

2010

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## Recommended Citation

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 (2010).

Available at: <http://scholarship.law.umn.edu/lawineq/vol28/iss1/2>

## Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations

James P. McLoughlin, Jr.†

### Introduction

In 1994 Congress directed the United States Sentencing Commission (Sentencing Commission) to create an “enhancement” for prison sentences resulting from felonies involving international terrorism.<sup>1</sup> The result was section 3A1.4 of the United States Sentencing Guidelines (Guidelines or U.S.S.G.).<sup>2</sup> This Guideline worked to increase a defendant’s Guidelines prison sentence whenever the defendant was convicted of a felony that “involved, or was intended to promote, international terrorism.”<sup>3</sup> Events since its inception have stretched U.S.S.G. section 3A1.4 far beyond its roots in international terrorism, giving it far-reaching power and leading to devastating consequences.

In the wake of the 1995 Oklahoma City bombing, Congress decided that U.S.S.G. section 3A1.4’s enhancement power should apply not only to international terrorism, but to domestic terrorism offenses as well.<sup>4</sup> The amended U.S.S.G. section 3A1.4 applies when a defendant is convicted of an offense that involves or is intended to promote a “federal crime of terrorism,”<sup>5</sup> “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>6</sup>

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1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022.

2. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (1995).

3. *Id.*

4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303.

5. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (2007).

6. 18 U.S.C. § 2332b(g)(5)(A) (2006 & Supp. 2009). Such an offense must also be a violation of:

Later terrorist activity caused Congress to expand U.S.S.G. section 3A1.4 further. Prior to the events of September 11, 2001, there were no base offense Guidelines for federal crimes of

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(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title;

(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284);

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505 (b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123 (b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or

(iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).

*Id.*

terrorism,<sup>7</sup> but when Congress passed the USA PATRIOT Act (PATRIOT Act)<sup>8</sup> in the wake of September 11, the Sentencing Commission created those Guidelines.<sup>9</sup> Among the offenses for which the PATRIOT Act instituted new base offense Guidelines is providing material support or resources to a designated foreign terrorist organization (DFTO).<sup>10</sup> Any prison sentence imposed under these Guidelines is also subject to enhancement under U.S.S.G. section 3A1.4.<sup>11</sup>

U.S.S.G. section 3A1.4 works by lengthening the Guidelines prison sentences to which defendants are otherwise subject.<sup>12</sup> U.S.S.G. section 3A1.4 is not a base offense Guideline<sup>13</sup>—it is applied atop the new anti-terrorism and other applicable base offense Guidelines.<sup>14</sup> When it comes into play, U.S.S.G. section 3A1.4 has a dramatic impact on sentences by increasing both factors in sentencing calculus—a defendant’s offense level and criminal history score.<sup>15</sup> The fact that it can be used to increase

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7. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2002) (noting that amendments under the USA PATRIOT Act modify existing Sentencing Guidelines “for a number of offenses that, prior to enactment of the Act, were enumerated in 18 U.S.C. § 2332b(g)(5) as predicate offenses for federal crimes of terrorism but were not explicitly incorporated in the guidelines”); see CARMEN D. HERNANDEZ, AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES THAT TOOK EFFECT NOV. 1, 2002 AND COMMISSION REPORT ON COCAINE SENTENCES 15 (2002), [http://www.fd.org/Publications/SpecTop/sentencing\\_amendment\\_highlights\\_112702.pdf](http://www.fd.org/Publications/SpecTop/sentencing_amendment_highlights_112702.pdf) (detailing Sentencing Guidelines additions made after the USA PATRIOT Act was enacted).

8. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

9. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2002).

10. *Id.*; see *id.* § 2M5.3.

11. United States Sentencing Guidelines section 3A1.4 applies to “Federal Crimes of Terrorism” as defined in 18 U.S.C. § 2332b(g)(5). U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.1 (2007). Under 18 U.S.C. § 2332b(g)(5), violating 18 U.S.C. § 2339B by providing material support to terrorist organizations is an offense that qualifies as a “Federal crime of terrorism.” 18 U.S.C. § 2332b(g)(5)(B)(i) (2006 & Supp. 2009).

12. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007); *id.* ch. 5, pt. A, sentencing tbl.

13. *Id.* § 3A1.4.

14. Section 1B1.1 of the United States Sentencing Guidelines explains how to apply the Guidelines. *Id.* § 1B1.1. It specifies that the first steps in applying the Guidelines are to determine the applicable offense Guideline and base offense level. *Id.* § 1B1.1(a)–(b). The next step is to apply adjustments under Chapter Three. *Id.* § 1B1.1(c). Section 3A1.4 of the Guidelines is contained within Chapter Three and qualifies as a victim-related adjustment. See *id.* ch. 3, § 3A1.4. *But cf. infra* note 247 (discussing U.S.S.G. section 3A1.4’s failure to mention a victim and asserting that Guidelines sections 2M5.3 and 2M6.1 are the relevant Guidelines for crimes of material support and specifically mention victims).

15. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

sentences beyond those imposed under the new terrorism base offense Guidelines, the breadth of its applicability, and its severity make U.S.S.G. section 3A1.4 a key component of the U.S. government's anti-terrorism arsenal.

U.S.S.G. section 3A1.4 is draconian. The minimum sentence U.S.S.G. section 3A1.4 would impose under the 2007 Guidelines is between 210 and 262 months.<sup>16</sup> The Guideline increases a defendant's offense level to not less than thirty-two and increases every defendant's Criminal History Category to Category VI.<sup>17</sup> If the offense level prior to the application of U.S.S.G. section 3A1.4 is above level twenty, but below level thirty-two, the Guideline adds twelve levels.<sup>18</sup> For example, if the offense level prior to the application of U.S.S.G. section 3A1.4 is twenty-four, the offense level after application of U.S.S.G. section 3A1.4 rises to level thirty-six.<sup>19</sup> With a Criminal History Category VI, the resulting sentencing range is between 324 and 405 months.<sup>20</sup> For a defendant with a Criminal History Category VI, all offense levels above level thirty-six require sentences ranging from 360 months to life,<sup>21</sup> and at offense level forty-three, the Guidelines sentence is life in prison.<sup>22</sup>

*United States v. Hammoud*<sup>23</sup> illustrates U.S.S.G. section 3A1.4's impact when a defendant is sentenced for a material support charge. Mohamad Hammoud was convicted of fourteen charges arising from a cigarette smuggling conspiracy.<sup>24</sup> The crux of the conspiracy involved the defendants purchasing cigarettes in North Carolina, where the state tax was fifty cents per carton;<sup>25</sup> they then transported the cigarettes to Michigan,<sup>26</sup> where the state

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16. *Id.* ch. 5, pt. A, sentencing tbl.

17. *Id.* § 3A1.4.

18. *Id.* § 3A1.4(a).

19. *Id.*

20. *Id.* ch. 5, pt. A, sentencing tbl.

21. *Id.*

22. *Id.*

23. 381 F.3d 316 (4th Cir. 2004) (en banc), *vacated*, 543 U.S. 1097 (2005), *sentence vacated*, 405 F.3d 1034 (4th Cir. 2005).

24. *Id.* at 325–26. The convictions particularly relevant to calculating Hammoud's sentence under the Sentencing Guidelines arose from money laundering and conspiracy to commit money laundering under 18 U.S.C. § 1956(a)(1) and (h), transportation of contraband cigarettes under 18 U.S.C. § 2342, and providing material support to a DFTO under 18 U.S.C. § 2339B. *Id.* at 325–26.

25. *Id.* at 326.

26. *Id.*

tax was \$7.50 per carton.<sup>27</sup> They sold the cigarettes illegally in Michigan to take advantage of the tax arbitrage.<sup>28</sup> The majority of the charges related to cigarette smuggling,<sup>29</sup> but two were terrorism related: Hammoud was convicted of two counts of violation of 18 U.S.C. § 2339B, first, for providing material support to Hezbollah, a DFTO, and second, for conspiring to do so.<sup>30</sup> As calculated for sentencing, his sentence under the Guidelines without U.S.S.G. section 3A1.4 would have been between forty-six and fifty-seven months given the jury findings;<sup>31</sup> the sentence would have been 108 to 135 months imprisonment with additional fact-finding by the trial court judge.<sup>32</sup> However, the trial court judge determined by a preponderance of the evidence that Hammoud, in knowingly providing material support for a DFTO, intended to influence the conduct of government,<sup>33</sup> which brought U.S.S.G. section 3A1.4 into play.<sup>34</sup> Applying U.S.S.G. section 3A1.4 increased Hammoud's offense level by twelve levels and his Criminal History Category, the measure of his criminal record, went from Category I (since he had no criminal record) to Category VI.<sup>35</sup> These increases caused Hammoud's sentencing range to jump to between 360 months and life imprisonment.<sup>36</sup> He was

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 361–62 n.1 (Motz, J., dissenting).

32. With all other enhancements used in the presentence Guidelines calculation, Hammoud's offense level was a thirty-one (base level twenty-four with enhancements for conviction under 18 U.S.C. § 1956 (two levels), sophisticated money laundering (two levels), leader and organizer of the conspiracy (four levels) and obstruction (two levels)). *Id.* at 326–27. With a Criminal History Category I, the sentencing range was 108 to 135 months. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2002).

33. *Hammoud*, 381 F.3d. at 362 (Motz, J., dissenting) (noting that the jury in Hammoud's case determined that he had provided material support for a DFTO in violation of 18 U.S.C. § 2339B(a)(1), but the judge determined by a preponderance of the evidence that Hammoud had the specific intent to influence the conduct of government); see 18 U.S.C. § 2332b(g)(5)(B)(i) (2000).

34. *Hammoud*, 381 F.3d. at 362 (Motz, J., dissenting); see also U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2002).

35. *Hammoud*, 381 F.3d. at 362 (Motz, J., dissenting).

36. *Id.* at 361 n.1, 363 (Motz, J., dissenting) (noting the base offense level and Criminal History Category under which Hammoud's sentence would have been determined based solely upon the jury's findings, then explaining the enhancements to which Hammoud was subjected based upon U.S.S.G. section 3A1.4, which raised his base offense fourteen levels to level thirty-seven and his Criminal History Category to IV). Under the adjusted based offense level and Criminal History Category, the Guidelines prison sentence for Hammoud's convictions rose to 360 months to life. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2002).

sentenced to 1860 months—155 years imprisonment.<sup>37</sup> To appreciate fully the impact of U.S.S.G. section 3A1.4, the maximum sentence for providing material support to a DFTO in violation of 18 U.S.C. § 2339B without any enhancements at the time Hammoud committed his offense was ten years in prison.<sup>38</sup>

In order to evaluate U.S.S.G. section 3A1.4, it is important to look to the federal sentencing policies mandated by controlling statute. Congress provided instructions on sentencing in 18 U.S.C. § 3553(a)(2), directing that a sentence should be

sufficient, but not greater than necessary

- (A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner.<sup>39</sup>

Section 3553(a)(1) instructs the court to consider “the history and characteristics of the defendant”<sup>40</sup> in its sentencing determinations.

When considering U.S.S.G. section 3A1.4 in light of these and additional federal sentencing policy factors enumerated in § 3553(a)(3)–(7),<sup>41</sup> as well as the goals of a sound anti-terrorism

37. *Hammoud*, 381 F.3d. at 363 n.2 (Motz, J., dissenting).

38. 18 U.S.C. § 2339B(a)(1) (2000), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 810(d)(1), 115 Stat. 272, 380 (increasing the maximum prison sentence for violating 18 U.S.C. § 2339B(a)(1) to fifteen years).

39. 18 U.S.C. § 3553(a)(2) (2006).

40. *Id.* § 3553(a)(1).

41. The factors to consider are:

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have

policy, two essential questions arise. First, does applying U.S.S.G. section 3A1.4 result in a valid and appropriate sentence? Second, does it represent good anti-terrorism policy? This Article submits that the answer to both questions is “no.”

U.S.S.G. section 3A1.4 represents bad anti-terrorism policy for several reasons. First, the Guideline increases a defendant’s Criminal History Category to a level VI—the most culpable.<sup>42</sup> The shift to Criminal History Category VI ensures that a defendant will be sentenced as if he or she were a career criminal,<sup>43</sup> with no empirical evidence that this is true or fair (under the considerations contemplated in 18 U.S.C. § 3553).<sup>44</sup> Second, the Guideline automatically and uniformly increases a defendant’s offense level,<sup>45</sup> ensuring a defendant will be sentenced as if his or her offenses are among the most serious offenses addressed by the Sentencing Guidelines, regardless of where the offense level fits on the spectrum of “material support.”<sup>46</sup> For example, U.S.S.G.

yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a)(3)–(7) (2006 & Supp. 2009).

42. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(b) (2007).

43. See *id.* § 4B1.1(a)–(b) (defining “career offender” and specifying that a “career offender’s criminal history category . . . shall be Category VI”).

44. For example, 18 U.S.C. § 3553(a)(1) states that a court should consider “the history and characteristics of the defendant” in considering the sentence it will impose, which argues against automatically classifying a defendant. 18 U.S.C. § 3553(a)(1) (2006); see also *infra* Part X (discussing Criminal History Categories’ function in sentencing repeat offenders to longer prison sentences and asserting that U.S.S.G. section 3A1.4’s manipulation of a defendant’s Criminal History Category results in sentences commensurate with career offenders, without evidence to show that offenders who commit crimes eligible for sentencing under this Guideline are more likely to reoffend).

45. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (2007).

46. Compare *id.* § 2A1.5(a) (setting the base offense level for Conspiracy or Solicitation to Commit Murder at thirty-three), and *id.* § 2A4.1(a) (setting the base offense level for Kidnapping, Abduction, Unlawful Restraint at thirty-two), and *id.* § 2G2.1(a) (setting the base offense level for Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material: Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production at thirty-two), with *id.* § 3A1.4 (increasing the offense level for



section 3A1.4 punishes the defendant who sends \$500 to the social services arm of a DFTO, such as Hezbollah or Hamas, the same as the defendant who attempts to bomb the United Nations, or who provides weapons of mass destruction to al Qaeda.<sup>47</sup> As a result, the sentences under U.S.S.G. section 3A1.4 are often disproportionate to the conduct of conviction.<sup>48</sup> Finally, the crushing increases in prison time under U.S.S.G. section 3A1.4 can be imposed based upon a judge's finding under a preponderance of the evidence standard, rather than jury findings under a beyond a reasonable doubt standard,<sup>49</sup> giving rise to constitutional concerns and questions of fundamental fairness in our justice system.

When comparing U.S.S.G. section 3A1.4 with the statutory maximum penalties for terrorism-related offenses—which should reflect Congressional judgment about the sentences appropriate to deter and punish those offenses—and when contrasting its impact with that of other Sentencing Guidelines addressing terrorism, U.S.S.G. section 3A1.4's flaws become apparent. This Article addresses the concerns U.S.S.G. section 3A1.4 raises by focusing on cases involving material support in violation of 18 U.S.C. § 2339B, the basic statute that criminalizes providing material support for a DFTO.<sup>50</sup>

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defendants convicted of federal crimes of terrorism (which include providing material support to a DFTO) to at least thirty-two).

47. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (failing to include language providing for any distinction between felony offenses that “involve[], or [were] intended to promote, a federal crime of terrorism”).

48. Cf. U.S. SENTENCING COMM'N, ANALYSIS OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (H.R. 3355, AS PASSED BY THE SENATE NOVEMBER 19, 1993, AND BY THE HOUSE APRIL 26, 1994): PART II 13 (1994) (emphasizing the possibility of prison sentences for terrorism cases under-punishing defendants, but noting that the mandate to provide an enhancement for felonies promoting terrorism may present a problem “for the Commission [in] that it may be difficult to develop a single fixed guideline enhancement for terrorism that would appropriately account for the seriousness of the conduct in all cases. . . . [W]hile the terrorist goal may be serious in all cases, the specific crimes a defendant may commit in furtherance of terrorism may not always reflect that seriousness. . . . In addition, defendants who share a common terrorist objective may vary greatly in terms of the threat to persons and national security that they realistically pose.”). U.S.S.G. section 3A1.4, however, takes a specific intent—the intent “to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”—and elevates that factor to dwarf all other factors. 18 U.S.C. § 2332b(g)(5)(a) (2006 & Supp. 2009) (providing intent requirement for a federal crime of terrorism); see also U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.1 (referring to 18 U.S.C. § 2332b(g)(5) for the definition of federal crimes of terrorism).

49. See *infra* Part IV.B.

50. 18 U.S.C. § 2339B (2006 & Supp. 2009).

## I. The History, Structure, and Operation of U.S.S.G. Section 3A1.4

U.S.S.G. section 3A1.4 went into effect in November of 1995 pursuant to the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA),<sup>51</sup> which directed the Sentencing Commission to “provide an appropriate enhancement” for felonies involving international terrorism.<sup>52</sup> The existing terrorism Guideline was then U.S.S.G. section 5K2.15, which had become effective November 1, 1989.<sup>53</sup> U.S.S.G. section 5K2.9 addressed criminal purpose,<sup>54</sup> and U.S.S.G. section 5K2.15 did not make a specific substantive change to the Guidelines with regard to purpose and terrorism, it simply authorized the court to increase the sentence “[i]f the defendant committed the offense in furtherance of a terroristic action.”<sup>55</sup> In contrast, U.S.S.G. section 3A1.4 is more specific. It reads:

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant’s criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.<sup>56</sup>

Congress defined a “federal crime of terrorism” in 18 U.S.C. § 2332b(g)(5) as an offense that:

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of . . . [18 U.S.C. §] 2339B (relating to providing material support to terrorist organizations) . . .<sup>57</sup>

Somewhat ironically, just a few months prior to the date the VCCLEA was enacted, the Sentencing Commission expressed some concern with promulgating a too-explicit penalty enhancement,<sup>58</sup> but despite what could be read as a very general

51. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

52. *Id.* § 120004, 108 Stat. at 2022.

53. U.S. SENTENCING GUIDELINES MANUAL § 5K2.15 app. C, amend. 292 (1990).

54. U.S. SENTENCING GUIDELINES MANUAL § 5K2.9 (1987).

55. U.S. SENTENCING GUIDELINES MANUAL § 5K2.15 (1990).

56. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007).

57. 18 U.S.C. § 2332b(g)(5) (2006 & Supp. 2009). When this Article refers to a “federal crime of terrorism” the reference is to statutorily defined crimes, not common parlance.

