ARTICLE: A QUANTITY-DRIVEN SOLUTION TO AGGREGATE GROUPING UNDER THE U.S. SENTENCING GUIDELINES MANUAL

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Highlight

ABSTRACT

The United States Sentencing Guidelines Manual mandates the grouping of many multiple-count convictions on an aggregate basis. In these instances the Guidelines aggregate a specific quality of the offenses--often the amount of drugs or money--and determine the punishment based on the aggregated quantity.

This Article first reviews the purposes of grouping under the Guidelines and concludes that grouping under the Guidelines' non-aggregate grouping provisions should precede grouping on an aggregate basis in order to minimize the influence of prosecutorial charging decisions. Second, the Article analyzes the text, commentary, and purpose of the aggregate grouping guideline and concludes that aggregate grouping is only appropriate when the offense level determination is based primarily on quantity or some other aggregable quality of the offense. Next, the Article formulates a mathematical ratio by which to test whether the offense level for an individual offense guideline is determined primarily on an aggregable or non-aggregable quality of the offense. The ratio is then applied to every offense guideline in the Guidelines Manual as well as to the distribution of each controlled substance and listed chemical. This data is reproduced in a series of appendices. The Article highlights anomalies in the data and identifies the specific offense guidelines that are either improperly subjected to or excluded from aggregate grouping under the current scheme. Lastly, in an appendix, the Article sets forth the text of a proposed revised aggregate grouping guideline.

Text

[*792] I. INTRODUCTION

For some multiple-count convictions, the United States Sentencing Guidelines Manual ("Guidelines") provides for the grouping of the offense conduct on an aggregate basis. In these instances, the Guidelines aggregate a specific quality of the offense--often the amount of drugs or money--without regard to separate counts of conviction. The effect of aggregate grouping is that the number of times the offense was committed has little impact on the offense level calculation relative to the aggregable quality of the offense.

It follows that, for offense guidelines subject to aggregate grouping, the base offense level should be low relative to the potential enhancement for the aggregable quality of the offense. And the opposite should hold true as well--for offense guidelines excluded from aggregate grouping, the aggregable quality of the offense should not dominate the offense level calculation. While many offense guidelines fit this mold, others do not and lead to anomalous application or nonapplication of the aggregate grouping guideline.

This Article proposes specific guideline amendments in order to bring the aggregate grouping guideline into appropriate equilibrium. In Part II, this Article provides a brief overview of the Guidelines' treatment of grouping of multiple counts. Part III explains why aggregate grouping is distinct from the other three grouping mechanisms **[*793]** set forth in the Guidelines. Part IV argues that aggregate grouping should only occur after the application of non-aggregate grouping mechanisms and should apply only where some aggregable quality of the offense dominates the offense level calculation. A mathematical ratio is constructed in order to measure whether an aggregable quality of the offense dominates the offense level calculation. The ratio is then applied to every offense guideline in the Guidelines Manual as well as to the distribution of each type of controlled substance and listed chemical. These results are reported in Appendices A, B, and C. In Part V, the Article highlights anomalies in the data and identifies the specific offense guidelines that are either improperly subjected to or excluded from aggregate grouping under the current system. Appendix D incorporates all of the suggested revisions from the Article into a proposed revised aggregate grouping guideline.

II. GROUPING OVERVIEW

The importance of aggregate grouping, and grouping in general, on Guidelines calculations is difficult to overstate. Its importance is perhaps only eclipsed by its problematic nature. The Introduction to the Guidelines candidly admits that the Commission "has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment." [1] One of the Guidelines' chief architects, then-Judge Stephen Breyer, has described the treatment of multiple counts as an "intractable sentencing problem" that "is so complex that only a rough approach to a solution is possible." [2] Although the grouping process has been previously well summarized in numerous sources, [3] the grouping guidelines remain some of the most difficult to apply. [4] It is therefore worth briefly setting them out again **[*794]** before engaging in

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[1] U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(e) (2012) [hereinafter U.S.S.G.].

[2] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 25 (1988); *see also* id. at 25-26 (arguing that the widely held perceptions that more severe punishment is warranted for each additional unit of harm inflicted, but that the corresponding increase should not be strictly proportional, "make it difficult to write rules that properly treat 'multiple counts' "). The Guidelines' solution has garnered at least some accolades from members of the judiciary. *See* United States v. Mizrachi, 48 F.3d 651, 654 (2d Cir. 1995) (recounting the "problem" of the either completely concurrent or completely consecutive sentences that were routinely imposed before the promulgation of the Guidelines and hailing the consistent treatment of defendants convicted of multiple counts as "[o]ne of the major innovations of the Guidelines").

[3] *See, e.g.*, United States v. Gordon, 291 F.3d 181, 192-93 (2d Cir. 2002); Mizrachi, 48 F.3d at 654-55; Breyer, *supra* note 2, at 27; James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 90-91 (2010).

[4] 2011 U.S. SENTENCING COMM'N ANN. REP. 28 (noting that queries related to the grouping of multiple counts of conviction are some of the most frequently asked questions on the Commission's *HelpLine*); OFFICE OF THE GEN. COUNSEL, U.S. SENTENCING COMM'N, FEDERAL SENTENCING: GROUPING OF MONEY LAUNDERING AND FRAUD COUNTS OF

a discussion of specific grouping mechanisms, because "[t]o fully comprehend the comments and criticisms regarding the Guidelines, at least a rudimentary understanding of how they work is required." [5]

When a defendant is convicted of multiple counts, her convictions may be combined into one or more groups of multiple counts or left separate as essentially "groups" of single counts. Counts that are subject to grouping may be grouped on an aggregate or non-aggregate basis. Counts of conviction may be grouped on a non-aggregate basis if: (1) the "counts involve the same victim and the same act or transaction;" (2) the "counts involve the same victim" and multiple "acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan;" or (3) one count "embodies conduct that is treated as a specific offense characteristic" or adjustment to "the guideline applicable to another of the counts." [6] If counts are grouped in this manner, then the offense level for the most serious offense in the group becomes the offense level for the group. [7]

When counts of conviction are grouped on an aggregate basis, "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity" after factoring in any applicable adjustments. [8] The aggregate grouping guideline lists thirty-five offense guidelines that "are to be grouped" on an aggregate basis, fifty-two offense guidelines that are excluded from aggregate grouping, and renders the balance--the remaining sixty-seven offense guidelines--to a case-by-case determination of whether grouping on an aggregate basis is appropriate. [9]

Any count of conviction that cannot be grouped on these bases essentially becomes its own group. Once the total offense level of each group is tallied, the total offense level of all the groups together must be calculated. [10] First, the group with the highest offense level ("the **[*795]** most serious group") is counted as one "unit." [11] Each additional group is counted as one unit, half a unit, or zero units depending on how greatly the group's offense level deviates from the offense level of the most serious group. [12] The units are then converted into offense levels and added to the offense level of the most serious group. [13] That sum is the total offense level for all of the groups. [14]

CONVICTION (2000) [hereinafter FEDERAL SENTENCING] (describing the circuit fracture on whether and by what mechanism to group money laundering and fraud counts).

[5] Breyer, *supra* note 2, at 6.

[6] U.S.S.G. § 3D1.2(a)-(c) (2012).

[7] *Id*. § 3D1.3(a).

[8] *Id.* § 3D1.3(b). When counts of different offenses "of the same general type" are aggregately grouped, the offense guideline that produces the highest offense level is applied. *Id.*

[9] *Id.* § 3D1.2(d). Although offense guidelines that are subject to mandatory grouping under subsection 3D1.2(d) have been referred to as "aggregatable offenses," U.S. SENTENCING COMM'N, STAFF DISCUSSION PAPER: RELEVANT CONDUCT 5 (1996) [hereinafter STAFF DISCUSSION PAPER], this Article will use the less bulky term "aggregable offenses." *See, e.g., Julie R. O'Sullivan, In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1359 (1997).

[10] Although not the approved vernacular, the groups of counts are essentially themselves grouped to create an ultimate group of groups.

[11] U.S.S.G. § 3D1.4 (2012).

[12] *Id.* § 3D1.4(a)-(c). A group that is zero to four offense levels less serious than the most serious group adds one unit. A group that is five to eight levels less serious than the most serious group adds half of a unit. A group that is nine or more levels less serious than the most serious group adds zero units.

[13] *Id.* § 3D1.4. Units do not convert into offense levels on a one-to-one basis. Instead, the Guidelines assign "more, but declining, additional amounts of punishment" for each additional group. *See* Breyer, *supra* note 2, at 27-28. For example, a total of six or more units adds five offense levels (although the commentary notes that a departure may be warranted where significantly more than five units are involved).

The Guidelines favor imposing concurrent sentences of the "total punishment" on each count of conviction to the extent permitted by law. [15]

III. THE UNIQUE NATURE OF AGGREGATE GROUPING

The aggregate grouping guideline is distinct from the Guidelines' other three grouping mechanisms in both purpose [16] and effect. [17] Because of its distinct qualities, the inclusion of the aggregate grouping guideline in section 3D1.2 ("Groups of Closely Related Counts") alongside the other grouping mechanisms is misleading at best and disingenuous at worst. The aggregate grouping guideline should be removed from section 3D1.2 and placed into its own guideline. [18] On a high level of generality, grouping "provide[s] incremental punishment for significant additional criminal conduct." [19] The Guidelines **[*796]** commentary states that a purpose of grouping is "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct." [20] Otherwise stated, "[t]he guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence." [21] However, this purpose is borne out only through grouping under subsections 3D1.2(a)-(c) by collapsing the offense level of the entire group into the highest offense level of any offense in the group. [22] Under these three subsections, less

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[14] U.S.S.G. § 3D1.4 (2012).

[15] *See id.* § 5G1.2-1.3. A more thorough description of the intricacies of the Guidelines' treatment of concurrent and consecutive sentencing of multiple counts is not necessary for purposes of this Article's discussion. For a more detailed discussion, see *21 AM. JUR. 2D Criminal Law § 793* (2012).

[16] Defining the "purpose" behind certain guidelines is often an exercise in interpretation. Unlike other rule-making federal agencies, the Sentencing Commission need not provide explanations for its rules nor may its rules be legally challenged as "'arbitrary' or 'capricious.'" KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 57 (1998). *But see* *28 U.S.C. § 994*(p) (2006) (requiring that newly proposed amendments to the Guidelines be submitted to Congress with a statement of reasons). To the extent possible, this Article draws the "purpose" of a guideline from the limited guidance set out in the Guidelines commentary and other Commission publications.

[17] *See* *United States v. Gordon, 291 F.3d 181, 193 (2d Cir. 2002)* (noting the "unique mechanism" created by subsection 3D1.3(b), which recognizes "the distinct structure of the punishment for § 3D1.2(d) offenses").

