

Summer 2009

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Recommended Citation

Abby Pringle, Enhancing Sentences for Past Crimes of Violence: The Unlikely Intersection of Illegal Reentry and Sex Crimes, 99 J. Crim. L. & Criminology 1195 (2008-2009)

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ENHANCING SENTENCES FOR PAST CRIMES OF VIOLENCE: THE UNLIKELY INTERSECTION OF ILLEGAL REENTRY AND SEX CRIMES

Abby Pringle*

This Comment explores the evolving understanding of when a sex offense may (and should) be considered a crime of violence sufficient to elicit the maximum enhancement available for illegal reentry crimes under the Federal Sentencing Guidelines. The meaning of the term “forcible sex offense,” though appearing in the commentary applicable only to a single Guideline, has created a persistent circuit split with implications for the development of Guidelines sentencing, the criminalization of immigration offenses, and state laws defining sexual offenses. This Comment introduces the Guidelines sentencing regime and conventions of judicial interpretation that serve as the foundation for the controversy, examines the state and federal laws at issue, and discusses origins of the split and the practical effects of its resolution for several areas of law, ultimately recommending that the Commission create a separate category of enhancement for sex offenses outside the crime of violence context.

I. INTRODUCTION

Section 2L1.2 of the Federal Sentencing Guidelines Manual (the Guidelines) delineates a graduated sentencing scheme for the offense of unlawfully entering or remaining in the United States following a prior removal.¹ The scheme provides four levels of enhancements for defendants whose prior removal was upon conviction of a crime.² The severity of the

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¹ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) (2008).

² *Id.*

enhancement is determined by the nature of the offense for which the defendant was removed, with the highest level reserved for the most culpable and dangerous offenses. One way the Guidelines make this distinction is by labeling an offense a “crime of violence,” a term that is defined differently under section 2L1.2 than elsewhere in the Guidelines or the United States Code.³ The United States Sentencing Commission has revised the section 2L1.2 definition of “crime of violence” several times to more accurately reflect the purposes of punishment in general and punishment of illegal reentry in particular.⁴ Since 2001, that definition has laid out two paths by which a court may label an offense a crime of violence: (1) it may be one of a number of enumerated crimes considered per se crimes of violence, or (2) it may fall under a more general, catchall description of crimes that involve actual, attempted, or threatened physical force.⁵

The courts have not, however, been in accord as to whether and how certain crimes fit into either definition. The most recent question to split the circuits is what range of crimes constitutes “forcible sex offenses,” one of the enumerated crimes of violence.⁶ In 2008, the Sentencing Commission set forth amendments to the Guidelines that explicitly addressed a split among the appellate circuits as to whether a “forcible sex offense” requires that the use of physical force be an element of the offense.⁷ The amendment clarified that, consistent with the evolution of state rape laws, “forcible sex offense” means any sexual contact that occurs against the will of the victim.⁸

This Comment examines the meaning of “forcible sex offense” under section 2L1.2 as part of a historical pattern and considers its implications going forward. Part II explores the crime of illegal reentry and the development of the accompanying sentencing regime. This Part also introduces the purposes of punishment and the Guidelines generally, and the purpose and development of section 2L1.2 in particular. Part III addresses the evolving definitions of “crime of violence” and “forcible sex offense,” explaining the differences in interpretation that created the circuit split and the Commission’s responses. Part IV briefly addresses the history of rape and sex offense law in the United States and considers the impact of

³ *Id.* § 2L1.2(b)(1)(A)(ii).

⁴ See 28 U.S.C. § 994(o) (2006) (explaining that the Sentencing Commission must “periodically review and revise” the Guidelines); see also *infra* Part II.B.2 (discussing the function of commentary to the Guidelines).

⁵ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(ii).

⁶ See *United States v. Chacon*, 533 F.3d 250, 256 (4th Cir. 2008) (recognizing the split).

⁷ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632.

⁸ *Id.*

that history on the current controversy. Finally, Part V discusses the intersection of sex offenses and immigration crimes in section 2L1.2 and the practical implications for each. This Comment suggests that the best way to synthesize and further the purposes of all of these competing aspects is to remove sex offenses from the “crime of violence” definition entirely and create a separate category of enhancement. Doing so harmonizes several purposes and concerns around this difficult area of law. The solution recognizes that sex offenders are dangerous and deserving of punishment and exclusion, but allows gradations among sex offenses to meet the stated purpose of assigning harsh punishments to only the most deserving offenders. The separation is also consistent with the movement toward understanding rape as a crime against individual autonomy rather than a crime of physical violence.