58. The Sentencing Commission’s report on the VCCLEA stated:

As a general principle, the Commission has opted for a more flexible guideline departure, rather than a fixed guideline enhancement where a

instruction from Congress in the VCCLEA,<sup>59</sup> the Sentencing Commission adopted just such a very explicit Guideline.<sup>60</sup>

After the Oklahoma City bombing, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and instructed the Sentencing Commission to make U.S.S.G. section 3A1.4 applicable to federal crimes of terrorism as defined in 18 U.S.C. § 2332b(g)(5).<sup>61</sup> The Conference Report on the AEDPA noted that U.S.S.G. section 3A1.4 substantially increased prison time for offenses related to international terrorism.<sup>62</sup> The report explained that the amendment would be “applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established at the sentencing phase of the prosecution.”<sup>63</sup> Thus, one can argue there was some congressional endorsement of the sentence increases, so long as the defendant was found to have had the “necessary” motivation. However, as this Article argues, the anti-terrorism statutes enacted after 2001 have sentences far shorter than those mandated by U.S.S.G. section 3A1.4,<sup>64</sup> and as

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sentencing factor is atypical or when it may arise during the course of a wide range of offenses of varying seriousness or in many forms. In such situations it may be difficult to arrive at a fixed formula in calibrating the seriousness of the factor with that of the underlying offense, although the factor nevertheless may be an important sentencing consideration for the court.

U.S. SENTENCING COMM’N, *supra* note 48, at 13.

59. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 (“The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, as defined in section 2332b(g) of title 18, United States Code.”).

60. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (1995).

61. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303 (“The United States Sentencing Commission shall forthwith . . . amend the sentencing guidelines so that [§ 3A1.4] relating to international terrorism only applies to Federal crimes of terrorism . . .”).

62. 142 CONG. REC. H3305-01, H3337 (daily ed. Apr. 15, 1996).

63. *Id.*

64. Compare U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007) (mandating a minimum offense level of thirty-two and the maximum Criminal History Category for a defendant (Category VI), a categorization that calls for a minimum sentence of 210–262 months), with 18 U.S.C. § 2339A(a) (2006 & Supp. 2009) (subjecting violators who provide material support to terrorists who did not cause a death to a maximum prison sentence of fifteen years (180 months)), and 18 U.S.C. § 2339B(a)(1) (2006 & Supp. 2009) (subjecting violators who provide material support to a foreign terrorist organization which did not cause a death to a maximum prison sentence of fifteen years (180 months)), and 18 U.S.C. § 2339C(d)(1)–(2) (2006 & Supp. 2009) (subjecting violators of § 2339(C)(a) who finance terrorism to a maximum prison sentence of twenty years (240 months), and violators of § 2339(C)(c) who aid in concealing terrorist financial resources to a

such they are inconsistent with the view that Congress intended sentences under U.S.S.G. section 3A1.4 to be as severe as they are.<sup>65</sup>

The Sentencing Commission expanded the scope and application of U.S.S.G. section 3A1.4 upon passage of the PATRIOT Act.<sup>66</sup> Effective November 1, 2002, U.S.S.G. section 3A1.4 became applicable to offenses including harboring or concealing a terrorist who has committed a crime of terrorism and obstructing the investigation of a crime of terrorism.<sup>67</sup> More controversially, the Sentencing Commission opined that U.S.S.G. section 3A1.4 may be applied when the offense of conviction is not one enumerated in the definition of a federal crime of terrorism, but otherwise involved terrorism.<sup>68</sup> In addition, the Guideline's Application Notes were amended to indicate that the Guideline could be applied when a defendant's motive was to affect government conduct, by intimidation or coercion, or to retaliate against government conduct or to intimidate or coerce a civilian population.<sup>69</sup> Partly as a result, U.S.S.G. section 3A1.4 has a broader reach than one might ordinarily describe as terrorism cases.

For example, in *United States v. Jordi*,<sup>70</sup> the defendant was found guilty of attempted arson under 18 U.S.C. § 844(i) for plotting to blow up abortion clinics.<sup>71</sup> The district court judge believed that a higher sentence range than that provided by the Guidelines was appropriate,<sup>72</sup> but denied the government's motion

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maximum prison sentence of ten years (120 months)), and 18 U.S.C. § 2339D(a) (2006 & Supp. 2009) (subjecting violators who receive military-type training from a foreign terrorist organization to a maximum prison sentence of ten years (120 months)).

65. See *infra* Part II.

66. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2002); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

67. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2002).

68. *Id.* (“[T]he amendment adds an encouraged, structured upward departure in § 3A1.4 (Terrorism) for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote ‘federal crimes of terrorism’ for purposes of the terrorism adjustment in § 3A1.4.”).

69. *Id.* § 3A1.4 cmt. n.4; see also *id.* at app. C, amend. 637 (noting that the amendment “makes it possible to impose punishment equal in severity to that which would be imposed if the § 3A1.4 adjustment actually applied”).

70. 418 F.3d 1212 (11th Cir. 2005).

71. *Id.* at 1214; 18 U.S.C. § 844(i) (2002) (criminalizing “attempts to damage or destroy, by means of fire or an explosive, any building . . . used in interstate or foreign commerce . . .”).

72. *Jordi*, 418 F.3d at 1214.

for an upward departure pursuant to U.S.S.G. section 3A1.4,<sup>73</sup> believing that such a departure was only allowed with “a showing that the defendant’s crime transcended national boundaries.”<sup>74</sup> The Eleventh Circuit ruled that U.S.S.G. section 3A1.4 could be used to calculate Jordi’s sentence, based on its reading of Application Note 4, because the district court had determined that Jordi “sought through his actions to intimidate or coerce a civilian population.”<sup>75</sup>

## II. U.S.S.G. Section 3A1.4 and Terrorism Sentences Under Statute and Other Guidelines

### A. *Statutory Penalties for Crimes Associated with Terrorism*

One measure of whether U.S.S.G. section 3A1.4 is good sentencing and anti-terrorism policy is a comparison between the penalties imposed under U.S.S.G. section 3A1.4 and the statutory maximum penalties enacted by Congress for terrorism offenses, particularly financing offenses. It is logical to assume that Congress enacted these criminal statutes with the penalties it thought appropriate to deter and punish offenses, such that any

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73. *Id.*

74. *Id.*

75. *Id.* at 1213. In a tape recording taken during a meeting with a confidential source, the defendant said, “I do not have the means to kill abortion doctors, but I do have the means to bomb clinics. Maybe that way I can dissuade other doctors from performing abortions.” *Id.* at 1214. The Eleventh Circuit found Jordi intended to intimidate or coerce a civilian population, and endorsed application of the Guideline. *Id.* at 1214. Other circuits have taken similar action. In *United States v. Graham*, the Sixth Circuit held that applying section 3A1.4 of the United States Sentencing Guidelines does not require that the defendant be convicted of a crime specifically enumerated in § 2332b(g)(5)(B); it can be applied if the government proves by a preponderance of the evidence that the defendant specifically intended to promote a federal crime of terrorism enumerated in 18 U.S.C. § 2332b(g)(5)(B). *United States v. Graham*, 275 F.3d 490, 517 (6th Cir. 2001). The *Graham* court ruled that the sentencing court must identify the enumerated federal crime of terrorism that the defendant intended to promote. *Id.* The Ninth Circuit has held that when U.S.S.G. section 3A1.4 does not apply to a defendant because his or her offense is not aimed at the government and thus is not a federal crime of terrorism, other sentencing Guidelines can be used to fill the breach and enhance the defendant’s sentence commensurate with what it would have been had the crime fit the terrorism definition. *United States v. Tankersley*, 537 F.3d 1100, 1103 (9th Cir. 2008), (affirming a defendant’s sentence under U.S.S.G. section 5K2.0 that imposed a twelve-step upward departure in order to “achieve sentencing parity between defendants who engaged in similar conduct: with some targeting government property and who were properly subject to the terrorism enhancement [U.S.S.G. section 3A1.4], and others targeting only private property who were not”); see also 18 U.S.C. § 2332b(g)(5) (2000) (defining “federal crime of terrorism”).

sentences imposed that are far above the statutory maximum—if based solely on the conduct criminalized in statute—are disproportionate. That comparison establishes that U.S.S.G section 3A1.4 results in far higher sentences than the statutes it was intended to supplement.<sup>76</sup>

1. 18 U.S.C. § 2332a—Use of Weapons of Mass Destruction

Through the VCCLEA, Congress codified 18 U.S.C. § 2332a,<sup>77</sup> making it illegal for an individual to use weapons of mass destruction against a U.S. national or property within the United States.<sup>78</sup> Under the statute an offender may face a prison sentence of “any term of years or for life.”<sup>79</sup> If a death results, however, an offender may be sentenced to death.<sup>80</sup>

2. 18 U.S.C. § 2332b—Acts of Terrorism Transcending National Boundaries

Eighteen U.S.C. § 2332b was promulgated under the AEDPA.<sup>81</sup> It criminalizes two types of actions. First, the statute criminalizes killing, kidnapping, or maiming any person in the United States, as well as any assault on a person in the United States that results in serious bodily harm or is conducted with a deadly weapon.<sup>82</sup> Threats, attempts, and conspiracy to undertake any of these actions are also punishable.<sup>83</sup> Second, § 2332b makes it illegal for an individual to create a substantial risk of bodily harm by damaging property within the United States or conspiring to do so.<sup>84</sup>

The statute imposes a range of prison sentences depending upon the culpability of the conduct—from a low of ten years for threatening to commit an enumerated offense<sup>85</sup> to death if the

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76. *See supra* note 64 (comparing sentences under U.S.S.G. section 3A1.4 with statutory maximum sentences for federal crimes of terrorism).

77. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60023(a), 108 Stat. 1796, 1980.

78. 18 U.S.C. § 2332a(a)–(b) (2006 & Supp. 2009).

79. *Id.*

80. *Id.*

81. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 702(a), 110 Stat. 1214, 1291–94.

82. 18 U.S.C. § 2332b(a)(1)(A) (2006).

83. *Id.* § 2332b(a)(2), (c)(1)(F), (c)(1)(G).

84. *Id.* § 2332b(a)(1)(B).

85. *Id.* § 2332b(c)(1)(G).

defendant is responsible for a death.<sup>86</sup> Prison sentences for intermediate offenses include up to thirty years for assault resulting in serious bodily injury,<sup>87</sup> up to thirty-five years for maiming,<sup>88</sup> and up to life imprisonment for kidnapping.<sup>89</sup> The statute provides that any sentences imposed shall run consecutively, not concurrently.<sup>90</sup>

### 3. 18 U.S.C. § 2332d—Financial Transactions

Eighteen U.S.C. § 2332d addresses individuals in the United States who engage in financial transactions with foreign governments.<sup>91</sup> The statute was also passed as part of the AEDPA.<sup>92</sup> It provides that any individual in the United States who “know[s] or ha[s] reasonable cause to know that a country is designated . . . a country supporting international terrorism”<sup>93</sup> and enters into a financial transaction with that country’s government may be punished.<sup>94</sup> The maximum prison sentence for violating § 2332d is ten years.<sup>95</sup>

### 4. 18 U.S.C. § 2339A—Providing Material Support to Terrorists

Eighteen U.S.C. § 2339A criminalizes providing material support to groups that the defendant is aware will conduct terrorist activities, or concealing such support.<sup>96</sup> Enacted in 1994,<sup>97</sup> § 2339A criminalizes conduct by which an individual provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out a violation [of various sections of Title 18, Title 42, Title 49 or any offense listed in 18 U.S.C. § 2332b(g)(5)(B)] (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an

86. *Id.* § 2332b(c)(1)(A).

87. *Id.* § 2332b(c)(1)(D).

88. *Id.* § 2332b(c)(1)(C).

89. *Id.* § 2332b(c)(1)(B).

90. *Id.* § 2332b(c)(2).

91. *Id.* § 2332d(a).

92. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 321(a), 110 Stat. 1214, 1254.

93. 18 U.S.C. § 2332d(a).

94. *Id.*

95. *Id.*

96. 18 U.S.C. § 2339A(b) (2006 & Supp. 2009).

97. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796, 2022.

escape from the commission of any such violation, or attempts or conspires to do such an act . . . .<sup>98</sup>

The enumerated offenses include those related to destruction of aircraft or aircraft facilities, to biological weapons, nuclear materials, arson and bombing of government property, destruction of an energy facility, weapons of mass destruction, and acts of terrorism transcending national boundaries, among others.<sup>99</sup> When enacted, anyone violating § 2339A was subject to imprisonment for a maximum of ten years.<sup>100</sup> The PATRIOT Act amended the statute to increase the maximum prison sentence to fifteen years, or if death results, imprisonment for a term of years or for life.<sup>101</sup>

5. 18 U.S.C. § 2339B—Providing Material Support or Resources to Designated Foreign Terrorist Organizations

Congress enacted § 2339B in 1996 as part of AEDPA.<sup>102</sup> Section 2339B criminalizes conduct by which an individual

knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so . . . . To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization[,] . . . that the organization has engaged or engages in terrorist activity[,] . . . or that the organization has engaged or engages in terrorism . . . .<sup>103</sup>

Congress enacted § 2339B in part to close a perceived loophole in § 2339A that permitted those who thought they were donating to charity to escape a material support charge.<sup>104</sup> Under the current

98. 18 U.S.C. § 2339A(a) (2006 & Supp. 2009).

99. *Id.* The statute specifies these offenses by reference to other sections of the United States Code. *Id.* The statute was amended to expand the list of predicate offenses by the AEDPA. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255.

100. 18 U.S.C. § 2339A(b) (1994); Violent Crime Control and Law Enforcement Act of 1994, § 120005(a), 108 Stat. at 2022.

101. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 810(c), 115 Stat. 272, 380.

102. Antiterrorism and Effective Death Penalty Act § 303(a), 110 Stat. at 1250.

103. 18 U.S.C. § 2339B(a)(1). Eighteen U.S.C. § 2339B(g) provides relevant definitions for terms used throughout the section. *Id.* § 2339B(g). Eighteen U.S.C. § 2339B(a)(2)–(f) provides for an extensive civil enforcement mechanism when a financial institution becomes aware it has custody of DFTO funds. *Id.* § 2339B(a)(2)–(f). Eighteen U.S.C. § 2339B(h) addresses providing personnel to DFTOs as a form of material support. *Id.* § 2339B(h).

104. See H.R. REP. NO. 104-383, at 43–45 (1995) (discussing First Amendment protections on freedom of association and noting that “[t]he prohibition [against



statute, a person need not have any intent to finance a specific act of terrorism or to foster terrorism generally in order to be found guilty.<sup>105</sup> Eighteen U.S.C. § 2339B incorporates § 2339A's definition of "material support,"<sup>106</sup> and, when enacted, had the same statutory maximum punishment—ten years imprisonment.<sup>107</sup> The PATRIOT Act increased the statutory maximum prison sentence to fifteen years, and also imposed a maximum sentence of life imprisonment if a death resulted from the prohibited activity.<sup>108</sup>

The most recent change to § 2339B occurred in 2004 as part of the Intelligence Reform and Terrorism Prevention Act of 2001.<sup>109</sup> Congress amended the definition of "material support" to include "training" and "expert advice or assistance"<sup>110</sup> and added the terms "any property, tangible or intangible, or service" to expand the scope of impermissible support.<sup>111</sup> Congress also added three subsections to § 2339B: §§ 2339B(h)–(j).<sup>112</sup> A violation of § 2339B(h) occurs when an individual "knowingly provide[s], attempt[s] to provide, or conspire[s] to provide a foreign terrorist organization with 1 or more individuals . . . to work under that terrorist organization's direction or control, or to organize, manage, supervise, or otherwise direct the operation of that organization."<sup>113</sup>

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financing terrorist activity] is not based upon the message or opinions espoused by a particular organization. Rather, the criminal prohibition is based on the documented illegal acts of that organization."); see also Tom Stacy, *The "Material Support" Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL'Y 461, 462–63 (2004) (discussing Congress' concerns in enacting 18 U.S.C. § 2339A and the fungible nature of money that allows terror organizations to divert it from charitable purposes to criminal conduct).

105. See 18 U.S.C. § 2339B(a)(1) (specifying that a person commits an offense when he or she "knowingly provides material support or resources to a foreign terrorist organization" and that a violation requires the person to "have knowledge" of the organization's status or activities, but containing no language requiring that a person act with intent in order to commit a violation (emphases added)).

106. See *id.* § 2339B(g)(4) ("[T]he term 'material support or resources' has the same meaning given that term in section 2339A . . .").

107. 18 U.S.C. § 2339B (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250.

108. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 810(d), 115 Stat. 272, 380.

109. Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762–64 (2004).

110. *Id.* § 6603(e), 118 Stat. at 3763.

111. *Id.* § 6603(a), 118 Stat. at 3762.

112. *Id.* § 6603(f), 118 Stat. at 3763–64.

113. 18 U.S.C. § 2339B(h) (2006 & Supp. 2009).

6. 18 U.S.C. § 2339C—Prohibitions Against the Financing of Terrorism

As part of the Anti-Terrorism Conventions of 2002, Congress codified 18 U.S.C. § 2339C.<sup>114</sup> Section 2339C criminalizes two types of conduct. First, § 2339C(a) punishes collecting or providing funds, and attempting or conspiring to collect or provide funds, with the knowledge or intention that they will be used to cause death or serious bodily injury in order to intimidate a population or influence the actions of a government or international organization.<sup>115</sup>

Eighteen U.S.C. § 2339C presents a telling contrast with § 2339B. Under § 2339B, providing support to a DFTO knowing it has or is engaged in terrorist activities is punishable by a maximum of fifteen years imprisonment.<sup>116</sup> In contrast, Congress imposed a maximum sentence of twenty years for violating § 2339C(a)<sup>117</sup>—only five years more than under § 2339B—by providing support “with the intention that such funds be used, or with the knowledge that such funds are to be used” to further an act of terror with the motive of intimidating a population or government.<sup>118</sup> While violating § 2339B is untethered from any specific act of terrorism or violence, a violation of § 2339C requires proof that the defendant knew the funds raised would be used or are intended to be used to fund an act of terrorism or other specified act of violence.<sup>119</sup> This contrast is arguably the best measure of Congressional priorities in defining the appropriate difference in punishment between these two distinct mindsets. It is also telling that this difference is dwarfed by the Sentencing Commission’s determination as reflected in U.S.S.G. section 3A1.4.<sup>120</sup>

The second type of activity punished by § 2339C is concealing material support knowing or intending that resources be provided or are to be provided to a DFTO.<sup>121</sup> The contrast between

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114. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 202–203, 116 Stat. 724, 724–28.

115. 18 U.S.C. § 2339C(a)(1)–(2) (2006 & Supp. 2009).

116. *Id.* § 2339B(a)(1).

117. *Id.* § 2339C(d)(1).

118. *Id.* § 2339C(a)(1).

119. *Id.* § 2339C(a)(1), (c)(2).

120. *See supra* notes 61–64 and accompanying text.

121. 18 U.S.C. § 2339C(c). The requirement that support go to a DFTO originates with 18 U.S.C. § 2339C(c)’s requirement that an offender know or intend that the support or resources provided were in violation of 18 U.S.C. § 2339B, which, by its title, specifies that its provisions relate to DFTOs. *Id.* § 2339B.