[18] *See* infra Appendix D (outlining a proposed revised stand-alone version of the aggregate grouping guideline). Likewise, the commentary to Part D of Chapter Three should be revised to reflect the distinct nature of aggregate grouping.

[19] U.S.S.G. ch. 3, pt. D, introductory cmt. (2012). The Guidelines generally do not employ a scale of increasing punishment that is proportional to increases in the aggregable quality of an offense, but rather assign a "'diminishing marginal significance'" to additional harm. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, *52 EMORY L.J. 557, 609-10 (2003);* *see also* Breyer, supra note 2, at 27 ("Since the Commission's punishments for most drug and money crimes are determined by tables that increase punishment at a rate less than proportional to the amounts of drugs or money, collapsing the counts and using the tables [through aggregate grouping] produces a result . . . [through which] the punishment increases, but at a less than proportional rate.").

[20] U.S.S.G. ch. 3, pt. D, introductory cmt. (2012); *see also* FIREARMS POLICY TEAM, U.S. SENTENCING COMM'N, SENTENCING FOR THE POSSESSION OR USE OF FIREARMS DURING A CRIME: REPORT OF THE FIREARMS POLICY TEAM 18 n.43 (2000) ("Rules for grouping related counts were created to prevent charge stacking from resulting in 'double counting' or otherwise exaggerating the punishment."); FIREARMS POLICY TEAM, U.S. SENTENCING COMM'N, SENTENCING FOR THE POSSESSION OR USE OF FIREARMS DURING A CRIME: EXECUTIVE SUMMARY 3-4 (1999) (grouping rules "help to prevent prosecutorial charging decisions from controlling the final sentence, and to reduce disparity created by charging variations"); FEDERAL SENTENCING, *supra* note 4, at 2 (grouping "is meant to protect defendants against arbitrary additions resulting from the government's formal charging decision").

[21] U.S.S.G. § 1A1.4(e) (2012).

[22] *Id.* § 3D1.3(a).

serious offenses within the group do not add to the offense level when offenses are grouped. But such is not the case with aggregate grouping. With aggregate grouping, a certain quality of each offense is aggregated together to *increase* the offense level of the group. Aggregate grouping does nothing to limit the significance of charging decisions or to prevent multiple punishments for essentially the same conduct. Instead of collapsing the counts into each other, aggregate grouping does the opposite--it *adds* some aggregable quality of the counts together and calculates the offense level based on that aggregated quantity.

Consistent with the purpose of minimizing the impact of the charging decision, grouping counts under subsections 3D1.2(a)-(c) can never result in a greater total offense level than if the counts had remained ungrouped. [23] But aggregate grouping can--and often does--result in a higher total offense level than if the counts had not been grouped at all. [24] Because of its potential to increase the offense **[*797]** level, aggregate grouping is grouping of a totally different character than grouping under subsections 3D1.2(a)-(c). [25]

Inclusion of an offense guideline in the "must group" list of subsection 3D1.2(d) carries another important consequence: it exposes the defendant to incremental punishment based on relevant conduct, including non-convicted conduct, that was "part of the same course of conduct or common scheme or plan as the offense of conviction." [26] The concept of relevant conduct is of monumental importance to the offense level determination. [27] The relevant conduct guideline provides for aggregation through the backdoor of all conduct that shares a common scheme as the offense of conviction, regardless of whether the defendant was charged with the conduct, charged but had the charges dropped as part of a plea bargain, or charged and then acquitted of the conduct. [28]

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[23] In this way, grouping of counts "reduces the impact of ancillary and minor related offenses on the sentence." McLoughlin, *supra* note 3, at 91.

[24] *See, e.g.*, United States v. Napoli, 179 F.3d 1, 12 (2d Cir. 1999) (noting that aggregate grouping would "actually increase" the sentence in some cases); United States v. Mizrachi, 48 F.3d 651, 655 (2d Cir. 1995) ("Contrary to normal expectations, the defendant objected to the recommended grouping and the prosecution favored it."); *see also* FEDERAL SENTENCING, *supra* note 4, at 1-2 (explaining that grouping under subsection (d) could "actually increase" a defendant's sentence).

[25] Consider a defendant convicted of three counts of counterfeiting $ 50,000 that were not part of a common scheme. The base offense level for counterfeiting bearer obligations of the United States is nine. U.S.S.G. § 2B5.1(a) (2012). Six offense levels are added based on the $ 50,000 value of the counterfeit items. *Id.* § 2B5.1(b).

If the three counts of conviction were not grouped, each would have an offense level of fifteen. In converting the three groups into a single offense level, a total of three units, which converts into three offense levels, would be added to the most serious group. *See id.* § 3D1.4. Thus, the total offense level would be eighteen.

If the three counts were grouped on a non-aggregate basis, the total offense level for the group would be the offense level of the most serious count. The relevant conduct guideline would not apply because the three acts of counterfeiting were not part of a common scheme. *See id.* § 1B1.3. Thus, the total offense level would be fifteen.

Under the aggregate grouping guideline, the three counts of conviction would be aggregated into essentially one act of counterfeiting $ 150,000. *Id.* § 3D1.2(d). Counterfeiting at that quantity adds ten offense levels to the base offense level of nine. *Id.* § 2B1.1(b)(1)(F). Thus, under the aggregate grouping guideline, the total offense level would be nineteen. Although this example is artificial because under a proper application of the Guidelines the three counts could only be grouped on an aggregate basis, it illustrates the point that the grouping mechanism employed impacts the resulting offense level calculation.

[26] *Id.* § 1B1.3(a)(2).

[27] An article co-authored by the Sentencing Commission's first chairman and its general counsel hailed the concept of relevant conduct as the "cornerstone" of the Guidelines. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990). Relevant conduct has also been described, although less admiringly, as "the most extraordinary conceptual invention of the Commission." STITH & CABRANES, *supra* note 16, at 96.

[28] Commentators have criticized the inclusion of such non-convicted conduct in the relevant conduct guideline and the disparate impact of including such conduct in the determination of offense guidelines that are subject to aggregate grouping while

Thus, through the consideration of relevant **[*798]** conduct, an offense guideline's inclusion in subsection 3D1.2(d)'s "must group" list can greatly impact the offense level calculation even if counts are not grouped under subsection (d). [29]

Unfortunately, by placing the aggregate grouping guideline alongside the other grouping mechanisms in section 3D1.2, the Sentencing Commission failed to signal the unique importance of the inclusion of an offense guideline on the "must group" list of subsection 3D1.2(d). [30] Indeed, the placement of the aggregate grouping guideline in a guideline entitled "Groups of Closely Related Counts" is puzzling. [31] Grouping under subsections 3D1.2(a)-(c) occurs when the counts are closely related: counts must involve the same victim and at least acts connected by a common criminal objective or part of a common scheme, or one of the counts must embody conduct that is subsumed as a specific offense characteristic or adjustment of another count. [32] But aggregate grouping requires no such close relationship. [33] Under subsection 3D1.2(d), theft from one victim must be grouped and aggregated **[*799]** with defrauding a separate victim on a different occasion. [34] No close relationship is present between the two offenses--the strongest commonality is that the offense guideline for both offenses is determined primarily on

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excluding consideration of such conduct for offense guidelines that do not appear on the "must group" list of subsection 3D1.2(d). *See* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 433-54 (1993). *But see generally* O'Sullivan, *supra* note 9 (defending the Guidelines' contemplation of non-convicted conduct); STAFF DISCUSSION PAPER, *supra* note 9.

As with any real-offense consideration, the inclusion of relevant conduct in the sentencing calculation removes power from the prosecutor by minimizing the impact of the charging decision. STITH & CABRANES, *supra* note 16, at 132; Wilkins & Steer, *supra* note 27, at 499-500, 509. However, relevant conduct also grants prosecutors the power to indict a de fendant on the charges that are easiest to prove beyond a reasonable doubt and then, upon conviction, to expose the defendant to additional punishment for uncharged conduct that perhaps was not provable beyond a reasonable doubt. STITH&CABRANES, *supra* note 16, at 140. Moreover, through fact bargaining to determine which version of the "facts" is presented to the court, the exercise of prosecutorial power has been, to some extent, driven from the light of day and away from meaningful checks. *Id.* at 138-39; *see also* Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Hath Wrought*, 10 Crim. Prac. Man. (BNA) 405, 405 (Oct. 9, 1996) (labeling fact bargaining as "a serious corruption of the federal criminal process").

[29] Had the relevant conduct guideline applied to the illustration, *supra* note 25, because the three acts of counterfeiting were part of a common scheme, the dollar amount of each of the counts of conviction would have been aggregated through the relevant conduct guideline. Thus, the counterfeiting amount for each of the three counts would be $ 150,000, and each count would carry an offense level of nineteen. If the three counts were not grouped, the total offense level would be twenty-two. U.S.S.G. § 3D1.4 (2012) (adding three levels for three units to a base offense level of nineteen). If the counts were grouped on a non-aggregate basis, the total offense level would be nineteen. *Id.* § 3D1.3(a) (applying the offense level of the most serious offense). If the counts were grouped on an aggregate basis, the total offense level would remain nineteen because, in order to avoid impermissible double counting, the operation of the relevant conduct guideline does not affect the relevant quantity for the aggregate grouping calculation here.

[30] Based on its significance to the operation of the relevant conduct guideline, Professor Yellen has suggested that "the Guidelines divide federal criminal offenses into two categories, those that fall under Section 3D1.2(d) and those that do not." Yellen, *supra* note 28, at 438.

[31] *See* U.S.S.G. § 3D1.2 (2012).

[32] *Id.* § 3D1.2(a)-(c).

[33] When different Guidelines provisions apply, offenses should be grouped under subsection 3D1.2(d) if the offenses "are of the same general type and otherwise meet the criteria for grouping under" subsection 3D1.2(d). *Id.* § 3D1.2 cmt. n.6. Some distance intervenes between offenses of "the same general type" and those that are truly "closely related." Attempts by courts to apply the closely related principle to analysis under subsection 3D1.2(d) have been strained and result in non-grouping because, quite simply, subsection 3D1.2(d) does not require a close relation for grouping. *See, e.g.*, United States v. Harper, 972 F.2d 321, 322 (11th Cir. 1992) (per curiam).

[34] Both theft and fraud are covered by the offense guideline of section 2B1.1. That offense guideline appears on the "must group" list of the aggregate grouping guideline. U.S.S.G. § 3D1.2(d) (2012).

the basis of the dollar amount of the loss. Thus, because the offense level of both theft and fraud is primarily measured in dollars, the Commission saw fit to group the offenses and add the dollars together. The Guidelines promulgate a fiction by listing aggregate grouping as grouping of "closely related counts."

