independent sovereign states, each with its own laws and courts.<sup>28</sup>

Section 2L1.2(b) is, thus, a mass incorporation into federal sentencing law of a hodge-podge of diverse and sometimes conflicting state criminal laws. The Commission could have compiled and continually updated a comprehensive list specifying which particular statutes trigger the enhancements. Instead, the Commission chose to define the categories in general terms, and then punt to the courts the task of sorting the state statutes, on a case-by-case basis.

That decision has plunged the courts of appeals into seemingly endless litigation about what the Commission means by the listed “generic” of-

22. See, e.g., *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (citations omitted) (en banc) (“All sentencing proceedings are to begin by determining the applicable Guidelines range. The range must be calculated correctly. In this sense, the Guidelines are ‘the starting point and the initial benchmark.’”).

23. 28 U.S.C. § 994(p) (2006) (providing that the Commission must submit amendments to Congress, and the amendments automatically take effect after 180 days (or later if specified by the Commission) unless Congress changes or rejects them).

24. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2010).

25. See *id.* § 2L1.2(b).

26. See *id.*

27. In fiscal year 2006, the most recent year for which the data has been compiled by the Bureau of Justice Statistics, there were approximately 1,132,000 convictions in state courts. See Sean Rosenmerkel et. al., *Felony Sentences in State Courts, 2006—Statistical Tables*, BUREAU OF JUST. STATISTICS, 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>. In fiscal year 2006, there were 72,585 federal criminal convictions. *Sourcebook of Federal Sentencing Statistics*, U.S. SENTENCING COMM’N (2009), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/SBTOC09.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm).

28. Not to mention, of course, territories, reservations, and the District of Columbia.

fenses given as enumerated “crimes of violence.”<sup>29</sup> The question is particularly frustrating because it is *unnecessary*: the Commission could at any time simply tell us what it means. If the Commission said, for example, “‘Crime of violence’ means any conviction under following statutes:” and appended a list of statutes, that would be the end of the debate.<sup>30</sup>

Furthermore, the Commission is continually engaged in precisely the kind of empirical evaluation we recommend here. It can cut its own Gordian knot with one stroke of the pen. In so doing, it would restore some rationality and interbranch comity to the post-*Booker* Guidelines. Since *Booker*, the Guidelines have been advisory, and the Supreme Court has now emphatically and repeatedly confirmed that district judges really do have the constitutional authority to disregard the Guidelines, for any principled reason they choose.<sup>31</sup> In such a constitutional framework, it makes no sense to force the courts into tangled and vexatious litigation over the *meaning* of the advisory Guidelines. Far better for the Commission—the body established by Congress specifically for the purpose of writing and updating the Guidelines<sup>32</sup>—to make its provisions as explicit and exhaustive as possible, to keep them updated to reflect changing state laws and empirical data, and *then* for sentencing courts to do what the Supreme Court says they should: give a thumbs up or thumbs down to the applicable, properly calculated Guidelines sentence in a particular case.<sup>33</sup>

The Sentencing Commission is good at this. The best recent example is the crime of escape. In response to a plea from Judge Posner for some data on what percentage of escapes involved violence,<sup>34</sup> the Commission

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29. Any federal prosecutor, defense attorney, or judge in a border district will get a dull headache if you ask her about the amount of time she spends litigating the reentry enhancements. This is an unnecessary waste of time and resources.

30. There is not, in the section 2L1.2 context, any direct interpretation of a statute, as in the Armed Career Criminal Act cases that comprise the bulk of the *Taylor* caselaw. The only issue is whether a sentencing court correctly applied the 16-level Guidelines enhancement in calculating the sentence.

31. See *Spears v. United States*, 129 S. Ct. 840, 843-44 (2009) (holding that district courts may disregard guidelines due to policy disagreement).

32. See 28 U.S.C. § 994 (2006); *Mistretta v. United States*, 488 U.S. 361, 367-70 (1987).

33. See *Adelman & Deitrich*, *supra* note 2, at 576 (citation omitted) (“The extent to which a sentencing court should accord respect to a guideline will generally depend on whether, when it developed the guideline, the Commission functioned as Congress envisioned in the Sentencing Reform Act (SRA). The idea that led to the establishment of the Commission was that an administrative agency, insulated from politics and composed of experts on sentencing, would enact guidelines that advanced the generally accepted purposes of sentencing (punishment, deterrence, incapacitation, and rehabilitation), eliminated sentencing disparity, and were regarded by participants in the sentencing process as fair and just.”).

34. See *United States v. Chambers*, 473 F.3d 724, 726-27 (7th Cir. 2008) (“[I]t is an embarrassment to the law when judges base decisions on conjectures . . . . The Sentencing

turned out a comprehensive analysis of the facts of every escape prosecution from the past two years, concluding that virtually none involved violence.<sup>35</sup> In reliance on that data, the Supreme Court held in *Chambers v. United States* that the Illinois escape statute is not a “crime of violence” for purposes of the Armed Career Criminal Act (ACCA).<sup>36</sup> Doing a similar study on state crimes at issue in section 2L1.2 cases would be a wonderful way for the Commission to justify its continued post-*Booker* existence.

Indeed, in *Chambers*, Justice Alito implored Congress to do for ACCA just what we are proposing for section 2L1.2:<sup>37</sup>

[O]nly Congress can rescue the federal courts from the mire into which ACCA’s draftsmanship and *Taylor*’s ‘categorical approach’ have pushed us. . . . At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.<sup>38</sup>

What is true of ACCA is true of section 2L1.2, but the fix is much easier. Because ACCA is a statute, Congressional action is necessary to amend it. We see no evidence that such amendment is high on Congress’s list of priorities. But, if Congress did enact a specific statutory list of predicate state and federal offenses, as it has in other contexts, then *Taylor* and its progeny would be moot for any listed offense.

So too with the Guidelines. But with the Guidelines, the suggestion is much easier to carry out—and the excuses for not doing so much less compelling. The Guidelines are controlled by the Commission, which amends and updates them every single year; the Guidelines must be empirically-based as a matter of law;<sup>39</sup> and the Commission is a body of just seven members, not 535. Furthermore, the policy imperative is greater: more appeals arise under section 2L1.2 than under the ACCA, and far more defendants are sentenced under section 2L1.3.<sup>40</sup>

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Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return.”).

35. UNITED STATES SENTENCING COMM’N, *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (2008) (reprinted in part as app. B, *Chambers v. United States*, 129 S. Ct. 687, 693 (2009)).

36. *Chambers*, 129 S. Ct. at 693.

37. *Id.* at 695 (Alito, J., concurring).

38. *Id.* at 694-95.

39. See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007).

40. For example, a Westlaw search reveals that between January 2009 and January 2010, there were 219 ACCA appeals in the circuits, and 367 section 2L1.2 appeals.

The Commission should focus its energies on clarifying the Guidelines based on the best current empirical research. It should start with the lowest-hanging fruit, by making explicit which prior state crimes trigger the enhancements in section 2L1.2. The first step could be simply to compile existing caselaw on section 2L1.2 from each circuit, and endorse or reject the offense classifications made in those circuits. That compilation and evaluation could be done in a year or two, even allowing for hearings and comments.<sup>41</sup>

The resulting list would then be published in a table as part of section 2L1.2. Statutes that have not yet been litigated could be studied and added on a yearly basis. Ideally, the list would be subdivided along the lines sketched out in this article. The Commission will obviously have considerable flexibility in choosing the empirical measures it uses to rank the severity of the crimes—but it must use some such measures, or else it will have no answer to the charge that the Guideline lacks an empirical basis.<sup>42</sup>

With such a list in hand, litigants and judges could turn their attention to where it properly should be post-*Booker*: to the question of whether the application of the Guidelines to a particular defendant in a particular case comports with the imperatives of the fundamental statutory command of 18 U.S.C. § 3553(a)—that sentences take into account basic principles of justice and are sufficient but not greater than necessary.<sup>43</sup>

## B. COMPARING CRIMES

We also find it wrong on both utilitarian and fairness grounds that section 2L1.2 applies the same +16 enhancement for such a wide range of crimes. Heinous crimes such as murder, forcible rape, and child molestation receive the same sixteen-level enhancement as less serious offenses such as alien smuggling and burglary. The level of enhancements should be graduated depending on the seriousness of the type of crime. Alien smuggling and murder should not warrant the same enhancement.

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41. We suspect that the Commission already has such a compilation of circuit results. Thus, all that is needed are the state-level empirical surveys.

42. That charge is the basis for arguments under *Kimbrough* that a given guideline should not be followed. See *Kimbrough*, 552 U.S. at 109. It can be leveled at a particular guideline in a particular case, or at the appellate presumption of reasonableness for that guideline. See, e.g., *United States v. Duarte*, 569 F.3d 529, 530 (5th Cir. 2009) (acknowledging *Kimbrough*'s distinction between empirically-grounded and non-empirically-grounded guidelines, but holding that "absent further instruction from the Court, we cannot read *Kimbrough* to mandate wholesale, appellate level reconception of the role of the Guidelines and review of the methodologies of the Sentencing Commission . . . . [or] piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines.").

43. 18 U.S.C. § 3553(a) (2010).

Furthermore, under the current regime, all convictions for the same type of crime warrant the same enhancement regardless of the severity of the sentence imposed.<sup>44</sup> For example, under the status quo, an underlying robbery conviction with a time-served fifty-day sentence and an underlying robbery conviction with a ten-year sentence trigger the same sixteen-level enhancement. Clearly, the time-served robbery involved less violence and was less heinous than the ten-year robbery. We argue that the length of the sentence on the felony triggering the enhancement should be considered as an additional adjustment to the enhancement.

We call upon the Commission to perform a thorough review of the relative threat posed to the United States of various types of defendants, including the seriousness of the crimes they are likely to commit once back in the United States, and relative recidivism rates. It is unacceptable that the Commission has provided no empirical justification for one of the most commonly applied guidelines in the federal system.<sup>45</sup>

In Part II of this paper, we examine the application to section 2L1.2 of the *Taylor* categorical approach. In Part III, we show how the application of *Taylor* to section 2L1.2 has led to confusion and absurd results with respect to a number of offenses, including burglary, robbery, carjacking, kidnapping, and drug transportation. In Part IV, we discuss the need to incorporate a more fine-grained stratification of the section 2L1.2 enhancements. In Part V we discuss further how our system would be implemented and how a defendant would be able to argue that his prior offense should not trigger the guideline.

### III. THE GUIDELINES DEFINITION OF CRIME OF VIOLENCE AND THE *TAYLOR* CATEGORICAL APPROACH

What is a “crime of violence” for purposes of enhancing § 1326 sentences? The Guidelines say:

“Crime of violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other of-

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44. The one distinction the current guideline draws based on sentence length is with respect to felony drug trafficking offenses, and it lumps together all sentences of thirteen months or greater. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (2010).

45. See Adelman & Deitrich, *supra* note 2, at 588-90.

fense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.<sup>46</sup>

Easy enough, right? Wrong. For enhancement purposes, courts must look only to the elements of the crime of conviction.<sup>47</sup> They then apply a “categorical approach,” in which they ask whether the elements of the offense fit the relevant definition—either the “generic” definition of one of the enumerated crimes,<sup>48</sup> or the “catch-all” definition (“use, attempted use, or threat of force against the person of another”). The legal question is whether, in virtue of the fact of conviction of this crime with these elements, the jury *necessarily* found, or the defendant *necessarily* admitted, the conduct specified by the “generic” definition or the “catch-all” definition.<sup>49</sup>

The problem with this procedure is that there is no such thing as a “generic definition” of crimes: crimes exist only as specific statutory creations. But there are fifty separate state criminal codes, each with its own definition of a given crime, and its own particular caselaw construing, refining, expanding, or contracting that definition. Looking to the common-law antecedents of modern statutory crimes is not necessarily informative either, because criminal codes expressly supersede prior common law crimes. And many state crimes—aggravated assault, for example—have no common-law equivalents as distinct crimes at all. Courts can look to the Model Penal Code for help, but it is, of course, not the law. Nor can federal law

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46. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 application n.(1)(B)(iii) (2010).