§ 2339C(c) and § 2339B is also instructive. Eighteen U.S.C. § 2339C(c) criminalizes concealment of resources related to violations of §§ 2339B or 2339C(a).<sup>122</sup> The maximum prison sentence for a violation of § 2339C(c) is ten years regardless of the underlying offense<sup>123</sup>—five years less than the maximum sentence for “knowingly” providing the support in the first place under § 2339B.<sup>124</sup>

### B. General Trends Among Terrorism Statutes

It is clear from the statutory scheme that Congress did not intend to punish a financial supporter of a DFTO or organization that commits a terrorist act as severely as an individual who commits the act itself.<sup>125</sup> The statutes addressing financing have a core maximum prison sentence range of ten to fifteen years, with the highest maximum at twenty years (unless a death results).<sup>126</sup> In contrast, the statutes that involve actual acts of terrorism or weapons use carry longer terms—up to life imprisonment or death.<sup>127</sup> These latter provisions address the primary perpetrators of violent acts of terrorism and are far more punitive. This difference suggests that Congress found financiers less dangerous or less culpable than the terrorists they finance, and so chose not to punish them as harshly.<sup>128</sup>

Charting these and other anti-terrorism statutes, it appears that the penalties are meant to be proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant’s actions, and to the nature of the organization’s actions. In summary, the analysis demonstrates:

- When Congress set a maximum prison sentence for providing funds to a terrorist organization with the specific intent that the funds be used to commit a crime of terrorism or violence intended to intimidate a population or a government, Congress limited the term of imprisonment to twenty years.<sup>129</sup>

122. *Id.* § 2339C(c).

123. *Id.* § 2339C(d).

124. *Id.* § 2339B(a)(1)

125. *Compare id.* § 2332a–b, *with id.* §§ 2332d, 2339A–C.

126. *Id.* §§ 2332d, 2339A–C.

127. *Id.* §§ 2332a–b.

128. *See, e.g.,* *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1014 (7th Cir. 2002) (“The fact that Congress imposed lesser criminal penalties for the financial supporters indicates perhaps that they found the financiers less dangerous or less culpable than the terrorists they finance . . .”).

129. 18 U.S.C. § 2339C(a).

- When Congress changed the statutory maximum prison sentence for providing material support to a DFTO with the less culpable mindset that the individual knows the organization is a DFTO and knows the DFTO is engaging or has engaged in terrorist acts, but does not intend to fund an act of terrorism or violence, it increased the sentence by five years to a maximum of fifteen years.<sup>130</sup>
- Congress authorized life in prison for material support of a DFTO only when a death or kidnapping occurs.<sup>131</sup>

A more thorough cataloging of the anti-terrorism statutes confirms the conclusion that extended terms of imprisonment (greater than ten or fifteen years) are reserved for crimes or acts of violence and acts that result in maiming and death.<sup>132</sup>

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130. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 810, 115 Stat. 272, 380; 18 U.S.C. § 2339B(a)(1).

131. 18 U.S.C. § 2339B(a)(1).

132. See *infra* tbl.1.

**Table 1: Material Support Crimes: Maximum Terms of Imprisonment**

<b>Use of Weapons of Mass Destruction: 18 U.S.C. § 2332a</b>		
§ 2332a(a)	Using, threatening, attempting, or conspiring to use a weapon of mass destruction if death results	Death or life imprisonment
§ 2332a(a)	Otherwise (if no death results)	Any term of years or for life
<b>Acts of Terrorism Transcending National Boundaries: 18 U.S.C. § 2332b</b>		
§ 2332b(c)(1)(A)	For a killing or if death results from other conduct covered by § 2332(b)	Death or for any term of years or for life
§ 2332b(c)(1)(B)	For kidnapping	For any term of years or for life
§ 2332b(c)(1)(C)	For maiming	Thirty-five years imprisonment
§ 2332b(c)(1)(D)	For assault with a dangerous weapon or if serious bodily injury results	Thirty years imprisonment
§ 2332b(c)(1)(E)	For destroying or damaging a structure or personal property	Twenty-five years imprisonment
§ 2332b(c)(1)(F)	For conspiracy or attempt	Same as if the offense had been completed
§ 2332b(c)(1)(G)	For threatening to commit one of the above	Ten years imprisonment
<b>Financing Transactions with a Country Designated as Supporting International Terrorism: 18 U.S.C. § 2332d</b>		
§ 2332d		Ten years imprisonment

<b>Providing Material Support to Terrorists: 18 U.S.C. § 2339A</b>		
§ 2339A(a)	If death results	Life imprisonment or a term of years
§ 2339A(a)	Otherwise (if no death results)	Fifteen years imprisonment
<b>Providing Material Support to DFTOs: 18 U.S.C. § 2339B</b>		
§ 2339B(a)(1)	If death results	Life imprisonment or a term of years
§ 2339B(a)(1)	Otherwise (if no death results) (after 2001)	Fifteen years imprisonment
§ 2339B(a)(1)	Otherwise (before 2001)	Ten years imprisonment
<b>Prohibitions Against Financing Terrorism: 18 U.S.C. § 2339C</b>		
§ 2339C(a)(1)	Providing or collecting funds with the intention or knowledge the funds are to be used to carry out (A) an act which constitutes an offense within the scope of a specified treaty; or (B) any other act intended to cause death or serious bodily injury to a civilian, or other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or abstain from doing any act	Twenty years imprisonment
§ 2339C(c)(2)	Knowingly concealing or disguising the nature, location, source, ownership, or control of any material support or resources (A) knowing or intending that the support or resources were provided, in violation of § 2339B; or (B) knowing or intending that any such funds are to be provided or collected, or knowing that the funds were provided or collected, in violation of § 2339C(a)	Ten years imprisonment

### III. Base Offense Guidelines for Terrorism Prison Sentences Compared to U.S.S.G. Section 3A1.4

Remembering that the objective is to assess whether U.S.S.G. section 3A1.4 results in an appropriate sentence for a violation of the statutes criminalizing material support for terrorism and supports a rational anti-terrorism policy, this Article next looks to the other Sentencing Guidelines addressing terrorism. Having contrasted the impact of U.S.S.G. section 3A1.4 with the statutory penalties for financing and other anti-terrorism offenses, one can contrast the impact of U.S.S.G. section 3A1.4 with the Sentencing Commission's efforts to craft base offense Guidelines for sentencing in terrorism cases.

#### A. *U.S.S.G. Section 2M5.3—Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists or for a Terrorist Purpose*

U.S.S.G. section 2M5.3 was promulgated effective November 1, 2002 under the PATRIOT Act.<sup>133</sup> It is a base offense Guideline found in the "Offense Conduct" section of the Guidelines.<sup>134</sup> U.S.S.G. section 2M5.3 applies to offenses under §§ 2339B and 2339C.<sup>135</sup>

U.S.S.G. section 2M5.3 sets a base offense level of twenty-six, which means a prison sentence range from sixty-three to seventy-eight months for a defendant in Criminal History Category I, and a range of 120 to 150 months for a defendant with a Criminal History Category VI.<sup>136</sup> The Guideline takes into account "Special Offense Characteristics," including whether

the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they

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133. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2002) (noting that the amendment was enacted in response to the PATRIOT Act and that it created a new Guideline at section 2M5.3 for offenses under 18 U.S.C. § 2339B).

134. See U.S. SENTENCING GUIDELINES MANUAL § 2M5.3 (2007). Specifically, section 2M5.3 falls under section 2, part M, which covers "Offenses Involving National Defense and Weapons of Mass Destruction." *Id.* ch. 2, pt. M.

135. *Id.* § 2M5.3 cmt. statutory provisions; see also 18 U.S.C. § 2339B(a)(1); 18 U.S.C. § 2339C(a)(1)(B).

136. U.S. SENTENCING GUIDELINES MANUAL § 2M5.3, ch. 5, pt. A, sentencing tbl.

are to be used to commit or assist in the commission of a violent act . . . .<sup>137</sup>

It also directs a sentencing judge to refer to other Guidelines in the event that an offense resulted in death, was tantamount to attempted murder, or involved the defendant providing certain types of weapons.<sup>138</sup>

It is important to note that U.S.S.G. section 2M5.3(b)(1) has an internal enhancement mechanism to calibrate the severity of the sentence to the culpability of the conduct and the harm.<sup>139</sup> For example, the means of support a defendant could provide are broken down—support can take the form of dangerous weapons, explosives, or funds provided with the intent or reason to believe that those funds will be used to purchase those items or to be used to commit a violent act—so that under this Guideline providing support demonstrates an intent to finance an act of violence.<sup>140</sup> Such an act results in an increase of two offense levels.<sup>141</sup> That jump results in the median sentencing range for a defendant increasing between seventeen months (for a defendant in Criminal History Category I) and eighteen months (for a defendant in Criminal History Category VI).<sup>142</sup>

*B. U.S.S.G. Section 2M6.1—Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy*

U.S.S.G. section 2M6.1 is another important point of comparison when mapping the sentencing landscape in order to assess the proportionality of a sentence under U.S.S.G. section 3A1.4. U.S.S.G. section 2M6.1 sets a base offense level of twenty-eight for most offenses to which it applies.<sup>143</sup> It, too, has an

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137. *Id.* § 2M5.3(b)(1).

138. *Id.* § 2M5.3(c).

139. *Id.* § 2M5.3(b)(1).

140. *Id.*

141. *Id.*

142. *Id.* ch. 5, pt. A, sentencing tbl. The range for offense level twenty-six within Category I is sixty-three to seventy months, and the range for offense level twenty-eight within Category I is seventy-eight to ninety-seven months. *Id.* At Category VI, offense level twenty-six results in a sentence of 120 to 150 months and offense level twenty-eight runs between 140 and 175 months. *Id.*

143. *Id.* § 2M6.1(a)(2); *see id.* § 2M6.1(a)(3)–(4) (providing statutes whose offenses carry different base offense levels); *see also id.* § 2M6.1(a)(1), (4) (listing special considerations which, when present, can alter the base offense level of twenty-eight).



internal enhancement mechanism to calibrate the sentence based upon the severity of the offense and the harm.<sup>144</sup> Under subsection (b), such factors as whether the offense involved a threat to use a weapon of mass destruction, whether any victim died, and whether the offense caused substantial disruption of public, governmental, or business functions can increase the base offense level under the Guideline.<sup>145</sup>

### C. Base Offense Guidelines and U.S.S.G. Section 3A1.4

The sentences generated by U.S.S.G. sections 2M5.3 and 2M6.1 on the one hand and section 3A1.4 on the other are significantly different because their approaches are different. First, and most importantly, in determining the defendant's Criminal History Category, the base offense Guidelines rely on a defendant's actual criminal history,<sup>146</sup> while U.S.S.G. section 3A1.4 creates a legal presumption that a defendant belongs in Criminal History Category VI.<sup>147</sup> Second, the base offense levels under U.S.S.G. sections 2M5.3 and 2M6.1 are twenty-six and twenty-eight, respectively,<sup>148</sup> but the minimum offense level under section 3A1.4 is level thirty-two.<sup>149</sup>

Two examples help demonstrate the contrasts between U.S.S.G. sections 2M5.3, 2M6.1, and 3A1.4. Assume an individual is convicted of a violation of 18 U.S.C. § 2339B, that is, providing material support to a DFTO with knowledge that the organization is a DFTO and that it has engaged in terrorist acts. Assume also that the defendant provided the funds with knowledge that the funds may be used to assist in committing some unspecified future violent act in order to intimidate a government. Further assume that the defendant has two prior felony convictions. Under U.S.S.G. section 2M5.3 alone the defendant's base offense level is twenty-eight and the Criminal History Category is II.<sup>150</sup> The sentencing range under the Guideline is between 87 and 108

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144. *Id.* § 2M6.1(a) (providing for base offense shifts for such factors as whether the offense was committed with the intent to harm the United States or the type of weapon(s) involved in the offense).

145. *Id.* § 2M6.1(b).

146. *Id.* §§ 2M5.3, 2M6.1 (containing no mention of any adjustment to Criminal History Category for defendants).

147. *Id.* § 3A1.4(b) ("In each such case [where the offense was a felony intended to promote a federal crime of terrorism], the defendant's Criminal History Category . . . shall be Category VI.>").

148. *Id.* §§ 2M5.3(a), 2M6.1(a)(2).

149. *Id.* § 3A1.4(a).

150. *Id.* § 2M5.3(a).

months.<sup>151</sup> If the defendant is sentenced with the added application of U.S.S.G. section 3A1.4, the defendant's offense level rises to forty and his or her Criminal History Category increases to VI.<sup>152</sup> This enhancement results in a sentencing range increase to between 360 months and life<sup>153</sup>—an increase of 273 months on the low end and life on the high end of the range.

Now, assume a second defendant who provides material support to a DFTO by providing a biological toxin with intent to coerce a government. Under U.S.S.G. section 2M6.1 the defendant's base offense level is forty-two.<sup>154</sup> With no prior convictions, and thus a Criminal History Category I, the sentencing range is 360 months to life.<sup>155</sup> Applying U.S.S.G. section 3A1.4, the offense level would be the highest possible, a level forty-three, and the Criminal History Category would rise to VI.<sup>156</sup> Taken together, the defendant's sentence rises to life imprisonment.<sup>157</sup>

Applying U.S.S.G. section 3A1.4 results in Sentencing Guidelines ranges that may cause glaring disparities in terrorism sentences because a less culpable defendant may receive a greater increase in his or her sentence than a defendant who commits a more serious offense. This possibility reveals flagrant inconsistencies in sentencing policy.<sup>158</sup> One must ask what

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151. *Id.* ch. 5, pt. A, sentencing tbl.

152. *Id.* § 3A1.4(a). Under Guidelines section 3A1.4, a felony offense that involved or was "intended to promote, a federal crime of terrorism" receives a base offense level increase of twelve levels—an offense level of twenty-eight under section 2M5.3 would become forty. *Id.* The Guidelines place the defendant in Criminal History Category VI. *Id.* § 3A1.4(b).

153. *Id.* ch. 5, pt. A, sentencing tbl.

154. *Id.* § 2M6.1(a).

155. *Id.* ch. 5, pt. A, sentencing tbl.

156. *Id.* § 3A1.4.

157. *Id.* ch. 5, pt. A, sentencing tbl. This theoretical calculation assumes that applying Guidelines sections 2M6.1 and 3A1.4 does not create a double jeopardy violation, so both would and could be applied concurrently. See *infra* Part IV.A. The court could, however, depending on the circumstances of the offense, choose not to start at a base level forty-two, but to use a lower base offense level, possibly a level twenty-eight. See U.S. SENTENCING GUIDELINES MANUAL §§ 2M6.1(a), 2M6.1(a)(2). In theory, if the district court were to find that the defendant intended to aid a DFTO, as instructed in section 2M6.1, the court would be obliged to apply section 2M6.1(a)(1), because the court is required to assign the highest base offense level. *Id.* § 2M6.1(a)(1).

158. Cf. *United States v. McMorrow*, 471 F.3d 921 (8th Cir. 2006) (finding that imposing a 360-month prison sentence on a defendant convicted of mailing threatening communications, extortion, and threatening to use a weapon of mass destruction was within the range allowable by the Sentencing Guidelines); *United States v. Neskini*, 319 F.3d 88 (2d Cir. 2003) (holding that applying Guidelines section 3A1.4 did not violate due process rights of a defendant with no prior

U.S.S.G. section 3A1.4 adds to the equation that improves sentencing or anti-terrorism policy when it creates such draconian anomalies that (in the case of defendants who are foreign nationals) become newsworthy in the countries from which the defendants have come fostering a belief that the U.S. justice system is biased and fundamentally unfair.<sup>159</sup> It is difficult to find anything but detriment in this result.

#### IV. U.S.S.G. Section 3A1.4 and the Constitution

##### A. *Double Jeopardy*

The policy conundrum over U.S.S.G.'s failure to require additional legal conclusions is properly understood to be a constitutional flaw as well. The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution requires that no "person be subject for the same offence to be twice put in jeopardy of life or limb."<sup>160</sup> *Blockburger v. United States*<sup>161</sup> is the controlling double jeopardy sentencing case.

Under the Supreme Court's *Blockburger* analysis, the definitive issue is whether a defendant has been punished twice for the same conduct, i.e., whether his or her convictions are multiplicitous.<sup>162</sup> In *Blockburger*, the defendant was charged with violating the Harrison Narcotic Act for selling morphine.<sup>163</sup> The defendant was found guilty on three of five counts<sup>164</sup> and appealed, asserting, inter alia, that selling drugs to the same person on consecutive days should constitute a single continuous offense.<sup>165</sup> The Supreme Court disagreed, finding that each of *Blockburger*'s charges represented distinct offenses because each required proof of distinct conduct.<sup>166</sup> The *Blockburger* test for a Double Jeopardy Clause violation is whether the second statute of conviction requires proof of an essential element that is different from the essential elements of the first offense.<sup>167</sup> If the two statutes of

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convictions).

159. Cf. David Feige, *The Real Price of Trying KSM: Defense Lawyers Will Inevitably Create Bad Law*, SLATE, Nov. 19, 2009, <http://slate.com/id/2236146/>.

160. U.S. CONST. amend. V.

161. 284 U.S. 299 (1932).

162. *Id.* at 301.

163. *Id.* at 300-01.

164. *Id.*

165. *Id.* at 301.

166. *Id.* at 301-04.

167. *Id.* at 304 ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

conviction require proof of the same elements, the defendant's constitutional right to be free from multiplicitous punishment has been violated and he or she may be punished under only one of the two offenses.<sup>168</sup> However, if the two offenses have distinct elements, a single transaction may result in conviction under more than one statute without violating the defendant's Fifth Amendment right against double jeopardy.<sup>169</sup>

In the sentencing context, the *Blockburger* test has been applied to the Sentencing Guidelines most often in cases involving gun offenses when a defendant has been charged with a violation of 18 U.S.C. § 922(g), prohibiting possession of a firearm or ammunition by a list of individuals, including felons, illegal aliens, or anyone committed to a mental institution.<sup>170</sup> But the key point is that the *Blockburger* analysis *has* been applied to the Sentencing Guidelines,<sup>171</sup> carrying implications for terrorism sentences as well.

Let us take the example of defendants convicted of two similar terrorism-related crimes: providing material support to a

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determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”).

168. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (“[T]he Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.”).

169. *See Blockburger*, 284 U.S. at 300–01 (“A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871))).

170. United States Sentencing Guidelines section 2K2.1 provides that if a defendant is convicted of violating § 922(g) and the defendant possessed the firearm in connection with another felony, the base offense level rises from a level twelve to a level eighteen. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2007). When the defendant comes into possession of the firearm as the result of a burglary, the question is whether the firearm and ammunition were “possessed in connection” with the burglary (another felony) to result in an upward adjustment under section 2K2.1(b)(6). Defendants have argued that another “felony offense” must be an offense distinct from the conduct by which the defendant acquired the firearm. *See, e.g.*, *United States v. Stokes*, 858 F. Supp. 434, 438–41 (D.N.J. 1994) (rejecting defendant’s claim that a five year sentence enhancement as a result of his possession of firearm during a hijacking violated the Double Jeopardy Clause). The government has argued under a *Blockburger* analysis that the possession of the firearm and the possession in connection with another felony require proof of an essential element that is different, so the adjustment should apply. *Id.* Courts that have addressed the question have found that the *Blockburger* analysis is the clearest analysis under which to do this calculation. *Id.* at 438; *United States v. Stewart*, 780 F. Supp. 1368 (N.D. Fla. 1991).