II. THE CRIME AND PUNISHMENT OF ILLEGAL REENTRY

The criminalization of immigration violations remains a relatively young area of law.⁹ Regulation of immigration is traditionally a federal administrative function, whereas state judiciaries claim primary responsibility for the enforcement of criminal law. Though increasingly integrated, the two regimes still operate independently—and often ignore the effects of the other.¹⁰

A. 8 U.S.C. § 1326 AND SECTION 2L1.2

Section 2L1.2 of the Federal Sentencing Guidelines Manual governs criminal penalties for “Unlawfully Entering or Remaining in the United States” following a prior removal.¹¹ Specifically, section 2L1.2 applies to the “illegal reentry” crimes described by 8 U.S.C. § 1326.¹² Subsection (a)

⁹ See, e.g., Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 264, 264 (2006).

¹⁰ *Id.* at 265 & n.21 (noting that some areas of immigration law impose criminal sanctions, but these sanctions are accompanied by removal or other immigration sanctions).

¹¹ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2. For the purpose of this Comment, the relevant segment of section 2L1.2 is subsection (b)(1)(A), addressing the specific offense characteristics that merit a sixteen-level sentence enhancement, applicable where

the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense.

¹² *Id.* § 2L1.2 cmt. Section 2L1.2 also applies to a second or subsequent violation of 8 U.S.C. § 1325(a), which, in pertinent part, punishes any non-citizen who “(1) enters or attempts to enter the United States . . . or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a

of this provision makes it a crime for any previously removed alien to “enter[], attempt[] to enter, or . . . at any time [be] found in, the United States” regardless of the reason for his removal.¹³ Conviction under subsection (a) carries a maximum prison sentence of two years.¹⁴ Subsection (b), to which section 2L1.2 most often applies, increases the punishment for aliens removed under specific circumstances. Section 1326(b)(2), for example, provides a statutory maximum of twenty years imprisonment for an alien “whose removal was subsequent to a conviction for commission of an aggravated felony.”¹⁵

Section 1326 essentially makes reentry a strict liability crime. Though a general intent to reenter the country is required, specific intent is not;¹⁶ once an offender is “found,” he has no meaningful defense.¹⁷ Accordingly, 99.3% of immigration convictions during the last fiscal year for which data are available were the result of a guilty plea.¹⁸ The statute provides minimal gradation or specificity within the range of conduct it prohibits; since section 2L1.2 does create gradations (ableit based on the offense for which the noncitizen was removed from the country), the Guideline assumes a central role in defining culpability.

Here the tension between criminal law and immigration law begins to emerge. Immigration law, like criminal law, regulates the relationship between the individual and the state, but the former has traditionally been understood as an exercise of state power to *exclude* individuals “whose presence in the country [Congress] deems hurtful.”¹⁹ Regardless of the facial similarities between an immigration adjudication and a criminal

willfully false or misleading representation or the willful concealment of a material fact.” 8 U.S.C. § 1325(a) (2006).

¹³ 8 U.S.C. § 1326(a) (2006).

¹⁴ *Id.*

¹⁵ 8 U.S.C. § 1326(b)(2); see *infra* note 81 (discussing the use and meaning of “aggravated felony”).

¹⁶ See, e.g., *Pena-Cabanillas v. United States*, 394 F.2d 785, 789 (9th Cir. 1968), *abrogated on other grounds by* *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005) (“The government need only prove that the accused is an alien and that he illegally entered the United States after being deported according to law. An allegation of willfulness is unnecessary . . .”). While this interpretation is universally accepted when an alien “enters” or is “found” in the United States, the appellate courts disagree as to whether the same is true for an attempted reentry. See, e.g., James A. Fortosis, *Through the Funnel of Abstraction: Why Specific Intent Should Be the Required Mens Rea for Attempted Illegal Reentries*, 2007 U. CHI. LEGAL F. 503, 505-06.

¹⁷ Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517, 521 (2006).

¹⁸ U.S. SENT’G COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2008), available at <http://www.ussc.gov/ANNRPT/2008/Table11.pdf>.

¹⁹ *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

proceeding, a deportation decision “is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.”²⁰ The distinction is important, because noncitizens in immigration hearings do not have the same procedural rights as defendants in criminal trials, regardless of citizenship status.²¹ Immigration defendants are entitled only to the constitutional guarantee of due process.²²

The Supreme Court maintains (albeit tenuously) that § 1326(b) does not violate due process by relying on these administrative deportation decisions to differentiate the level of punishment from that available under § 1326(a).²³ In so deciding, however, the Court explicitly expressed no view as to whether the holding applies to *sentencing* determinations based on decisions that bear “significantly” on the severity of the sentence.²⁴ In the context of illegal reentry, immigration decisions provide not only an element of the strict liability crime under § 1326 but also the basis for both determining and enhancing the Guidelines sentence. The Guidelines, however, deal explicitly with the criminal system, and the Sentencing Commission assumes a defendant subject to sentencing has received the benefits of that system’s attendant guarantees.