47. This is the rule established in 1990 by the Supreme Court for prior-conviction enhancements, in *United States v. Taylor*, 495 U.S. 575 (1990). While its etiology lies in *Apprendi*-esque Sixth Amendment concerns (though it predates *Apprendi*) it has survived *Booker* unscathed. See John C. Richter, *Déjà Vu All Over Again: How Post-Booker Sentencing Threatens Equal Justice Under the Law*, 20 FED. SENT’G REP. 340, 2007 WL 5658937 (2008); Kate Stith, *Two Fronts for Sentencing Reform*, 20 FED. SENT’G REP. 343, 2008 WL 4702688 (2008); William Otis, *Priority for a New Administration: Restore the Rule of Law in Federal Sentencing*, 20 FED. SENT’G REP. 345, 2008 WL 4702689 (2008). Whether *Taylor* ceased to apply to pure Guidelines classifications on January 12, 2005 is beyond the scope of this Article.

48. When Congress described predicate offenses, it meant to incorporate “the generic sense in which the term is now used in the criminal codes of most States.” *Taylor*, 495 U.S. at 598.

49. *United States v. Rodriguez-Guzman*, 506 F.3d 738, 744 (9th Cir. 2007) (holding that the categorical approach must be employed “even when the object offense is enumerated as a *per se* crime of violence under the Guidelines.”). Among the listed crimes that have been recently or are currently being thus litigated are: burglary, robbery, aggravated assault, sexual assault, sexual assault with the intent to commit rape, statutory rape, extortion, attempted murder. And that is just California crimes in the Ninth Circuit.

control; federal criminal law is limited by federal jurisdictional considerations, and thus doesn't include equivalents to most state crimes.

Instead, following *Taylor*, courts look to "the generic sense in which the term is now used in the criminal codes of most States."<sup>50</sup> There is no uncontroversial way to compare the apples and oranges of different states' definitional formulations and determine what "most" states do or agreement on the meaning of "most." Worst of all, courts must rely entirely upon the parties and their own clerks' searches for this data. There is no publicly available, professionally compiled, authoritative set of data to rely on. These problems are exacerbated by the trend of states to broaden the range of conduct that is criminalized; state crimes have tended to drift away from the generic common law definitions.<sup>51</sup>

Having settled upon a generic definition, the court must then decide if the particular state statutory crime matches that generic definition. If it matches the generic definition, then any and all convictions under that statute trigger the enhancement.

If the state definition does not match the generic definition, then the courts must determine whether the state crime is "broader" than the generic definition, meaning that it has *disjunctive elements*, some of which match the generic definition and some of which do not,<sup>52</sup> or whether it is *missing an element* of the generic definition altogether. If the elements are disjunctive, the courts may look to the record of conviction—charging document, judgment, plea colloquy, plea agreement, transcripts—to determine which elements were alleged and proved. Documents outside of the record of conviction, such as police reports or the presentence report, may not be used. This is the so-called "modified categorical" approach. If, on the other hand, the state statute is missing an element of the generic definition, then it is categorically excluded: conviction will never trigger the enhancement.

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50. *Taylor*, 495 U.S. at 598.

51. For a theoretical explanation, see, e.g., William Stuntz, *Criminal Law's Pathology*, 101 MICH. L. REV. 828, 836-37 (2002). For examples, see, e.g., *Nell v. State*, 642 P.2d 1361, 1365-66 (Alaska Ct. App. 1982) (robbery); *People v. Davis*, 958 P.2d 1083 (Cal. 1998) (burglary); Anne Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1086 n.74 (1988) (sodomy). For good narratives on the history of liability-expanding legislation including laws on drunk driving and sex offender registration, see Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Nation*, 58 BUFF. L. REV. 1 (2010).

52. For example, a burglary statute might criminalize "unlawful entry" into (a) a residence or (b) a commercial building. If charged under subsection (a), the conviction is generic. Likewise, an aggravated assault statute might list a number of aggravating factors that transform ordinary assault into aggravated assault. Not all those factors might match the court's generic definition. See, e.g., *United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009).



The “modified categorical approach” has one significant limitation: in many state prosecutions, there simply is no record evidence establishing precisely what facts were found or admitted. Far too many state plea colloquies are carried out with no factual basis laid whatsoever; in fact, many state plea agreements have no factual basis section, and those that do often just regurgitate the statutory language above the defendant’s initials.<sup>53</sup>

Most problematically, the whole exercise is unnecessary to begin with: it is undertaken only to ascertain the intent of the drafter of the Guidelines—the Commission.<sup>54</sup> But the courts should not have to divine the Commission’s intent; the Commission can and should make its intent clear.

Our proposal is simple: the Commission should publish a yearly-updated exhaustive list of state statutes that define crimes of violence for purposes of the section 2L1.2 enhancement. The government, the defense bar, and interested academics can direct proposals and objections to the Commission, which holds several public meetings every year for the purpose of deliberating possible Guidelines revisions. The list would eliminate the middleman: instead of asking the courts to speculate about what the Sentencing Commission meant when it drafted section 2L1.2 comment note 1(B)(iii), parties could simply ask the Commission to revise the list as appropriate.<sup>55</sup> The common-sense appeal of our proposal should be apparent so long as we recall the fact that in Guidelines enhancement litigation, the *only issue* for the courts is what the Commission meant.

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53. See U.S. SENTENCING COMM’N, *supra* note 12, at 24 (“Given the difficulty in obtaining sentencing documents from jurisdictions across the nation, the limitation on the types of documents that can be used to establish the type of prior conviction (per the ‘Categorical Approach’), the sheer volume of cases in border districts especially, and the operation of Early Disposition Programs and other time-saving procedures, guidelines users have expressed frustration with this approach to sentencing under § 2L1.2.”).

54. Pure Guidelines enhancement cases are thus distinguishable from, for example, Armed Career Criminal Act (ACCA) cases, in which the courts are interpreting a statute, 18 U.S.C. § 16, which has its own definition of “crime of violence.” The categorical approach makes more sense in the ACCA context, because there is neither the expectation nor the possibility of continual clarification by Congress. The *Taylor* methodology was initially developed specifically for the ACCA “crime of violence” definition, and was only subsequently imported into the pure Guidelines context. While such “interoperability” has some virtues, we do not share Judge Kozinski’s certainty that applying an ACCA doctrine to a Guidelines classification necessarily makes sense. *United States v. Mayer*, 560 F.3d 948, 957 (9th Cir. 2009) (Kozinski, J. dissenting from denial of rehearing *en banc*). If the Commission insists on oracular vagueness, then of course the courts have no choice but to use a categorical approach of some kind, but unlike Congress, the Commission has not earned the right to be oracular: it has a specific statutory mandate to make its recommendations clear and empirically based.

55. And of course, a defendant could always ask a judge not to apply the Guideline in his case, and the judge could always decline to apply the Guideline, either on the facts of the case or because he thinks the Commission got its list of statutes wrong. See, e.g., *Kimbrough*, 552 U.S. 85.

As an illustration, in the next section, we outline the current morass as it pertains to three California state crimes as construed under section 2L1.2 by the Ninth Circuit: burglary, robbery, and kidnapping. We will note other statutes and appellate jurisdictions as well, because this is by no means only a Ninth Circuit or California problem. In each case, the problem is the same: state law expands criminal liability within existing categories, and the question is whether the “generic” boundaries have been crossed. Our point is simple: whether you think these crimes should trigger enhancements or not, there has got to be a better way to decide the question.

Some readers may be thinking at this point that it is unrealistic for the Commission to engage in such an intensive undertaking. We do not buy this objection for two reasons. First, someone has to do it. Under the current regime, instead of the Commission doing this work, courts and litigants are doing it, piecemeal. This ad hoc approach is not only duplicative and inefficient, but it also leads to conflicting and uncertain results.

Second, the objection ignores the fact that the Commission’s statutory function is to conduct this kind of research, and it has proven time and again that it can do it well. Sure, it will take some time and money, but it will be far less expensive and labor-intensive compared to the current regime, and, more importantly, far more complete, accurate, and authoritative. And as discussed above, the Commission has proved that it can complete such studies quickly and thoroughly, as with its study on the use of violence in escape cases.<sup>56</sup>

#### IV. THE CATEGORICAL APPROACH IN PRACTICE

##### A. BURGLARY AND ROBBERY

The problematic outcomes we have discussed above are perhaps best exemplified by the cases addressing prior convictions for burglary and robbery. One might think that burglary and robbery would be easy crimes for section 2L1.2. They have a long common-law history of being denominated crimes of violence, they are regularly litigated, and they are listed right there in the “crime of violence” definition. Nevertheless, California burglary<sup>57</sup> is, in the Ninth Circuit, categorically distinct from “generic burglary,” and therefore never a crime of violence for section 2L1.2 purposes. California robbery,<sup>58</sup> too, is categorically distinct from “generic robbery,” and therefore is a crime of violence only insofar as it overlaps with “generic extortion.” Furthermore, the Ninth Circuit only recently determined that a

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56. See *supra* notes 26-31 and accompanying text.

57. CAL. PENAL CODE § 459 (West 1999).

58. CAL. PENAL CODE § 211 (West 2008).

common robbery variant, carjacking,<sup>59</sup> was a crime of violence after a district court ruled that it was not. Similar stories, it turns out, can seemingly be told of every other listed crime in the section 2L1.2 definition.<sup>60</sup>

### 1. *Burglary*

Common-law burglary, as every lawyer remembers from the bar exam, had some idiosyncratic requirements: it had to be at night; it had to be of a dwelling; the burglar had to physically create the opening to enter, etc.<sup>61</sup> Those ancient rules are gone, and burglary is one of the most commonly-charged state offenses. In California, there are degrees of burglary.<sup>62</sup> Per the Guidelines list, we are concerned only with first-degree burglary, burglary “of a dwelling.” The *Taylor* problem here is that while most states define burglary as requiring an “unlawful entry” into a building with the intent to commit a felony therein, the California statute merely requires “entry.”<sup>63</sup>

The Ninth Circuit, accordingly, held that no California burglary conviction could ever be used for the section 2L1.2(b) enhancement:

Here, the California residential burglary crime of conviction, California Penal Code § 459, requires (1) entry, (2) into any building or other listed structure, (3) with intent to commit larceny or any felony. The Guidelines' generic crime of burglary requires (1) entry, (2) which is unlawful or unprivileged, (3) into a building or structure, (4) with intent to commit a crime. In addition to the elements required by the applicable California burglary statute, generic burglary under the Guidelines also requires that the entry be “unlawful or unprivileged.” Even if we were to undertake a modified categorical approach, we could not narrow the California statute by amending it to include the restrictive

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59. *Id.* § 215.

60. For example, statutory rape, *see* *United States v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007) (California statutory rape not “generic statutory rape”); aggravated assault, *see* *United States v. Esparza-Herrera*, 557 F.3d 1019 (Arizona aggravated assault not “generic aggravated assault”); sexual assault, *see* *United States v. Beltran-Mungia*, 489 F.3d 1042 (9th Cir. 2007); arson, *see* *United States v. Velasquez-Reyes*, 427 F.3d 1227 (9th Cir. 2005); *see generally* Jeremy D. Feinstein, *Are Threats Always “Violent” Crimes?*, 94 MICH. L. REV. 1067 (1996).

61. *See, e.g.*, *People v. Cole*, 67 Cal. Rptr. 3d 526 (Cal. Ct. App. 2007); *People v. Salemme*, 3 Cal. Rptr. 2d 398, 402-03 (Cal. Ct. App. 1992)).

62. CAL. PENAL CODE § 460 (West 1999).

63. *Id.* § 459.

elements of the Guidelines' generic offense—namely, that the entry must have been “unlawful or unprivileged.”