171. *See United States v. McAninch*, 994 F.2d 1380, 1385 (9th Cir. 1993) (explaining that the “relevant comparison in determining whether there was double counting” between two Guidelines is to compare the applicable Guidelines provisions, not the Guidelines provisions and the criminal code).

DFTO under 18 U.S.C. § 2339B and providing funds knowing that they are to be used to promote a federal crime of terrorism under 18 U.S.C. § 2339C(a)(1)(B). The base offense levels for both of these crimes are determined under U.S.S.G. section 2M5.3,<sup>172</sup> and both offenses are subject to sentence enhancements under U.S.S.G. section 3A1.4 if the offense qualifies as a federal crime of terrorism.<sup>173</sup> Under 18 U.S.C. § 2332b(g)(5), these offenses are federal crimes of terrorism if they are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct . . . .”<sup>174</sup>

In the case of the defendant convicted of knowingly providing material support to a DFTO under 18 U.S.C. § 2339B, assume that the government cannot prove beyond a reasonable doubt that the defendant committed the offense in a manner “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”<sup>175</sup> as required for the offense to qualify as a “federal crime of terrorism.”<sup>176</sup> The defendant would be sentenced solely under U.S.S.G. section 2M5.3.<sup>177</sup> Because U.S.S.G. section 3A1.4 requires proof of a fact that U.S.S.G. section 2M5.3 does not,<sup>178</sup> applying both U.S.S.G. sections 3A1.4 and 2M5.3 would not result in a double jeopardy violation under *Blockburger*.

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172. U.S. SENTENCING GUIDELINES MANUAL § 2M5.3, cmt. statutory provisions (2007) (specifying the statutory provisions to which the Guideline applies and listing 18 U.S.C. §§ 2339B, 2339C(a)(1)(B)).

173. *Id.* § 3A1.4, cmt. n.1; 18 U.S.C. § 2332b(g)(5) (2006 & Supp. 2009).

174. 18 U.S.C. § 2332b(g)(5)(A). This intent requirement is one of two factors that determine whether an offense is a federal crime of terrorism. *Id.* § 2332b(g)(5). The other factor is whether an offense violates one in a specified list of statutes. *Id.* § 2332b(g)(5)(B). Violations of §§ 2339B and 2339C are on this list. *Id.*

175. *Id.* § 2332b(g)(5)(A).

176. *Id.* § 2332b(g)(5); U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.1.

177. U.S. SENTENCING GUIDELINES MANUAL app. A (designating Guidelines section 2M5.3 as the applicable Guideline for violations of § 2339B).

178. Compare U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.4(a), 3A1.4(a) cmt. n.1 (specifying that the Guideline applies to felonies involving or intended to promote federal crimes of terrorism and referring to 18 U.S.C. § 2332b(g)(5) for the definition of federal crimes of terrorism), and 18 U.S.C. § 2332b(g)(5) (providing the definition for federal crimes of terrorism, which includes the requirement that such offenses be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”), with U.S. SENTENCING GUIDELINES MANUAL § 2M5.3 (lacking any requirement that the Guideline apply only to federal crimes of terrorism or to offenses that are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”).

However, let us assume instead a hypothetical defendant convicted under 18 U.S.C. § 2339C(a)(1)(B) of a single transaction of providing funds knowing that they are to be used to promote a federal crime of terrorism. Since the conviction itself is based on a determination that the defendant acted with a purpose to influence or affect the conduct of government by intimidation or coercion,<sup>179</sup> as soon as the defendant has been convicted all elements are present to enhance his or her sentence under U.S.S.G. section 3A1.4.<sup>180</sup> Thus, one can argue that our defendant suffers from a double jeopardy violation under *Blockburger* because he or she would receive multiple punishments for the same conduct—one under the base offense Guideline and then an enhancement under U.S.S.G. section 3A1.4—since both Guidelines rely on conviction for the same essential elements and findings of fact. However, this is the lesser of the constitutional questions U.S.S.G. section 3A1.4 raises.

*B. Apprendi, Blakely, Booker, and Circumventing Proof to a Jury Beyond a Reasonable Doubt*

In a classic *Blockburger* analysis, prosecutions under §§ 2339B and 2339C do not present a double jeopardy problem because their intent elements differ: § 2339B criminalizes “knowingly” providing material support to a DFTO,<sup>181</sup> while § 2339C criminalizes collecting or providing funds with the “intention that such funds be used, or with the knowledge that such funds are to be used” to harm a civilian with the purpose of “compel[ling] a government . . . to do or to abstain from doing any act.”<sup>182</sup> But sentencing these offenses under U.S.S.G. section 3A1.4 poses a different constitutional issue. In order to obtain a conviction under § 2339C(a)(1)(B), a jury must find, beyond a reasonable doubt, that the defendant acted with a purpose to influence or affect the conduct of government by intimidation or coercion.<sup>183</sup> As noted above, such a conviction would then automatically be subject to a sentence enhancement under

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179. 18 U.S.C. § 2339C(a)(1)(B) (2006 & Supp. 2009) (criminalizing any act with the purpose “to intimidate a population, or to compel a government . . . to do or abstain from doing any act”).

180. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.1 (applying the Guideline to all federal crimes of terrorism, as defined in 18 U.S.C. § 2332b(g)(5)); 18 U.S.C. § 2332b(g)(5) (2006 & Supp. 2009).

181. 18 U.S.C. § 2339B(a)(1) (2006 & Supp. 2009).

182. *Id.* § 2339C(a)(1).

183. *Id.* § 2339C(a)(1)(B).

U.S.S.G. section 3A1.4.<sup>184</sup> However, a conviction under § 2339B requires only that a jury find beyond a reasonable doubt that a defendant knowingly provided funds to a DFTO—it requires no determination that the defendant knew the funds were to be used to support terrorism.<sup>185</sup> In order for this conviction to be subject to a sentence enhancement under U.S.S.G. section 3A1.4, a *judge* must determine that the defendant's actions were “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”<sup>186</sup>—and he or she may make this determination under the lower preponderance of the evidence burden of proof.<sup>187</sup> In this way the government can get the same sentencing “bang for its buck” by seeking a jury conviction under the easier to prove § 2339B offense, then getting a judge to determine that the defendant acted with the requisite intent for a U.S.S.G. section 3A1.4 sentence enhancement under a lower burden of proof.

Under the Due Process Clause of the Fifth Amendment<sup>188</sup> and the Trial by Jury Clause of the Sixth Amendment,<sup>189</sup> “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”<sup>190</sup> The Supreme Court considered whether this requirement extends into the sentencing realm in *Apprendi v. New Jersey*.<sup>191</sup> In *Apprendi*, the defendant fired a gun into the home of an African American family, claiming that he “[did] not want them in the neighborhood.”<sup>192</sup> Apprendi pled guilty to three of twenty-three counts in the indictment against him,<sup>193</sup> and the prosecutor agreed to dismiss the other charges.<sup>194</sup> At sentencing, however, the state requested an enhanced sentence for an offense committed with a biased

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184. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4, cmt. n.1 (applying the Guideline to all federal crimes of terrorism, as defined in 18 U.S.C. § 2332b(g)(5)); see also 18 U.S.C. § 2332b(g)(5) (defining “federal crime of terrorism”).

185. 18 U.S.C. § 2339B(a)(1) (“To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . .” (emphasis added)).

186. *Id.* § 2332b(g)(5)(A).

187. See *infra* Part IV.B.1–2.

188. U.S. CONST. amend. V.

189. *Id.* amend. VI.

190. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

191. 530 U.S. 466 (2000).

192. *Id.* at 469.

193. *Id.* at 469–70.

194. *Id.* at 470.

purpose.<sup>195</sup> After an evidentiary hearing into Apprendi's purpose, the trial court judge found by a preponderance of evidence that Apprendi had acted "with a purpose to intimidate" under the statute.<sup>196</sup> The judge sentenced Apprendi to twelve years imprisonment on the enhanced count;<sup>197</sup> without the enhancement the offense would have carried a Guidelines sentence range of five to ten years.<sup>198</sup>

The Supreme Court held that the enhancement statute was unconstitutional.<sup>199</sup> "Other than the fact of a prior conviction," said the Court, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>200</sup>

Cases following *Apprendi* have affirmed its basic holding. In *Blakely v. Washington*,<sup>201</sup> the Court heard the case of a defendant who pled guilty to kidnapping his estranged wife.<sup>202</sup> Based upon the facts admitted, Blakely faced a maximum prison sentence of fifty-three months.<sup>203</sup> The sentencing court, however, determined *sua sponte* that Blakely had the specific intent of acting with deliberate cruelty with respect to the underlying offense (second degree kidnapping).<sup>204</sup> The judge sentenced Blakely to ninety months imprisonment.<sup>205</sup> But the Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."<sup>206</sup> The Court invalidated Blakely's sentence as inconsistent with the Sixth Amendment.<sup>207</sup>

*United States v. Booker*<sup>208</sup> involved two defendants charged with drug crimes.<sup>209</sup> Defendant Booker was found guilty in a jury

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195. *Id.*

196. *Id.* at 470-71.

197. *Id.* at 471.

198. *Id.* at 469-70 (identifying Count Eighteen, to which Apprendi pleaded guilty, as a second-degree possession of a firearm for unlawful purpose charge and noting that second-degree offenses carry a penalty range of five to ten years under state law).

199. *Id.* at 491-92.

200. *Id.* at 490.

201. 542 U.S. 296 (2004).

202. *Id.* at 298.

203. *Id.*

204. *Id.* at 300.

205. *Id.* at 298.

206. *Id.* at 303.

207. *Id.* at 305.

208. 543 U.S. 220 (2005).



trial under 21 U.S.C. § 841(a)(1),<sup>210</sup> and faced a Guidelines sentence of between 210 and 262 months in prison.<sup>211</sup> But during the sentencing proceeding Booker's trial judge concluded by a preponderance of the evidence that Booker had possessed additional drugs and was guilty of obstructing justice.<sup>212</sup> The Guidelines range for Booker's sentence jumped to between 360 months and life.<sup>213</sup> The judge sentenced him to thirty years.<sup>214</sup>

In the same case, defendant Fanfan was convicted of conspiracy to distribute and possession with intent to distribute cocaine.<sup>215</sup> The jury found that Fanfan possessed an amount of cocaine that would have qualified him for a sentence enhancement of five or six years.<sup>216</sup> Without additional findings, his Guidelines maximum prison sentence was seventy-eight months.<sup>217</sup> At Fanfan's sentencing hearing the trial judge found additional facts that elevated the Guidelines-recommended sentence to between 188 and 235 months.<sup>218</sup> The trial judge declined to follow the enhancement required by the additional fact-finding, and sentenced Fanfan in accordance with the jury verdict.<sup>219</sup>

The *Booker* Court held that *Blakely*, with regard to maximum statutory sentences, also applies to the United States Sentencing Guidelines.<sup>220</sup> It explicitly endorsed the *Apprendi* holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."<sup>221</sup> The Court found, however, that making the Sentencing Guidelines mandatory was "incompatible" with the constitutional requirement that sentence enhancements be heard by a jury.<sup>222</sup>

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209. *Id.*

210. *Id.* at 227.

211. *Id.* In addition, the statute under which Booker was charged prescribed a minimum prison sentence of ten years. 28 U.S.C. § 841(b)(1)(A)(iii) (2002).

212. *Booker*, 543 U.S. at 227.

213. *Id.*

214. *Id.*

215. *Id.* at 228.

216. *Id.* (noting that the jury answered "yes" to the specific question of whether the amount of cocaine involved was 500 grams or more, and that the jury verdict would have required an enhanced sentence of five or six years).

217. *Id.*

218. *Id.*

219. *Id.* at 229.

220. *Id.* at 243.

221. *Id.* at 244.

222. *Id.* at 245.

Instead, the Court ruled that the Guidelines are “effectively advisory.”<sup>223</sup> Both Booker’s and Fanfan’s sentences were remanded in light of the Court’s decision.<sup>224</sup>

1. The Applicable Standard of Proof Required for U.S.S.G. Section 3A1.4

After *Booker* and *Blakely*, there is a serious argument that unless a jury finds beyond a reasonable doubt that a defendant had the intent required to apply U.S.S.G. section 3A1.4, there is a violation of the Due Process Clause of the Fifth Amendment and the Trial by Jury Clause of the Sixth Amendment as interpreted in *Apprendi*.<sup>225</sup> U.S.S.G. section 3A1.4 can be distinguished from the statute at issue in *Apprendi* only on the grounds that U.S.S.G. section 3A1.4 is “discretionary.”<sup>226</sup> But even after these cases the Sentencing Commission has continued to support a preponderance of the evidence standard for Guidelines application.<sup>227</sup> Courts

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223. *Id.*

224. *Id.* at 267–68.

225. This represents a change from cases prior to *Booker*, in which the Supreme Court authorized use of the preponderance of the evidence standard in the majority of sentencing determinations. See *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91–92 (1986)) (authorizing the use of the preponderance of the evidence, but noting “a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.”); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (explaining that when the disputed factor becomes “a tail which wags the dog of the substantive offense,” due process requires the element to be a consideration of the sentence and not an element of the offense).

226. Compare N.J. STAT. ANN. § 2C:44-3, -3(e) (1995) (“The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime . . . to an extended term if it finds, by a preponderance of the evidence,” that there are grounds to show that the defendant “acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity”), with U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007), and *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that the United States Sentencing Guidelines are “effectively advisory”).

227. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2007) (post-dating *Booker* and stating that “[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”). But cf. *Booker*, 543 U.S. at 244 (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”); *id.* at 319 n.6 (Thomas, J., dissenting) (noting that “[t]he commentary to [Guidelines section] 6A1.3 states that “[t]he [Sentencing] Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy

have followed suit, ruling that juries need not find sentence-determinative facts because sentencing is discretionary, and that there is no constitutional problem so long as the sentence imposed is below the “statutory maximum.”<sup>228</sup>

In *United States v. Gray*,<sup>229</sup> a district court in West Virginia heard the case of two men charged with drug trafficking.<sup>230</sup> The defendants pled guilty,<sup>231</sup> and the judge held a hearing to determine their sentences.<sup>232</sup> During the sentencing phase, however, the judge declined to rule that the Constitution required that he find the facts at sentencing beyond a reasonable doubt,<sup>233</sup> and decided that for future cases, after first using the preponderance standard to determine the facts,<sup>234</sup> he would measure his findings against the reasonable doubt standard to inform himself of how much deference to accord those facts in determining the advisory Guidelines range.<sup>235</sup> Judge Goodwin explained his reasoning this way:

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concerns in resolving disputes regarding application of the guidelines to the facts of a case.’ The Court’s holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.”).

228. *Cf.* *United States v. Pirnani*, 406 F.3d 543, 551 n.4 (8th Cir. 2005) (“Nothing in *Booker* suggests that sentencing judges are required to find sentence-enhancing facts beyond a reasonable doubt under the advisory Guidelines regime.”); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (“The sentencing judge is entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence.”); *United States v. Graham*, 275 F.3d 490 (6th Cir. 2001) (vacating defendant’s sentence for charges relating to weapons, drugs, and conspiracy to commit offenses against the United States because the sentence exceeded the combined maximum prison sentences of all counts of conviction and thus represented an *Apprendi* violation).

229. 362 F. Supp. 2d 714 (S.D. W.Va. 2005), *aff’d* 491 F.3d 138 (4th Cir. 2007).

230. *Id.* (holding that the application of the preponderance of the evidence standard to guilty pleas for drug charges did not violate the Sixth Amendment).

231. *Id.* at 716–17.

232. *Id.* at 717.

233. *Id.* at 720 (explaining that it is a “long-standing and deeply cherished tradition” to rely on the beyond a reasonable doubt standard at sentencing, but finding that doing so is not constitutionally required).

234. *Id.* at 723 (noting that in the future the judge would first use the preponderance of the evidence standard when considering the facts of a case).

235. *Id.* (“Accordingly, after I calculate and consider the advisory Guidelines for each defendant by a preponderance of the evidence in accordance with *Booker*, I will consider what the Guideline range would be if based solely on conduct that I have found beyond a reasonable doubt. While this additional consideration is no more binding on my determination than the advisory Guidelines themselves, it will help me to weigh the reliability of the advice provided by the Guidelines, and will inform the exercise of my discretion as I determine an appropriate sentence in light

The burden of proof represents a substantive embodiment of social values regarding the risk of error. Furthermore, ‘standards of proof are important for their symbolic meaning as well as for their practical effect.’ The reasonable-doubt standard in particular serves as a reminder and a message that ‘in the administration of criminal justice, our society imposes almost the entire risk of error upon itself.’ As a tool for reducing the risk of error, reasonable doubt retains its usefulness in the advisory regime. As Justice Harlan noted in his concurrence in [*in re*] *Winship*, the chosen standard of proof operates ‘to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’

The practical effect of fact finding at sentencing, even under the advisory regime, is most often to increase a defendant’s period of incarceration based on findings that I make by a preponderance of the evidence. The risk of error is not insignificant or inconsequential. Even though the defendant is already theoretically exposed to the maximum prison term allowed by statute, an erroneous factual determination regarding relevant conduct at sentencing will likely result in a longer period of incarceration than if the determination were not made. It therefore seems important to consider the risk of error when calculating the advisory range of incarceration. The reasonable-doubt standard presents a useful tool for closing the margin of error in this context. In essence, it helps me to measure the degree of certainty that I have in the Guideline advice before I sentence a defendant to prison.<sup>236</sup>

## 2. Judges or Juries: Who Decides Whether to Apply U.S.S.G. Section 3A1.4?

It is not just the standard of proof that U.S.S.G. section 3A1.4 calls into question; one must ask whether it should be a judge or a jury who makes a finding with such an impact on the sentence. In *Ring v. Arizona*,<sup>237</sup> the Supreme Court held, “[i]f a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”<sup>238</sup>

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of the advisory Guideline range and the 3553(a) factors.”).

236. *Id.* at 722–23 (citations omitted); *accord* *United States v. Thomas*, 360 F. Supp. 2d 238, 241 (D. Mass. 2005) (holding that the impact of a finding of crack versus powder cocaine has an extraordinarily powerful impact on the sentence and the court is justified in requiring more proof than the testimony of a chemist identifying the substance as cocaine base and that of an agent stating that in his opinion it was crack).

237. 536 U.S. 584 (2002).

238. *Id.* at 602 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482–83 (2000)).

In *Booker*, the Supreme Court discussed the trend of legislatures selecting facts that authorize or mandate heavier sentences, thereby increasing the judge's power and diminishing that of the jury.<sup>239</sup> The Court explained:

As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed. As it thus became clear that sentencing was no longer taking place in the tradition that Justice Breyer invokes [in his dissent], the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.<sup>240</sup>

The Supreme Court found that it did not matter which body decided to enhance a sentence, saying:

Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of 10 more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State."<sup>241</sup>

No one should doubt that the framers would be troubled by a judge ruling that a sentence that would be no more than fifty-seven months under the Sentencing Guidelines based upon the findings of the jury rises to 1860 months based upon a district court judge's findings, under a preponderance of the evidence standard,<sup>242</sup> that

239. As the Court stated:

In 1986 . . . our own cases first recognized a new trend in the legislative regulation of sentencing when we considered the significance of facts selected by legislatures that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime . . . . The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury.