B. THE ROLE OF THE GUIDELINES AND THE SENTENCING COMMISSION

To understand how and why the “forcible sex offense” controversy arose (and may reasonably be resolved), some background on the Sentencing Guidelines and the purposes Congress seeks to achieve through sentencing is necessary. This history and structure both affect the ways in

²⁰ *Id.*

²¹ See Stumpf, *supra* note 9, at 265 & n.36.

²² *Id.* Immigration hearings do not recognize other constitutional protections associated with criminal defendants, such as the right to confront witnesses or to a public trial. See U.S. CONST., amend VI; *infra* note 179 and accompanying text.

²³ In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court found that the prior felony or aggravated felony included in subsection (b) is merely a sentencing enhancement rather than elements of a separate crime. *Id.* at 247; see also Stumpf, *supra* note 9, at 235-39. The 5-4 decision carved out an exception to the rule announced two years later in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact that increased a sentence must be proved to a jury beyond a reasonable doubt. The majority opinion in *Apprendi* acknowledged that *Almendarez-Torres* conflicted with the general rule *Apprendi* solidified but maintained what is often referred to as the “recidivism exception” on the grounds that the prior convictions had already been subjected to constitutional scrutiny. *Apprendi*, 530 U.S. at 496. *Apprendi* also noted, however, that it was possible that *Almendarez-Torres* was incorrectly decided. *Id.* at 489 & n.15.

²⁴ *Almendarez-Torres*, 523 U.S. at 247-48.

which the Guidelines are interpreted and necessarily inform the proper solution to any controversy.²⁵

A few unique features of the Guidelines make implementation unlike that of other federal statutes. First, the Sentencing Commission plays a role different from that of a legislative body, but one that is also not directly analogous to other administrative bodies.²⁶ Though considered an "independent agency in every relevant sense,"²⁷ the Commission is situated by statute in the judiciary. This placement insulates the Commission from much of the reach of the Administrative Procedure Act of 1946, the source of judicial authority to review the actions and interpretations of administrative agencies.²⁸ Within the realm of its expertise, the Commission is not only the creator and proponent of its own "legislative rules," but it also monitors the rules' success and suggests amendments.²⁹ Crucially, the Commission also has primary authority, recognized by the Supreme Court, to resolve disagreements among appellate circuits as to substantive questions of Guideline interpretation where they arise.³⁰

Second, albeit relatedly, the relationship between the Commission and the courts is unusual. The Commission's roles include both regulation of judicial discretion and aid in judicial interpretation.³¹ In both functions, the Commission speaks through commentary accompanying the Guidelines. The commentary binds the courts, though it is not reviewed by Congress and may be inconsistent with judicial precedent.³²

²⁵ See, e.g., *Koon v. United States*, 518 U.S. 81, 95-96 (1996) (citing with approval then-Judge Breyer's statement in *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) that proper application of a Guideline requires examination of the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole").

²⁶ See John P. Jurden, *United States v. Muschik: An Administrative Law Critique of the Federal Sentencing Guidelines' Ability to Override Judicial Statutory Interpretations*, 80 MINN. L. REV. 469, 475-76 (1995).

²⁷ *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

²⁸ See Jurden, *supra* note 26.

²⁹ See *Braxton v. United States*, 500 U.S. 344, 348 (1991) ("[C]ongress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.").

³⁰ *Id.* (stating that while the Court usually considers the prerogative to resolve disputes among appellate circuits "initially and primarily [theirs] . . . this may not be Congress' intent with respect to the Sentencing Guidelines"); see also Jurden, *supra* note 26, at 480 (explaining that the legislative history of the Sentencing Reform Act shows that Congress intended the Commission to be the "primary means" of resolving circuit splits).

³¹ *Braxton*, 500 U.S. at 348.

³² *United States v. Stinson*, 508 U.S. 36, 46 (1993). See *infra* Part II.B.2 for further discussion on the role of commentary in the Guidelines.

In establishing the Sentencing Commission, Congress identified a handful of purposes for criminal sentences: retribution, education, deterrence, and incapacitation.³³ The resulting Sentencing Reform Act of 1984 (SRA) charged the Commission with promulgating guidelines to further these purposes and simultaneously reducing the sentencing disparities observed under a discretionary sentencing regime.³⁴ The SRA commands that a sentence be “sufficient, but not greater than necessary” to achieve these goals.³⁵ When first enacted, the SRA required courts to adhere to the Sentencing Guidelines unless a departure was specifically warranted by the circumstances.³⁶ The Supreme Court declared the Guidelines advisory in 2005,³⁷ returning discretion in sentencing decisions to district judges, subject to appellate review for “reasonableness” and consistency with the policy purposes of sentencing.³⁸