Thus, we may not apply a modified categorical approach. Applying simply a categorical approach, Aguila-Montes's California predicate conviction of first degree residential burglary does not match the generic offense of burglary of a dwelling under the Guidelines. His sentence, therefore, was improperly enhanced sixteen levels.<sup>64</sup>

Under the procedures required by the categorical approach caselaw, and assuming that the court has gotten its California law right,<sup>65</sup> this result makes sense: (1) “generic” burglary requires as an element an “unlawful entry”; (2) California burglary does not have that element; therefore (3) no California judge or jury is ever required to make a finding of unlawful entry in a burglary case; so (4) California burglary is never generic burglary, and therefore never a crime of violence.

The logic is clear enough, but from a “common sense”<sup>66</sup> or legislative intent standpoint, it's absurd. The “missing element” problem should be settled empirically: what is the frequency with which unlawful entry is present as a fact (charged, proved, admitted) in California first-degree burglary convictions? Isn't that what we really want to know? The question should be: How many burglary convictions are there where there was no unlawful entry?<sup>67</sup>

But the only entity that is institutionally situated to do such a rigorous study, the Commission, has never done so. And the *Taylor* rule provides that so long as there is at least one extant affirmed burglary conviction in which there was no “unlawful entry,” no burglary convictions will ever count as crimes of violence.<sup>68</sup>

64. *United States v. Aguila-Montes*, 553 F.3d 1229, 1234 (9th Cir. 2009) (internal citations omitted).

65. Which we believe it has not, but we are not making that argument here.

66. Which, the Ninth Circuit has explicitly noted, is not the categorical approach perspective. *See United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (following circuit precedent and applying the categorical approach to hold that Arizona aggravated assault is not “generic” aggravated assault, but noting: “We do not use the common sense approach.”). Notably, the three-judge panel issued its opinion per curiam, then all joined in a separate concurrence expressing their shared approval of a “common-sense” approach, and their frustration that it is foreclosed by circuit precedent.

67. It would be helpful to know whether the caselaw from California, which expressly requires that there be an invasion of a possessory right, *see supra*, note 60, creates an unlawfulness requirement equivalent to that in states with an “unlawful entry” element written into the statute.

68. In fact, the Ninth Circuit has an even more stringent test, in which finding a case is not necessary. In *United States v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the Supreme

If that is the test, the argument is over,<sup>69</sup> because there are at least two affirmed California burglary convictions where the defendants were door-to-door salesmen who were invited into the houses of their victims and therein persuaded the victims to invest in bogus securities.<sup>70</sup> Those are the two cases cited by the dissenting judges in a predecessor case to *Montes de Oca*.<sup>71</sup> Those judges (whose view subsequently prevailed) would have held California burglary categorically excluded from the “crime of violence” category under the “missing element” rule. The *Montes de Oca* court, for its

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Court held that *Taylor* categorizations must be more than exercises in “the application of legal imagination to a state statute’s language”—that in order to hold a statute was categorically overbroad or categorically distinct, a court had to identify an actual case in which the statute had been applied in the putatively nongeneric way. The Ninth Circuit promptly responded, en banc, with a decision, *United States v. Grisel*, that pushes back on *Duenas-Alvarez*, holding that when a state statute is “missing an element” of the generic crime, then *no case* needs to be found that actually exceeds the generic limits. *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). This means, for burglary, that so long as the statute lacks the “unlawful entry” element, it would not matter whether every single burglary prosecuted in California included an unlawful entry; California burglary would still not be burglary for any federal enhancement purposes. As noted below, there have been at least two reported cases in the past century where a burglary conviction has been upheld in California following a permissive entry. Whether said entry was deemed “lawful” in the cases is another question entirely.

69. It is over for the *Montes de Oca* court, but not, perhaps, for commentators, or perhaps for further judicial examination, because the *Montes de Oca* court is wrong about California burglary law, and its conclusory opinion neglects to conduct any analysis of California cases whatsoever. In fact, California caselaw expressly requires that the predicate entry “invade a possessory interest in the property.” *People v. Glazier*, 113 Cal. Rptr. 3d 108, 113 (2010). Therefore, permissive entries are only predicates for burglary if made on false pretenses. For this reason, there is a bright-line rule in California that a person cannot be convicted of burglarizing his own home, or any building or dwelling which he has an unconditional right to enter, because in such cases (and only such cases) the right to enter is absolute and not conditioned on anything. *See id.* For example, in the cases in which a husband has been kicked out by his wife, and later comes back in and assaults her, the courts are very careful to establish that the husband had lost or given up his unconditional right to enter the home, whether by court order or waiver (e.g., husband gave up keys, moved to a hotel, and admitted to police that he knew “things had changed” and he was not allowed in the house). In a similar case involving two roommates, the court rejected the burglary theory precisely because, unlike a wife, a roommate had no authority to kick out another roommate. Therefore, when the ejected roommate came back with his gun and shot the ejector, that was not burglary, although he concededly entered with the intent to do so. *See People v. Gill*, 159 Cal. App. 4th 149 (Cal. Ct. App. 2008); *People v. Gauze*, 542 P.2d 1365 (Cal. 1975); *People v. Sears*, 401 P.2d 938 (Cal. 1965).

The *Montes de Oca* court was too quick to accept the “lawful entry” premise without investigating whether the cases actually established an unlawfulness requirement—which, as noted, they do.

70. *People v. Cole*, 67 Cal. Rptr. 3d 526 (Cal. Ct. App. 2007); *People v. Salemme*, 3 Cal. Rptr. 2d 398, 402-03 (Cal. Ct. App. 1992).

71. *See United States v. Snellenberger*, 548 F.3d 699, 707 (9th Cir. 2008) (en banc) (Smith, J., dissenting).

part, cited only one California case, which in turn cited only one of the securities-fraud cases noted above, and an 1892 case involving a defendant who entered a grocery store during business hours with the intent to shoplift.<sup>72</sup>

But this is a question of the Commission's (and thus ultimately Congress's) intent, and the question is simple: *Does the Commission intend that re-entering aliens with California residential burglary convictions get enhanced sentences?* And since that is the question, should the relative numbers be relevant? We think they should be, because the *whole point* of having a Commission writing sentencing guidelines in the first place was so that sentences would be based on empirical evidence.<sup>73</sup> Why should one outlier case out of ten thousand heartland cases invalidate the ten thousand?

It is easy to lay the blame on the *Grisel* rule, which states that when a state statute is missing an element of the generic crime, the court can never turn to the "modified categorical approach" and look at charging documents, plea documents, judgments, or transcripts.<sup>74</sup> Certainly it seems like the rule produces an absurd result in the case of burglary. But the *Grisel* rule is a direct logical outgrowth of the *Taylor* system. Under *Taylor*, the only application of the "modified categorical approach" is where the judge or jury *might have* found the elements of the generic offense. It applies where statutes are written in the disjunctive, where one disjunct is generic and one nongeneric. But that is not the case with California burglary. We know, in every burglary case, that the factfinder did not have to make a finding that the entry was unlawful. Thus, the modified *Taylor* approach has no application.

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72. *People v. Davis*, 958 P.2d 1083, 1088-1089 (Cal. 1998) ("More than a century ago, in *People v. Barry* (1892) 94 Cal. 481, 29 P. 1026, this court addressed the subject of what constitutes an entry for purposes of burglary. The defendant in *Barry* entered a grocery store during business hours and attempted to commit larceny. This court, rejecting the contention that a burglary had not occurred because the defendant had entered lawfully as part of the public invited to enter the store, stated: '[A] party who enters with the intention to commit a felony enters without an invitation. He is not one of the public invited, nor is he entitled to enter.'" *Id.* at p. 483, 29 P. 1026; *People v. Saleme* (1992) 2 Cal. App. 4th 775, 781, 3 Cal. Rptr. 2d 398 (entering a residence to sell fraudulent securities is an entry within the meaning of the burglary statute).

And note that the *Barry* case is inapposite to the "crime of violence" question because commercial burglary is never a crime of violence in any event. So the grand total of cited cases is two.

73. *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) ("Congress established the Commission to formulate and constantly refine national sentencing standards. Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.") (internal quotations and citations omitted).

74. *See United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007).



So it is not fair to lay this on the Ninth Circuit; the obvious fault lies with the Commission. All it has to do is say yes or no—either the Commission thinks California burglary should get the enhancement, or it does not think so—and insert a simple clause into the Application Note: “including burglary under Cal. Pen. Code § 459,” or “not,” as the case may be. Whatever the Commission decides is the end of the matter for Guidelines analysis. Defendants could still put the underlying conduct before the court, and courts could still choose not to apply the Guidelines sentence under *Spears*, but as to whether the enhancement applies under the Guidelines, as a question strictly of calculating the Guidelines sentence—the first step in post-*Booker* sentencing—that is a question solely for the Commission, and whatever the Commission says about it is the final word.

On what should the Commission base its decision? We have a clear answer from both Congress and the Supreme Court: the Guidelines are supposed to be based on analysis of empirical data about crimes and punishments. The Commission is specifically designed, staffed, funded, and mandated to conduct the sort of research necessary to definitively fill in all the specific factual lacunae that ought to inform the question of whether California burglary should trigger the enhancement: how often do California district attorneys in fact charge and prosecute as burglary, acts committed after a permissive entry into a dwelling?<sup>75</sup> In addition to the two cases noted, how many others have there been? What were the facts? What was the basis for the district attorney’s decision to prosecute? If the answer turns out to be that there are only a handful of “lawful entry” cases and thousands upon thousands of “generic burglary” break-in cases, then wouldn’t the better rule be that California burglary is categorically a crime of violence? The defendant could still argue under 18 U.S.C. § 3553(a)—the general sentencing factors that are now supreme post-*Booker*—that his case was the one-in-a-thousand, diamond-in-the-rough lawful entry case, and that his sentence should not be enhanced. Surely a one-in-a-thousand chance of error is sufficient for a finding beyond a reasonable doubt?<sup>76</sup> And of course, proof beyond a reasonable doubt is not necessary: under the Guidelines, the applicable standard of proof is preponderance of the evidence.<sup>77</sup>

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75. Leaving aside again the question whether a permissive entry under false pretenses constitutes a “lawful entry,” whether for California law or for “generic” burglary.

76. One thing courts hate is trying to pin a number on “beyond a reasonable doubt,” but some numbers are just plain high enough. *See, e.g.,* *Buckland v. Commonwealth*, 329 S.E.2d 803, 807 (Va. 1985) (“The blood tests established a 99.72% probability that Buckland was the child’s father, and this evidence alone proved Buckland’s paternity beyond a reasonable doubt.”).

77. In a pure Guidelines case, where the statutory maximum is not implicated, there are no *Apprendi* rights as to the finding of sentencing facts, and the standard of proof for sentencing facts is preponderance. Thus, it would appear, on first blush, more appropriate to have an enhancement triggered by a finding that the preponderance of convictions under a



## 2. *Robbery*

Robbery, too, is on the “crime of violence” list, and unlike burglary, its definition has remained fairly constant over the centuries.<sup>78</sup> To be a robber, you have to take something from the immediate possession of the person who (lawfully) has it, by means of force or fear. There are two nuances, however, that vex the *Taylor* robbery analysis for modern statutory robbery and some of its related offspring. First, under the section 2L1.2 residual “crime of violence” definition, the threat or use of force must be directed “against the person” of another.<sup>79</sup> Second, at common law and in contemporary state caselaw, the robber must intend to “permanently deprive” the possessor of the property.

State legislative dynamics, however, continually push for the expansion of criminal liability,<sup>80</sup> to respond to new patterns of antisocial behavior, or simply to address a perceived unwarranted limitation in a statute’s scope. In California, the robbery statute includes a broadening disjunctive element appended to the “force or threat” clause, adding “property” as a possible object of the force or threat. The result is that the robber’s predicate threat or use of force can be against either a person herself (“Give me your money or I’ll shoot you.”), or against her property (“Give me your money or I’ll slash the tires on your car.”).<sup>81</sup> Does this expansion of the predicate threat push California robbery outside the generic boundary?