United States v. Booker, 543 U.S. 220, 236 (2005).

240. *Id.* at 237 (citations omitted).

241. *Id.* at 238 (quoting Blakely v. Washington, 542 U.S. 296, 313–14 (2004)).

242. See, e.g., United States v. Hammoud, 381 F.3d 316, 362–63 (4th Cir. 2004) (Motz, J., dissenting), *vacated*, 543 U.S. 1097 (2005), *sentence vacated*, 405 F.3d 1034 (4th Cir. 2005) ("[T]he judge made findings with respect to numerous facts that had never been considered by the jury or proved beyond a reasonable doubt. On the basis of these findings, the district judge sentenced Hammoud not to 57 months, but to 155 years. . . . [T]he district judge 'reduced' Hammoud's sentence from the Guidelines range of life to 'only' 155 years—the total maximum sentence authorized under the statutes governing the offenses for which Hammoud was

the defendant intended “to influence or affect the conduct of government by intimidation or coercion.”<sup>243</sup>

*Blakely* and *Booker* appear to indicate that to some as yet unspecified degree, the Fifth and Sixth Amendments apply in the sentencing context.<sup>244</sup> Under the *Booker* remedy, sentencing is a hybrid, neither purely discretionary nor mandatory, but “still profoundly influenced by the rules, namely the Guidelines.”<sup>245</sup> Disputed facts that increase the Guidelines range continue to have a measurable effect on the sentence and may be determined by the judge by a preponderance of the evidence.<sup>246</sup> The question is will the Supreme Court draw the line for discretionary consideration of facts, and if so, where?

#### V. U.S.S.G. Section 3A1.4 and Intent Requirements for Crimes Supporting Terrorism

To apply U.S.S.G. section 3A1.4, the sentencing court need not find additional facts or reach additional legal conclusions—the Guideline applies without proof of any conduct or motive beyond that covered by the base offense Guideline in each case.<sup>247</sup> This is

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convicted.”); see also *id.* at 327 (majority opinion) (explaining that the terrorism enhancement under U.S.S.G. section 3A1.4 placed Hammoud in Criminal History Category VI with a base offense level of forty-three, indicating a sentence of life imprisonment); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl (2007) (indicating a sentence of life imprisonment for a defendant in Criminal History Category VI with base offense level forty-three). See *infra* Part VI for a discussion of courts’ sentence “stacking” practices, which led to Hammoud’s sentence.

243. *Hammoud*, 381 F.3d at 356 (explaining the district court’s conclusion, and the circuit court’s approval of that conclusion, that Hammoud’s offenses were committed with the intent that qualified them as federal crimes of terrorism); see also 18 U.S.C. § 2332b(g)(5)(A) (2006 & Supp. 2009) (noting the intent requirement for a federal crime of terrorism).

244. *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 305.

245. *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (“Sentencing today—even *post-Booker*—is still profoundly influenced by the rules, namely the Guidelines. That is what the remedy opinion admonishes; that is what the *post-Booker* case law suggests. It is, in effect, a hybrid regime—neither purely discretionary nor mandatory Guidelines.”); see *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

246. See *infra* Part VIII.

247. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (containing no mention of enhanced requirements for an offender’s conduct or motive). One could try to defend the anomaly by arguing that U.S.S.G. section 3A1.4 is found in Chapter Three of the Guidelines, which houses “victim related” adjustments. *Id.* ch. 3, pt. A (outlining Guidelines’ “Victim-Related Adjustments”). The flaw with this argument is that, despite the chapter heading, Guidelines section 3A1.4 is in no way dependent upon the harm or the victim; the section makes no mention of either. *Id.* § 3A1.4(a) (specifying that sentencing increases are contingent upon the offender’s

so even though U.S.S.G. section 3A1.4 does contain a particularized intent requirement; its application to felonies requires that a defendant committed a federal crime of terrorism “calculated to influence or affect the conduct of government by intimidation or coercion.”<sup>248</sup> This requirement illustrates the disconnect between U.S.S.G. section 3A1.4 and 18 U.S.C. § 2339B. Violating § 2339B is *not*, on its face, a “federal crime of terrorism”—it requires only that a defendant provide support with the knowledge the recipient is a DFTO.<sup>249</sup> Thus applying U.S.S.G. section 3A1.4 punishes a defendant who has pled guilty to § 2339B as if he or she had committed a different offense than the crime of conviction.<sup>250</sup> Reinforcing this conclusion is that the predicate at issue is “offense conduct”—classically an essential element of the crime.<sup>251</sup>

If Fifth Amendment due process is to be meaningful after *Booker*, and if that due process is to be properly understood in light of the protections of the Sixth Amendment, then the argument can be made that this predicate must be found beyond a reasonable doubt by a jury.

## VI. Conviction on Multiple Counts and “Stacking” Sentences Under U.S.S.G. Section 3A1.4

U.S.S.G. section 3A1.4’s impact is most devastating when a defendant is compelled to plead to multiple counts or goes to trial and is convicted of multiple counts. In criminal cases, the government’s power to drop charges as an incentive for the

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intent to promote a federal crime of terrorism without mentioning requirements for victims or resulting harm). Guidelines sections 2M5.3 and 2M6.1 are the terrorism Sentencing Guidelines that provide for base offense adjustments based on victims and resulting harm. *Id.* §§ 2M5.3(c)(1)–(3), 2M6.1(b)(2)–(d)(1).

248. 18 U.S.C. § 2332b(g)(5) (defining “federal crime of terrorism” and incorporated by reference into Guidelines section 3A1.4); U.S. SENTENCING GUIDELINES MANUAL § 3A1.4, cmt. n.1.

249. 18 U.S.C. § 2339B (2006 & Supp. 2009); *see also id.* § 2332b(g)(5)(A)–(B) (designating a violation of 18 U.S.C. § 2339B a federal crime of terrorism, but only when a defendant’s conduct is also “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”).

250. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (requiring a finding of a felony which intended to promote a federal crime of terrorism), *with* 18 U.S.C. § 2339B (requiring a finding of knowingly giving material support or resources to a terrorist organization or attempting or conspiring to do so).

251. *Cf.* *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000) (“[W]e agree wholeheartedly . . . that merely because the state legislature placed its hate crime sentence ‘enhancer’ ‘within the sentencing provisions’ of the criminal code ‘does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.’” (citation omitted)).

defendant to plead guilty is coercive<sup>252</sup>—one may argue whether this discretion is good or bad, but one cannot argue that a reduction in the number of charges, especially those carrying higher sentences, is a powerful tool to “encourage” a defendant to plead guilty.<sup>253</sup> This dynamic could have particularly serious consequences in terrorism cases when the defendant faces the prospect of being sentenced under U.S.S.G. section 3A1.4.

The Sentencing Guidelines, which many U.S. circuit courts have adopted as reasonable standards,<sup>254</sup> instruct courts that if the Guidelines sentence is higher than the maximum statutory sentence for the most serious offense, then the sentences for the offenses of conviction should be “stacked”—imposed to run consecutively, not concurrently—until the Guidelines sentence is reached.<sup>255</sup> As a result, a defendant who is convicted of a single material support charge and a series of minor related or unrelated offenses can face a sentence dramatically greater than the statutory maximum. The greater sentence is *not* the result of the Sentencing Guideline’s grouping protocol reflecting cumulative culpability for all of the charged offenses; rather, it is the result of the fact that the minor unrelated charges can add fuel to U.S.S.G. section 3A1.4.<sup>256</sup>

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252. See *United States v. Rahman*, 189 F.3d 88, 157 (2d. Cir. 1999) (advocating for discretion on the part of prosecutors in avoiding duplicitous charges for a single action while recognizing that prosecutors are granted absolute immunity and given the presumption of proper conduct).

253. See *Schloss v. Bouse*, 876 F.2d 287, 291 (2d. Cir. 1989) (asserting that plea bargaining can be seen as coercive where prosecutors promise to drop certain charges in exchange for guilty pleas).

254. See, e.g., *United States v. Chriswell*, 401 F.3d 459, 463 (6th Cir. 2005) (“The Supreme Court in *Booker* severed the statutory provisions which made the Sentencing Guidelines mandatory in nature, thus rendering the Guidelines ‘effectively advisory.’ However, 18 U.S.C. § 3553(a) remains in effect and binding on federal courts, which ‘requires judges to take account of the Guidelines together with other sentencing goals.’ Thus, the proper interpretation of the various provisions of the Sentencing Guidelines remains vitally important for this court.”); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (“Although *Booker* excised the mandatory duty to apply the Guidelines, the sentencing court remains under a duty pursuant to § 3553(a) to “consider” numerous factors . . . . This duty to ‘consider’ the Guidelines will ordinarily require the sentencing judge to determine the applicable Guidelines range even though the judge is not required to sentence within that range.”); *United States v. Antonakopoulos*, 399 F.3d 68, 76 (1st Cir. 2005) (“Under the post-*Booker* approach, ‘district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing,’ subject to review by the courts of appeals for ‘unreasonableness.’”).

255. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2007).

256. See, e.g., *infra* text accompanying notes 276–282 (providing examples of how minor charges can result in higher sentences under Guidelines section 3A1.4).



### A. Standard Grouping Calculations

Ordinarily, a defendant's total sentence is determined by "grouping" criminal conduct pursuant to U.S.S.G. sections 3D1.1–3D1.5.<sup>257</sup> U.S.S.G. section 3D1.1(a) instructs a sentencing court first to "group" closely related counts.<sup>258</sup> U.S.S.G. section 3D1.2 specifies that "[a]ll counts involving substantially the same harm shall be grouped together in a single Group."<sup>259</sup> Counts involve substantially the same harm when they "involve the same victim and the same act or transaction."<sup>260</sup> Counts that involve "the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan" also involve substantially the same harm and should be grouped.<sup>261</sup>

After the counts are grouped, a court must determine each Group's offense level pursuant to U.S.S.G. section 3D1.3.<sup>262</sup> The court then determines the combined offense level under the rules set out in U.S.S.G. section 3D1.4.<sup>263</sup> If the counts are grouped pursuant to U.S.S.G. section 3D1.2(a)–(c), the offense level is that of the most serious of the counts in the Group.<sup>264</sup> Alternatively, if the counts are grouped pursuant to U.S.S.G. section 3D1.2(d)—because the severity of the grouped counts is measured by the total harm or loss, for example in fraud cases—the offense level applicable to the Group is determined by the aggregate quantity at issue, for example, the quantity of drugs, the amount of tax avoided, etc.<sup>265</sup> With these grouping calculations in hand, U.S.S.G. section 3D1.4 instructs the court to start with the Group having the highest offense level and increase that offense level as required based upon the number of total "units."<sup>266</sup> Each offense constitutes

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257. U.S. SENTENCING GUIDELINES MANUAL §§ 3D1.1–3D1.5 (2007).

258. *Id.* § 3D1.1(a)(1).

259. *Id.* § 3D1.2.

260. *Id.* § 3D1.2(a).

261. *Id.* § 3D1.2(b); *see also id.* § 3D1.2(c) (dictating that conduct should also be grouped "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic" in another guideline).

262. *Id.* § 3D1.3.

263. *Id.* § 3D1.4 (increasing incrementally defendants' overall offense level according to the number and severity of collateral offenses); *see also id.* §§ 3D1.1(d), 5D.2 (excluding counts which involve a mandatory minimum sentence or a statutory instruction that determines imprisonment).

264. *Id.* § 3D1.3(a).

265. *Id.* § 3D1.3(b); *see id.* § 3D1.2(d).

266. *Id.* § 3D1.4.

one unit or one-half unit, depending on its severity in comparison to the level of the highest Group.<sup>267</sup>

If the sentence imposed on the count carrying the highest statutory maximum adequately achieves the total sentence required by the Guidelines, the sentences on all other counts shall run concurrently.<sup>268</sup> In contrast, if the crime carrying the highest statutory maximum is less than the total Guidelines punishment, then the sentence imposed on one or more of the other counts shall be added to run consecutively until the Guidelines sentence is reached.<sup>269</sup> For example, a defendant convicted of five counts may face a Guidelines sentence of fifteen years after his or her offenses are grouped. If one of the five counts has a statutory maximum of ten years and the remaining counts have a statutory maximum of five years each, the sentencing court is instructed to sentence the defendant to the statutory maximum of ten years and to impose a consecutive sentence on the next count to reach the Guidelines sentence of fifteen years.<sup>270</sup> The sentences on the remaining three counts are to run concurrently<sup>271</sup>—resulting in imprisonment for fifteen years.<sup>272</sup> Though some criticize the mechanisms of “grouping,” the general effect of grouping and counting units is intended to result in a sentence that reflects the cumulative weight of the criminal behaviors and the resulting harms.<sup>273</sup> The result most often reduces the impact of ancillary and minor related offenses on the sentence.<sup>274</sup>

#### *B. Grouping Calculations Under U.S.S.G. Section 3A1.4*

U.S.S.G. section 3A1.4 drives the process differently. Assume a defendant is convicted of material support in violation of 18 U.S.C. § 2339B for sending financial contributions to a DFTO, the current statutory maximum prison sentence (if no death results) is

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267. *Id.* §§ 3D1.4(a)–(b), 3D1.4 cmt. n.1, 3D1.4 cmt. background.

268. *Id.* § 5G1.2(c).

269. *Id.* § 5G1.2(d).

270. *Id.*

271. *Id.*

272. *Id.*

273. *See id.* ch. 3, pt. D, introductory cmt. (“Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.”).

274. *See id.* (“The amount of the additional punishment declines as the number of additional offenses increases.”).

fifteen years.<sup>275</sup> If the only count on which the defendant has been convicted is § 2339B, the court should impose a sentence no longer than fifteen years.<sup>276</sup> If, however, the defendant has also committed other crimes, the sentencing court is instructed by the Sentencing Guidelines to impose the maximum fifteen year sentence for the violation of § 2339B, then to “stack” sentences for the other convictions to reach the Guidelines sentence.<sup>277</sup> If a court applies U.S.S.G. section 3A1.4, the maximum prison sentence rises to 262 months.<sup>278</sup>

For a § 2339B violation carrying a base offense level of twenty-six (the starting point under section 2M5.3),<sup>279</sup> applying U.S.S.G section 3A1.4 boosts the offense level to thirty-eight<sup>280</sup> and the Guidelines sentence range increases to 360 months to life.<sup>281</sup> If stacking a defendant’s sentences leads to a sentence of 360 months as permitted under this calculation, the defendant may receive a sentence of twice the fifteen-year statutory maximum sentence for material support.<sup>282</sup> These sentence increases are not driven by grouping under the Guidelines to punish for the collateral offenses; rather, they are driven solely by the material support charge, producing the possibility of a thirty year sentence based on an offense that otherwise carries a statutory maximum sentence of fifteen years.

For constitutional and policy purposes one must recognize that dramatically increased sentences do not result from an assessment of culpability after a thoughtful analysis of the entire complex of a defendant’s convictions. Rather, it is the disparity between sentencing under U.S.S.G. section 3A1.4 and the statutory maximum prison sentence for a single act of material support under § 2339B that can, and often does, drive this anomaly. Whether courts apply U.S.S.G. section 3A1.4 or not

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275. 18 U.S.C. § 2339B(a)(1) (2006 & Supp. 2009).

276. *Id.*

277. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2007).

278. *Id.* § 3A1.4 (specifying that a defendant convicted of one violation of § 2339B should be sentenced with a base offense level of thirty-two and a Criminal History Category of VI), ch. 5, pt. A, sentencing tbl. (indicating that a defendant with a base offense level of thirty-two and a Criminal History Category of VI should receive a prison sentence of between 210 and 262 months).

279. *Id.* § 2M5.3.

280. *Id.* § 3A1.4(a) (“If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels . . .”).

281. *Id.* § 3A1.4, ch. 5, pt. A, sentencing tbl. This calculation also takes into account Guidelines section 3A1.4(b), which sets a defendant’s Criminal History Category at VI. *Id.* § 3A1.4(b).

282. *See* 18 U.S.C. § 2339B(a)(1) (2006 & Supp. 2009).

determines whether defendants receive dramatically disparate sentences for the very same conduct.

This incongruity gives prosecutors overwhelming leverage to force defendants to forego trial by jury. By pushing for or agreeing to lobby against applying U.S.S.G. section 3A1.4, prosecutors can manipulate the sentences among comparable defendants.<sup>283</sup> A prosecutor's threat to seek a sentence enhancement under U.S.S.G. section 3A1.4 can force a defendant into a Hobson's choice between pleading guilty to a terrorism offense to secure a shorter sentence, or risking life imprisonment if he or she is convicted at trial and the judge determines by a preponderance of evidence that the defendant had the requisite intent to commit a federal crime of terrorism.<sup>284</sup> This choice may also encourage defendants to engage in other undesirable conduct, for example, providing false testimony to ensure credit for cooperation and secure a more favorable sentence. The standard of proof in sentencing, coupled with the practice of stacking consecutive sentences for each conviction to achieve the Guidelines sentence calculated under U.S.S.G. section 3A1.4, gives prosecutors tremendous power and so distorts the criminal justice system.

Few courts have upheld challenges to stacked sentences in terrorism cases.<sup>285</sup> In *United States v. Rahman*,<sup>286</sup> the Second

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283. Disproportionality is a significant concern for courts. See *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (noting that the goals of sentencing include avoiding "unwarranted sentenc[ing] disparities"); *Gall v. United States*, 128 S. Ct. 586, 599 (2007) (noting that the goals of sentencing include avoiding "unwarranted sentenc[ing] disparities"); see, e.g., *Thurston v. United States*, 358 F.3d 51, 73 (1st Cir. 2004), *vacated*, 543 U.S. 1097 (2005), *on remand*, 456 F.3d 211 (1st Cir. 2006), *vacated*, 128 S. Ct. 854 (2008) (imposing a sentence of three months where Guidelines range was sixty-three to seventy-eight months to avoid unwarranted disparity with co-defendant and promote respect for law); *United States v. Colby*, 367 F. Supp. 2d 1, 1 (D. Me. 2005) (comparing proportionality of co-defendants sentenced pre- and post-*Booker*'s holding that courts must consider whether applying the sentencing Guidelines would result in "unwarranted sentencing disparities"); *United States v. Revock*, 353 F. Supp. 2d 127, 129 (D. Me. 2005) (imposing a sentence on the defendant outside the Guidelines range so that he received the same sentence as a co-defendant); *United States v. Gray*, 362 F. Supp. 2d 714, 718-19 (S.D. W.Va. 2005), *aff'd*, 491 F.3d 138 (4th Cir. 2007) (imposing a sentence of ninety-seven months on both defendants, despite the fact that the Guidelines sentence range for one defendant would have been between 97 and 121 months and the Guidelines sentence range for the co-defendant would have been between 135 and 168 months, due to the judge's determination that they had equal culpability).