1. Basic Sentencing Methodology

The Sentencing Guidelines can be described as “a long set of instructions for one chart: the sentencing table . . . , which has 43 offense levels, 6 criminal history categories, and 258 sentencing range boxes.”³⁹ To determine the appropriate prison term, a sentencing court: (1) identifies the proper Guideline (or Guidelines) to provide the “base level” for the offense; (2) applies relevant adjustments based on “specific offense characteristics” or special instructions contained within the Guideline; (3) applies adjustments related to the victim, the offender’s role in the crime, obstruction of justice, or acceptance of responsibility; (4) determines the appropriate category for the offender’s criminal history; and (5) consults the

³³ See LISA M. SEGNETTI & ALISON M. SMITH, CONG. RES. SERV., REP. NO. RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 10-11 (2007), available at <http://www.fas.org/sgp/crs/misc/RL32766.pdf>.

³⁴ U.S. SENTENCING GUIDELINES MANUAL § 1A.2 (2008).

³⁵ 18 U.S.C. § 3553(a)(2) (2006) lays out the purposes of sentencing as:

(A) to reflect the seriousness of the offense, to promote respect for the 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; (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The Sentencing Reform Act of 1984 is codified at 18 U.S.C. §§ 3551-3626 (2006) and 28 U.S.C. §§ 991-998 (2006).

³⁶ See 18 U.S.C. § 3553(b)(1); see also Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1116 (2008).

³⁷ *United States v. Booker*, 543 U.S. 220 (2005). See *infra* Part II.C.1, discussing the impact of *Booker*.

³⁸ See Harrison, *supra* note 36, at 1123-24; see also *Booker*, 543 U.S. at 261.

³⁹ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324-35 (2005).

Sentencing Table⁴⁰ to determine the sentence range based on the intersection of the specific offense level and the offender's criminal history category.⁴¹ Once the range has been determined, the court also considers the use of alternative forms of punishment and whether departures are appropriate under the circumstances.⁴²

2. *The Function of Commentary*

The controversy surrounding the “crime of violence” enhancement at issue in this Comment involves a definition contained in the commentary accompanying section 2L1.2 rather than the Guideline itself. The Supreme Court's position with respect to commentary to the Guidelines is that where the commentary “does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁴³ Even commentary, however, must be read to be harmonious with the plain text of the Guideline; where any inconsistency arises, the plain text controls.⁴⁴ Amended commentary is similarly binding on the courts regardless of the fact that the amendments are not reviewed by Congress; the Commission's most recent interpretation trumps any preceding judicial interpretation.⁴⁵

Though the Guidelines are now advisory, the commentary still holds the weight of the Commission's reasoning.⁴⁶ The definitions and clarifications within the commentary continue to help courts parse meaning from abstract or general language in the Guidelines—such as whether a prior conviction qualifies as a crime of violence as the Commission understood that term under the definition specific to section 2L1.2.⁴⁷

⁴⁰ U.S. SENTENCING GUIDELINES MANUAL § 5A (2008), available at http://www.ussc.gov/2008guid/5a_SenTab.htm. The Sentencing Table is a grid, the horizontal axis of which represents the level assigned to the offender's criminal history, and the vertical axis of which represents the offense level calculated under the appropriate guideline. The intersection of the two provides the range, in months, within which the sentence should fall.

⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

⁴² *Id.*

⁴³ *United States v. Stinson*, 508 U.S. 36, 45 (1993) (internal quotations omitted) (finding the commentary to the Guidelines analogous to a federal agency's interpretation of its own legislative rules).

⁴⁴ See, e.g., *United States v. Rising Sun*, 522 F.3d 989, 996 (9th Cir. 2008).

⁴⁵ *Id.* at 46-47 (holding that the amended definition of “crime of violence” for purposes of section 4B1.2 was binding on the courts).

⁴⁶ For a discussion of the impact of *Booker v. United States*, 543 U.S. 220 (2005), see *infra* Part II.C.1.

⁴⁷ This argument is subject to the same considerations, of course, as noted with regard to the Court's reluctance to resolve circuit disagreements over Guideline interpretation. See *infra* Part II.B.3. Decisions since *Booker* continue to look to the commentary for guidance,

C. JUDICIAL INTERPRETATION OF THE GUIDELINES

1. *Booker and the Advisory Nature of the Guidelines*

In 2005, fewer than twenty years after the first Sentencing Guidelines went into effect, the Supreme Court ended the federal experiment with determinate sentencing.⁴⁸ In *United States v. Booker*, the Court held that the mandatory guidelines violated the Sixth Amendment of the United States Constitution because they gave the power to find essential facts to the judge rather than the jury.⁴⁹ As a remedy, the Court excised the mandatory provision from the United States Code.⁵⁰ The introduction to the current version of the Guidelines Manual addresses the altered nature of advisory guidelines; according to *Booker*, advisory guidelines still serve to

further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted [Advisory guidelines] continue[] to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review . . . [and to] promote certainty and predictability in sentencing⁵¹