The only common theme running through many offense guidelines subject to aggregate grouping is that the harm is primarily measured in quantity. [35] The Introduction to the Guidelines recognizes the distinct nature of aggregate grouping by summarizing it separately from the other grouping mechanisms. [36] Likewise, the introductory commentary **[*800]** to Part D of Chapter Three of the Guidelines seemingly recognizes this difference and summarizes aggregate grouping separately from those grouping mechanisms set forth in subsections 3D1.2(a)-(c). [37] The commentary directs grouping under the latter rules "[w]hen offenses are closely interrelated," as distinct from grouping under the aggregate grouping guideline, which is appropriate when the Chapter Two offense guidelines are based primarily on quantity or deal with ongoing conduct. [38] In doing so, the commentary specifically separates aggregate grouping from grouping of offenses that are "closely interrelated." [39] Such distinction is appropriate given the uniqueness of the aggregate grouping guideline. Therefore, the aggregate grouping guideline should not appear in section 3D1.2 ("Groups of Closely Related Counts"), but rather in a separate section with a more appropriate title, such as "Groups of Quantity-Driven Counts." [40] Severing the aggregate grouping guideline

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[35] Quantity is the most common specific offense characteristic found in the Guidelines. STITH & CABRANES, *supra* note 16, at 68; *see also* Rappaport, *supra* note 19, at 608 (stating that quantity is the "key determinant" in offense seriousness under Chapter 2 of the Guidelines). The use of quantity as a dominant offense characteristic has been heavily criticized. *See* STITH & CABRANES, *supra* note 16, at 69-70 (arguing that although quantification is facially attractive because it distinguishes defendants "on the basis of apparently objective and precisely measured criteria," the Guidelines' heavy reliance on quantification "give[s] relatively short shrift to more subjective, less-easily-measured aggravating factors relating to both harm and culpability"); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 915 (1991) ("Sentencing commissions can quantify harms more easily than they can quantify circumstances. Commissions count the stolen dollars, weigh the drugs, and forget about more important things."); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 854 (1992) ("In effect, quantity-driven sentences mandate inequality by requiring that different cases be treated alike."); Yellen, supra note 28, at 452-53 (opining that the quantity for many offenses--including larceny, fraud, and narcotics offenses--"is often beyond the defendant's control or expectations" and arguing that quantity-driven offense guidelines give law enforcement the ability to manipulate sentences through suggesting higher quantities in undercover operations). *See generally* Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANT. CRIMINOLOGY 155, 155 (2009) (finding that quantity-driven sentencing results "in excessively uniform sentences for offenders with highly dissimilar roles in the offense"). The Commission itself has found that the drug quantity attributable to a defendant is a poor proxy of the defendant's role in the drug distribution organization. *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 165-68 (2011); *see also* STEPHEN J. SCHULHOFER, ROBERT B. MCKAY PROF. OF LAW, N.Y.U. SCH. OF LAW, STATEMENT BEFORE THE U.S. SENTENCING COMMISSION 12-14 (2010) (explaining how the concepts of relevant conduct and co-conspirator liability drive up the drug quantities attributable to less culpable defendants so that drug quantity does not actually distinguish between major and minor actors in drug distribution organizations). Despite these criticisms and findings, the quantification of harms remains deeply entrenched in the Guidelines. Given that reality, this Article lets alone the question of whether mass quantification is wise and seeks to resolve whether and when the aggregation of such quantifiable harms through grouping is appropriate.

[36] U.S.S.G. § 1A1.4(e) (2012) (distinguishing "when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount" from "when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction").

[37] *See id.* ch. 3, pt. D, introductory cmt.

[38] *Id.*

[39] *Id.*; *see also* United States v. Gordon, 291 F.3d 181, 193 (2d Cir. 2002) (noting that the introductory commentary emphasizes the uniqueness of subsection 3D1.2(d)).

from the other three grouping mechanisms would appropriately reflect its distinct nature and purpose and increase the grouping guidelines' transparency.

IV. PROPER APPLICATION OF THE AGGREGATE GROUPING GUIDELINE

A. Order of Operations

Although section 3D1.2 provides that offense guidelines "shall" be combined whenever possible into a single group, [41] it does not directly advise users on the proper order of applying its grouping subsections. [42] Thus, grouping is mandatory, but the *order* of the grouping is not mandated by the Guidelines. [43] As explained above, non-aggregate grouping under subsections 3D1.2(a)-(c) leads to a very different method for combining counts than does aggregate grouping under subsection 3D1.2(d). Thus, the order of grouping operations has very real implications on the calculation of a defendant's total offense level. Grouping first under subsections (a)-(c) will always produce a total offense level that is lower than or, at most, equal to an offense level **[*801]** produced by grouping first under subsection (d). Thus, grouping first under subsections (a)-(c) is understandably attractive to defendants.

The Guidelines' Application Instructions obliquely direct users to "[a]pply Part D of Chapter Three to group the various counts and adjust the offense level accordingly." [44] The step-by-step grouping checklist provided by the Commission directs users to first group all appropriate counts under subsection (d) before grouping any counts under subsections (a)-(c). [45] However, several examples in the Guidelines commentary suggest grouping counts under subsections (a) and (b) rather than under subsection (d) [46] or grouping counts under subsection (a) before doing so under subsection (d). [47] Another example in the commentary grants Guidelines users the option to group under either subsection (b) or subsection (d) because the resulting offense level would be the same under either approach for that example. [48] Elsewhere, the commentary to specific offense guidelines or adjustments directs grouping under subsection (c). [49] While acknowledging that grouping under multiple subsections may be

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[40] *See infra* Appendix D.

[41] U.S.S.G. § 3D1.2 (2012).

[42] Some individual offense guidelines provide special instructions for grouping (or for not grouping) offenses. *See, e.g., id.* § 2A1.4(b)(1); *id.* § 2J1.3(d)(1) (instructing that certain multiple counts should not be grouped together); *id.* § 2M6.1(d)(1); *id.* § 2N1.1(d)(1).

[43] *See* Gordon, 291 F.3d at 196-98 (Newman, J., concurring) (discussing the lack of guidance in the Guidelines on whether to group counts first under subsection 3D1.2(c) or (d)).

[44] U.S.S.G. § 1B1.1(a)(4) (2012).

[45] *Checklist for Multiple Count Grouping (§ 3D1.2)*, U.S. SENTENCING COMM'N, http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/checklis.htm (last visited June 30, 2013). After grouping under subsection (d), the checklist goes on to direct users to group "all counts involving an attempt, conspiracy, or solicitation and a substantive count that was the sole object" of the same under subsections (a) and (b), then to group all appropriate counts under subsection (c), and finally to return to subsections (a) and (b) to group "counts in which the victim is the same and substantially the same harm results."*Id.*

[46] *See* U.S.S.G. § 3D1.2 cmt. n.3, ex. 5 (2012) (grouping three counts of bringing illegal aliens into the United States under subsection (a)); *id.* § 3D1.2 cmt. n.4, ex. 2 (grouping two counts of mail fraud and one group of wire fraud under subsection (b)).

[47] *See id.* § 3D1.2 cmt. n.6, ex. 8 (grouping two counts of check forgery and one count of uttering the first of the forged checks under subsection (a)).

[48] *Id.* § 3D1.2 cmt. n.4, ex. 4 (noting that after the operation of the relevant conduct guideline, grouping under either subsection (b) or subsection (d) would produce the same drug quantity for two counts of distributing a controlled substance).

necessary, [50] the Guidelines commentary fails to clearly direct users as to the preferred order of grouping operations and whether such ordering is mandatory or at the discretion of the sentencing court.

In light of the purposes of the various grouping guidelines, grouping should first occur under subsections (a)-(c) whenever those subsections are applicable. Grouping under subsections (a)-(c) minimizes the effects of the formal charging decision. [51] Because aggregate grouping has no such mitigating effects, it should yield to nonaggregate grouping.

[*802] For subsections (a)-(b), counts that involve the same victim and either a single act or different acts constituting part of a common scheme are collapsed into the most serious offense guideline no matter how many different counts arose from the act or scheme. The same should hold true even if some quality of the offense conduct could be aggregated.

Expanding an example from the Guidelines commentary that illustrates grouping under subsection (a), a defendant could be convicted of forging and uttering the same $ 7500 check. [52] Aggregating the harm of both offenses by doubling the $ 7500 check into an aggregated $ 15,000 loss amount would unfairly penalize defendants based on whether the prosecutor bothered to charge both forging and uttering the check or just one of the two offenses. In this case, a defendant's two-count conviction reflects the prosecutorial charging decision more than her actual bad acts. Thus, it is sensible to collapse the two counts of conviction into one group under subsection (a) and apply the most serious offense level rather than counting the face value of the check twice under subsection (d). [53]

Moreover, by embedding the aggregation principle into the relevant conduct guideline, subsections (a) and (b) adequately take aggregated quantities into consideration without the need to group first under subsection (d). Distribution of controlled substances in the course of a common scheme provides a good example. If a defendant is twice convicted of distributing two grams of methamphetamine, the guideline for each will be calculated using the backdoor aggregation embedded in the relevant conduct provision of section 1B1.3. That section directs the inclusion of all acts or omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction" for offense guidelines that are on subsection 3D1.2(d)'s "must group" list. [54] Thus, the offense guideline for each methamphetamine distribution offense would be calculated using four grams as the drug quantity. Proper punishment results from grouping under subsection (b) and taking relevant conduct into account, thereby setting the drug quantity at four grams and collapsing the second count into the first under subsection 3D1.3(a). Thus, aggregate grouping should follow grouping under subsections (a) and (b). Subsection 3D1.2(c) is designed to "prevent[] 'double counting' of offense behavior" by grouping together closely related counts where one count "is also a specific offense characteristic in or other adjustment **[*803]** to another count." [55] Grouping such counts first under subsection (d) would only multiply the double counting that subsection (c) was designed to prevent and could lead to triple counting or worse by using one count as an upward adjustment for another count *and* adding the aggregable quality of the two counts together. Thus, grouping under subsection (c) should precede grouping under subsection (d).

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[49] *See id.* § 2K2.6 cmt. n.3 (using body armor in connection with another count of conviction); *id.* § 2S1.1 cmt. n.6 (laundering the proceeds of another count of conviction); *id.* § 3C1.1 cmt. n.8 (obstructing justice with respect to another count of conviction).

[50] *Id.* § 3D1.2 cmt. n.7.

[51] *See supra* Part III.

[52] U.S.S.G. § 3D1.2 cmt. n.3, ex. 1 (2012).

[53] *See id.* § 3D1.2 cmt. n.6, ex. 8 (advising to group uttering and forgery counts first under subsection (a) "so that the monetary amount of that check counts only once when the rule in § 3D1.3(b) is applied").

[54] *Id.* § 1B1.3(a)(2). The relevant conduct guideline requires the inclusion of nonconvicted conduct as well. *See supra* note 28 and accompanying text.

[55] U.S.S.G. § 3D1.2 cmt. n.5 (2012).