284. See *supra* Part IV.B.

285. Cf. *United States v. Walker*, 473 F.3d 71, 83 (3d Cir. 2007) (finding that defendant's stacked sentence for drug crimes was not a violation of the Eighth Amendment); *United States v. Khan*, 461 F.3d 477, 493 (4th Cir. 2006) (upholding the stacked sentence of individuals associated with a terrorist group for their violations of federal gun laws).

Circuit addressed stacking arising from the same criminal conduct.<sup>287</sup> Defendant El-Gabrowny's conviction for seditious conspiracy and lesser charges resulted from conspiracies to bomb the United Nations, the Holland Tunnel, and the Lincoln Tunnel.<sup>288</sup> Under U.S.S.G. section 3A1.4, the defendant could have received a prison sentence of life,<sup>289</sup> even though the statutory maximum prison sentence for seditious conspiracy was twenty years.<sup>290</sup> The district court gave El-Gabrowny a fifty-seven year sentence,<sup>291</sup> which resulted from stacking the sentences of each charge in order to approach the Guidelines punishment of life in prison.<sup>292</sup> The district court judge believed that the sentence was excessive,<sup>293</sup> and, if not for his belief that the Guidelines restricted a judge's sentencing discretion, would have sentenced El-Gabrowny to a total of not more than thirty-three years.<sup>294</sup> The Second Circuit recognized that the government's decision to charge El-Gabrowny with multiple minor counts made a sentence far above the statutory maximum for seditious conspiracy possible.<sup>295</sup> The court remanded the sentence,<sup>296</sup> reasoning that the district court judge, Judge Michael B. Mukasey, did not give sufficient consideration to his power to depart downward.<sup>297</sup> This decision

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286. 189 F.3d 88, 157 (2d. Cir. 1999).

287. *Id.* at 154–58.

288. *Id.* at 103–04. El-Gabrowny was convicted of seditious conspiracy, two counts of assaulting a federal officer, five counts of possessing a fraudulent foreign passport (as a result of five false passports), one count of possession with intent to transfer false identification documents, and one count of impeding the execution of a search warrant as a result of resisting agents in front of a co-conspirator's apartment. *Id.*

289. *Id.* at 145–46 (calculating the defendant's base offense level through an analogy to the crime of treason and discussing the applicable adjustments, resulting in a maximum prison sentence of life); see U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (1992) (indicating that offense level forty-three warrants a life sentence for all criminal history categories).

290. 18 U.S.C. § 2384 (1994).

291. *Rahman*, 189 F.3d at 148.

292. *Id.*

293. See *id.* at 158 (noting that the district court judge believed a lesser sentence was appropriate, but that he “[did] not believe that the guidelines le[ft him] free to impose that sentence”).

294. *Id.*

295. See *id.* at 151 (noting that “the consecutiveness of the defendants’ sentences that carried their cumulative punishment above 20 years could not have occurred unless they had been convicted of other counts.”).

296. *Id.* at 160.

297. *Id.* at 157–58 (“The departure authority here has not previously been settled in this Circuit, and Judge Mukasey’s sentencing remarks . . . imply that he thought he lacked departure authority.”).

was based upon the fact that U.S.S.G. section 3A1.4 trumps grouping principles:

There is no reason to think that the [Sentencing] Commission gave adequate consideration to the extent to which [El-Gabrownny's] sentence could be extended by multiplication of essentially duplicative charges for a single criminal act . . . . We believe the prosecutor's ability to lengthen sentences in these circumstances simply by adding essentially duplicative counts, each describing the same criminal conduct, is a circumstance that was not adequately considered by the Sentencing Commission when it devised the formula for consecutive sentencing under § 5G1.2(d). It therefore establishes a permissible basis for downward departure.<sup>298</sup>

The Second Circuit gave a specific example of how U.S.S.G. section 3A1.4 frustrates the principles that underlie grouping convictions for conspiracy and for the substantive act:

Before the Guidelines, prosecutors could hope to enhance sentences above statutory maximums by charging defendants with both conspiring to commit a crime and the substantive offense of committing it, and judges sometimes rewarded that expectation by imposing consecutive sentences for both offenses. The Guidelines substantially ended that practice by providing that a conspiracy offense and the substantive offense that was the sole object of the conspiracy are to be grouped together and sentences for the two offenses will normally not be consecutive, except to the extent necessary to reach the total punishment for the most serious of the grouped counts.<sup>299</sup>

In its ruling, the Second Circuit held that 18 U.S.C. § 3584 gave the district court discretion to decline to impose consecutive sentences even though U.S.S.G. section 5G1.2(d) (and section 3A1.4) might appear to require consecutive sentences.<sup>300</sup>

In *Booker*, the Supreme Court held that a sentencing court has discretion within the range suggested by the Guidelines so long as it does not exceed the "statutory maximum" prison sentence.<sup>301</sup> Most of the courts post-*Booker* have assumed, without

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298. *Id.* at 157.

299. *Id.* at 153–54 (citations omitted).

300. *Id.* at 155; *see also* 18 U.S.C. § 3584(b) (1994) ("The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in Section 3553(a).").

301. *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (rendering the Guidelines advisory by requiring that a sentencing court consider Guidelines ranges but allowing the court to tailor the sentence to other concerns); *see also* *United States v. Duncan*, 400 F.3d 1297, 1303 (11th Cir. 2005) ("When Justice Breyer's opinion [in *Booker*] is retroactively applied on direct review, the guidelines are deemed to have been 'effectively advisory.' This means that the various top

thorough analysis, that the “statutory maximum” is not the statutory maximum for a single offense, but is the total of the statutory maximums of all of the offenses for which the defendant is convicted.<sup>302</sup> This assumption has historical validity,<sup>303</sup> and under a grouping analysis it is not harmful because there is a check against prosecutors who seek to bury a defendant under a host of minor offenses.<sup>304</sup> U.S.S.G. section 3A1.4 reverses that check.<sup>305</sup>

The impact of this reading of *Booker* is that a defendant sentenced under U.S.S.G. section 3A1.4 will likely find himself or herself sentenced to far more than the statutory maximum for material support—based solely on that charge—if he or she is convicted of multiple counts. *Booker’s* holding—rendering the Sentencing Guidelines advisory—was arguably intended to resolve the question of whether judges may make findings used to

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ranges of the guidelines are no longer binding, and therefore, no longer constitute ‘little relevant maximums.’ This leaves as the only maximum sentence the one set out in the United States Code. Justice Breyer’s opinion making the guidelines advisory essentially changes what sentence is authorized by a jury verdict—from the sentence that was authorized by the mandatory guidelines to the sentence that is authorized by the U.S. Code.” (citation omitted).

302. See, e.g., *United States v. Sadler*, 538 F.3d 879, 892 (8th Cir. 2008) (finding, in case involving defendant convicted of two drug offenses, that, “[b]ecause each offense would have a statutory maximum of twenty years’ imprisonment and because a district court may ‘run sentences from multiple counts consecutively, rather than concurrently, if the Guideline sentence exceeds the statutory maximum sentence for each count,’” a sentence of 322 months (nearly 27 years) was “well within the statutory maximum available to the court” (citations omitted)); *United States v. Allen*, 491 F.3d 178, 195 (4th Cir. 2007) (“The statutory maximum for each count . . . is sixty months. Because the Guidelines range exceeded the statutory maximum for one count, and [defendant] Reinhardt was convicted of multiple counts . . . the Guidelines allowed the district court to ‘stack’ multiple counts consecutively to achieve a sentence within the Guidelines range. There is no evidence in the record that the district court acted improperly in following the mandate of the Guidelines and increasing Reinhardt’s maximum sentence to seventy months.” (citations omitted)). *But see, e.g., United States v. Foy*, 646 F. Supp. 2d 1055, (N.D. Iowa 2009) (asserting that neither advisory Sentencing Guidelines nor statutory maximums limit consecutive sentences in stating that “the sentencing court may use consecutive sentences on multiple counts to impose the sentence that the court considers to be appropriate in light of the § 3553(a) factors, notwithstanding either advisory guidelines or statutory maximum sentences.”).

303. See *supra* notes 257–274 and accompanying text.

304. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.1(a) (2007) (instructing the sentencing court first to “group” closely related counts); *id.* § 3D1.2 (instructing that “all counts involving substantially the same harm shall be grouped together into a single Group.”).

305. See *supra* text accompanying notes 275–282 (providing examples of possible sentences under Guidelines section 3A1.4 that illustrate the potential for minor offenses greatly increasing a defendant’s sentence).

increase a defendant's time served and still comply with the Fifth and Sixth Amendments.<sup>306</sup> If this is so, two questions remain: whether applying U.S.S.G. section 3A1.4 violates the constitutional principles that underlie *Booker*, and which provision in 18 U.S.C. § 3553 counsels a court using its discretion to add U.S.S.G. section 3A1.4 on top of U.S.S.G. section 2M5.3. In light of the government's failure to secure convictions in high profile material support cases,<sup>307</sup> this question is no minor tactical consideration for the court.

### VII.U.S.S.G. Secton 3A1.4's Failure to Calibrate Sentences

The failure to calibrate sentences is a key flaw in U.S.S.G. section 3A1.4. Consider a defendant who makes a financial contribution to a DFTO and a defendant who sends that DFTO a biological toxin. Some would argue that the two are equivalent because delivering cash may facilitate acquiring a biological toxin. This argument is more persuasive if the government can prove that the defendant delivering the cash intended to facilitate purchasing a biological toxin. Without this proof, however, there is little basis for such a presumption.

The problem with convicting a defendant who merely knows that an organization to which he or she donates is a DFTO that has engaged in terrorist activities is that the donor may have other motives for donating. Hamas and Hezbollah stand as examples of DFTOs that provide social services and have other quasi-governmental functions. A donor may also be motivated by a chance to gain personally from his or her contribution (for example, an individual who solicits funds for a DFTO and then keeps some portion).

U.S.S.G. sections 2M5.3 and 2M6.1 draw this distinction. When a defendant is convicted of dealing biological toxins to a DFTO with the intent to assist the organization, the base offense level under U.S.S.G. section 2M6.1 is forty-two.<sup>308</sup> In contrast, if the defendant intended merely to fund the purchase of weapons

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306. *Booker*, 543 U.S. at 257–58 (noting that “Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*” as a reason for the Court’s determination to sever and excise elements of the Sentencing Act).

307. CTR. ON LAW AND SEC., TERRORIST TRIAL REPORT CARD: U.S. EDITION 3 (2006), <http://www.lawandsecurity.org/publications/TTRCCComplete.pdf> (analyzing 510 announced terrorism cases resulting in only 158 prosecutions for terrorism or material support, and concluding that “the vast majority of [terrorism] cases turn out to include no link to terrorism once they go to court.”).

308. U.S. SENTENCING GUIDELINES MANUAL § 2M6.1 (2007).



that are not weapons of mass destruction, then U.S.S.G. section 2M5.3 prescribes an offense level of twenty-eight.<sup>309</sup> If the defendant intended to fund the purchase of a biological toxin, U.S.S.G. section 2M5.3 directs the sentencing court to apply U.S.S.G. section 2M6.1.<sup>310</sup>

One hurdle to properly calibrating a defendant's sentence to the offense is that, for most cases, the line between material support offenses performed with general knowledge or intent and those performed with more specific intent requirements is blurred by the very essence of the DFTO designation and the government exploiting the resulting ambiguity. An organization is designated a DFTO pursuant to § 219 of the Immigration and Nationality Act.<sup>311</sup> To warrant the DFTO designation, a foreign organization must either engage in "terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B),<sup>312</sup> engage in "terrorism" as defined in 22 U.S.C. § 2656f(d)(2),<sup>313</sup> or it must retain the capability and intent to

309. *Id.* § 2M5.3(b)(1).

310. *Id.* § 2M5.3(c)(3).

311. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 301, § 219, 110 Stat. 1214, 1248 *amending* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1189(a) (2006)); *see also* U.S. DEPT OF STATE, FOREIGN TERRORIST ORGANIZATIONS (FTOS), FACT SHEET 2 (2005), <http://merln.ndu.edu/archivepdf/terrorism/state/37191.pdf> (providing an overview of designating Foreign Terrorist Organizations and a list of current DFTOs).

312. 8 U.S.C. § 1189(a)(1)(B) (2006). "Terrorist activity" is defined as:

[A]ny activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii).

313. 22 U.S.C. § 2656f(d)(2) (2006 & Supp. 2009) ("[T]he term 'terrorism' means

engage in terrorist activity or terrorism.<sup>314</sup> The organization's terrorist activity must threaten the security of U.S. nationals or the national security of the United States, including its national defense, foreign relations, or economic interests.<sup>315</sup>

These definitions of terrorist activity or terrorism mean that the government is in a position to allege first that every defendant who supports a DFTO supports all of the actions and objectives of the DFTO; and, second, that every DFTO intends to coerce, intimidate, or retaliate against government or the citizenry. Thus, to complete the syllogism, the government may argue that any defendant who supports a DFTO does so with the intent to support coercion, intimidation, or retaliation against a government or the citizenry regardless of the DFTO's other activities. In fact, the government has taken the position that a defendant who contributes to a DFTO knowing it is engaged in terrorist acts should be deemed to intend to support any federal crimes of terrorism the DFTO commits, regardless of other activities in which the DFTO has engaged.<sup>316</sup> Under this argument the distinction between violations under §§ 2339B and 2339C disappears.

This same approach is reflected in the contrast between U.S.S.G. sections 2M5.3 and 3A1.4. U.S.S.G. section 2M5.3 provides for an increase of two offense levels if a defendant provides material support with the "intent, knowledge, or reason to believe [it is] to be used to commit or assist in the commission of a violent act . . . ."<sup>317</sup> In the Application Notes to U.S.S.G. section 2M5.3, the Sentencing Commission stated that courts applying U.S.S.G. section 2M5.3 "may consider the degree to which the violation threatened a security interest of the United States"<sup>318</sup> or the extent to which the volume of support (including funds) or some other facet of the offense or the number of occurrences resulted in greater culpability, which should be reflected in an

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premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents . . . .").

314. 8 U.S.C. § 1189(a)(1)(B).

315. See U.S. DEP'T OF STATE, *supra* note 311.

316. See *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1296 (M.D. Fla. 2004) ("The government took the position that the *mens rea* necessary to support a conviction under section 2339B was proof that a: 'defendant knew of the designation of the organization as a foreign terrorist organization or the defendant knew that the organization engaged in or had engaged in terrorist activity . . . .').

317. U.S. SENTENCING GUIDELINES MANUAL § 2M5.3(b)(1)(E) (2007).

318. *Id.* § 2M5.3, cmt. n.2(A).

upward adjustment.<sup>319</sup> Arguably, U.S.S.G. section 2M5.3 provides the flexibility to calibrate the sentence to these factors based upon an individualized inquiry.

In contrast, U.S.S.G. section 3A1.4 represents a philosophically different approach to material support charges—one that supports the idea that any support for a DFTO, is by definition, support for terrorism perpetrated against the United States or its interests. U.S.S.G. section 3A1.4 makes no distinction in the amount of “support” provided, which is to say it does not differentiate between whether support is nominal or constitutes millions of dollars.<sup>320</sup> U.S.S.G. section 3A1.4 does not discriminate among types of support, failing to differentiate between delivery of automatic weapons, Stinger missiles, or cash.<sup>321</sup> U.S.S.G. section 3A1.4 does not incorporate an individual analysis for each defendant,<sup>322</sup> and thus supports the conclusion that any support for a DFTO is by definition support for a violent act of terrorism. Calibration, if any, is derivative—arising from the calculation of the base offense level under U.S.S.G. sections 2M5.3 or 2M6.1.<sup>323</sup>

### VIII.U.S. Courts Can and Should Deconstruct Offense Conduct and Defendant Characteristics to Calibrate Sentences

A key premise of this Article is that there is a critical flaw in U.S.S.G. section 3A1.4, in that it fails to provide for calibrating a defendant’s sentence to his or her conduct and characteristics. There are many meaningful distinctions between defendants convicted of crimes of terrorism, including the “materiality” of their support, the intent with which they gave the support, the organization to which the support was given, the quality and quantum of the support, the duration of the support, the identifiable harm caused by the support, and any identifiable victim of the support. U.S.S.G. section 3A1.4 fails to account for these differences.

Under *Booker*, which rendered the Sentencing Guidelines discretionary,<sup>324</sup> the sentencing factors in 18 U.S.C. § 3553(a) take

319. *Id.*

320. *Id.* § 3A1.4 (requiring only that offense be a “felony that involved, or was intended to promote, a federal crime of terrorism”).

321. *Id.*

322. *Id.*

323. *See supra* text accompanying notes 308–310, 317–319.

324. *See United States v. Booker*, 543 U.S. 220, 245–46 (2005).

on added importance.<sup>325</sup> No longer can judges defer to the Sentencing Commission's judgment in taking these into account, they must consider the factors themselves in evaluating appropriate sentences.<sup>326</sup> When courts follow the instruction of 18 U.S.C. § 3553 to avoid disproportionate sentences, it is essential that they comply with the statute by deconstructing the offense conduct and the defendant's individual characteristics.<sup>327</sup>

Though *Booker* did not create an explicit test for calibrating sentences under the newly advisory Guidelines and the § 3553 factors,<sup>328</sup> subsequent cases are helping the courts reach equilibrium between the two. Three recent cases illustrate the Supreme Court's post-*Booker* approach to the Sentencing Guidelines.

*Rita v. United States*<sup>329</sup> concerned a defendant convicted of making false statements to a grand jury in connection with a Bureau of Alcohol, Tobacco, Firearms and Explosives investigation into possible violations of gun registration and importation laws.<sup>330</sup> A presentence report calculated Rita's Guidelines sentence recommendation as thirty-three to forty-one months,<sup>331</sup> it noted "that there 'appear[ed] to be no circumstance or combination of circumstances that warrant a departure from the prescribed

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325. See *infra* text accompanying notes 371–375.

326. See *infra* text accompanying note 373.

327. 18 U.S.C. § 3553 (2006 & Supp. 2009) (explaining that when a court is determining the sentence to impose, the court must consider the "nature and circumstances" of the offense as well as the characteristics of the offender; the need for the sentence to reflect the gravity of the crime, promote respect for the law, provide justice, afford deterrence, shield the public from future crimes by the defendant, and provide the offender the needed education, medical attention, and correctional treatment; "the kinds of sentences available;" the sentencing range established by the Guidelines; relevant policy; the desire for consistency in sentencing; and the need to grant restitution to victims); see *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005). In *Biheiri*, the court analyzed the relative weight to be given to § 3553(a)(6), which cautions sentencing judges to take care to avoid unwarranted disparities and opined, "[n]or should the importance of this goal [avoiding unwarranted disparities] be understated; it is central to a just sentencing process, given that the essence of justice is that like cases should be treated alike, and importantly, should be seen to be treated alike . . ." *Id.* at 593–94. According to the court, this is a "difficult task without the sort of benchmark that the Guidelines provide." *Id.* at 593.