The issue was hotly litigated, and culminated in 2008 in *United States v. Becceril-Lopez*.<sup>82</sup> In that case, the Ninth Circuit held that, yes indeed, California robbery was broader than “generic robbery” because of the “threat to property” disjunct.<sup>83</sup> However, the court continued, the hypothetical factual scenarios for California robbery liability that would lie outside generic robbery would necessarily constitute generic extortion—another enumerated crime, which the court defined, generically, as obtaining anything of value by threatening to harm persons or property.<sup>84</sup> Generic extortion has always been broad enough, the court held, to cover threats to prop-

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particular statute fit the definition—in other words, that it is more likely that not that the defendant’s criminal act fit the definition.

78. See, e.g., 67 AM. JUR. *Robbery* § 1 (“Similarly, under common law, ‘robbery’ consists of the felonious and forcible taking from the person of another of goods or money of any value by violence or putting him or her in fear.”).

79. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2010).

80. See Stuntz, *supra* note 51.

81. It can also be directed against the person or property of another person, if related to the victim, for example, “give me your money or I’ll shoot your mom,” or “give me your money or I’ll slash the tires on your mom’s car.”

82. *United States v. Becceril-Lopez*, 528 F.3d 1133 (9th Cir. 2008).

83. *Id.* at 1141-42.

84. *Id.* at 1142.

erty, including property of third parties. Thus, anyone convicted of California robbery on facts that lie outside generic robbery necessarily committed generic extortion, so the enhancement is categorically applicable.<sup>85</sup>

*a. Carjacking*

Problem solved, right? Wrong. In the early 1990s, in response to public fears over a number of violent and highly-publicized carjacking incidents, the California legislature created carjacking as a separate statutory crime.<sup>86</sup> It was explicitly created as an offshoot of robbery, but with one key difference: the “permanent deprivation” element was removed. The legislature did this because of reports that prosecutors were having trouble sustaining robbery convictions in carjacking cases. The defendant could assert that while he did take the car by force, he was only joyriding—he had no intention of keeping it. And in many cases, the car was indeed abandoned shortly after the attack. The lack of a permanent deprivation intent meant that the only other statutory option was California Vehicle Code section 10851, Taking a Vehicle Without Permission, a much less serious crime than robbery. Faced with a rash of well-publicized and often brutal carjackings,<sup>87</sup> the legislature crafted a statute that would flummox the joyriding defense.

The resulting crime is identical to robbery, except that it lacks a permanent deprivation intent and it only applies to vehicle takings. Now here is the federal sentencing question: does California carjacking fit into the “crime of violence” list in section 2L1.2? The *Taylor* litigation over California carjacking shows just how intractable categorization problems can be. Though the Ninth Circuit has now finally held carjacking to be a categorical crime of violence under section 2L1.2,<sup>88</sup> the route to that result, and

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85. *Id.* at 1143.

86. *See, e.g.*, Cal. B. Analysis, Assemb. Floor, 1993-1994 Reg. Sess., Sen. B. 60, Sept. 8, 1993 (“[T]here has been considerable increase in the number of persons who have been abducted, many have been subjected to the violent taking of their automobile and some have had a gun used in the taking of the car. This relatively ‘new’ crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes. Additionally, law enforcement is reporting this new crime is becoming the initiating rite for aspiring gang members and the incidents are drastically increasing. Under current law there is no carjacking crime per se and many carjackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense (to permanently deprive one of the car) since many of these gang carjackings are thrill seeking thefts. There is a need to prosecute this crime.”).

87. *See id.*

88. *United States v. Velasquez-Bosque*, 601 F.3d 955, 962 (9th Cir. 2010).

the doctrinal basis for it, are object lessons in the need for reform of the guideline.

The defense argument was that carjacking is not a crime of violence because, due to its lack of the permanent deprivation element, it is neither “robbery” nor “extortion.” Furthermore, it shares with section 211 robbery the theoretical possibility of liability where the predicate threat is made against property rather than a person. Thus, it is not a “catch-all” crime of violence, because it does not require that the use or threat of force be directed “against the person of another.”<sup>89</sup>

The best way to respond to such an argument is to conduct an empirical study, the kind of exhaustive case survey the Commission is designed for, and answer a simple question: Has there ever been a carjacking conviction where there was no force or threat directed against a person? One of us (Mason) litigated (for the government) the first case on this issue in the Ninth Circuit, *United States v. Ramos*,<sup>90</sup> and the entirety of the defense argument was a hypothetical: theoretically, a person could be convicted of carjacking by taking a car from the immediate possession of its owner, by threatening to use force not against the owner, but against some other piece of the owner’s property, and with no intention of permanently depriving the owner of the car.<sup>91</sup> In such a case, the argument ran, the defendant is guilty of carjacking under the statute, but has committed neither generic robbery nor generic extortion, and has not threatened to use force against the person of another.<sup>92</sup> There has never been such a case

In *Ramos*, the Ninth Circuit held that carjacking was covered by the *Becceril* robbery decision and was thus categorically a crime of violence.<sup>93</sup> But it issued its decision in a non-precedential memorandum opinion with no reasoning (the substantive part of the opinion was a single sentence). In the Ninth Circuit, memorandum opinions are binding only on the parties and are not precedent.<sup>94</sup>

89. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n. 1(B)(iii) (2008) (“[O]r any other offense . . . that has an element the use, attempted use, or threatened use of physical force against the person of another.”).

90. 312 F. App’x 852 (9th Cir. 2009).

91. See Brief for Appellant at 21-22 *United States v. Ramos*, (No. 07-50532), 2008 WL 2340117 (9th Cir. Apr. 28, 2008).

92. Separately, the Ninth Circuit has since held that section 215 carjacking is categorically a “crime of violence” for purposes of the broader immigration-law definition at section 1182(a), but the section 2L1.2 issue remains unsettled because of the “threat to property” element, which is included in the section 16(a) definition but omitted from the section 2L1.2 definition. See *Nieves-Medrano v. Holder*, 590 F.3d 1057 (9th Cir. 2010).

93. See *Ramos*, 312 F. App’x at 853.

94. See Caleb E. Mason, *An Aesthetic Defense of the Non-Precedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 687-92 (2008). Memorandum opinions are, in

Then, just a week before the Ninth Circuit issued its memorandum in *Ramos*, a district court in the Central District of California issued an opinion reaching precisely the opposite result from *Ramos*.<sup>95</sup> The district court in that case, *United States v. Velasquez-Bosque*, held that *Becceril* did not cover carjacking.<sup>96</sup> The court considered the “threat to property” hypothetical, and rejected the analogy to generic extortion because of the lack of a permanent deprivation intent requirement for carjacking.<sup>97</sup> The government appealed, and the case went up to the Ninth Circuit on precisely the same legal question litigated in *Ramos*.<sup>98</sup>

The carjacking conundrum is even more frustrating intellectually than the burglary conundrum. At least in the case of burglary, we know that on two identifiable occasions, a California defendant has been convicted of burglary based on an invited entry into a dwelling.<sup>99</sup> By contrast, the “threat to property” carjacker remains entirely hypothetical. He does not exist.<sup>100</sup> And yet that imaginary criminal was enough for the *Velasquez-Bosque* district court to rule that carjacking was not categorically a crime of violence.<sup>101</sup>

Why, you might ask, should the permanent deprivation intent matter at all in classifying a crime as “violent” or otherwise? If I point a gun at you and take your car, the threat is the same whether I abandon the car five minutes later, or keep it for years. Irrespective of one’s underlying views on street crime, immigration, or federal sentencing policy, everyone should agree that whether carjacking is a violent crime has nothing whatsoever to do with what the carjacker intends to do with the car *after* taking it—the violent part comes *when* he takes it! But under *Taylor*, there is no avenue for making that argument.<sup>102</sup>

The focus on the permanent-deprivation intent is wholly a product of the convoluted *Taylor* analysis necessitated by the vagueness of the Guideline, which forces the courts to shoehorn carjacking into generic *Taylor*

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theory, only supposed to be used in easy cases squarely covering by controlling precedent. As Mason has argued elsewhere, however, courts occasionally give in to the temptation to use them even in difficult, first-impression cases. *Id.*

95. *United States v. Velasquez-Bosque*, No. SACR-07-275 JVS (C.D. Cal. Feb. 10, 2009).

96. *Id.*

97. *Id.*

98. *Id.*

99. *People v. Cole*, 67 Cal. Rptr. 3d 526 (Cal. Ct. App. 2007); *People v. Salemme*, 3 Cal. Rptr. 2d 398, 402-03 (Cal. Ct. App. 1992).

100. Defense counsel conceded at oral argument, for example, that he had been unable to find any examples of such a case.

101. *United States v. Velasquez-Bosque*, No. SACR-07-275 JVS (C.D. Cal. Feb. 10, 2009).

102. *See United States v. Taylor*, 495 U.S. 575, 600-01 (1990).

categories. The proper classification of carjacking could be easily resolved by an empirical survey of California law that asked some simple questions: has there ever actually been a carjacking prosecution in which a defendant was convicted who did not use or threaten force against the person in the vehicle?<sup>103</sup> If it has ever happened, how many times? What were the facts? What considerations led to the decision to press charges? It would be right up the Commission's alley to undertake such a study, and then give a simple thumbs up or thumbs down to the inclusion of carjacking on the list.

It appears that the Ninth Circuit panel that decided *Velasquez-Bosque* in the spring of 2010 shared the intuition that it would be absurd to hold that carjacking is not a crime of violence, just because the carjacker did not have to have a permanent deprivation intent. The court held that carjacking is a categorical section 2L1.2 crime of violence. But the court's reasoning is quite interesting: it held that the permanent deprivation intent is not in fact part of "generic" theft, robbery, or extortion.<sup>104</sup> While a permanent deprivation intent is part of California's definition of robbery, the court held that California law was irrelevant because it is the "generic," or, if we will, Platonic, meaning of the term that the *Taylor* approach analyzes. So a temporary deprivation of property, accomplished against the victim's will, is enough to make carjacking a form of generic theft, robbery, and extortion.

We think that the *Velasquez-Bosque* result is correct, but that the extended litigation and circuitous reasoning were unnecessary: the Sentencing Commission could, and should, have simply updated the section 2L1.2 comment to include the carjacking statute. When only the Commission's intent about the scope of the guideline is at issue—as in all these cases—there is no need to force courts to reach sweeping holdings about the elements of imaginary generic crimes. The only question should be: Does the Commission intend that this conviction trigger this enhancement?

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103. See *Velasquez-Bosque*, 601 F.3d 955, 962 (9th Cir. 2010); *People v. Hill*, 3 P.3d 898, 903 (Cal. 2000). That there has not been such a situation is underscored by the actual case *Velasquez-Bosque* used to argue that section 215 was overbroad: *People v. Hill*, in which the defendant carjacked a woman and her baby, threatened to kill both, and then raped the woman. He was convicted of two counts, one for each victim. *Velasquez-Bosque*'s argument was that the conviction as to the baby showed that the statute was overbroad because you cannot actually "threaten" a baby that is unable to understand language yet. The Ninth Circuit did not buy the argument, but the fact that the attorney actually made the argument about the impossibility of threatening a baby, is, to our minds, conclusive evidence that the nonviolent carjacker remains entirely fictional. See *Velasquez-Bosque*, 601 F.3d at 962.

104. *Velasquez-Bosque*, 601 F.3d at 960 ("Because generic robbery is a theft offense, we conclude it does not include the element that the stolen property be taken permanently. Nor does generic extortion, as defined in *Becerril-Lopez*, contain any requirement that property be taken permanently.").