B. Types of Offense Guidelines Subject to Aggregate Grouping

The text of subsection 3D1.2(d) states that aggregate grouping is appropriate

> [w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. [56]

Thus, the guideline authorizes aggregate grouping on two distinct bases: (1) offense guidelines based on quantity, and (2) offense behavior that is ongoing. While the first is appropriate in some cases, the latter is unsupportable.

1. Quantity-Driven Offense Guidelines

Because the effect of aggregate grouping is to focus the offense level determination on the aggregable quality of the offense guideline, aggregate grouping is appropriate only for offenses in which society's main interest in punishing is based on the aggregable quality of the offense rather than on how many times the offense was committed or some other non-aggregable quality. To strike the appropriate balance, it is first necessary to address a discrepancy between the text of subsection 3D1.2(d) and the guideline commentary. The guideline text states that counts involve substantially the same harm and therefore should be grouped "[w]hen the offense level is determined *largely* on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm." [57] The commentary, in two separate places, states that section 3D1.2(d) applies to offenses "where the guidelines are based primarily on quantity." [58]

[*804] As a clarification of the guideline's text, the commentary's "primarily" language sets forth the proper standard for aggregate grouping determinations. This type of commentary "interpret[s] the guideline or explain[s] how it is to be applied." [59] The United States Supreme Court has explained that such explanatory commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." [60] Inconsistency between a guideline's text and its commentary exists where "following one will result in violating the dictates of the other." [61] Deference to the guideline text is proper where such forced violation exists. But explanatory commentary, which is written by the same body as a guideline's text, and often at the same time, is not akin to administrative regulations that fill holes in Congressional statutes and necessarily yield to the clear meaning of the statutes. [62] Rather, federal courts are required to consider the Guidelines' commentary at sentencing, [63] and failure to abide by explanatory commentary may lead to an incorrect application of the Guidelines. [64]

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[56] *Id.* § 3D1.2(d).

[57] *Id.* (emphasis added).

[58] *Id.* § 3D1.2 cmt. n.6 (emphasis added); *see also id.* ch. 3, pt. D, introductory cmt. (explaining that aggregate grouping is appropriate "[i]f the offense guidelines in Chapter Two base the offense level *primarily* on the amount of money or quantity of substance involved" (emphasis added)).

[59] *Id.* § 1B1.7.

[60] *Stinson v. United States, 508 U.S. 36, 38 (1993).*

[61] *Id. at 43.*

[62] *Id. at 44.*

[63] *See* *18 U.S.C. § 3553*(b) (2006).

[64] U.S.S.G. § 1B1.7 (2012).

The "primarily" language of the commentary merely serves to clarify the term "largely" in the text of subsection 3D1.2(d). Here, following the language of the commentary does not lead to any violation of the language of the text. Thus, the commentary need not yield to the guideline text because the two are not "inconsistent." Rather, the commentary "assist[s] in the interpretation and application" of subsection 3D1.2(d) and "represent[s] the most accurate indication[] of how the Commission deems that the guidelines should be applied." [65] Consistent with that treatment of the commentary, numerous courts have applied the "primarily" language of the commentary despite its absence in the text of the guideline. [66]

[*805] The policy behind aggregate grouping supports the "primarily" language as well. Grouping on an aggregate basis is only appropriate where the offense level is driven by the aggregable quality of the offense rather than the base offense level or some other non-aggregable quality of the offense. In setting the base offense level, the Sentencing Commission deems that the bare commission of an offense at the lowest possible level of measurable harm is worth a certain number of offense levels. It is only where the possible upward adjustment for the aggregable quality of the offense eclipses that base offense level that aggregate grouping makes sense. Otherwise, aggregate grouping is not appropriate simply because something other than the aggregable quality of the offense is the primary determining factor of the offense level.

Thus, in the words of the commentary, aggregate grouping is proper where the offense level determination of an offense guideline is based *primarily* on quantity or some other aggregable quality of the offense. [67] As an extension, offense guidelines that are determined by reference to underlying offense guidelines should be amenable to aggregate grouping when the underlying offense guideline is calculated primarily on the basis of an aggregable quality. [68] Offense guidelines with offense level determinations driven by a non-aggregable quality of the offense should not be grouped on an aggregate basis.

The term "primarily" is easily reducible to mathematical quantification. The simplest way to ensure that the aggregable quality of an offense is the primary driver of the offense level is to compare the maximum potential upward enhancement available for the aggregable quality of the offense to the base offense level and other potential enhancements based on non-aggregable qualities of the offense. If the aggregable quality of the offense predominates, then the ratio will be less than one and aggregate grouping is appropriate. [69] If the base offense

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[65] *Stinson, 508 U.S. at 45.*

[66] *See United States v. Young, 413 F.3d 727, 733-34 (8th Cir. 2005)* (noting section 3D1.2(d) "requires grouping where the offense level is determined primarily on the basis of the total amount of the loss"); *United States v. Napoli, 179 F.3d 1, 9-11 (2d Cir. 1999)* (finding that aggregate grouping was not appropriate because the offense guideline for money laundering was not based primarily on the amount of money laundered); *United States v. Rudolph, 137 F.3d 173, 179 (3d Cir. 1998)* (noting section 3D1.2(d) applies to "offenses where guidelines are based primarily on quantity or contemplate continuing conduct"); *United States v. David, 940 F.2d 722, 741 (1st Cir. 1991)* (finding that aggregate grouping was proper because the drug offenses all had offense levels that were "determined primarily by the aggregate quantity of drugs involved in [the defendant's] course of conduct"); *see also United States v. Gordon, 291 F.3d 181, 192 (2d Cir. 2002)* (noting commentary's directive to group on an aggregate basis where the offense level is based primarily on measurable quantity); *United States v. Kalust, 249 F.3d 106, 114 n.3 (2d Cir. 2001)* (Winter, J., concurring) (noting that the *Napoli* court emphasized the "primarily" language in the commentary over the "largely" language of the text of subsection 3D1.2(d)). *But see United States v. Kneeland, 148 F.3d 6, 15 (1st Cir. 1998)* ("focus[ing] on the term 'largely'" in the text of subsection 3D1.2(d)).

[67] U.S.S.G. ch. 3, pt. D, introductory cmt. (2012).

[68] For example, the offense level for aiding and abetting is determined solely by reference to the offense level for the underlying offense. *Id.* § 2X2.1. Thus, when the offense guideline for the underlying offense is primarily based on an aggregable quality, the aiding and abetting offense guideline is as well.

[69] For example, the base offense level for insider trading is eight, and the maximum potential upward enhancement based on the amount of money gained in the offense is thirty. *Id.* § 2B1.4. Thus, the ratio is 8:30, or 0.27. Aggregate grouping is appropriate because the offense level calculation is primarily driven by the amount of money gained in the offense, not by the bare commission of the offense. Although a guideline's commentary will occasionally state that the amount of the loss is the

level (or some other non-aggregable quality) predominates, then the ratio will be greater than one and aggregate grouping is not **[*806]** appropriate. [70] The ratio looks only to the Chapter Two offense guidelines to determine the basis of the offense level calculation--not to Chapter Three adjustments or to possible grounds for departure. [71] The ratio provides an easily measurable way to determine whether aggregate grouping is appropriate for a given offense guideline. [72]

Although rare, a small number of offense guidelines contain multiple aggregable qualities. [73] When aggregate grouping under subsection 3D1.2(d) is appropriate, multiple counts of conviction should be aggregated across all possible aggregable qualities. Once the aggregate grouping hurdle has been cleared, it makes little sense to aggregate some qualities but not others. Failure to aggregate some qualities of multiple counts of conviction would lead to an incomplete picture of the total offense conduct by collapsing, rather than adding together, some aggregable qualities of the offense conduct. Thus, in order to align outcomes with expectations and impose incremental punishment for incremental harms, offense level calculations aggregately grouped under subsection 3D1.2(d) should aggregate all aggregable qualities of the offenses.

2. Ongoing or Continuous Offense Behavior

As a separate basis from offense levels that are determined primarily upon some type of aggregable harm, subsection 3D1.2(d) mandates grouping "if the offense behavior is ongoing or continuous **[*807]** in nature and the offense guideline is written to cover such behavior." [74] However, subsection 3D1.3(b), which directs the aggregate grouping of offenses grouped under subsection 3D1.2(d), calls for the calculation of the offense level based on the "aggregated quantity." [75] Thus, to the extent that subsection 3D1.2(d) groups counts based on ongoing offense behavior that does not contain an aggregable quality, it is unclear how--or why--subsection 3D1.3(b) operates to

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principal factor in calculating the offense level, *see, e.g., id.* § 2B1.1 cmt. background; *id.* § 2B5.3 cmt. background, such explicit self-analysis does not consistently appear throughout the Guidelines commentary.

[70] For example, the commentary to the robbery offense guideline explains that, consistent with pre-Guidelines practice, the monetary amount of the loss is less important than the other harms attendant to robbery. *Id.* § 2B3.1 cmt. background. The base offense level for robbery is relatively high (twenty) compared to the maximum potential upward enhancement based on the dollar amount of the loss (seven). *Id.* § 2B3.1. Thus, the ratio is 20:7, or 2.86. Aggregate grouping is not appropriate because the offense level calculation is primarily driven by the bare commission of the offense, not by the dollar amount of the robbery.

[71] Although the Guidelines commentary contemplates upward departures for offenses involving "substantially" greater than the maximum defined aggregable quality for many offenses (for example, for passport trafficking offenses involving substantially more than 100 passports, *see id.* § 2L2.1 cmt. n.5), such departures do not factor into the ratio because, first, the Guidelines do not offer quantifiable guidance on how to calculate the extent of such a departure and, second, departures are by their very nature outliers from the mainline application of the specific offense guidelines.

[72] The Second Circuit has applied a similar percentage-based method to determine whether a specific offense guideline is based primarily on quantity. *See* United States v. Napoli, 179 F.3d 1, 11 (2d Cir. 1999) (finding that the money laundering offense guideline, as it was then written, was not based primarily on quantity because the maximum potential upward adjustment based on the amount of money laundered was only approximately sixty percent of the base offense level); *see also* United States v. Kneeland, 148 F.3d 6, 15-16 (1st Cir. 1998) (comparing base offense level to possible enhancement based on specific offense characteristics). *But see* United States v. O'Kane, 155 F.3d 969, 974 (8th Cir. 1998) (comparing base offense level for money laundering to the enhancement for amount of money laundered *in that case*).

[73] *See* U.S.S.G. § 2B1.1(b) (2012) (using dollar amount of loss and number of victims); *id.* § 2G2.2(b) (using retail value of the material and number of images).

[74] *Id.* § 3D1.2(d).