328. See *Booker*, 543 U.S. at 245–46 (explaining that sentencing courts should "consider Guidelines ranges, but . . . tailor the sentence in light of other statutory concerns as well" (citations omitted)).

329. 551 U.S. 338 (2007).

330. *Id.* at 341–42.

331. *Id.* at 344; see *id.* at 342–44 (explaining the calculus that went into determining Rita's sentence).

sentencing guidelines.”<sup>332</sup> Rita argued for a sentence less than that recommended by the Guidelines, relying on the sentencing factors listed in 18 U.S.C. § 3553(a).<sup>333</sup> The sentencing judge elected to adhere to the Guidelines, imposing a sentence of thirty-three months.<sup>334</sup>

Rita appealed, arguing that the judge had failed to adequately consider his history and characteristics, and that the sentence was greater than necessary to achieve sentencing purposes under § 3553(a)(2).<sup>335</sup> The Fourth Circuit disagreed, stating, “a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable.”<sup>336</sup> On review, the Supreme Court agreed with the lower courts.<sup>337</sup>

In its decision, the Court specifically noted that both a sentencing judge *and the Sentencing Commission* are instructed to take the sentencing considerations in § 3553(a) into account.<sup>338</sup> The Court further noted that “[t]he Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate.”<sup>339</sup> According to the Court, the Sentencing Commission’s ongoing work results in “a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.”<sup>340</sup> Thus, the Court held that, even after *Booker*, a reviewing court is allowed to assume that a sentence is reasonable if it falls within the Sentencing Guidelines.<sup>341</sup>

*Gall v. United States*<sup>342</sup> involved a college student involved in a conspiracy to sell ecstasy.<sup>343</sup> Gall had participated in the conspiracy by delivering drugs for others to sell, but withdrew before the end of his college career, and was not indicted until two

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332. *Id.* at 344.

333. *Id.* Specifically, Rita requested a departure due to vulnerability stemming from his military experience, his poor physical condition, and his involvement in government criminal justice work that caused people to be imprisoned and may potentially have led to retribution against him. *Id.* at 344–45.

334. *Id.* at 345.

335. *Id.*

336. *Id.* at 346.

337. *Id.* at 360.

338. *Id.* at 347–48.

339. *Id.* at 349.

340. *Id.* at 350.

341. *Id.* at 341.

342. 128 S. Ct. 586 (2007).

343. *Id.* at 591–92.

years after he graduated.<sup>344</sup> Gall pled guilty, with the government stipulating in his plea agreement that he had not himself distributed ecstasy, and had made his intent to withdraw from the conspiracy clear to others involved.<sup>345</sup> Nonetheless, the government requested a Guidelines sentence.<sup>346</sup>

The sentencing judge declined, imposing a sentence of thirty-six months probation.<sup>347</sup> The judge indicated that he had considered the sentencing factors under § 3553(a)<sup>348</sup> and determined that “[a]ny term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life.”<sup>349</sup> The Eighth Circuit reversed, holding that “a sentence outside of the Guidelines range must be supported by a justification that ‘is proportional to the extent of the difference between the advisory range and the sentence imposed.’”<sup>350</sup>

The Supreme Court reversed.<sup>351</sup> It noted that *Booker’s* holding that the Sentencing Guidelines are advisory also limited an appellate court to reviewing whether a district court judge’s sentence was reasonable and did not represent an abuse of discretion.<sup>352</sup> The Court determined that the Guidelines should serve as “the starting point and the initial benchmark” for determining sentences.<sup>353</sup> But it rejected “an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range . . . [or] a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence” as bases for determining reasonableness.<sup>354</sup> After reviewing the sentencing judge’s actions and justifications,<sup>355</sup> the Court

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344. *Id.*

345. *Id.* at 592.

346. *Id.* at 593.

347. *Id.*

348. *Id.*

349. *Id.*

350. *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006) (quoting *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)), *rev’d*, 128 S. Ct. 586 (2007).

351. *Gall*, 128 S. Ct. at 602.

352. *Id.* at 594.

353. *Id.* at 596.

354. *Id.* at 595.

355. *Id.* at 598–600.

determined that the judge had not committed an abuse of discretion.<sup>356</sup>

In *Kimbrough v. United States*,<sup>357</sup> the Supreme Court considered the case of a defendant convicted of drug trafficking crimes involving crack cocaine.<sup>358</sup> Under the relevant statutes, Kimbrough was eligible for a maximum sentence of fifteen years.<sup>359</sup> Calculating Kimbrough's sentence under the Guidelines, however, the sentencing court determined that Kimbrough fell within the Guidelines range for a 228 to 270 month sentence (between 19 and 22.5 years).<sup>360</sup> The judge determined that adhering to the Guidelines would result in a sentence "greater than necessary" to achieve the sentencing objectives laid out in 18 U.S.C. § 3553(a).<sup>361</sup> The court instead considered the § 3553(a) factors driving sentencing, paying particular attention to the disparity that Kimbrough faced for having dealt in crack rather than powder cocaine.<sup>362</sup> These considerations led the judge to sentence Kimbrough to 180 months, or fifteen years, imprisonment.<sup>363</sup>

The Fourth Circuit vacated Kimbrough's sentence on the basis that sentencing "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."<sup>364</sup> In essence, the Fourth Circuit agreed with the government's argument that, post-*Booker*, the Sentencing Guidelines may be advisory and a judge may depart from them when he or she believes that a departure best serves sentencing goals, but the judge cannot depart because he or she disagrees with a congressional policy decision (e.g., punishing offenses involving crack cocaine more seriously than those involving powder cocaine).<sup>365</sup>

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356. *Id.* at 600–02.

357. 128 S. Ct. 558 (2007).

358. *Id.* at 564.

359. *Id.*

360. *Id.* at 565.

361. *Id.*

362. *Id.*

363. *Id.*

364. *United States v. Kimbrough*, No. 05-4554, 2006 WL 1233525, at \*1 (4th Cir. 2006) (per curiam), *rev'd*, 128 S. Ct. 558 (2007).

365. See *Kimrough v. United States*, 128 S. Ct. 558, 570 (2007).

The Supreme Court disagreed.<sup>366</sup> The Court again reiterated its position from *Booker* and *Rita* that the Guidelines deserve respect because the Sentencing Commission “has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’”<sup>367</sup> But the Court determined that in the case of crack cocaine Guidelines the Sentencing Commission “did not take account of ‘empirical data and national experience.’”<sup>368</sup> The Court noted that “the [Sentencing] Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions . . . ‘greater than necessary’ in light of the purposes of sentencing set forth in § 3553(a).”<sup>369</sup> In light of these facts, the Court determined that the sentencing court had not abused its discretion in “conclud[ing] when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purpose.”<sup>370</sup>

After *Rita*, *Kimbrough*, and *Gall*, sentencing courts retain their discretion to depart from the Sentencing Guidelines established under *Booker*.<sup>371</sup> The Supreme Court’s guidance in these cases, however, seems to lay out a technique for taking the Guidelines into account in determining a defendant’s sentence. First, the sentencing judge should determine the Guidelines sentence for a defendant.<sup>372</sup> Then, the judge should look to the sentencing factors and purposes of sentencing listed in § 3553(a) to determine whether departing from the Guidelines sentence is warranted.<sup>373</sup> There is no formula to use in determining whether

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366. *Id.* at 564 (“We hold that, under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory.”).

367. *Id.* at 574 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring), *vacated*, 168 S. Ct. 1869 (2008)).

368. *Id.* at 575 (quoting *Pruitt*, 502 F.3d at 1171 (McConnell, J., concurring)).

369. *Id.*

370. *Id.* at 576.

371. *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (“In *Booker* we invalidated . . . the statutory provision, 18 U.S.C. § 3553(b)(1), which made the Sentencing Guidelines mandatory . . .”) (citation omitted); *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (“[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”); *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).”).

372. See *Gall*, 128 S. Ct. at 596.

373. See *Kimbrough*, 128 S. Ct. at 565; *Rita*, 551 U.S. at 344–45.



to depart from a Guidelines sentence,<sup>374</sup> and departure does not require the court to find extraordinary circumstances.<sup>375</sup> The ultimate touchstone is whether a judge believes a departure is reasonable.<sup>376</sup>

One case in the Fourth Circuit analyzing sentencing after *Rita*, *Gall*, and *Kimbrough* gives some guidance as to where sentencing may be headed. *United States v. Pauley*<sup>377</sup> involved child pornography. This sensitive subject makes the case instructive; opining on societal consensus about culpability associated with various crimes is a dangerous endeavor, but it is safe to say that child pornography is one of the most universally reviled offenses in our criminal justice system. Therefore, the extent to which the sentencing court in *Pauley* was willing and able to deconstruct the conduct of the defendant and to secure the circuit court's approval of that analysis stands in contrast to the approach to sentencing approach embodied in U.S.S.G. section 3A1.4.

Mr. Pauley was an art teacher in West Virginia.<sup>378</sup> In 2003, he was approached by a female eighth grade student who asked whether he was interested in paying for nude photographs of her.<sup>379</sup> On three occasions Pauley purchased Polaroid photographs from her.<sup>380</sup> On a fourth occasion, when he agreed to buy photographs of the victim and her friend posing nude together, the victim's friend reported the incident to school authorities and Pauley was arrested.<sup>381</sup> Prosecutors determined that seventeen photographs of the twenty-five he had bought contained images of child pornography.<sup>382</sup>

Mr. Pauley pled guilty to one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).<sup>383</sup> The Guidelines prison sentence range was between seventy-eight and

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374. *Gall*, 128 S. Ct. at 595.

375. *Id.*

376. *United States v. Booker*, 543 U.S. 220, 224 (2005) (asserting that the sentencing "factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for 'unreasonable[ness].'"

377. 511 F.3d 468 (4th Cir. 2007).

378. *Id.* at 469.

379. *Id.*

380. *Id.*

381. *Id.* at 469–70.

382. *Id.* at 470.

383. *Id.*

ninety-seven months imprisonment,<sup>384</sup> but after considering the factors set forth in 18 U.S.C. § 3553(a) the district court determined that forty-two months imprisonment was a sufficient sentence.<sup>385</sup> The government appealed and the Fourth Circuit affirmed.<sup>386</sup>

The district court made the following determinations in support of its decision to vary from the Guidelines sentence: (1) the victim initiated each of the transactions; (2) fewer than two dozen pornographic photographs were taken; (3) the victim's face did not appear in the photographs; (4) Pauley displayed deep remorse; (5) prior to this offense Pauley was a good citizen, father, and teacher; (6) Pauley suffered collateral punishment, including loss of his teaching certificate and his pension; (7) Pauley agreed to a lifetime of supervised release; (8) no other child pornography was found in the Pauley house; and (9) incarceration counseling would rehabilitate him and allow him to lead a productive life upon release.<sup>387</sup>

What is instructive about the *Pauley* decision is the latitude the district court used in deconstructing the crime, the collateral punishment, the defendant himself, and the prospect of rehabilitation. Based upon his personal history and the court's assessment, the district court expressed confidence that he was unlikely to reoffend.<sup>388</sup> The court also considered Mr. Pauley's loss of his teaching certificate and state pension to be collateral

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384. *Id.* The probation officer's recommendations for the defendant's sentence started with a base offense level of fifteen. U.S. SENTENCING GUIDELINES MANUAL § 2G2.4(a) (2002). Because the offense involved causing a minor to engage in sexually explicit conduct in order to produce a visual image of the conduct, the probation officer applied the Sexual Exploitation of a Minor Guideline, raising the offense level to twenty-seven. *Id.* § 2G2.1. The officer then recommended adding two more offense levels because the victim was above the age of twelve but below the age of sixteen. *Id.* § 2G2.1(b)(1)(B). Furthermore, because the victim was a student at the same school in which the defendant taught, potentially bringing her within his supervisory control, the offense level increased another two levels. *Id.* § 2G2.1(b)(2). Finally, the probation officer recommended raising the offense level another two levels, arguing that the victim was vulnerable. *Id.* § 3A1.1(b)(1). The offense level was next reduced by three levels because the defendant accepted responsibility for the crime. *Id.* § 3E1.1. The final offense level was thirty. At sentencing, the district court sustained the defendant's objection to the increase based on the vulnerable victim argument, reducing the sentencing range to between seventy-eight and ninety-seven months. *Pauley*, 511 F.3d at 470.

385. *Pauley*, 511 F.3d at 470.

386. *Id.* at 469.

387. *Id.* at 470.

388. *Id.* at 470, 475 (noting that Pauley's Criminal History Category was I and approving the district court's determination "that a lifetime of supervised release would reduce the risk of Pauley becoming a repeat offender and would deter him from future criminal conduct").

punishment affecting the sentence.<sup>389</sup> On appeal, the government argued that the sentence should be vacated because the district court placed “excessive weight” on one factor: Mr. Pauley’s history and characteristics.<sup>390</sup> The Fourth Circuit panel held that it was within the district court’s discretion to conduct the analysis as it had.<sup>391</sup>

Deconstructing defendants and their offenses, and placing both on the spectrum of similar defendants convicted of similar crimes, is classic sentencing practice.<sup>392</sup> It requires nuance and careful discrimination between and among cases and defendants based on the factors enumerated in 18 U.S.C. § 3553.<sup>393</sup> That nuance is impossible under a Guideline that is structured as bluntly as U.S.S.G. section 3A1.4. A Guideline can account for deconstructing a discrete offense and specific defendant. U.S.S.G. sections 2M5.3 and 2M6.1 are not paragons of sophistication in this regard, but they do permit some differentiation between and among defendants and offenses.<sup>394</sup> After *Blakely*, *Booker*, *Rita*, and *Gall*, that differentiation and nuance is no longer merely desirable—it is constitutionally required.<sup>395</sup> U.S.S.G. section 3A1.4 is an impediment to that constitutionally required analysis.

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389. *Id.* at 470. The Fourth Circuit panel employed a broad and pragmatic reading of § 3553(a) in holding that Pauley’s loss of his teaching certificate and pension was consistent with § 3553(a)’s directive that a sentence reflect the need for “just punishment” and “adequate deterrence.”

390. *Id.* at 475.

391. *Id.* at 475–76.

392. *See, e.g.*, 18 U.S.C. § 3553(a)(6) (2006) (prescribing that judges consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” when imposing sentences).

393. *Id.* § 3553 (listing considerations for a court to take into account during sentencing).

394. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2M5.3 and 2M6.1 (2007) (spelling out base offense levels and special offense characteristics which can be used to increase the offense levels, allowing for consideration of specific qualities of a defendant’s crime).

395. The constitutional requirement of differentiation and nuance between defendants and offenses requires the exercise of judicial discretion and consideration of mitigating and aggravating factors. *See* *Rita v. United States*, 551 U.S. 338, 357 (2007) (explaining that the lower court judge fully considered each argument advanced in favor of lower the sentence and was “fully aware of defendant’s various physical ailments” and considered special circumstances, such as military service); *Gall v. United States*, 128 S. Ct. 586, 600 (2007) (showing that the district court judge discussed at great length the sentence imposed on a co-defendant and comparing and contrasting the two individuals, and thus did not commit a procedural error); *United States v. Booker*, 543 U.S. 220, 251 (2005) (explaining that judges have often looked to presentencing reports, background, character, and conduct of a defendant when determining sentence, a practice Congress intended to continue); *Blakely v. Washington*, 542 U.S. 296, 313–14

## IX. Sentence Disproportionality in Material Support Cases

Despite courts' increased discretion post-*Booker*, *Rita*, *Kimbrough*, and *Gall*, disproportionate sentences under U.S.S.G. section 3A1.4 persist. In federal fiscal year 2007, 60.8% of all criminal sentences were within the Guidelines range.<sup>396</sup> Excluding below-range sentences given pursuant to U.S.S.G. sections 5K1.1 and 5K3.1 or other government-sponsorship, after *Booker* approximately 12.1% of the sentences were below the Guidelines range.<sup>397</sup> Only 1.5% of all cases resulted in a sentence above the Guidelines range.<sup>398</sup> The fact that such a high percentage of sentences were below the Guidelines range before *Rita*, *Gall*, and *Kimbrough* indicates that the district courts were taking advantage of their limited post-*Booker* authority to mitigate the Guidelines' impact.

In fiscal year 2007, the Sentencing Commission reported that the base offense Guideline for material support cases, U.S.S.G. section 2M5.3, was used as a Guideline in eight cases and of those, six cases primarily relied on it.<sup>399</sup> U.S.S.G. section 2M6.1 was used as the primary Guideline in all five cases that cited it.<sup>400</sup> Of the 63,882 sentencings in fiscal year 2007, twenty involved U.S.S.G. section 3A1.4.<sup>401</sup> According to Sentencing Commission statistics, "national defense cases" had a mean sentence of 48.9 months and a median of 22.5 months<sup>402</sup> compared to a mean sentence for all cases of 60.4 months and a median of 37 months.<sup>403</sup>

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(2004) (holding that a jury must first determine any additional facts be considered for sentencing).

396. U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCE STATISTICS 167 tbl.14 (2007).

397. *Id.*

398. *Id.*

399. *Id.* at 40 tbl.17.

400. *Id.*

401. *Id.* at 41 tbl.18. There were a total of 72,865 cases, but the Sentencing Commission only received complete Guidelines application information for 63,906 of them. *Id.* at 42 tbl.18 n.1. There were twenty-four terrorism cases for which the Commission did not have sufficient information. *Id.*

402. *Id.* at 30 tbl.14. It is unclear from the 2007 Sourcebook, *supra* note 396, exactly what constitutes a "national defense case," but it is reasonable to conclude that these cases include offenses sentenced under United States Sentencing Guidelines Chapter Two, Part M addressing "Offenses Involving National Defense and Weapons of Mass Destruction." See U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. M (2007). There are twenty-six national defense cases in the 2007 Sourcebook. U.S. SENTENCING COMM'N, *supra* note 396, at 30 tbl.14. Of those, twenty-one cases involved defendants with a Criminal History Category I; in one case, the defendant was in Criminal History Category III; in four cases the defendant was in Criminal History Category VI (non-career offender); and there

For fiscal year 2008, the Sentencing Commission reported a total of forty-five “national defense cases.”<sup>404</sup> The mean sentence for all cases was 62.5 months and the median was 30 months.<sup>405</sup> For the three cases in which the defendant was in Criminal History Category VI, the mean sentence was 376.7 months and median was 360 months.<sup>406</sup> U.S.S.G. section 2M5.3 was the primary Guideline in fourteen cases,<sup>407</sup> section 2M6.1 was the primary Guideline in five cases,<sup>408</sup> and section 3A1.4 was applied in eleven cases.<sup>409</sup>

Professor Robert M. Chesney of Wake Forest University Law School examined the prison sentences imposed on defendants who have pled guilty to or been convicted of violating 18 U.S.C. § 2339B.<sup>410</sup> Professor Chesney found that between September 2001 and July 2007, a total of 108 individuals were charged with at least one count under 18 U.S.C. § 2339B.<sup>411</sup> The mean of all the § 2339B sentences was 122.73 months, with a median of 120 months and a mode of 180 months.<sup>412</sup> In cases where the defendant was found guilty after a jury trial, the median prison sentence was 180 months for conspiracy and attempt and 150

were no cases in which the defendant had Criminal History Category II, IV, V, or VI (career offender). *Id.* at 30–31 tbl.14.