## B. KIDNAPPING

One might assume that kidnapping would always count as a crime of violence for purposes of the +16 enhancement under section 2L1.2.<sup>105</sup> Like burglary and robbery, kidnapping is specifically enumerated in the list of predicate crimes.<sup>106</sup> However, depending on the state statute and on the circuit, the crime may or may not trigger the enhancement. The same statute may not even trigger the same enhancement in different appellate jurisdictions. For example, in California kidnapping<sup>107</sup> is a crime of violence predicate offense for aliens prosecuted in the Tenth Circuit, but not for those prosecuted in the Ninth or Fifth Circuits. The reasons for this illuminate the fundamental problems with the *Taylor* approach—lack of a uniform empirical foundation among different courts about the underlying statistical data that inform their definitions.

California defines kidnapping as follows: “Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.”<sup>108</sup> The Ninth Circuit has held that for purposes of the broader definition of “crime of violence” at 18 U.S.C. § 16(b), kidnapping categorically qualifies: “kidnapping as defined in California Penal Code § 207(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) because the very nature of kidnapping involves a substantial risk of the use of physical force.”<sup>109</sup> The section 2L1.2 guideline, however, does not include section 16(b)’s broader “substantial risk of the use of physical force” definition. Thus, the issue for applying that guideline is whether section 207(a) kidnapping is “generic” kidnapping or not.

On that issue, the Ninth Circuit held that California kidnapping does not fit, and so has the Fifth Circuit.<sup>110</sup> The courts’ reasons, however, are both different and inconsistent, underscoring the need for a uniform federal

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105. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2010).

106. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n. (1)(B)(3) (2008).

107. See CAL. PENAL CODE § 207(a) (West 2008).

108. *Id.*

109. See *Rong Jian Xu v. Chertoff*, 166 F. App’x 912, 914 (9th Cir. 2006). See also *United States v. Williams*, 110 F.3d 50, 52-53 (9th Cir. 1997); *United States v. Lonczak*, 993 F.2d 180, 181-83 (9th Cir. 1993); *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir. 1988).

110. See *United States v. Fernandez-Serrano*, 327 F. App’x 9 (9th Cir. 2009) (citing *United States v. Lopez-Montanez*, 421 F.3d 926, 931 (9th Cir. 2005)); *United States v. Gonzalez-Perez*, 472 F.3d 1158, 1161 (9th Cir. 2007); *United States v. Moreno-Florean*, 542 F.3d 445 (5th Cir. 2008).

resolution of this federal sentencing question. In a nutshell, the Fifth and the Ninth Circuits disagree about what constitutes “generic kidnapping.”<sup>111</sup>

Under the Model Penal Code, a defendant

is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function . . . . A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception . . . .<sup>112</sup>

The Fifth Circuit holds that California kidnapping does not meet the generic definition of kidnapping because, first, it does not categorically require a “substantial interference with the victim’s liberty,” and, second, it does not categorically require either “(a) circumstances exposing the victim to substantial risk of bodily injury, or (b) confinement as a condition of involuntary servitude.”<sup>113</sup>

The Ninth Circuit, by contrast, holds that California kidnapping does not meet the generic definition of kidnapping for a different reason, to wit, because it does not require the defendant to have a so-called “nefarious purpose.”<sup>114</sup>

The two courts’ split on the status of the “nefarious purpose” element particularly illustrates the failings of the *Taylor* mode of analysis. In contrast to the Ninth Circuit, the Fifth Circuit holds that generic kidnapping does *not* include the “nefarious purpose” element.<sup>115</sup> The Fifth Circuit reached this result, in large part, because of its determination that a majority of state kidnapping statutes do not require a “nefarious purpose.”<sup>116</sup> Accord-

111. Compare *Moreno-Flores*, 542 F.3d at 452 (quoting TENN. CODE ANN. § 39-13-303 (2008)), with *Fernandez-Serrano*, 327 F. App’x at 11.

112. MODEL PENAL CODE § 212.1 (Proposed Official Draft 1985).

113. See *Moreno-Flores*, 542 F.3d at 452 (quoting TENN. CODE ANN. § 39-13-303 (2008)).

114. See *Fernandez-Serrano*, 327 F. App’x at 11.

115. See *United States v. Gonzalez-Ramirez*, 477 F.3d 310, 318 (5th Cir. 2007). However, the lack of a nefarious purpose does factor against a statute meeting the generic definition and necessitates some other aggravating factor. *Id.*

116. *Id.*



dingly, it has held that New York's second degree kidnapping statute<sup>117</sup> and Tennessee's kidnapping statute<sup>118</sup> both do fit the generic definition of kidnapping, even though neither statute has a nefarious purpose requirement.<sup>119</sup>

The Ninth Circuit, on the other hand, holds that generic kidnapping does indeed require a nefarious purpose.<sup>120</sup> Based on this analysis, the court held that Florida's false imprisonment statute<sup>121</sup> did not fit the generic definition of kidnapping.<sup>122</sup> Because the statute is missing an element, it is categorically excluded, and the modified approach is inapplicable.<sup>123</sup>

The circuits' different results are the product of different assumptions about the nature of state practice and the content of state law. The Ninth Circuit cited Professor LaFave's conclusion that all but eleven states require a nefarious purpose in their kidnapping statutes.<sup>124</sup> The Fifth Circuit thought the majority of states do not require that element.

So who is right? We put Mason's research assistants on the case, and determined that twenty-nine states' kidnapping statutes require some specified "nefarious purpose," while twenty-one, plus Washington, DC, do not.<sup>125</sup>

117. N.Y. PENAL LAW § 135.20 (McKinney 2009).

118. TENN. CODE ANN. § 39-13-303 (2008).

119. See *United States v. Iniguez-Barba*, 485 F.3d 790, 791-93 (5th Cir. 2007); *Gonzalez-Ramirez*, 477 F.3d at 318-19.

120. See *Gonzalez-Perez*, 472 F.3d at 1161. The court relied heavily on the Model Penal Code and on Professor LaFave.

121. FLA. STAT. § 787.02(1)(a) (2008).

122. See *Gonzalez-Perez*, 472 F.3d at 1160-61. It also did not fit the residual "crime of violence" definition because a false imprisonment can be effectuated "secretly." *Id.*

123. See *Fernandez-Serrano*, 327 F. App'x at 11.

124. See *Gonzalez-Perez*, 472 F.3d at 1161.

125. Compare ALA. CODE § 13A-6-43 (2010); ARIZ. REV. STAT. ANN. § 13.1304 (2010); ARK. CODE ANN. 5-11-102 (2010); 11 Del. Code § 782 (2010); FLA. STAT. § 787.01 (2010); HAW. REV. STAT. § 707-720 (2010); IND. CODE § 35-42-3 (2010); IOWA CODE § 710.1 (2010); KAN. STAT. ANN. § 21-3420 (2010); KY. REV. STAT. ANN. § 509 (west 2010); LA. REV. STAT. ANN. § 14:45 (2010); ME. REV. STAT. tit. 13 § 301 (2010); MICH. COMP. LAWS §750.349 (2010); MINN. STAT. § 609.25 (2010); NEB. REV. STAT. § 28-313 (2010); NEV. REV. STAT. § 200.310 (2010); N.H. REV. STAT. ANN. § 633:1 (2010); N.J. STAT. ANN. § 2C:13-1b (2010); N.M. STAT. ANN. § 30-4-1 (2010); N.Y. PENAL LAW § 135.25 (McKinney 2010); N.C. GEN. STAT. § 10 (2010); S.D. CODIFIED LAWS § 22-19-1 (2010); TEX. PENAL CODE ANN. § 20.04 (West 2010); UTAH CODE ANN. § 76-5-302 (West 2010); VT. STAT. ANN. tit. 13 § 2405 (2010); VA. CODE ANN. § 18.2-47 (2010); WASH. REV. CODE § 9A.40.20 (2010); W. VA. CODE § 61-2-14a (2010); WYO. STAT. ANN. § 6-2-201 (2010); with ALASKA STAT. § 11.41.300 (2010); CAL. PENAL CODE § 207(a) (West 2010); COLO. REV. STAT. § 18-3-301 (2010); CONN. GEN. STAT. § 53a-92; D.C. CODE § 22-2001 (2010); GA. CODE ANN. § 16-5-40 (2010); IDAHO CODE ANN. § 18-4502 (2010); 720 ILL. COMP. STAT. 5/10-1 (2010); MD. CODE ANN., CRIM. LAW § 27-337 (2010); MASS. GEN. LAWS ch. 265 § 26 (2010); MISS. CODE ANN. § 97-3-53 (2010); MO. REV. STAT. §565.115 (2010); MONT. CODE ANN. § 5-302 (2010); N.D. CENT. CODE § 12.1-18-01 (2010); OHIO REV. CODE ANN. § 505.01(a) (2010); OKLA. STAT. tit. 21 § 741 (2010); OR. REV. STAT. § 163.225 (2010); 18 PA. CONS. STAT. §

We think our numbers are correct—but we would never claim that they answer the classification question. At best they should serve as a guide to policy-making, which is to say that the question of what enhancement should apply for what particular prior conviction is a question for the Sentencing Commission. Judicial speculation about what “most states” do is merely a “least-bad” solution created by the *Taylor* Court to deal with Congressional vagueness. The Commission has no justification for emulating Congressional vagueness. We ask the Commission to do its job, to do an authoritative survey of those statutes, and make a decision about which ones should trigger the enhancement, or whether all should, and incorporate its conclusion explicitly into the Guideline.<sup>126</sup>

Take California kidnapping as an example. The only way to rationally categorize the statute is to determine whether there have been *actual* California kidnapping cases that did not meet either the generic definition of kidnapping or 18 U.S.C. § 16(a)—that is, cases that *neither* (1) interfered substantially with the victim’s liberty, *nor* (2) had a “nefarious purpose,” *nor* (3) involved the use, attempted use, or threatened use of force. As with burglary and robbery, isn’t that what we really want to know? What are the actual chances that this statute is sweeping up people whose actions were not really as bad as the statutory label makes them out to be? Should the mere possibility of non-categorical application (or a few examples of apparent nongeneric application scattered over two centuries) be enough to rule out the +16 enhancement for every single kidnapper? And if so, how *much* of a possibility? Is it ten percent, five percent, one percent, or one-tenth of a percent?<sup>127</sup>

The present lack of uniformity creates a variety of potentially disparate outcomes. From the prosecution standpoint, some re-entering prior kidnappers will get a windfall—a +8 enhancement instead of a +16 enhancement—merely because they were lucky enough to commit their kidnapping

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2901 (2010); R.I. GEN. LAWS § 11-26-1 (2010); S.C. CODE ANN. § 16-3-910 (2010); TENN. CODE ANN. § 39-13-303 (2010); WIS. STAT. § 940.31 (2010).

126. See, e.g., *United States v. Cervantes-Blanco*, 504 F.3d 576 (5th Cir. 2007) (struggling with Colorado kidnapping under COLO. REV. STAT. § 18-3-302 (2007)).

127. Of course, there may be no such problems even with ACCA, because *Almendarez-Torres* exempts from *Apprendi* judicial fact-finding about the existence of a prior conviction, and the classification of priors is deemed a purely legal issue. But we suspect that if the *Taylor* approach had evolved more in the empirical direction we are urging, the Sixth Amendment fact-finding objections would have more traction. The Guidelines standard, recall, is preponderance. Unlike with the ACCA scenario for which the *Taylor* approach was created, there are no lurking constitutional problems with applying advisory guidelines on the basis of proof by a preponderance of the evidence. Of course, the *Taylor* approach is not derived from Sixth Amendment worries, but rather from the oft-expressed judicial fear that courts are not well equipped to engage in a lengthy empirical analysis into how often statutes are actually applied in a nongeneric fashion.

in a state with an over-broad kidnapping statute. From the defense standpoint, other re-entering prior kidnappers will suffer an undue hardship—a +16 enhancement instead of a +8 enhancement—merely because they were unlucky enough to commit their kidnapping in a state with a generic kidnapping statute.

And it gets worse. The Ninth and the Fifth Circuits do not cover the whole southwest border. If you are a deported alien with a prior California kidnapping conviction and you decide to cross in California, Arizona, or Texas, you can be confident that you will not get a +16. But those three states have been tightening up enforcement, pushing a lot of foot traffic to the wide open territory in the middle of the border—New Mexico, which is in the Tenth Circuit. And the Tenth Circuit has a different view of California kidnapping. Bad luck if you start south of Del Rio, Texas, but wander a bit west.