[75] *Id.* § 3D1.3(b).

determine the total offense level on the basis of the "aggregated quantity." Where ongoing behavior lacks an aggregable quality, it is simply impossible to group on an aggregate basis. [76]

Furthermore, to the extent that offense behavior is ongoing in nature, it is unclear what subsection 3D1.2(d) contemplates by "written to cover *such* behavior." [77] Either "such" refers to "offense behavior" in the sense that the offense guideline must be written to cover the defendant's offense behavior, or "such" refers to the ongoing nature of the offense behavior, in the sense that the offense guideline is written to cover continuous behavior. [78] Neither option is satisfying. The former will always be true: in the absence of erroneous application of the Guidelines, the offense guideline applied to the defendant's conduct will *always* be written to cover the defendant's offense behavior--otherwise the offense guideline would not apply. Thus, this interpretation is a circular non-limitation.

[*808] The latter option is puzzling. [79] If the offense guideline is written to cover ongoing behavior, then the ongoing nature of the offense is "a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," and grouping would be appropriate under subsection 3D1.2(c). [80] In such a circumstance, the ongoing nature of the behavior has already been accounted for in the guideline, and no aggregation would be necessary to achieve incremental punishment. For example, under the guideline for offenses that pertain to material involving the sexual exploitation of a minor, an upward adjustment of five offense levels is appropriate "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." [81] Thus, the Commission has already deemed that the ongoing nature of the defendant's activity is worth five offense levels. But to aggregate multiple counts based on the ongoing nature of the offense behavior would effectively double count that ongoing nature--first as an offense adjustment and then as an aggregation of the an offense characteristic. [82] Subsection 3D1.2(c) was written purposefully to avoid such double counting because, if

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[76] The original version of subsection 3D1.2(d) in the 1987 Guidelines Manual directed that "[t]his rule also applies where the guidelines deal with offenses that are continuing" and listed the examples of sections 2L1.3 (engaging in a pattern of unlawful employment of aliens) and 2Q1.3(b)(1)(A) (mishandling of environmental pollutants resulting in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment). *Id.* § 3D1.2(d) (1987). While the text of the rule was easier to follow, neither of the example Guidelines contained a true aggregable quality, and thus, aggregation under section 3D1.3(b) would have been problematic. Although it still contains the same "ongoing" offense characteristic, section 2Q1.3 does not appear on the current "must group" list. Section 2L1.3 was deleted with the removal of petty offenses from the Guidelines. *See id.* app. C amend. 194 (2003); *see also id.* § 1B1.9 (2012).

In *United States v. Mizrachi*, the Second Circuit ostensibly grouped arson and fraud counts under subsection 3D1.2(d) because the offense behavior was ongoing and the arson guideline was written to cover such behavior in that it contemplated arson committed in connection with a scheme to defraud. *48 F.3d 651, 655 (2d Cir. 1995).* However, in calculating the offense level, the court did not actually aggregate anything--it simply calculated the offense level for the most serious offense, arson, and collapsed the other counts into that offense level. *Id. at 655-56.* To avoid the thorny problem of aggregating ongoing behavior, the court essentially co-opted the grouping mechanism of subsection 3D1.3(a) and applied it to the grouping of ongoing offense behavior.

[77] U.S.S.G. § 3D1.2 (2012) (emphasis added).

[78] At least one court has stated it both ways in the same case. *See United States v. McIntosh, 216 F.3d 1251, 1253 (11th Cir. 2000)* (per curiam) (stating that "[t]o prevail, [the defendant] would have to prove both that his offense behavior was ongoing or continuous in nature and that the offense guideline is written to cover his offense conduct" but later stating that, for subsection 3D1.2(d) to apply, the offense guideline must be written to cover the defendant's offense behavior "as an ongoing offense").

[79] To read one judge's dissatisfaction with the latter interpretation, see *United States v. Rudolph, 137 F.3d 173, 181-83 (3d Cir. 1998)* (Becker, C.J., concurring) (suggesting that "the grouping guidelines would benefit from a redraft that would elevate substance and common sense over form").

[80] U.S.S.G. § 3D1.2(c) (2012).

[81] *Id.* § 2G2.2(b)(5).

at all, multiple counts should either elevate the offense level of a group through an adjustment or through aggregation, but not through both. [83]

Aggregate grouping of ongoing offenses that utilize different offense guidelines is simply impossible when those guidelines do not contain compatible aspects subject to ready aggregation. For example, controlled substance and monetary offenses simply do not easily aggregate, even if they are part of an ongoing scheme such as distributing drugs and evading tax on the proceeds. Multiple controlled substance offenses may be readily aggregated with each other based on drug quantity. Multiple monetary offenses may be readily aggregated with each other based on dollar amount. But, without indulging in the fiction that everything can be monetized (or converted into a drug quantity), drug quantities and dollar amounts do not aggregate. Nor do smuggled illegal aliens and smuggled firearms, even if both are smuggled together as part of ongoing offense conduct. [84] Aggregation **[*809]** is only possible where the aggregable qualities of the offenses are of the same type. [85]

Because attempted aggregation of ongoing offense behavior under subsection 3D1.3(b) is troublesome, if not impossible, the continuous nature of offense behavior should not bring it within the compass of subsection 3D1.2(d). [86] Rather, subsection 3D1.2(d) should be reserved only for offense guidelines for which the offense level calculation is based primarily on some aggregable quality of the offense. [87]

V. APPLICATION TO INDIVIDUAL OFFENSE GUIDELINES

The Sentencing Commission has made the determination for each offense that its bare commission is worth a certain number of offense levels and specific offense characteristics are worth a certain number of additional levels. This Article does not undertake to second-guess those determinations. Rather, it accepts the levels set by the Commission and analyzes whether the current levels demonstrate that the offense guideline should be grouped on an aggregate basis. Appendix A sets forth the ratio between the most significant nonaggregable quality of each offense guideline (usually the base offense level) and the offense guideline's most significant aggregable enhancement. [88] For offense guidelines with a variety of base offense levels, a separate ratio is set forth for each base offense level. [89] Many offense guidelines possess no aggregable qualities, and thus receive no ratio.

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[82] Section 2G2.2 contains two potentially aggregable offense qualities--pecuniary gain and the number of images. *Id.* § 2G2.2(b)(3)(A), (7).

[83] *Id.* § 3D1.2 cmt. n.5.

[84] *See id.* § 2K2.1(b)(1); *id.* § 2L1.1(b)(2).

[85] Indeed, for multiple counts involving different offense guidelines, the commentary advises that grouping under subsection 3D1.2(d) is only appropriate "if the offenses are of the same general type." *Id.* § 3D1.2 cmt. n.6.

[86] Moreover, the grouping guidelines already appropriately account for the grouping of most ongoing behavior. Where the ongoing offense behavior injures the same victim or societal interest, multiple counts are grouped under subsection 3D1.2(b). Where multiple counts of ongoing behavior are treated as offense adjustments of each other, those counts are grouped under subsection 3D1.2(c). Where the ongoing behavior involves offense guidelines that are primarily determined based on quantity, multiple counts are grouped under the first clause of subsection 3D1.2(d). The only remaining ungrouped ongoing behavior will be that which involves different victims, is not primarily based on quantity, and is not treated as an offense adjustment of another count. In the unlikely event that the remaining offense guidelines contain aggregable offense qualities, aggregation would likely distort the resulting offense level by placing too great or too small an emphasis on the aggregable quality of at least one of the offense guidelines. Thus, should such ungrouped ongoing offense behavior exist and merit grouping, the grouping should not be done on an aggregate basis through subsection 3D1.3(b).

[87] *See supra* Part IV.B.1.

[88] *See* infra Appendix A.

[89] Not all base offense levels are subject to the same enhancements within the same offense guideline. *See, e.g.*, U.S.S.G. § 2J1.6 (2012) (splitting the offense guideline for failure to appear by a defendant between two base offense levels; certain specific

Appendices B and C calculate the same ratio for each individual controlled substance and listed chemical. [90] The following sections **[*810]** describe the anomalies--offense guidelines on subsection 3D1.2(d)'s "must group" or "do not group" list with ratios that suggest inclusion on the relevant list is inappropriate. [91] Should the Commission find itself dissatisfied with the current ratio for a given offense guideline, it could alter the base offense level or the magnitude of specific enhancements to bring the ratio in better alignment with its intentions.

A. Anomalies Currently Subject to Aggregate Grouping

1. Section 2A3.5 - Failure to Register as a Sex Offender The guideline for failure to register as a sex offender simply does not contain any aggregable qualities. Rather, it is likely included on the "must group" list as an offense guideline covering potentially ongoing offense behavior. [92] As such, it is a good example of why ongoing offense behavior is not naturally well-suited to aggregate grouping. The base offense level is determined based on whether the defendant failed to register as a Tier I, Tier II, or Tier III sex offender. [93] An enhancement is available depending on whether the defendant committed certain other offenses while in failure to register status. [94] An offense level reduction is available if the defendant corrected the failure to register or attempted to register but was prevented from registering by certain uncontrollable circumstances. [95] Aggregation is not relevant to inclusion in the various tiers of sex offenders--the tier designation is determined by the seriousness of the underlying sex offense without regard to the number of previous sex offenses or any other quantifiable quality. [96]

Because the offense guideline lacks any aggregable qualities, grouping under subsection 3D1.2(d) makes little sense and is impossible in application. For counts grouped pursuant to subsection 3D1.2(d), subsection 3D1.3(b) directs that "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity." [97] Because the offense guideline for failure to register as a sex offender lacks any reference to "quantity," [98] multiple counts of failure to register as a sex offender cannot be grouped through the method set forth in subsection 3D1.3(b). Thus, section 2A3.5 is a poor **[*811]** candidate for grouping under subsection 3D1.2(d) and should be removed from the "must group" list. [99]

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offense characteristics can only decrease one of the base offense levels while other specific offense characteristics can only increase the other base offense level).

[90] *See infra* Appendices B, C.

[91] U.S.S.G. § 3D1.2(d) (2012).

[92] *See id.*

[93] *Id.* § 2A3.5(a).

[94] *Id.* § 2A3.5(b)(1).

[95] *Id.* § 2A3.5(b)(2).

[96] *See* *42 U.S.C. § 16911* (2006).

[97] U.S.S.G. § 3D1.3(b) (2012).

[98] *Id.* § 2A3.5.

[99] Multiple counts of conviction for failure to register as a sex offender would generally be groupable under subsection 3D1.2(b)--the counts would share a common victim (society's interest in monitoring sex offenders) and will likely constitute "part of a common scheme or plan." *Id.* § 3D1.2(b). For example, a defendant could be convicted of failing to register in both the jurisdiction in which she resides as well as the jurisdiction where the conviction for the underlying sex offense took place. *42 U.S.C. § 16913*(a) (2006). Despite the offense guideline's inclusion in Part A of Chapter 2 ("Offenses Against the Person"), even if the sex offender attacked another victim in one of the jurisdictions while on failure to register status, the primary victim of the failure to register would be society's interest in monitoring sex offenders, not the individual victim of the attack. *See* U.S.S.G. § 3D1.2 cmt. n.2 (2012). Thus, the counts would properly be grouped under subsection 3D1.2(b).