The post-*Booker* era has seen the rise of a host of disparities in Guideline interpretation. The Supreme Court continues in its reluctance to review conflicting interpretations of specific Guidelines, deferring to the Commission's expertise and obligation to "periodically review and revise"⁵² as appropriate.⁵³ The Court's post-*Booker* decisions have addressed questions relating to the appropriate standards of appellate review and the

whereas the question of more liberal grants of certiorari has not been directly addressed. *See, e.g.,* *United States v. Bryant*, 557 F.3d 489, 498 & n.8 (7th Cir. 2009) (recognizing that commentary should continue to be considered binding unless it contravened the Guideline or other statute); *accord, United States v. Hawkins*, 554 F.3d 615, 618 (6th Cir. 2009); *United States v. Mohr*, 551 F.3d 604, 607 (5th Cir. 2009); *United States v. Morris*, 562 F.3d 1131, 1135 (10th Cir. 2009); *United States v. Smith*, 568 F.3d 923, 927 (11th Cir. 2009); *United States v. Valenzuela*, 495 F.3d 1127, 1133 (9th Cir. 2007).

⁴⁸ *Booker*, 543 U.S. at 220.

⁴⁹ *Id.* at 235.

⁵⁰ *Id.* at 259.

⁵¹ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2) (2008).

⁵² 28 U.S.C. § 994(o) (2000).

⁵³ *See Braxton v. United States*, 500 U.S. 344, 348 (1991) (explaining that congressional intent regarding the function of the Commission requires the Court to be "more restrained and circumspect" in granting certiorari to resolve conflicts among lower courts' interpretations of the Guidelines).

scope of discretion permitted at the trial court level,⁵⁴ an area better suited to the expertise of the Court than that of the Commission.⁵⁵

One should note, however, that the last time the Court acknowledged its “restrained” use of certiorari to resolve substantive Guidelines disputes was in an opinion delivered while the Guidelines were still mandatory.⁵⁶ Does the timing matter? It may be irrelevant in light of *Booker*’s clear affirmation of the Commission’s expertise and ownership of the Guidelines. Alternatively, if, because the Guidelines are no longer binding, lower courts continue to diverge in their interpretations of a Guideline in spite of an amendment to a guideline, the Court may have occasion to step in to enforce the “appropriate” interpretation through binding precedent. The definition of forcible sex offense may present such an opportunity.

2. The Categorical Approach

Another critical element in Guidelines sentencing is the Commission’s choice to base sentences on the elements of the offense with which a defendant is charged rather than the particular facts of the offense.⁵⁷ Courts have formulated many manifestations of this “charge offense” sentencing to fit different Guidelines.⁵⁸ When making an “individualized” determination as to whether a defendant’s prior conviction is a crime of violence under section 2L1.2, the sentencing court is bound by the “categorical” (or “modified categorical”) approach⁵⁹ laid out in *Taylor v. United States*⁶⁰ and

⁵⁴ In addition to excising the mandatory provisions of 18 U.S.C. § 3553(b)(1) (2000), *Booker* also excised the standard of appellate review for mandatory guidelines, former 18 U.S.C. § 3742(e) (2000 & Supp. 2004). *Booker*, 543 U.S. at 259-60, 271.

⁵⁵ The Court’s primary decisions are *Rita v. United States*, 551 U.S. 338 (2007) (holding that an appellate court may, but is not required to, apply a presumption of reasonableness to a sentence within the range provided by the appropriate Guideline); *Gall v. United States*, 552 U.S. 38 (2007) (finding that courts of appeals must review a sentence imposed by the district court under an abuse-of-discretion standard, regardless of the degree of departure from the Guidelines); and *Kimbrough v. United States*, 552 U.S. 85 (2007) (finding that district courts may rely in part on policy disagreements with the Guidelines in imposing a sentence, and that such reliance is not grounds for automatic reversal under the abuse-of-discretion standard). Recently, the Court also reaffirmed a subset of its holdings in *Rita* and *Kimbrough*. First, in *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam), the Court announced that *Kimbrough* permits a judge to categorically reject and vary from the crack-cocaine Guidelines based on a policy disagreement. *Id.* at 843-44. Second, a unanimous Court, in *Nelson v. United States*, 129 S. Ct. 890 (2009), clarified that while an appellate court may apply a presumption of reasonableness to a sentence within the guidelines range, the sentencing court may not. *Id.* at 892.

⁵⁶ *Braxton*, 500 U.S. at 348.

⁵⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(a) (2008).