Indeed, we do not need a hypothetical crosser. We have a real one: his name is Audon Juarez-Galvan. He was convicted of kidnapping in California, and was deported upon release. Then he re-entered and was arrested in Kansas, in the Tenth Circuit.<sup>128</sup> The district court gave him the +16 enhancement, holding that section 207 was a crime of violence under section 2L1.2.<sup>129</sup>

On appeal, Juarez-Galvan relied on the Fifth Circuit's holding that California kidnapping is nongeneric, but the Tenth Circuit rejected the Fifth Circuit's approach to defining generic kidnapping, deeming the Fifth Circuit's analysis inadequate because it had "consider[ed] only the MPC and a variety of kidnapping statutes from other states."<sup>130</sup> The Tenth Circuit found a better authority in *Black's Law Dictionary*, which defines kidnapping in terms a lot like section 207 does: "kidnapping is '[t]he crime of seizing and taking away a person by force or fraud . . .'"<sup>131</sup>

*Juarez-Galvan* is a plain-error case, and thus arguably would not be binding on subsequent panels considering the issue de novo. But, even a plain-error ruling will be quite persuasive for future district courts in the Tenth Circuit inclined to apply the +16. Certainly, the best advice for aliens with section 207 priors about where to cross is to avoid New Mexico, and cut east or west before hitting the border.

There is no good jurisprudential reason to have a federal sentencing regime that varies so dramatically based on fundamental disagreements among circuits about the meaning of the basic concepts that underlie the regime. Potential federal defendants who are going to be sentenced based

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128. United States v. Juarez-Galvan, 572 F.3d 1156, 1158 (10th Cir. 2009).

129. *Id.*

130. *Id.* at 1160 (citing *Moreno-Flores*, 542 F.3d at 452).

131. *Id.* at 1161 (quoting BLACK'S LAW DICTIONARY 886 (8th ed. 2004)).

on whether they have committed a “crime of violence” deserve to be put on notice as to what crimes those are. There is no reason whatsoever for two re-entering aliens with the same California state priors to end up with a federal sentence variance of one hundred percent because one turned left into New Mexico and the other turned right into Texas.<sup>132</sup>

### C. DRUG TRAFFICKING OFFENSES

The problems with the application of the section 2L1.2 sentencing enhancements are not limited to crimes of violence. The application of the section 2L1.2(b)(1) enhancements for a prior “drug trafficking” felony conviction are illustrative. Under the Guideline, “drug trafficking offense” means:

[A]n offense under federal, state, or local 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.<sup>133</sup>

That is how it currently reads. However, prior to the 2008 amendment cycle, it did not include the language “or offer to sell.”<sup>134</sup> This led to cases challenging the application of the enhancement to prior convictions under Texas Health and Safety Code section 481.112(a). Section 481.112 covers anyone who “knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance . . . .”<sup>135</sup> On the surface, the statute and Guideline seemed to be coextensive: both were limited to people involved in the sale, distribution, or manufacturing of illegal drugs, as opposed to simple possession. However, the definition of the term “deliver” supplied by the Texas statute included *offering to sell* a controlled substance.<sup>136</sup> The Guideline language said nothing about offering to sell. So the Fifth Circuit held that section 481.112 does not categorically meet section 2L1.2’s definition of a “drug trafficking offense.”<sup>137</sup>

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132. See, e.g., Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180 (1999) (“In seeking ‘greater fairness,’ Congress, acting in bipartisan fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complain[t]s that differences among sentences reflected not simply different offense conduct or different offender history, but the fact that different judges imposed the sentences.”).

133. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n. (1)(B)(iv) (2008).

134. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2007).

135. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (West 2009).

136. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) n. 8 (West 2009).

137. *United States v. Gonzales*, 484 F.3d 712 (5th Cir. 2007).

In response, the Sentencing Commission amended the definition of “drug trafficking offense” to include offering to sell. But the problem could have been avoided entirely if the Sentencing Commission had simply specified which state statutes should trigger the enhancement, and it will occur in other contexts. The choice of classificational methods matters, because no abstract definition will perfectly match up with the codes and cases of all fifty states.

Consider California Health and Safety Code section 11379(a). It targets

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 any controlled substance.<sup>138</sup>

This statute again would seem to fit the broad intent of the Guideline, in that it distinguishes between personal use and distribution, and covers only the latter. However, both the Fifth Circuit and Ninth Circuit have held that section 11379(a) is not a categorical “drug trafficking offense.”<sup>139</sup> The statute had two problems: first, like the Texas statute, it prohibited *offers* to sell, etc.; second, the “transports” element is not sufficiently grammatically tied to the “sell, furnish, administer, or give away” elements.

The former problem was fixed by the 2008 guidelines amendment that added “offers” to the definition of “drug trafficking offense.” The latter problem was not. Thus, section 11379(a) is still not a categorical “drug trafficking offense.”<sup>140</sup>

The \$64,000 question, that neither the Fifth Circuit nor the Ninth Circuit addressed is: how often are people prosecuted for section 11379(a) for merely transporting illegal drugs for personal use? Perhaps there are a sizeable number of felony prosecutions under this statute for transportation of personal use amounts of illegal drugs.<sup>141</sup> The answer is highly relevant, because this statute is among the primary statutory vehicles for prosecution of drug trafficking in California.

138. CAL. HEALTH & SAFETY CODE § 11379(a) (West 2008).

139. See *United States v. Navidad-Marcos*, 367 F.3d 903, 907-908 (9th Cir. 2004); see also *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir.2001) (en banc) (finding that California Health and Safety Code section 11360(a), which is almost identical to section 11379(a), but is limited to marijuana, is categorically overbroad); *United States v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008) (finding that N.C. GEN. STAT. § 90-95(h) (1993) is overbroad).

140. See *United States v. Garza-Lopez*, 410 F.3d 268, 274-75 (5th Cir. 2005).

141. Recall that intent to distribute is provable, and generally proved, by drug quantity.

Nor is the problem just one of potential under-inclusiveness. An additional problem is arbitrariness: another commonly prosecuted statute in drug trafficking cases is California Health and Safety Code section 11378,<sup>142</sup> which criminalizes possession of an illegal drug with intent to distribute. The two code sections are largely overlapping in coverage, so the same conduct could be charged indifferently under either. But section 11378, under *Taylor*, is a categorical “drug trafficking offense.”<sup>143</sup> Most people convicted under section 11378 could equally have been convicted under section 11379 and vice versa. Thus, whether a defendant receives a categorical enhancement for a “drug trafficking offense” will often depend on whether he was fortunate enough to be prosecuted under section 11379 instead of section 11378. This arbitrariness subverts the goals of 18 U.S.C. § 3553(a) and the Guidelines: it undermines deterrence; it undermines fairness (treating similar defendants similarly); it undermines respect for the law; and it undermines predictability and notice.

#### V. AN ARGUMENT FOR A MORE GRADUATED APPROACH TO THE ENHANCEMENTS

We argued above that the lack of uniform categorical guidance from the Commission has led to absurd results and unnecessary splits over the meaning of state laws, and the resulting sentencing disparities are unjustified and unjust. A related criticism of the existing section 2L1.2 regime is that it lumps together a diverse array of offenses without giving any empirical justification for their equivalence or providing any mechanism for distinguishing among them. Luckily this second problem can be fixed along with the first, and by the same means.

##### A. MURDER IS WORSE THAN ALIEN SMUGGLING

As discussed in Section I, a wide hodge-podge of crimes fit into the +16 enhancement: drug trafficking, firearms offenses, child pornography offenses, national security or terrorism offenses, human trafficking offenses, and all the crimes of violence:

[M]urder, manslaughter, kidnapping, aggravated assault, forcible sex offenses [including where consent is invalid], statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that

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142. CAL. HEALTH & SAFETY CODE § 11378 (West 2010).

143. See *United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007).

has as an element the use, attempted use, or threatened use of physical force against the person of another.<sup>144</sup>

The Guideline makes no distinctions among these crimes. They are treated as all equally serious. The Commission, however, has failed to explain why they should be. Absent any such explanation, or any stratification among crimes, the guideline fails to live up to the standard for empirical validity laid out in *Kimbrough*.

The Commission needs to provide some rationale for the application of the enhancement to defendants with these priors—ideally, an empirical analysis of the future dangerousness of felons in each category, including recidivism rates.

We are not on the Commission; and much of the empirical research needed to support any proposed hierarchy still needs to be done, in any event.<sup>145</sup> We will, however, lay out some preliminary ideas.

At a minimum, there should be a more finely-grained gradation of enhancement levels. We propose that enhancements for the current set of section 2L1.2 crimes go up by twos from +4 to +16, with murder and forcible sex offenses at the top and unenumerated felonies that have escaped explicit classification at the bottom.<sup>146</sup> Where each specific type of crime falls within that spectrum will depend on the Commission's determination of its severity. We know that not all of the crimes are equally serious, because no jurisdiction subjects them all to the same penalties. The conceptual justification for having the section 2L1.2 enhancement in the first place is that it is worse for some deportees to re-enter than for others. This reasonable justification is undermined—and with it the political legitimacy of criminal punishment—when the Guideline lumps together such a hodge-podge of disparate crimes. They are not all equivalent, and treating them as such contravenes the principal of even moderately real-offense sentencing, on which our guideline systems are built.

As an initial rough guide to respective crime-category severity, we can turn to the Guidelines themselves, which include recommended offense levels for the federal equivalents of all of the section 2L1.2 crimes.<sup>147</sup> For example, the offense level for first-degree murder is forty-three,<sup>148</sup> for second-degree murder thirty-eight,<sup>149</sup> for voluntary manslaughter twenty-

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144. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1 (2008).

145. Or at least compiled; it would be perfectly reasonable for the Commission to rely on existing empirical and theoretical publications.

146. We anticipate that this category will shrink as the Commission refines its list.

147. See U.S. SENTENCING GUIDELINES MANUAL § 2A1.1 (2010).

148. *Id.*

149. *Id.* § 2A1.2.



nine,<sup>150</sup> and for involuntary manslaughter twelve.<sup>151</sup> For alien smuggling, the base offense level is twelve.<sup>152</sup> Offense level forty-three is life in prison, while offense level twelve is, for a first-time offender, a range of ten to sixteen months.<sup>153</sup> It simply makes no sense that the Guidelines themselves recognize this vast difference in severity in the underlying substantive crime, but treat them as identical for purposes of section 1326 enhancement.

Here is our proposed initial classification table, using the crime categories currently listed in section 2L1.2 taking as our measure of relative seriousness the treatment by the Guidelines themselves of the underlying substantive crimes.

### 1. *Prior-Offense Enhancements*

- +4: • any felony not otherwise specified
  - 3 or more misdemeanor crimes of violence or drug trafficking offenses
- +6: • alien smuggling<sup>154</sup>
  - statutory rape<sup>155</sup>
  - felony drug trafficking offense with sentence imposed of 13 months or less
  - any other “aggravated felony” specified in 8 U.S.C. § 1182
- +8: • extortionate extension of credit<sup>156</sup>
  - residential burglary<sup>157</sup>
- +10: • firearms offense
  - felony drug trafficking offense with sentence imposed above 13 months
  - extortion<sup>158</sup>
  - child pornography<sup>159</sup>

150. *Id.* § 2A1.3.

151. *Id.* § 2A1.4.

152. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 (2010).

153. *Id.* § 2A1.1.

154. *See id.* § 2L1.1 (providing a base offense level of twelve, with enhancements for creation of substantial risk, use of weapons, injury to aliens, and number of aliens).

155. *See id.* § 2A3.2 (providing a base offense level of eighteen).

156. *See id.* §§ 2B3.3, 2B3.2 (providing a base offense level of nine or eighteen, depending on nature of threat).

157. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B2.1 (2010) (providing a base offense level of seventeen, with enhancements for planning, amount of loss, and possession of a weapon).

158. *See id.* § 2B3.2 (providing a base offense level of eighteen, with enhancements for threat of death, amount of money demanded, use of weapon, injury to victim, and abduction of victim).

- +12: • robbery<sup>160</sup>
  - aggravated assault<sup>161</sup>
  - human trafficking<sup>162</sup>
  - kidnapping<sup>163</sup>
  - arson<sup>164</sup>
- +14: • manslaughter<sup>165</sup>
  - national security or terrorism offense<sup>166</sup>
  - sexual abuse of a minor<sup>167</sup>

159. *See id.* § 2G2.2 (providing a base offense level of eighteen or twenty-two, depending on statute of conviction, with enhancements for distribution or number of images, and reduction for simple possession).

160. *See id.* § 2B3.1 (providing a base offense level of twenty, with enhancements for victim (a bank), use of weapons, injury to victim, use of hostage or human shield, car-jacking object of robbery, and amount of loss, e.g., a well-executed “Point Break”-style robbery involving the brandishing but not firing of weapons, the targeting of a bank, and the successful acquisition of between \$10,000 and \$50,000, would yield an offense level of  $20 + 2 + 5 + 2 = 29$ ).

161. *See id.* § 2A2.2 (providing a base offense level of fourteen, with enhancements for planning, use of weapons, injury to victim, and status of victim (subject of a protective order, or law enforcement)). Most aggravated assaults include by definition one or more of these factors. For example, a run-of-the-mill aggravated assault conviction for hitting someone with a pool cue, and breaking their nose, would be  $14 + 4$  (use of dangerous weapon) + 5 (serious but not permanent or life-threatening bodily injury) = 23. *See id.*

162. *See* U.S. SENTENCING GUIDELINES MANUAL § 2H4.1 (2010) (providing a base offense level of twenty-two, with enhancements for injuries, use of weapons, length of confinement, and commission of another crime in connection with trafficking). For example, serious injury to victim (+2), use of dangerous weapon (+4), victim held for between 30 and 180 days (+1), and commission of another felony (+2) (which would always be the case if a person were brought into the country, or assaulted) would yield an offense level of thirty-one. *See id.*

163. *See id.* § 2A4.1 (providing a base offense level of thirty-two).

164. *See id.* § 2K1.4 (providing a base offense level of twenty-four for dwellings or where substantial risk to persons is knowingly created; the base offense level is twenty for non-dwellings without knowing creation of substantial risk).

165. *See id.* §§ 2A.1.3, 2A1.4 (providing offense level of twenty-nine for voluntary manslaughter, twelve for involuntary manslaughter with adjustments to eighteen if reckless, and to twenty-two if reckless operation of vehicle).

166. There are a variety of guidelines under this general heading, but we consider only those that do not involve intentional killing, because those would be covered under the +16 murder enhancement. For example, disclosure of information identifying a covert agent by a person with authorized access to that information has an offense level of thirty (§ 2M3.9); losing national security information has an offense level of eighteen or thirteen, depending on the classification of the information lost; destruction of war material or premises has an offense level of thirty-two; gathering national defense information or transmitting it to a foreign government has an offense level of thirty-seven or forty-two, depending on the classification of the information.

- +16: • forcible sex offenses<sup>168</sup>
  - murder and attempted murder<sup>169</sup>

Of course, this ranking need not be the Commission's ranking. The list simply reflects the relative seriousness of these categories of crime according to the Guidelines themselves. But the Commission could consult other sources, as well, for example surveys of state sentencing practices. The Commission should also consult studies on recidivism data--both in terms of likelihood of recidivism in general, and the severity of the likely crime committed when the defendant recidivates. The point is simply that the Commission should base the section 1326 enhancements on *something*. As written, they cannot escape the charge of arbitrariness.

A graduated enhancement table would make doubly important the careful and defensible classification of state crimes as discussed in the preceding section. The restructured guideline should include, for each listed enhancement category, a comment listing every state statute that in the Commission's view defines that offense. We would anticipate, for example, in view of the analysis of robbery herein, that California robbery and California carjacking would both be listed in the +12 robbery category. But that would be up to the Commission, so long as the Commission based its decision on some substantive evaluation of relative severity. To achieve empirical legitimacy for the guideline, the details of offense placement matter far less than the method: considering each statute individually, and making a deliberate decision as to its nature and seriousness.

## B. PRIOR SENTENCE LENGTH

Under the current regime, the sentence received for the aggravating prior offense is irrelevant:<sup>170</sup> if the crime is punishable by more than a year, the Guidelines give no effect to the actual decision on punishment made by

167. See U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 (2010) (providing a base offense level of eighteen, with four-level enhancement if the victim was in the care or custody of the defendant).

168. *Id.* § 2A3.1 (providing a base offense level of thirty-eight if convicted under 18 U.S.C. 2241(c) (victim under age twelve), thirty otherwise, with enhancements for use of force, age of victim, and injury to victim. Thus, for example, forcible sexual assault of an adult victim with serious bodily injury to the victim, would yield an offense level of 30 + 4 (forcible conduct) + 2 (serious injury) = 36. For the same offense with a victim between the ages of twelve and sixteen, the final offense level would be thirty-eight, and if the victim was younger than twelve, the offense level would be forty-four (38 + 4 + 2)).

169. *Id.* §§ 2A1.1, 2A1.2 (providing offense level of forty-three and thirty-eight for first and second-degree murder, respectively).

170. Noting, again, the one exception of drug trafficking felonies with imposed sentences of thirteen months or less.

the original sentencing court. We think the enhancement should depend in part on the length of the prior sentence. In general, more-serious offenses tend to be punished with lengthier sentences than less-serious offenses. If this is so, then it is reasonable that a prior-offense enhancement should reflect this fact. Section 2L1.2 does not. Before the 2001 amendments, there was a blanket +16 enhancement for defendants with prior aggravated felonies as defined in 8 U.S.C. § 1182(a).<sup>171</sup> In 2001, the Commission considered adjusting the enhancements within that set of defendants based on the length of the sentence of the defendant's most serious prior aggravated felony.<sup>172</sup> The adjusted enhancements would have ranged from six levels to sixteen levels.<sup>173</sup>

The Commission conducted a study on the likely effects of the proposed change.<sup>174</sup> The study did not find a meaningful link between the level of enhancement that would result under the proposal and the seriousness of the type of crime committed.<sup>175</sup> The study suggested that roughly half of defendants who had been convicted of what were traditionally considered the most serious crimes would receive the lowest enhancement proposed—six levels.<sup>176</sup> Fifty-one percent of defendants in the study received six months or less for their aggravated felony, and eighty-nine percent of defendants had a sentence of two years or less.<sup>177</sup> The Commission concluded that an enhancement regime based on sentence length would not track salient differences among types of crime, and could be too dependent on differences in sentencing practices in different states.<sup>178</sup> Thus, the Commission instead adopted the current system of enhancements.<sup>179</sup>

The Commission was right to reject an enhancement system based solely on prior sentence length. But the Commission was wrong to ignore sentence length altogether. Eleven percent (the percentage of defendants who had prior sentences of more than two years) is a significant amount in a system with tens of thousands of reentry prosecutions per year.<sup>180</sup> And there is great variation in prosecution strategies among the different border districts, as evidenced by the wide differences in the number of aliens pros-

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171. See Linda D. Maxfield, *Aggravated Felonies and § 211.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 529-33 (2003).

172. *Id.* at 533.

173. *Id.*

174. *Id.* at 531-32.

175. *Id.* at 535.

176. See Maxfield, *supra* note 171, at 535.

177. *Id.* at 536-37.

178. *Id.* at 535-36.

179. *Id.* at 536.

180. *Id.* at 537.

ecuted.<sup>181</sup> For example, there are roughly seven times more immigration prosecutions in the Southern District of Texas than in the Southern District of California; this suggests that the prosecution strategies in the two districts are different.<sup>182</sup> A district might cast a wide net, prosecuting all re-entering deportees with any record. Or it might focus just on those with very serious prior records, and adjust the intake guidelines up or down depending on attorney caseloads and detention center bed space. Such differences in the selectivity of intake screening for entry and reentry prosecutions may be skewing the data. We can state in our experience as prosecutors in the Southern District of California that in our district the percentage of reentry defendants with a prior sentence of more than two years is much higher than eleven percent. Thus, a sentence-length enhancement would have significant effects in sorting more serious prior offenders from less serious prior offenders at the fast-track plea bargaining stage.

We propose something like the following, with the Commission doing empirical research to determine the actual adjustments:

### 1. *Sentence-Length Adjustments*

If more than one of the following adjustments applies, use the one resulting in the highest offense level. If the sentence imposed for the conviction triggering an enhancement was:

- 8 years or greater, then increase by 3 levels
- 5 years or greater, then increase by 2 levels
- less than 2 years, then decrease by 1 level, to no less than +6 if the enhancement was originally greater than +4, otherwise to no less than +4
- 12 months or less, then decrease by 2 levels, to no less than +5 if the enhancement was originally greater than +4, otherwise to no less than +4
- 6 months or less, then decrease by 4 levels, to no less than +5 if the enhancement was originally greater than +4, otherwise to no less than +4

On this model, all defendants with prior felonies get a minimum +4 enhancement. Those with enumerated enhancing felonies always get a larger enhancement than those without, except in cases in which the sentence imposed was six months or less. We anticipate that a significant number of defendants with enhancing prior offenses would see decreases in sentence length under our proposal.

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181. See Maxfield, *supra* note 171, at 530.

182. See U.S. SENTENCING COMM'N *supra*, note 3.

On the other side of the scale, the proposal takes into account decisions by prior sentencing courts to impose long sentences, and it raises the maximum enhancement to +19 for murderers and rapists who received significant sentences.

Obviously how any such model translates into practice will depend on the intake screening policies of a particular district. It is likely that reductions in enhancement under the proposed regime would be more common than increases in enhancement, and that substantially fewer defendants would face +16 enhancements. That is exactly as it should be: the greatest enhancements should be reserved for the worst prior offenders, the ones we have the strongest interest in keeping out of the country.<sup>183</sup>

#### VI. THE ONE-IN-A-THOUSAND DEFENDANT WILL STILL GET HIS SAY

The main benefit of our proposal is the gain in uniformity and rationality. Under the revised guideline, the prior-offense classification would come to the judge, statute by statute, as part of the guideline. We propose that the Commission compile its list using a “most cases” intrastate analysis, with “most” defined as a ninety-five percent confidence interval, to determine the scope of state statutes. Thus, California burglary would be “burglary,” an enumerated offense, and California robbery would be “robbery,” an enumerated offense. The sentencing court’s function would then be to do what it should be doing in the first place: making a fact-specific determination about the culpability of *this* defendant. The relevant sentencing question is: based on the facts of this defendant’s criminal history, do the broad categories sketched out by the Guidelines fit? Thus, the judge makes a determination under 18 U.S.C. § 3553(a) whether the enhancement called for by the Guidelines should actually affect the sentence, and if so, by how much.<sup>184</sup>

The Commission would decide as a matter of policy how to classify each offense, based on its assessment of the state elements, their relationship to whatever elements the Commission takes as a generic baseline, the seriousness of that generic offense, and—crucially—its empirical survey of state charging practices. We think a ninety-five percent “generic” charging rate should suffice for presumptive categorical application of the guideline, for four reasons that seem to us legally irrefutable. First, the default stan-

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183. These reductions for sentence length, along with the lower enhancements for most types of crimes of violence, balance out any notion that our proposal is “pro-prosecution.” Yes, some felonies not defined as crimes of violence now would presumably be defined as such in the future. However, this detriment to defendants would likely be more than offset by our “pro-defendant” adjustments made according to the type of crime of violence—and other enumerated offenses like alien smuggling—and the sentence imposed.