2. Section 2K2.1 - Unlawful receipt, possession, or transportation of firearms or ammunition; prohibited transactions involving firearms or ammunition

Section 2K2.1 encompasses a wide array of firearm offenses. The guideline sets forth eight possible base offense levels, from six to twenty-six, depending on a variety of factors such as the type of firearm involved, the criminal history of the defendant, and the statute of conviction. [100] The aggregable quality of the offense guideline is the number of firearms involved, with a maximum upward adjustment of ten offense levels for 200 or more firearms. [101] The maximum potential adjustment for the number of firearms--ten levels--is eclipsed by seven of the eight possible base offense levels. [102]

Aside from the base offense level, the quantity of firearms involved in the offense is not even the most significant specific offense characteristic. Fifteen offense levels are added to the base offense level if the offense involved a portable rocket or missile or a device for launching portable rockets or missiles. [103] The involvement or lack of involvement of even one such a rocket, missile, or launching device has a greater impact on the offense level calculation than the number of firearms involved in the offense.

The offense level for the section 2K2.1 guideline is not primarily based on the quantity of firearms involved, but rather on the base offense level or on whether a particular type of destructive device was involved in the offense. Therefore, aggregate grouping of counts that utilize this offense guideline is inappropriate.

[*812] *3. Section 2L1.1 - Smuggling, transporting, or harboring an unlawful alien*

The base offense level for smuggling an illegal alien is twelve, twenty-three, or twenty-five depending on whether the illegal alien was inadmissible, was previously deported after a conviction for an aggravated felony, or fell into neither of the above categories. [104] The aggregable quality of the offense--the number of unlawful aliens smuggled, transported, or harbored--has the potential to add up to a maximum of nine additional levels. [105] Thus, the ratios between the three base levels and the aggregable quality of the offense--2.78, 2.56, and 1.33, respectively--all weigh in favor of the base offense level. [106] In determining the offense level under section 2L1.1, the most significant factor is the status of the alien and the bare commission of the offense. The number of aliens

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[100] U.S.S.G. § 2K2.1(a) (2012).

[101] *Id.* § 2K2.1(b)(1).

[102] For instance, assuming that no other aggravating factors are present, a defendant who unlawfully possessed one sawed-off shotgun would receive an offense level of twentysix. *See id.* § 2K2.1(a)(1); *26 U.S.C. § 5845*(a)(2) (2006). But if the defendant instead possessed 200 such weapons, her offense level would be thirty-six. The quantity of firearms is not the primary driver of the guideline.

[103] U.S.S.G. § 2K2.1(b)(3)(A) (2012).

[104] *Id.* § 2L1.1(a).

[105] *Id.* § 2L1.1(b)(2)(C) (adding nine levels when 100 or more aliens are involved).

[106] *See infra* Appendix A. To arrive at these specific ratios, the base offense levels (twenty-five, twenty-three, and twelve) were each divided by the maximum potential aggregable enhancement (nine).

smuggled or harbored, while important, is not the primary basis for determining the offense level. [107] Thus, section 2L1.1 offenses should not be grouped on an aggregate basis.

4. Section 2L2.1 - Trafficking in a document relating to naturalization, citizenship, or legal resident status, or a United States passport; false statement in respect to the citizenship or immigration status of another; fraudulent marriage to assist alien evading immigration law

The ratio tips slightly in favor of the base offense level for trafficking in a document relating to naturalization, citizenship, or legal resident status. The base offense level for these offenses is eleven, but the aggregable quality of the offense--the number of documents or passports involved--only can increase the base offense level by a maximum of nine levels. [108] Thus, the ratio between the base offense **[*813]** level and the aggregable quality of this offense is 1.22. [109] Although the quantity of documents or passports is an important factor in determining the offense level, it does not dominate the offense level calculation. [110] Thus, according to its current calibration, section 2L2.1 is ill-suited for aggregate grouping.

5. Section 2S1.1 - Laundering of monetary instruments; engaging in monetary transactions in property derived from unlawful activity, and Section 2S1.3 - Structuring transactions to evade reporting requirements; failure to report cash or monetary transactions; failure to file currency and monetary instrument report; knowingly filing false reports; bulk cash smuggling; establishing or maintaining prohibited accounts

Both sections 2S1.1 and 2S1.3 contain base offense levels that lead to aggregable qualities and those that do not. [111] Instead of including both sections on the "must group" list wholesale, subsection 3D1.2(d) should reflect that portions of these offense guidelines are not amenable to aggregate grouping.

The money laundering guideline, section 2S1.1, is amenable to aggregate grouping where either the defendant is not accountable for the underlying offense from which the laundered funds were derived or the offense level for the underlying offense cannot be determined. [112] In such a case, the offense level is determined based largely on the

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[107] Other smuggling guidelines involve low base offense levels relative to the aggregable quality of the offense. See, for example, the offense guideline for bulk cash smuggling, U.S.S.G. § 2S1.3 (2012), with a ratio of 0.2 and the guideline for general smuggling, *id.* § 2T3.1, with a ratio of 0.13. *See infra* Appendix A. The ratio for the alien smuggling guideline, however, reflects a different approach to immigration offenses and the uniqueness of "human cargo." *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 61-65 (2004) (recounting immigration policy decisions by Congress and the Commission that increased the severity of punishment for smuggling illegal aliens).

[108] U.S.S.G. § 2L2.1(a), (b)(2)(C) (2012) (adding nine levels when 100 or more passports or documents involved).

[109] To arrive at this ratio, the base offense level (eleven) is divided by the maximum potential aggregable enhancement (nine).

[110] Unlike trafficking in immigration documents, other trafficking guidelines are usually appropriate fodder for aggregate grouping. For trafficking comparators, see trafficking in contraband cigarettes or smokeless tobacco, with a ratio of 0.33, *id.* § 2E4.1(a); trafficking in material involving the sexual exploitation of a minor for pecuniary gain, with a ratio of 0.6 or 0.73 depending on the statute of conviction, *id.* § 2G2.2(a), (b)(3)(A); trafficking in stolen property, with a ratio of 0.23, *id.* § 2B1.1; and trafficking in motor vehicles or parts with altered or obliterated identification numbers, with a ratio of 0.27, *id.* § 2B6.1. The current ratio for section 2L2.1, however, is dictated in part by a Congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that ordered the Commission to increase the base offense by at least two offense levels and to increase the upward adjustment based on the number of documents or passports by at least fifty percent. Pub. L. No. 104-208, § 211, ***110 Stat. 3009, 3009-569*** to -570 (1996). As a result, the Commission, by emergency amendment, increased the base offense level from nine to eleven and increased the upward adjustment corresponding to the number of documents or passports by fifty percent (from two, four, or six offense levels to three, six, or nine offense levels). U.S.S.G. app. C amend. 544 (2003). However, even the pre-amendment ratio weighed against aggregate grouping and reflected a different treatment of immigration documents than other trafficked items.

[111] U.S.S.G. §§ 2S1.1, 1.3 (2012).

amount of money laundered, which is an aggregable quality. Otherwise, where the defendant is accountable for the underlying offense, and that crime's offense level can be determined, the base offense level for the money laundering offense is the underlying **[*814]** crime's offense level. [113] The underlying crime's Guidelines calculation very well may not be determined through an offense guideline that contains an aggregable quality. Thus, the current inclusion of all of section 2S1.1 on the "must group" list captures offense behavior that may not be groupable on an aggregate basis. Rather, only the portion of the money laundering guideline that is always amenable to aggregate grouping (subsection 2S1.1(a)(2)) should appear on the "must group" list of subsection 3D1.2(d).

Similarly, when applying section 2S1.3, no aggregable qualities are relevant to the offense level determination when the conviction arises under *31 U.S.C. § 5318* or § 5318A. [114] For convictions under other statutory provisions, the value of the funds, an aggregable quality, dominates the offense level calculation. [115] Therefore, the operation of subsection 3D1.2(d) should be split as it pertains to section 2S1.3: offense levels calculated through the former path (subsection 2S1.3(a)(1)) should not be amenable to aggregate grouping, and those calculated through the latter path (subsection 2S1.3(a)(2)) should be grouped on an aggregate basis.

6. Offense guidelines calculated through the Drug Quantity Table of subsection 2D1.1(c) [116]

Although the offense level calculations for most controlled substances on subsection 2D1.1(c)'s Drug Quantity Table are based primarily on quantity, the guidelines for offenses involving the least serious controlled substances are not primarily, or even largely, based on quantity. For Schedule V substances, such as medicinal substances containing very small amounts of codeine or opium relative to the total substance, [117] the drug quantity matters relatively little to the overall offense level calculation. The base offense level is six if less than 40,000 units are involved in the offense. [118] Only two additional offense levels are added if more than 40,000 units are involved. [119] Thus, the ratio between the base offense level and the maximum enhancement based on an aggregable quality of the offense is six-totwo. For Schedule IV substances except flunitrazepam, the ratio between the base offense level (six) and the maximum quantity-based **[*815]** enhancement (six additional levels) is one-to-one. [120] For these least harmful controlled substances, these ratios may be warranted by a determination that the amount of the distribution matters very little when balanced against the defendant's decision to break the law and distribute a controlled substance of any kind.

These ratios reveal that mandatory aggregate grouping is not appropriate for all controlled substances on the Drug Quantity Table. One solution would be to remove offense guidelines that utilize the Drug Quantity Table [121] from

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[112] *Id.* § 2S1.1(a)(2).

[113] *Id.* § 2S1.1(a)(1).

[114] *Id.* § 2S1.3(a)(1).

[115] *Id.* § 2S1.3(a)(2).

[116] *See, e.g., id.* § 2D1.1 ("Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy"); *id.* § 2D1.2 ("Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy"); *id.* § 2D1.5 ("Continuing Criminal Enterprise; Attempt or Conspiracy").

[117] *21 U.S.C. § 812*(b)(5), (c) sched. V (2006).

[118] U.S.S.G. § 2D1.1(c)(17) (2012).

[119] *Id.* § 2D1.1(c)(16).