⁵⁸ *Id.*

⁵⁹ See, e.g., *United States v. Romero-Hernandez*, 505 F.3d 1082, 1085-86 (10th Cir. 2007).

clarified and reaffirmed in *Shepard v. United States*.⁶¹ The approach permits the sentencing court to look only to the “statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”⁶² If the statute covers a broad range of conduct, the “modified” approach allows (but does not require) the court to look to a limited set of court documents to determine the relevant section under which the defendant was charged.⁶³

Ultimately, the categorical approach protects defendants from being retried for the underlying offense and makes the task of the sentencing court one of statutory interpretation rather than adjudication of guilt.⁶⁴ The modified categorical approach allows the court to further the policy of imposing harsher punishments on more dangerous offenders, even within a single offense.⁶⁵

The difficulty with this approach is that few underlying crimes are defined by federal law⁶⁶—and in the case of sex crimes, that number is essentially zero.⁶⁷ The resulting sentencing decisions are based not necessarily on the actions of a defendant but rather on the language of a wide variety of state statutes. While general trends emerge in the progression of rape law on a national scale, enormous diversity in state approaches is equally apparent—especially in the divisions and grading of

⁶⁰ 495 U.S. 575 (1990).

⁶¹ 544 U.S. 13 (2005).

⁶² *Taylor*, 495 U.S. at 600.

⁶³ *Shepard*, 544 U.S. at 26. The court may look to “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Id.*

⁶⁴ This is particularly appropriate in the context of convictions for illegal re-entry, in which a defendant is guilty merely by “being found” in the country. 8 U.S.C. § 1326(a) (2006).

⁶⁵ See, e.g., *United States v. Lopez-Montanez*, 421 F.3d 926, 931 (9th Cir. 2005) (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc)).

⁶⁶ The power to define and enforce criminal law is traditionally reserved to the states under the federal system. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 824 (1991) (“Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States.”).

⁶⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (finding that Congress overstepped its authority under the Commerce Clause and violated federalism principles in creating a civil remedy for victims of gender-based violence as part of the Violence Against Women Act of 1994). Federal law may be implicated, however, if a sex offender takes a victim over state lines in order to commit the offense. A recent example is the conviction of evangelist Tony Alamo for violations of the Mann Act, 18 U.S.C. §§ 2421-24 (2006), an early twentieth century law prohibiting, among other things, moving women across state lines for “immoral purposes.” See Jon Gambrell, *Jurors Convict Evangelist on 10 Sex-Abuse Counts*, ASSOC. PRESS, July 24, 2009.

offenses and the gravity of the particular facts to be proved.⁶⁸ The fact that courts are not *obligated* to employ the more individualized “modified” categorical approach to the statutory definition further aggravates disparities in court interpretations. Though most courts, faced with a broad or lengthy statute, choose to narrow the scope of their inquiry, those that opt for a formalistic categorical approach (that is, considering whether *all* conduct covered by the *entire* statute can be classified as a crime of violence) add another layer of confusion to the mix.⁶⁹

III. FORCIBLE SEX OFFENSES AND CRIMES OF VIOLENCE

The term “crime of violence” appears frequently throughout the federal criminal codes, often as means by which legislators designate certain actions as more culpable or deserving of punishment than others.⁷⁰ Within the Sentencing Guidelines, there are two definitions of “crime of violence,” both meant to differentiate offenses the Commission deems deserving of greater punishment.⁷¹ As originally laid out by the SRA,⁷² there are four primary purposes to be achieved in imposing a sentence: (1) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment”; (2) to deter criminal conduct in general; (3) to “protect the public” by deterring the individual offender from further

⁶⁸ See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 297, 307-09 (8th ed. 2007). For an overview of the progression of rape and sexual assault law, see *infra* Part IV.A.

⁶⁹ The Fifth Circuit, in *United States v. Meraz-Enriquez*, 442 F.3d 331 (5th Cir. 2006), for example, recognized the circuit’s inconsistent application of the two approaches. In *Meraz-Enriquez*, the information to which the defendant pled guilty was not part of the record. *Id.* at 333 n.2. The opinion noted that while they were permitted to narrow the scope of a broad statute, as the en banc court did in *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc), they would follow the reasoning of *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004), discussed *infra* Part III.C; where the statute criminalized sexual contact effectuated by legally-invalid consent-in-fact, it was not a crime of violence. *Meraz-Enriquez*, 442 F.3d at 333 & n.2.

⁷⁰ See, e.g., *United States v. Lucio-Lucio*, 347 F.3d 1202, 1205 (10th Cir. 2003) (stating that the crime of violence distinction was intended to “differentiate among crimes and to apply more severe sanctions to a limited class of especially heinous offenses”).

⁷¹ See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632 (2001).