184. 18 U.S.C. § 3553(a) (2010).

dard of proof for Guidelines adjustments is a preponderance of the evidence.<sup>185</sup> Second, even in the rare cases in which courts have required a higher standard for adjustments that “disproportionately” drive sentence length, that higher standard is clear and convincing evidence.<sup>186</sup> A ninety-five percent confidence interval satisfies both standards easily.<sup>187</sup> Third, under *Booker*, only facts that alter the statutory maximum, not those that merely alter the guidelines range, trigger Sixth Amendment claims.<sup>188</sup> And fourth, courts have uniformly held that the classification of a prior conviction—as distinct from the fact that it occurred—is not even a question of fact at all, but rather a question of law.<sup>189</sup> Thus, there is neither a statutory nor a constitutional impediment to an empirically-restructured enhancement table derived from surveys of actual state charging practices.

But of course, every curve has its tail. While there is no good reason to grant an unjustified windfall to generic offenders, the ideal of real-offense sentencing—and of maximizing the social legitimacy of the nation’s immigration enforcement regime—weighs in favor of allowing nongeneric offenders a chance to challenge the application of the enhancement. Therefore, in cases involving prior offenses classified as enhancement predicates on the basis of confidence intervals of less than one hundred percent,<sup>190</sup> the defendant should be given an opportunity under 18 U.S.C. § 3553(a) to present evidence that his conviction was nongeneric and thus warrants a departure or variance.<sup>191</sup> Indeed, post-*Booker*, defendants already have this ability, but because federal sentencing remains Guideline-centric, the revised guideline should make the defendant’s right explicit, to better ensure that the judge recognizes the importance of the issue. Therefore an application note is recommended that says something like the following: “In cases where the Commission has found actual nongeneric applications of an enumerated enhancing offense, if the defendant presents credible evidence

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185. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (2010).

186. See, e.g., *United States v. Staten*, 466 F.3d 708, 717-18 (9th Cir. 2007) (requiring clear and convincing evidence where guideline adjustment has “extremely disproportionate” effect on sentence). Even commentators who have argued that the beyond-a-reasonable-doubt standard ought to govern all guidelines enhancements have recognized that no court has ever so held. See, e.g., Alan Ellis & Mark H. Allenburgh, *Standards of Proof at Sentencing*, CRIM. JUST., Fall 2009, at 62.

187. Arguably it should satisfy a beyond-a-reasonable-doubt standard, too, but as noted above, courts frown on such numerical equivalents.

188. *United States v. Booker*, 543 U.S. 220, 249-50 (2005).

189. See, e.g., *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994) (“[W]hether an offense is an aggravated felony or a nonaggravated felony is a question of law for the court to decide.”).

190. That is, offenses for which the Commission was able to locate actual instances of nongeneric charging practices.

191. That is, even though the enhancement is correct under the guidelines, the guideline should be ignored or minimized when deciding the actual sentence.



that his particular conduct resulting in the conviction did not meet the generic definition of the offense, the court should consider granting a departure or variance.”

We do not believe that such a “safety-valve” mechanism will precipitate § 1326 sentencing into a miasma of time-intensive mini-trials. First, the district judge will have wide latitude in deciding whether or not to grant the departure or variance. Second, for many state statutes—for example California robbery and carjacking—the confidence interval will likely be one hundred percent. Third, even where some actual nongeneric cases exist, it is highly unlikely that any particular § 1326 defendant will have been one of those nongeneric defendants. Thus there simply will not be many genuine claims. And while we know that people lie, we are confident that the courts can apply the usual suite of deterrent mechanisms.<sup>192</sup> Fourth, the court will have before it all the usual *Taylor* records, and those will likely be dispositive in most cases.

Such a procedure is, we emphasize, already within the existing discretion of post-*Booker* sentencing courts;<sup>193</sup> the proposed application note would just ensure that the judge seriously consider credible claims that the underlying conviction was nongeneric when fashioning the appropriate sentence under 18 U.S.C. § 3553(a).<sup>194</sup>

Finally, there is the argument that if defendants could re-litigate the facts of their priors, sentencing hearings would go on forever or necessitate flying old eyewitnesses across the country. We don’t buy it. The rules of evidence don’t apply at sentencing hearings, so courts can consider all manner of hearsay and documentary evidence.<sup>195</sup> There are no jury trial

192. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2010) (providing that giving knowingly false testimony at sentencing triggers a sentence enhancement and would be a legitimate basis for an upward variance). Additionally, the government always has the option of bringing perjury charges.

193. See *supra* Part I.

194. 18 U.S.C. § 3553(a) (2010).

195. The standard is minimal indicia of reliability. Police reports, for example, are regularly used. PSRs are used as a matter of course. There is simply no bite to the defense-bar claim we have heard that “I can’t imagine a cop from, say, North Carolina is going to want to have to come to federal court to talk about a burglary arrest he made years ago.” Letter from a Federal Defenders attorney to Caleb Mason (Dec. 22, 2009). Well, sure: but he wouldn’t have to come. He’d just fax his report. The real objection, as the attorney acknowledged, is this: “[T]he prior conviction enhancements make little sense to begin with, so I don’t see the point in simply re-shaping them using the same basic framework.” *Id.* We respect that position, just as we respect the political argument that our immigration policies need to be reformed and that such reform might legalize some conduct currently illegal. But neither is a legal argument. *Given that* Congress has made reentry illegal, and *given that* the Commission has the power to set guidelines sentencing enhancements for prior offenses in reentry cases, our point is that those enhancements can either be rationally based on empirical analysis consistent with the jurisprudential underpinnings of the Sentencing Reform Act,

rights because the statutory maximum is not implicated.<sup>196</sup> The burden is preponderance.<sup>197</sup> In our model, the “real prior offense” evidentiary hearing will only arise if the defendant claims that the facts of his prior offense don’t fit the guideline definition. Most reentry defendants won’t be able to make that claim. For California burglars facing Section 1326 sentencing, for example, *Taylor* was a pure windfall absent a claim that the burglary conviction was in fact based on a permissive entry into the victim’s house.<sup>198</sup> Yet we know from the extensive *Taylor* litigation on the California burglary statute that the diligent work of numerous advocates and clerks has turned up only two such burglars in the past century. The argument that all the other thousands of residential burglars, who broke into houses in the usual burglar way, are therefore not *really* burglars for sentencing purposes does not make sense.<sup>199</sup> We submit that not a single section 1326 defendant with a prior burglary will be able to make a claim that his entry was permissive under the proposed guideline.<sup>200</sup>

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or they can be irrational, devoid of empirical analysis, and flatly inconsistent with the jurisprudential underpinnings of the Sentencing Reform Act. It smacks of sour grapes to oppose trying to improve Section 2L1.2 on the grounds that it made little sense to begin with.

196. We recognize the lurking *Apprendi* argument that has been floating around ever since *Booker*: that if a sentence is only substantively reasonable based on facts found at sentencing, then it would have been illegal without those facts, and thus could not have been imposed without those facts—in short, that the relevant stat max for *Apprendi* purposes should be construed not as the stat max in the actual statute, but rather as the highest sentence that an appellate court would uphold on substantive reasonableness review absent any sentencing facts. Obviously, if this argument ever gets any traction, there are big problems for post-*Booker* sentencing practice. But the argument has gone, and is going, nowhere. The relevant stat max is the max given by the actual statute. Sentencing facts raise no *Apprendi* problems in an advisory guidelines regime. Not everyone likes it, but that’s the way things are. For one variant on the argument, based on § 3553(a) itself, see Steven F. Hubachek, *The Undiscovered Apprendi Revolution*, 33 AM. J. TRIAL ADVOC. 521 (2010).

197. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (2010).

198. *Taylor v. United States*, 495 U.S. 575, 598 (1990).

199. It should be noted that in speculating about possible alternative legal universes, it makes sense that the constitutional imperative would require them to get that windfall in a mandatory guidelines regime, where every enhancement raised the statutory maximum for Sixth Amendment purposes. But there is not such a regime: all that is available is the *Booker* remedial opinion and *Almendarez-Torres*.

200. We say this because in the *Montes de Oca* case, which would have been the place to showcase all the nongeneric burglary cases out there, the Ninth Circuit relied exclusively on the two cases noted above; and because in our experience litigating hundreds of Section 2L1.2 cases, no Section 1326 defendant raising a *Taylor* issue has ever claimed that his own offense was nongeneric. Cf., e.g., Lynn Hartfield, *Challenging Crime of Violence Enhancements in Federal Court*, CHAMPION, May 2006, 28, 31 (“[O]btain as complete a copy as possible of the underlying court file. . . . [I]n most cases it will not be in your client’s interest to supply the documentation yourself. This is because if a statute is broad enough to cover both violent and non-violent conduct, and there is no documentation available that sheds further light on your client’s conviction, the judge will have to rule the offense not a crime of violence.”).

And most importantly, the legitimacy of criminal justice is enhanced by proof of facts as a basis for sentencing. No one respects a sentencing regime based on speculation and dictionary-reading. There is nothing to fear for either side, in asking, in cases where the issue is colorably raised: What did this guy actually do? Criminal lawyers *like* proving facts. What they *don't* like is the sentencing court turning a blind eye to facts on the basis of speculative appellate opinions about hypothetical situations. And irrespective of what criminal lawyers like doing, the Sentencing Reform Act was explicitly intended to bring real-offense sentencing to the federal system. The *entire point* of the Guidelines can be simply expressed as: sentence the person *for what he did*.<sup>201</sup>

## VII. CONCLUSION

The Guidelines still provide the disparity-minimizing anchor the Sentencing Reform Act initially sought to create, and they are not going away as a starting point for sentencing.<sup>202</sup> In some circuits, there is a presumption that sentences within the Guidelines range are reasonable.<sup>203</sup> Congress has shown no inclination to pass comprehensive post-*Booker* sentencing legislation, so the current sentencing jurisprudence is unlikely to be significantly altered anytime soon.<sup>204</sup> There is, therefore, no good reason for the Com-

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201. Julie O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW U. L. REV. 1342 (1997) (articulating and defending the jurisprudential merits of real-offense guideline sentencing). It should be noted that this discussion of real-offense hearings is limited to criminal sentencing in federal court, where all the paperwork is in order, the judges have life tenure, and you can be reasonably sure that everyone has a decent lawyer. There is a distinction between the application of *Taylor* in criminal sentencing in federal court and its application in deportation proceedings in immigration court. There are legitimate reasons to fear mini-trials on predicate priors in deportation proceedings—not least of which is that the alien is not entitled to an attorney. See Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1033 (2008) (explaining the reasons why mini-trials don't make sense in immigration court). But none of those reasons apply to federal criminal sentencing.

202. See U.S. Sent. Comm., *Preliminary Quarterly Data Report (2010)*, at 10, fig. A (showing percentage of within-range and out-of-range sentences from 2005 to 2010).

203. See, e.g., *United States v. Alonzo*, 435 F.3d 551, 553-54 (5th Cir. 2006) (announcing appellate presumption of substantive reasonableness for within-guidelines sentences).

204. It is unlikely that there is any agreement in Congress in any event as to what form comprehensive post-*Booker* sentencing legislation should take, and as various commentators have noted (e.g., Berman), the White House has been virtually silent on criminal justice issues, which is understandable, but still disappointing. There is almost certainly no significant support for the abandonment of Guidelines sentencing and a return to pre-CRA discretion.

mission not to state clearly which state convictions it believes should trigger the crime of violence enhancement in section 2L1.2.

If the Commission undertakes such a project and revises section 2L1.2 accordingly, it can solve, in one stroke, two of the principal deficiencies that plague federal immigration sentencing: it can eliminate the vexing disparities stemming from the present scattershot array of “generic” crime definitions and classificational methodologies; and it can more precisely fit the punishment to the defendant by stratifying prior offenses along a graduated scale of severity.

It is obvious that no amount of tinkering with the sentencing guidelines for illegal entry will solve the many dilemmas of immigration policy. But if we’re going to punish people for disobeying laws—any laws—the least we in the law-enforcement community can do is make our sentencing procedures as transparent and rational as possible.