[120] *See* infra Appendix B.

the "must group" list of subsection 3D1.2(d). Such a move would fundamentally alter the calculation of total offense levels in drug cases by also removing these offense guidelines from the operation of the relevant conduct guideline. [122] Such a huge revision is unlikely given the heavy reliance on quantity in determining the offense level for most controlled substances that appear on the Drug Quantity Table. To avoid this side effect, subsection 3D1.2(d) should be amended to exclude offenses involving the substances listed in Schedule V and Schedule IV (except flunitrazepam) from aggregate grouping. While most drug offenses will remain within the reach of the relevant conduct guideline, offenses involving the least serious controlled substances would not. [123]

Furthermore, sections 2D1.1, 2D1.2, and 2D1.5 are each structured so that the base offense level is not always subject to an enhancement based on an aggregable quality. For instance, "if the defendant is convicted under *21 U.S.C. § 841*(b)(1)(E) or *21 U.S.C. § 960*(b)(5), and the offense of conviction established that death or serious bodily injury resulted from the use of the substance," the base offense level is set at twenty-six regardless of the quantity of the controlled substance involved. [124] In that case, aggregate grouping would be impossible because the offense guideline lacks any aggregable quality. Therefore, the following base offense levels that do not lead to any aggregable quality should be excluded from the "must group" **[*816]** list of subsection 3D1.2(d): subsections 2D1.1(a)(1), (2), (3), (4); subsections 2D1.2(a)(3), (4); and subsection 2D1.5(a)(2). [125] Offense guidelines calculated through these base offense levels simply lack any meaningful aggregable qualities and therefore cannot be aggregated.

7. Offense guidelines calculated through the Chemical Quantity Table of subsection 2D1.11(e) [126]

Similarly, two chemicals on the Chemical Quantity Table of subsection 2D1.11(e) carry ratios of three-to-one. Both anthranilic acid and N-acetylanthranilic acid, with base offense levels of twelve, [127] possess a maximum enhancement of only four offense levels based on the quantity of the chemical involved. [128] Because the quantity

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[121] *See* U.S.S.G. §§ 2D1.1, 2D1.2, 2D1.5 (2012). Section 2D1.5 does not directly reference the Drug Quantity Table, but rather co-opts all of section 2D1.1. *Id.* § 2D1.5(a)(1).

[122] *See id.* § 1B1.3(a)(2).

[123] If Schedule V drug offenses were removed from the "must group" list of subsection 3D1.2(d), a defendant convicted of two counts of distributing 25,000 units of a Schedule V controlled substance would not have those quantities aggregated. Assuming that the two distributions were part of a common scheme, grouping under subsection 3D1.2(b) would be appropriate. *See id.* Thus, the two counts would collapse into each other and the offense level for the group would be set at the offense level of the most serious single count (here, an offense level of six, based on a drug quantity of 25,000 units). *See id.* § 2D1.1(c)(17). Under the current system of relevant conduct and aggregate grouping, the aggregated drug quantity of 50,000 units, or two quantities of 25,000 units, would yield an offense level of eight for the group. *See id.* § 2D1.1(c)(16). Should the Commission be dissatisfied with that result, it should consider altering the ratio by lowering the base offense level and placing a greater emphasis on the amount of the distribution for Schedule V controlled substances.

[124] *See id.* § 2D1.1(a)(4).

[125] Technically, subsection 2D1.5(a)(1) does not always lead to an offense level calculation that involves an aggregable quality. Subsection 2D1.5(a)(1) calculates the base offense level through section 2D1.1. As discussed in the text, only one of section 2D1.1's base offense levels involves an aggregable quality of the offense. But, because subsection 2D1.5(a)(1) appears to contemplate aggregation of the drug quantity when the base offense level is determined through section 2D1.1 and the Drug Quantity Table, it remains on the aggregate grouping list in Appendix D. *See infra* Appendix D.

[126] *See, e.g.*, U.S.S.G. § 2D1.11 (2012) ("Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy"); *id.* § 2D1.13 ("Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy").

[127] *Id.* § 2D1.11(e)(10).

of these chemicals does not dominate the offense level calculation, subsection 3D1.2(d) should be amended to exclude offenses involving these chemicals from the "must group" list of subsection 3D1.2(d). Likewise, offense guidelines calculated through base offense level 2D1.13(a)(3) lack any potentially aggregable qualities and therefore should be excluded from the "must group" list.

B. Anomalies Currently Excluded from Aggregate Grouping

The touchstone of many aggregately grouped offenses is the property offense table of subsection 2B1.1(b)(1). [129] The property offense table acts as a sliding scale that adds offense levels based on the dollar amount of the loss, gain, or other pecuniary aspect of the offense. At the high end of the table, a loss amount exceeding four hundred million dollars adds thirty offense levels. Therefore, offenses that utilize the property offense table generally have a low offense level relative to the possible upward adjustment available based on the aggregable quality of the offense. [130] However, two offense guidelines **[*817]** that utilize the property offense table--a form of trespassing [131] and blackmail [132]--are explicitly forbidden from aggregate grouping even though the prospect of a thirty-offense-level enhancement far outweighs the base offense levels of the offenses. [133] As explained below, certain trespass offenses should be subject to aggregate grouping while blackmail is appropriately excluded from aggregate grouping based on its low statutory maximum sentence.

1. Section 2B2.3 - Trespass

Trespass, with a base offense level of four, is not generally subject to an enhancement based on an aggregable quality of the offense. However, if the offense involves the invasion of a protected computer, up to thirty offense levels are added based on the dollar amount of the loss resulting from the invasion. [134] The ratio between the base offense level and this maximum aggregable enhancement produces a miniscule ratio of four-to-thirty, or 0.13. By providing the possibility of such a large enhancement in only one type of trespass, section 2B2.3 essentially operates as two distinct offense guidelines--one that applies to invasion of a protected computer and one that applies to all other types of trespass. In the case of invasion of a protected computer, the amount of the loss resulting from the invasion drives the offense level calculation to a massive extent. This one type of trespass should therefore be subject to mandatory aggregate grouping and added to the "must group" list of subsection 3D1.2(d). The remainder of the offense guideline does not provide any aggregable quality by which to group other types of trespasses on an aggregate basis; thus, the entire guideline is not a good candidate for inclusion on the "must group" list.

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[128] *Id.* § 2D1.11(e)(8).

[129] *Id.* § 2B1.1(b)(1).

[130] Offense guidelines that utilize the property offense table and also appear on the "must group" list of subsection 3D1.2(d) include: basic property offenses like theft, fraud, and property damage, *id.* § 2B1.1; insider trading, *id.* § 2B1.4(b)(1); destruction of paleontological resources, *id.* § 2B1.5(b)(1); bribery in the procurement of a bank loan, *id.* § 2B4.1(b)(1); counterfeiting, *id.* § 2B5.1(b)(1); copyright or trademark infringement, *id.* § 2B5.3(b)(1); altering or removing vehicle identification numbers, *id.* § 2B6.1(b)(1); offering, giving, soliciting, or receiving a bribe, *id.* § 2C1.1(b)(2); offering, giving, soliciting, or receiving a gratuity, *id.* § 2C1.2(b)(2); making, receiving, or failing to report a violation of the Federal Election Campaign Act, *id.* § 2C1.8(b)(1); offering, accepting, or soliciting a bribe or gratuity affecting the operation of an employee welfare or pension plan, *id.* § 2E5.1(b)(2); violation of odometer laws and regulations, *id.* § 2N3.1(b)(1); wildlife offenses, *id.* § 2Q2.1(b)(3); money laundering, *id.* § 2S1.1(a)(2); and structuring transactions to avoid reporting requirements, *id.* § 2S1.3(a)(2). *See id.* § 3D1.2(d).

[131] *Id.* § 2B2.3(b)(3).

[132] *Id.* § 2B3.3(b)(1).

[133] *See id.* § 3D1.2(d).

[134] *Id.* § 2B2.3(b)(3).

2. Section 2B3.3 - Blackmail and similar forms of extortion

On its face, the blackmail and non-violent extortion guideline appears primed for aggregate grouping. With a base offense level of nine and the prospect of an additional thirty offense level increase **[*818]** based on the dollar amount obtained or demanded, its ratio of 0.30 heavily favors the aggregable quality of the offense. However, because of the relatively low statutory maximum sentences applicable to offenses leading to application of the guideline, the ratio is deceiving, and aggregate grouping is, in fact, not appropriate.

Section 2B3.3 is operable only for the offenses of blackmail and extortion without a threat of violence to person or property. [135] For federal criminal purposes, "blackmail" includes only demanding or receiving money in exchange for not informing another of a violation of federal law. [136] This offense carries a maximum term of imprisonment of one year. [137] Extortionate threats to injure reputation are punishable by up to two years imprisonment. [138] More serious forms of extortion, subject to lengthier maximum sentences, are sentenced through other offense guidelines. [139] Thus, the maximum custodial sentence for violation of an offense sentenced through section 2B3.3 is two years.

Offense level seventeen is the highest offense level corresponding to a Guidelines range that includes a sentence of twenty-four months or less. [140] Therefore, only eight *effective* offense levels can be added to the blackmail guideline's base offense level of nine before topping out at the statutory maximum sentence. Any additional offense levels would not affect the offender's ultimate Guidelines range because the Guidelines range cannot extend above the statutory maximum sentence. [141] Because the aggregable quality of the offense can add only eight *effective* offense levels to the base offense level of nine, the "effective ratio" is nine-to-eight (1.125). Based on this effective ratio, section 2B3.3 is properly excluded from aggregate grouping.

C. Offense Guidelines with Aggregable Qualities Currently Subject to Aggregate Grouping on a Case-by-Case Basis

Although subsection 3D1.2(d)'s directive that offense guidelines that fall into neither the "must group" nor the "do not group" lists conjures up visions of sentencing courts making individualized determinations in huge swaths of cases, out of the sixty-seven offense guidelines excluded from the "must group" and "do not group" lists, **[*819]** only four include aggregable qualities of their own: sections 2D1.10, 2G3.2, 2K1.3, and 2M5.2. [142] Of these four sections, two contain subsections that should be grouped on an aggregate basis. Certain other offense guidelines currently subject to case-by-case determination are always calculated by reference to another guideline that

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135 *See id.* § 2B3.3 cmt. n.1.

136 *18 U.S.C. § 873* (2006).

137 *Id.*

138 *Id.* § 875(d) (making communications in interstate or foreign commerce); *id.* § 876(d) (mailing threatening communications); *id.* § 877 (mailing threatening communications from a foreign country).

139 *See* U.S.S.G. app. A (2012) (listing other extortionate offenses under *18 U.S.C. §§ 875*-877 that are sentenced through Guidelines sections 2A4.2, 2A6.1, and 2B3.2).

140 *Id.* ch. 5, pt. A. For an offender in criminal history category I, an offense level of seventeen yields a Guidelines range of twenty-four to thirty months imprisonment. *Id.*

141 *See id.* § 5G1.1(c)(1), cmt.