⁷² Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998). The federal statutes creating the United States Sentencing Commission and providing for sentencing structure were enacted as part of a larger Comprehensive Crime Act, which, in turn, was part of an appropriations bill. The portion of the Act creating the United States Sentencing Commission and instructing it to create sentencing guidelines for the federal courts is known as the Sentencing Reform Act of 1984. See PAUL J. HOFER ET AL., U.S. SENT’G COMM’N, FIFTEEN YEARS OF FEDERAL SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL GOVERNMENT IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

criminal conduct; and (4) to provide the most effective correctional treatment for the offender.⁷³ Increasing sentences based on the violent nature of a crime is one way the Sentencing Commission seeks to further these purposes.⁷⁴

A. DEFINITIONS UNDER THE SENTENCING GUIDELINES

Before 2001, the Guidelines defined “crime of violence” only once, in section 4B1.2, as an offense that: “(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”⁷⁵ Section 2L1.2 (and any other Guideline that referred to crimes of violence) incorporated this definition.⁷⁶ In its 2001 amendments to the Guidelines, the Commission replaced wholesale the existing section 2L1.2, severing the meaning of “crime of violence” (and certain other stipulations) from the section 4B1.2 definition.⁷⁷ The purpose of the change was to create a “graduated” enhancement structure for the crime of unlawful reentry, using the seriousness of the prior crime as a proxy for the dangerousness and culpability of the defendant.⁷⁸ The Commission acted largely in response to the concerns of judges, attorneys, and law enforcement officials that the existing structure imposed unnecessarily harsh punishments on some less-deserving offenders.⁷⁹ The practical effect, they feared, was *greater* sentencing disparities, as judges applied other types of departures to compensate for this effect.⁸⁰

The pre-2001 version of section 2L1.2 provided for a sixteen-level enhancement for any prior crime that was an “aggravated felony,” as

⁷³ 18 U.S.C. § 3353(a)(2) (2006).

⁷⁴ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2008).

⁷⁵ *Id.* Section 4B1.2 defines terms used to describe “career offenders,” which include those situations where “(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” *Id.* § 4B1.1(a). Chapter Four of the Guidelines deals with an offender’s criminal history and the effect of past criminal acts on sentencing for present offenses. See *generally id.* ch. 4, pt. A, introductory cmt.

⁷⁶ See, e.g., *United States v. Gomez-Leon*, 545 F.3d 777, 788-89 (9th Cir. 2008) (discussing the history of the crime of violence definition under section 2L1.2).

⁷⁷ *Id.* at 788.

⁷⁸ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632 (2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

defined by 8 U.S.C. § 1101(a)(43).⁸¹ The graduated (post-2001) structure offers three options for “specific offense characteristic” enhancements.⁸² Sixteen-level enhancements are reserved for those felonies judged most harmful,⁸³ including “crimes of violence,” whereas “aggravated felonies” now only receive an eight-level enhancement.⁸⁴

B. THE EVOLUTION OF “FORCIBLE SEX OFFENSE” AS A CRIME OF VIOLENCE

Disparate interpretations of “forcible sex offense” have roots in the instability of the definition of crime of violence under both section 2L1.2 and section 4B1.2. The first independent definition of “crime of violence” under the new section 2L1.2 reads as follows:

“Crime of violence”—

(I) means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; *and*

(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.⁸⁵

The two-paragraph format established two “paths” to determine whether an offense is a crime of violence, mimicking section 4B1.2. In fact, the first paragraph was identical to that of section 4B1.2, aside from

⁸¹ *Id.* Somewhat confusingly, one of the definitions of “aggravated felony” found in this title is a “crime of violence” as it is defined under 18 U.S.C. § 16(b)—which is not the same as the definition under the Guidelines. See 8 U.S.C. § 1101(a)(43)(F) (2006). The measure of a crime of violence adopted by 18 U.S.C. § 16 is a lower standard: crimes that “by [their] nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b) (2006). Conduct meeting this definition may only be assigned an eight-level increase under the current section 2L1.2(b)(1)(C). See Kimberly J. Winbush, Annotation, *What Constitutes “Aggravated Felony” for Purposes of U.S.S.G. § 2L1.2(b)(1)(C), 18 U.S.C.A., Providing for Enhanced Sentence for Illegal Reentry If Defendant Was Previously Deported After Conviction for Aggravated Felony*, 25 A.L.R. FED. 2d 349.

⁸² U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1).

⁸³ The sixteen-level enhancement applies to defendants deported upon conviction of “(i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense.” U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2008).

⁸⁴ *Id.* § 2L1.2(b)(1)(B). Other enhancements include twelve levels for drug trafficking offenses with sentences of less than thirteen months and four levels for either any felony *not* considered to be covered by subsections (A) or (B) or for three misdemeanors that are either crimes of violence or drug trafficking offenses. *Id.* § 2L1.2(b)(1)(D)-(E).