403. U.S. SENTENCING COMM’N, *supra* note 396, at 30 tbl.14.

404. THE U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCE STATISTICS tbl.14, <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>. Like the 2007 Sourcebook, the 2008 Sourcebook does not provide a definition of “national defense cases,” but it remains reasonable to conclude that these cases include offenses sentenced under United States Sentencing Guidelines Chapter Two, Part M addressing “Offenses Involving National Defense and Weapons of Mass Destruction.” See U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. M (2007).

405. U.S. SENTENCING COMM’N, *supra* note 404, tbl.14.

406. *Id.*

407. *Id.* tbl.17.

408. *Id.*

409. *Id.* tbl.18.

410. Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Convictions and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 851 (2007).

411. *Id.* at 884 (including direct violations, conspiracies, and attempts). Of those charges, forty-six were pending at the time the article was published, twenty-three defendants so charged were not yet in U.S. custody, and twenty-three others were in custody and awaiting trial. *Id.* Of the remaining sixty-two defendants in Professor Chesney’s database, nine were convicted by jury and thirty others pled guilty. *Id.* Eleven defendants pled guilty to other charges and the § 2339B counts against them were dropped. *Id.* Eleven defendants were acquitted or successfully moved to have the charges dismissed. *Id.* Charges against one defendant were dropped when he died. *Id.*

412. *Id.* at 886. One defendant received sentences for two separate charges under 18 U.S.C. § 2339B, and these numbers reflect Professor Chesney’s calculations taking into account the higher sentence. *Id.*

months for direct violations;<sup>413</sup> the mode was 180 months for all § 2339B offenses.<sup>414</sup> As discussed above, when applying U.S.S.G. section 3A1.4, the minimum sentence for offenses involving a federal crime of terrorism is between 210 and 262 months.<sup>415</sup> The minimum U.S.S.G. section 3A1.4 sentence is approximately 171% of the mean sentence in 18 U.S.C. § 2339B cases analyzed by Professor Chesney. The maximum sentence from the stated range is approximately 213% above the mean § 2339B sentence.<sup>416</sup>

#### **X. U.S.S.G. Section 3A1.4's Manipulation of Criminal History Category**

It is difficult to isolate any one factor in U.S.S.G. section 3A1.4's sentencing calculus that is most flawed, but if one were forced to do so, the factor that most drives the dramatic increases in sentences is fixing defendants' Criminal History Categories at VI. Eighteen U.S.C. § 3553(a)(1) requires a court to consider a defendant's history and characteristics in making its sentencing determinations.<sup>417</sup> To evaluate U.S.S.G. section 3A1.4 under that standard, it is important to ask two questions. First, what evidence does the Sentencing Commission rely upon to support a legal presumption that every defendant is properly a Criminal History Category VI? Second, does the evidence support a shift in every case? One effect of U.S.S.G. section 3A1.4 is to exacerbate disparities between the sentences of similar defendants for similar conduct, because this Guideline instructs a sentencing court to substitute an artificial determination for each individual defendant's true characteristics.<sup>418</sup>

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413. *Id.* at 888.

414. *Id.*

415. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4, ch. 5, pt. A, sentencing tbl. (2007).

416. Since section 3A1.4 of the U.S.S.G. is an adjustment made after the base offense and other adjustments have been calculated, when the adjusted offense level is above twenty before applying section 3A1.4, the sentence is driven even higher, and the ratio of that sentence to the mean for all § 2339B cases will be even greater. *See id.* § 3A1.4(a) (instructing that a defendant's base offense level should be raised to level thirty-two, or by twelve levels, whichever is greater, with the result that a defendant whose base offense level is greater than twenty will have a Guidelines sentence range of greater than 210 to 262 months); *see also id.* ch. 5, pt. A, sentencing tbl. (providing longer prison sentences for defendants with higher offense levels). These statistics indicate courts are taking steps to mitigate section 3A1.4 or are simply not adding the enhancement. *See infra* note 456 for discussion of jurisdictions that deviate from the Guidelines.

417. 18 U.S.C. § 3553(a)(1) (2006).

418. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(b) (instructing that a defendant sentenced under the Guideline is to automatically receive an enhanced

The Sentencing Guidelines have legitimacy only if they are based in valid statistics and principles.<sup>419</sup> The Supreme Court and the Sentencing Commission have opined that the deference to be given to the Sentencing Guidelines derives principally from the fact that the Guidelines were developed based on the experience of thousands of cases over a period of years.<sup>420</sup> But when U.S.S.G. section 3A1.4 was adopted, the number of the anti-terrorism cases was tiny, so there could be no analysis of a statistically reliable group of defendants upon which to build a reliable Guideline.<sup>421</sup>

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Criminal History Category, without mandating individualized consideration of whether this is appropriate for the individual defendant). Before *Booker*, the Second Circuit determined that Guidelines Manual section 3A1.4(b)'s boost of a criminal history to a Category VI for a single act of terrorism by a first-time offender with no prior criminal behavior was not double counting. *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). The court justified this holding on the theory that a terrorist with no prior criminal record nonetheless might have a likelihood of recidivism and may be particularly difficult to rehabilitate, and, therefore, may merit incarceration for a long period of time. *Id.* However, the Second Circuit also cautioned that if a judge determined that section 3A1.4(b) overrepresented the seriousness of the defendant's past criminal conduct and the likelihood that he or she would commit other crimes, the court "always has the discretion under § 4A1.3 to depart downward in sentencing." *Id.*

419. See *Rita v. United States*, 551 U.S. 338, 349 (2007) (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); cf. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2007) (listing honesty, uniformity, and proportionality as Congress' objectives in creating the Sentencing Guidelines).

420. *E.g., Rita*, 551 U.S. at 349 ("The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time . . ."); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) ("[T]he Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statute, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice.").

421. United States Sentencing Guidelines section 3A1.4 went into effect November 1, 1995. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4, historical n. Pre-1997 statistics on terrorism cases are not readily available or reliable. Even looking to statistics post-enactment, in 1997 there were only eight indictments for international terrorism offenses, in 1998 a total of seven, in 1999 a total of twenty-nine, and in 2000 a total of fourteen. See TRAC REPORTS, A SPECIAL TRAC REPORT: CRIMINAL ENFORCEMENT AGAINST TERRORISTS (2002), <http://trac.syr.edu/tracreports/terrorism/report011203.html>. Post-2001 cases show an exponential growth in investigations, charges, and prosecutions, but not a large number of cases overall. See CTR. ON LAW AND SEC., *supra* note 307.

A. *Recidivism and the U.S.S.G.*

When the Sentencing Commission was created, it did not have the time or resources to create a measure of the risk of recidivism, so it relied on existing measures.<sup>422</sup> These included the United States Parole Commission Recidivism Predictor—the Salient Factor Score (SFS).<sup>423</sup> The Sentencing Commission’s Criminal History Categories scale (CHC) and the SFS scale consider: the frequency and seriousness of criminal history, whether the instant offense was conducted while under criminal justice supervision, and the recency of the prior offenses in determining the risk of recidivism.<sup>424</sup> The two methods differ in two factors: the CHC considers whether the prior offense conduct involved violence,<sup>425</sup> and the SFS takes into account the offender’s age.<sup>426</sup>

The SFS is intended to assess only the probability of recidivism,<sup>427</sup> while the CHC has as its “core philosophy” the additional purpose of “just punishment and deterrence.”<sup>428</sup> This component is explained in the Introductory Comments to Chapter 4, Part A of the Guidelines.<sup>429</sup> The current offense alone does not determine culpability, a defendant’s prior criminal behavior also comes into play.<sup>430</sup> The Sentencing Commission states that its policy of “[g]eneral deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.”<sup>431</sup>

Since its adoption, the SFS’s reliability has “been continually tested, reformatted, and evaluated . . . .”<sup>432</sup> The Sentencing Commission staff<sup>433</sup> analyzed how to improve the CHC by using recidivism data to test the predictive power of the SFS and the

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422. LINDA DRAZGA MAXFIELD ET AL., A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE 3 (2005), [www.ussc.gov/publicat/recidivismsalientfactorcom.pdf](http://www.ussc.gov/publicat/recidivismsalientfactorcom.pdf).

423. *Id.* at 1, 2–3.

424. *Id.* at 5–7.

425. *Id.* at 7.

426. *Id.* at 7–8. The report notes, however, that “the ‘decay’ factor of the CHC is often interpreted as a proxy for age at current offense.” *Id.* at 8.

427. *Id.* at 3.

428. *Id.*

429. U.S. SENTENCING GUIDELINES MANUAL ch.4, pt. A, introductory cmt. (2007).

430. *Id.*

431. *Id.*

432. MAXFIELD ET AL., *supra* note 422, at 3.

433. *Id.* at title page (identifying the Sentencing Commission staff as authors).



CHC.<sup>434</sup> The staff found that the SFS is the better predictor of recidivism<sup>435</sup> and suggested that the CHC's power to predict recidivism could be greater than the SFS's if it incorporated two elements from the SFS.<sup>436</sup> These elements were an age factor and a first offender status factor.<sup>437</sup> Both are relevant to U.S.S.G. section 3A1.4 analysis.

The Sentencing Commission staff has concluded that first offenders are unique,<sup>438</sup> and consequently distinguished first offenders within the procedural structure of the Guidelines.<sup>439</sup> The Sentencing Commission, however, did not create a separate Criminal History Category for first offenders.<sup>440</sup> That decision prompted the Sentencing Commission, fifteen years later, to analyze recidivism data to assess the need for such a category.<sup>441</sup> The resulting recidivism study found that a first offender with no prior arrests has a 2.5% probability of a second conviction; a first offender with arrests, but no convictions, has a 5.3% chance of a second conviction; and a first offender with convictions on minor offenses that do not generate a Criminal History Category point has a 2.9% chance of a second conviction.<sup>442</sup>

Many of the defendants against whom material support cases have been brought have no prior criminal history.<sup>443</sup> There is no

434. *Id.* at 8–15.

435. *Id.* at 12.

436. *Id.* at 15–16.

437. *Id.*

438. See LINDA DRAZGA MAXFIELD ET AL., RECIDIVISM AND THE “FIRST OFFENDER” 2 (2004), [www.ussc.gov/publicat/Recidivism\\_FirstOffender.pdf](http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf).

439. Cf. 28 U.S.C. § 994(j) (2006). (“The [Sentencing] Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the Defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”).

440. MAXFIELD ET AL., *supra* note 438, at 1 (“[O]ffenders with the least number of prior criminal convictions are classified into Criminal History Category I (“CHC I”) . . . [but] CHC I is more broadly defined than “first offenders.” While offenders with zero criminal history points are included, CHC I also applies to offenders with a prior conviction receiving one criminal history point.”).

441. *Id.* at 2.

442. *Id.* at 26.

443. See, e.g., *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008) (finding that Chandia's sentencing enhancement was not properly assessed due to his lack of a criminal history); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc), *vacated*, 543 U.S. 1097 (2005), *sentence vacated*, 405 F.3d 1034 (4th Cir. 2005) (stating Hammoud would have been placed in a Category I if not for the enhancement); *United States v. Warsame*, No. 04-29, 2009 WL 2611277, at \*2 (D. Minn. 2009) (finding the material support raised enhancement raised Warsame's Criminal History Category from I to VI); *United States v. Aref*, No. 04-CR-402, 2007 WL 804814, at \*3 (N.D.N.Y. 2007) (finding that placing the defendant in Criminal History Category VI substantially over-represented the seriousness of his

published statistical data demonstrating that defendants convicted of violating 18 U.S.C. §§ 2339B, 2339C, or other anti-terrorism statutes—and especially those convicted of financing offenses—are any more likely to be recidivists than any other first offenders.<sup>444</sup> Nothing in the history of U.S.S.G. section 3A1.4 would indicate that any reliable data was used to determine if a person convicted of a material support offense is more likely to be a recidivist.<sup>445</sup>

*B. Comparing Defendants Sentenced Under U.S.S.G. Section 3A1.4 and Defendants Sentenced as Career Offenders*

There is no true analog to U.S.S.G. section 3A1.4's manipulation of criminal history, but comparing it to U.S.S.G. section 4B1.1 (the "Career Offender" Guideline)<sup>446</sup> is instructive. U.S.S.G. section 4B1.1 defines a career offender as a defendant who is at least eighteen years of age at the time he or she committed the current offense; has committed a felony that is either a crime of violence or a drug offense; and has had at least two prior felony convictions of either a crime of violence or a drug offense.<sup>447</sup> In these circumstances, the defendant becomes a Category VI offender and specified offense levels apply.<sup>448</sup>

U.S.S.G. section 3A1.4's fixing a defendant's Criminal History Category at VI creates an irrebuttable legal presumption that the defendant is a recidivist career offender who cannot be deterred by fear of prison and who is certain to commit serious offenses in the future.<sup>449</sup> Like U.S.S.G. section 3A1.4, the "Career

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criminal history).

444. Cf. CTR. ON LAW AND SEC., *supra* note 307 (highlighting the relatively minimal usage of the statute and the lack of substantive data on collective characteristics of offenders who have been convicted of financing terrorism).

445. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

446. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2007).

447. *Id.*

448. *Id.*

449. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2007). This comment introduces the Guidelines in the chapter addressing how a defendant's Criminal History Category is determined. *Id.* ch. 4, pt. A ("Criminal History"). *But see id.* ch. 4, pt. B (addressing "Career Offenders" and setting their Criminal History Category, in every case, as VI). The Sentencing Commission states that "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of a greater punishment" and that "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." *Id.* ch. 4, pt. A, introductory cmt.

Offender” Guideline substitutes a legal presumption for an individualized profile.<sup>450</sup> But U.S.S.G. section 4B1.1 has some claim to be predictive, because it requires evidence of particularized recidivism in that the defendant must have two prior felony convictions and those felonies must be crimes of violence or drug offenses.<sup>451</sup> Furthermore, the new offense for which the defendant is being sentenced must also be a crime of violence or a drug offense,<sup>452</sup> indicating habitual behavior warranting the highest Criminal History Category.

The presumption under U.S.S.G. section 3A1.4 is incompatible with 18 U.S.C. § 3553, which requires that a defendant be evaluated individually to justify his or her sentence.<sup>453</sup> Worse, U.S.S.G. section 3A1.4’s presumption is not based on a study of the recidivism of those convicted of material support or any other empirical evidence.<sup>454</sup> By focusing on prior convictions, the CHC heightens culpability based upon the defendant’s decision to engage in recurrent criminal activity as demonstrated by prior convictions.<sup>455</sup> Nonetheless, post-*Booker*, but pre-*Kimbrough*, *Rita*, and *Gall*, a number of courts held that the “Career Offender” Guideline produces sentences that are greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553, and so did not apply the Guidelines faithfully.<sup>456</sup> One court reasoned that “Career Offender” presumptions are “fraught with potential imprecision.”<sup>457</sup>

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450. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (“A career offender’s criminal history category *in every case* under this subsection shall be Category VI.” (emphasis added)).

451. *Id.* § 4B1.1(a).

452. *Id.*

453. 18 U.S.C. § 3553(a)(2) (2006).

454. *United States v. Awan*, No. CR-06-0154, 2007 U.S. Dist. LEXIS 51772 \*5–6 (E.D.N.Y. 2007) (noting that U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 took effect in November 1995, and “there is limited legislative or administrative history discussing how and why this sentencing enhancement came into being.”); *see supra* text accompanying note 421.

455. MAXFIELD ET AL., *supra* note 422, at 3–4.

456. In *United States v. Moreland*, the Fourth Circuit addressed the sentence imposed upon a defendant treated as a career offender with a Guidelines prison sentence range of thirty years to life because of two minor, prior non-violent drug offenses. 437 F.3d 424 (4th Cir. 2006). The district court imposed a sentence of ten years, one-third the Guidelines sentence. *Id.* at 428. The Fourth Circuit found that a departure was warranted, because the defendant’s prior history did not justify the career offender designation, though it concluded that the district court judge committed a clear error in judgment and remanded for a sentence of at least twenty years. *Id.* at 436–37; *see also* *United States v. MacKinnon*, 401 F.3d 8, 10 (1st Cir. 2005) (remanding for re-sentencing post-*Booker* when the district court, ruling before *Booker*, found that the “Career Offender” Guideline produced a sentence that

## Conclusion

U.S.S.G. section 3A1.4 is not consistent with congressionally established penalties for the offense of providing material support to a designated foreign terrorist organization. Neither is it consistent with the related Guidelines. Its treatment of defendants—especially first offenders—as undeterrable and incorrigible recidivists is inconsistent with sentencing policy and the available study data. If constitutionally valid, its impact on sentences based upon a defendant’s intent—a classic essential element of an offense—determined by a judge by a preponderance of the evidence, must at a minimum raise disturbing questions about the fairness and integrity of the sentencing process. In addition to all of the sentencing-related questions about the Guideline, questions of whether it represents beneficial anti-terrorism policy remain. Nuance in sentencing those guilty of “material support” is better anti-terrorism policy, as well as better sentencing policy. U.S.S.G. section 3A1.4, in its deviation from existing Guidelines policy and failure to account for the specific attributes of each offense and defendant, represents the worst in U.S. sentencing policy, and as such should be abandoned.

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was “obscene” and “unwarranted by the conduct”); *United States v. Burhoe*, 409 F.3d 5, 11 (1st Cir. 2005) (remanding for a second examination of the Guidelines in the interest of reducing the sentence because the defendant did not fit the personal profile of a career offender); *United States v. Carvajal*, No. 04-CR-222, 2005 U.S. Dist. LEXIS 3076, at \*15 (S.D.N.Y. 2005) (stating the “Career Offender” Guideline is “the same regardless of the severity of the crimes, the dangers posed to victims’ and bystanders’ lives, and other appropriate criteria”); *United States v. Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005) (imposing sentence of 108 months rather than the 188 to 235 month “Career Offender” range based on diminished capacity from an “appallingly traumatic childhood” which “directly precipitated his life on the streets and his conduct as a career offender”); *United States v. Person*, 377 F. Supp. 2d 308, 310 (D. Mass. 2005) (departing downward from a 262 to an 84 month sentence where the court determined that designating the defendant a “Career Offender” based on one prior charge each of drug distribution, assault and battery by means of a dangerous weapon, and resisting arrest “grossly overstated” the seriousness of the defendant’s criminal history); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005), *vacated*, 456 F.3d 1353 (11th Cir. 2006) (sentencing the defendant to 204 months because the “Career Offender” sentence of 360 months to life was “out of character with the seriousness” of the offense, was not necessary to achieve deterrence or incapacitation, and would undermine respect for law).

457. *Moreland*, 437 F.3d at 436.