142 *Id.* §§ 2D1.10, 2G3.2, 2K1.3, 2M5.2. A fifth section, the Tax Table of section 2T4.1, is primarily driven by an aggregable quality (the amount of the tax loss). However, the Tax Table is not directly keyed to any offense; rather, it is a tool incorporated by other offense guidelines for offenses involving taxation. *See, e.g., id.* § 2T1.1(a)(1). In that sense, section 2T4.1 is unique within the overall design of Chapter Two.

appears on the "must group" list. These offense guidelines should likewise be added to the "must group" list. By adding the appropriate offense guidelines to create a comprehensive "must group" list, the "do not group" list and reference to "case-by-case determination" could be deleted from subsection 3D1.2(d).

1. Case-by-Case Offense Guidelines with Self-Contained Aggregable Qualities

One variant of the base offense level for "endangering human life while illegally manufacturing a controlled substance" is determined through a calculation involving the Drug Quantity Table of subsection 2D1.1(c). [143] Thus, subject to the limitation that aggregate grouping is inappropriate for offenses involving Schedule IV and V controlled substances except flunitrazepam, [144] this subsection should be subject to aggregate grouping just like the other offense guidelines that are determined through the Drug Quantity Table. [145]

The guideline for broadcasting obscene material or making obscene telephone communications for a commercial purpose, section 2G3.2, is subject to an enhancement based on the volume of commerce attributable to the defendant. [146] The maximum potential enhancement based on the volume of commerce attributable to the defendant (twenty-four levels) dwarfs the base offense level (twelve). However, aggregation of the volume of commerce attributable to the defendant is only sensible if that volume includes only the commerce attributable to the obscene material underlying the conviction. If the volume of commerce is expanded to include the defendant's entire volume of commerce, then aggregation would multiply the defendant's total volume of commerce by the number of counts, and the defendant's volume of commerce for the purposes of the guideline would unfairly balloon beyond anything based in reality. Based on the commentary, it appears that the defendant's relevant volume of **[*820]** commerce is limited only to the volume of commerce attributable to the obscene material. [147] This definition of "volume of commerce" comports with its use elsewhere in the Guidelines. [148] With volume of commerce restrictively defined, section 2G3.2 should join subsection 3D1.2(d)'s "must group" list.

Section 2K1.3, the offense guideline for the unlawful receipt, possession, or transportation of explosive materials and prohibited transactions involving explosive materials, carries base offense levels ranging from twelve to twenty-four. [149] In comparison, the aggregable quality of the offense--the weight of the explosive material--provides for a maximum potential enhancement of five offense levels. [150] Thus, in every case, the bare commission of the offense will have more than twice the impact on the total offense level than the weight of the explosive material. This guideline is therefore ill-suited for aggregate grouping.

Lastly, the offense level for the exportation of arms without a proper license is based to some degree on the number of arms in cases of exportation of non-fully automatic small arms or ammunition. [151] However, the enhancement

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143 *Id.* § 2D1.10(a)(1).

144 *See* discussion of offense guidelines based on the Drug Quantity Table of subsection 2D1.1(c) *supra* Part V.A.6.

145 *See, e.g.*, U.S.S.G. § 2D1.1(a)(5) (2012).

146 *Id.* § 2G3.2(b)(2).

147 *See id.* § 2G3.2 cmt. background ("The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.").

148 *See id.* § 2R1.1(b)(2) (explaining that, for antitrust offenses, "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation" and that "[w]hen multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level").

149 *Id.* § 2K1.3(a).

150 *Id.* § 2K1.3(b)(1).

based on that aggregable quality (twelve) is eclipsed by the base offense level (fourteen). [152] Thus, the ratio discloses that this offense guideline should not be subject to aggregate grouping.

2. Case-by-Case Offense Guidelines with Offense Levels Calculated by Reference to Other Offense Guidelines

The base offense levels for numerous offense guidelines are determined through calculation of the offense level of the "underlying" offense. [153] Often, the underlying offense could be anything, as with the offense guideline for aiding and abetting or accessory after the fact. [154] Inclusion on the "must group" list is not appropriate when the offense guideline is written so that it could be determined through another offense guideline that may or may not be amenable to aggregate **[*821]** grouping. However, the aggregate grouping guideline should be written so that multiple counts of conviction are aggregately grouped when they are determined through another offense guideline on the "must group" list. [155]

Four offense guidelines currently subject to "case-by-case" determination are written so that the guideline calculation will always be made through an underlying offense guideline that is on the "must group" list: section 2D1.8 [156] (determined through section 2D1.1), [157] subsection 2H3.3(a)(2) [158] (determined through section 2B1.1), subsection 2K1.4(a)(4) [159] (determined through section 2B1.1), and subsection 2Q1.6(a)(2) [160] (also determined through section 2B1.1). Because the base offense levels of these guidelines are determined through aggregately groupable offense guidelines, these guidelines should also be added to the "must group" list of subsection 3D1.2(d).

VI. CONCLUSION

This Article's goal is to help shape a version of subsection 3D1.2(d) that is more transparent, more internally consistent, and easier to apply than the current iteration. The revisions suggested in this Article are reflected in the proposed revised aggregate grouping guideline set forth in Appendix D. [161] First, this proposed guideline

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[151] *See id.* § 2M5.2(a)(2).

[152] *Id.* § 2M5.2(a). The enhancement applies to offenses involving more than two nonfully automatic small arms or more than 500 rounds of ammunition for non-fully automatic small arms.

[153] *See* infra Appendix A.

[154] *See* U.S.S.G. §§ 2X2.1, 2X3.1 (2012).

[155] *See* infra Appendix D.

[156] This section covers "Renting or Managing a Drug Establishment." U.S.S.G. § 2D1.8 (2012).

[157] Like subsection 2D1.5(a)(1), which is also calculated through section 2D1.1, section 2D1.8 technically does not always lead to an offense level calculation that involves an aggregable quality of the offense. But, for the same reasons, it is included in the aggregate grouping list in Appendix D. *See supra* note 125.

[158] This subsection covers "theft or destruction of mail." U.S.S.G. § 2H3.3(a)(2) (2012).

[159] This subsection covers arson that does not create a substantial risk of serious bodily injury or endanger a structure, dwelling, or mass transportation vehicle. *Id.* § 2K1.4(a). Therefore, this type of arson is quite similar to property damage offenses directly covered by section 2B1.1. The offense level calculation for more serious forms of arson do not take the monetary loss into account and therefore are not aggregately groupable. *See id.*

[160] This subsection covers placing a hazardous device on federal land with the intent to obstruct the harvesting of timber with resulting property destruction. *Id.* § 2Q1.6(a)(2).

[161] *See infra* Appendix D. Ideally, subsection 3D1.2(d) would be severed from the rest of section 3D1.2 and placed into its own guideline. *See supra* Part III. For lack of an available adjacent section number, the proposed guideline in Appendix D is numbered section 3D1.X.

appropriately captures only the offense guidelines with offense level calculations primarily driven by an aggregable quality of the offense. Second, by doing away with the "do not group" and "case-by-case" categories and keeping only a comprehensive "must group" list, the structure of the proposed aggregate grouping guideline is streamlined and its application more transparent. And, lastly, by directing that multiple counts first be grouped under subsections 3D1.2(a) through (c), **[*822]** the proposed guideline provides clear guidance on the proper ordering of the various grouping guidelines. Hopefully this system, or some variant of the ratio system, will be useful to the Sentencing Commission in amending the grouping rules. If not, hopefully it will aid sentencing judges in varying from them.

[*823] VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES VII. APPENDIX A: RATIO CALCULATIONS FOR SPECIFIC OFFENSE GUIDELINES

[*850] VIII. APPENDIX B: RATIO CALCULATIONS FOR CONTROLLED SUBSTANCES LISTED ON THE DRUG QUANTITY TABLE

Section	**Substance**	**Base offense level (1)**	**Most significant aggregable enhancement (2)**	**Ratio<274>**
2D1.1(c)	Schedule V substances	6	2	3
	Schedule IV substances (except flunitrazepam)	6	6	1
	Schedule III substances (except ketamine or hydrocodone)	6	14	0.43
	Schedule III hydrocodone	6	24	0.25
	Schedule I or II depressants	6	32	0.19

Section	Substance	Base offense level (1)	Most significant aggregable enhancement (2)	Ratio<274>
	Ketamine	6	32	0.19
	Hashish oil	6	32	0.19
	Hashish	6	32	0.19
	Marihuana	6	32	0.19
	Flunitrazepam	8	30	0.27
	Fentanyl analogue	12	26	0.46
	Fentanyl	12	26	0.46
	LSD	12	26	0.46
	Amphetamine	12	26	0.46
	Methamphetamine	12	26	0.46
	PCP	12	26	0.46
	Cocaine base	12	26	0.46
	Cocaine	12	26	0.46
	Heroin	12	26	0.46

274. The ratio of column (1) to column (2).

[*851] IX. APPENDIX C: RATIO CALCULATIONS FOR LISTED CHEMICALS

Section	Substance	Base offense level (1)	Most significant aggregable enhancement (2)	Ratio<275>
2D1.11(d)	Ephedrine	12	26	0.46
	Phenylpropanolamine	12	26	0.46
	Pseudoephedrine	12	26	0.46
2D1.11(e)	List II chemicals	12	16	0.75
	List I chemicals (except anthranilic acid and N-acetylanthranilic acid)	12	18	0.67
	Anthranilic acid	12	4	3
	N-acetylanthranilic acid	12	4	3

275. The ratio of column (1) to column (2).

[*852] X. APPENDIX D: PROPOSED REVISED AGGREGATE GROUPING GUIDELINE

§ 3D1.X: Groups of Quantity-Driven Counts

After grouping closely related counts under subsections 3D1.2(a)-(c), the remaining counts (or groups thereof) shall be grouped when the offense level is determined primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm.

Only offenses covered by the following guidelines, or offenses with offense guidelines determined by reference to one of the following underlying guidelines, are to be grouped under this subsection:

§§ 2B1.1, 2B1.4, 2B1.5, 2B2.3(b)(3), 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§ 2C1.1, 2C1.2, 2C1.8;

§§ 2D1.1(a)(5), 2D1.2(a)(1), (2), 2D1.5(a)(1), 2D1.8, 2D1.10(a)(1), 2D1.11, 2D1.13(a)(1), (2);

§§ 2E4.1, 2E5.1;

§§ 2G2.2, 2G3.1, 2G3.2;

§ 2H3.3(a)(2);

§ 2K1.4(a)(4);

§ 2N3.1;

§§ 2Q1.6(a)(2), 2Q2.1;

§ 2R1.1;

§§ 2S1.1(a)(2), 2S1.3(a)(2);

§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Except that offenses with offense guidelines contained in Part D of Chapter Two are not to be grouped under this guideline to the extent the offenses involve anthranilic acid, N-acetylanthranilic acid, Schedule V controlled substances, or Schedule IV controlled substances other than flunitrazepam.

Counts involving offenses to which different offense guidelines apply are to be grouped together under this section if the offenses are of the same general type and the aggregable qualities of the offenses are readily combinable.

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