⁸⁵ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(ii) (2001) (emphasis added).

section 2L1.2's use of the inclusive "and" rather than "or" at the end.⁸⁶ The second paragraph of both sections enumerated certain offenses that were per se crimes of violence.⁸⁷ Section 4B1.2, however, concludes that list with the open-ended catchall, "or otherwise involves conduct that presents a *serious potential risk* of physical injury to another."⁸⁸ At least in the opinion of some courts, the Commission retained the spirit of that definition in section 2L1.2 by selecting certain crimes as per se crimes of violence because they "inherently pose an implicit threatened use of force."⁸⁹

The ordering and the inclusive "and" at the end of the first paragraph, however, triggered the first reexamination of the section 2L1.2 definition. The Commission discovered that some courts, in deciding whether a statutory definition fit within the meaning of an enumerated offense under the second paragraph, interpreted the Guideline to require the satisfaction of the first condition as well.⁹⁰ This "layered" method of interpretation was not confined to the definition of forcible sex offense, but sex offenses were early contributors to the eventual split.⁹¹

In 2003, the Commission revised the commentary to section 2L1.2 to define a crime of violence as follows:

[A]ny of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.⁹²

The amendment specifically addressed this "layering" of the two paragraphs. As the Commission explained, "The amended definition makes clear that the enumerated offenses are always classified as 'crimes of violence,' *regardless* of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another."⁹³

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2008) (emphasis added).

⁸⁹ *United States v. Pereira-Salmeron*, 337 F.3d 1148, 1152 (9th Cir. 2003) (internal quotations omitted); *accord* *United States v. Curtis*, 481 F.3d 836, 839 (D.C. Cir. 2007).

⁹⁰ See *infra* Part III.C, discussing the rise of a circuit split regarding the proper interpretation of this language.

⁹¹ See, e.g., *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) (interpreting the 2002 Guidelines).

⁹² U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 658 (2003).

⁹³ *Id.* (emphasis added). The commentary noted that confusion had arisen in particular in connection with the element of force in both sexual abuse of a minor and residential burglary.

The Commission further illustrated its clarification by adding statutory rape and sexual abuse of a minor as enumerated crimes separate from “forcible sex offenses.” By declaring these offenses per se crimes of violence, the Commission ensured that they would receive the same sixteen-level enhancement regardless of the fact that both can be accomplished without physical force.

C. THE CIRCUIT SPLIT OVER “FORCIBLE SEX OFFENSES”

In early 2008, the United States Court of Appeals for the Fourth Circuit faced a question of first impression in *United States v. Chacon*: whether a sexual offense that could, by statute, be accomplished with or without the use of physical force qualified as a “forcible sex offense” for the purposes of applying the sixteen-level sentencing enhancement for a crime of violence.⁹⁴ The Fourth Circuit, acknowledging a split among its sister circuits over the force requirement, surveyed the reasoning of both factions to provide a detailed explanation for its decision to answer the question presented in the affirmative.⁹⁵ Defendant Chacon had been convicted under a Maryland statute defining second-degree rape as intercourse accomplished in any of three ways: (1) “by force,” (2) with a victim that is “mentally defective, mentally incapacitated, or physically helpless,” or (3) with a victim who is of or below a certain age.⁹⁶ To determine whether the second definition qualified as a forcible sex offense,⁹⁷ the court began its analysis with the ordinary meaning of the words “forcible” and “force,” looking to both lay and legal dictionary definitions.⁹⁸ It then noted that the Commission “knew how” to denote the necessity of physical force, pointing to the use of the modifier “physical” elsewhere in the commentary to specify the type of force required.⁹⁹

⁹⁴ 533 F.3d 250, 252 (4th Cir. 2008).

⁹⁵ *Id.* at 256-58.

⁹⁶ *Id.* at 255 (citing MD. CODE ANN. art 27, § 463 (repealed 2002)). The law was repealed as part of a reorganization of Maryland statutes and was replaced by an identically-worded statute. See MD. CODE ANN., CRIM. LAW § 3-304 (West 2002). The modified categorical approach was not available in this case, as the charging document did not specify under which subsection of the offense the defendant was charged.

⁹⁷ The court acknowledged that both of the other definitions clearly fit within the definition of forcible sex offense. See *Chacon*, 533 F.3d at 255.

⁹⁸ *Id.* at 257 (“[The] term ‘forcible’ is used in a wide and somewhat unnatural sense to include any act of physical interference with the person or property of another.” (citing BLACK’S LAW DICTIONARY 674 (8th ed. 2004))); *id.* at 257 n.7 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 888 (3d ed. 2002)).

⁹⁹ *Chacon*, 533 F.3d at 258.

Finally, it argued that other enumerated offenses did not require a finding of physical force to be considered crimes of violence.¹⁰⁰

The *Chacon* opinion traces the circuit split's origins to 2004, when the Fifth Circuit held in *United States v. Sarmiento-Funes* that "assented-to-but-not-consented-to" sexual conduct did not constitute a forcible sex offense under the section 2L1.2 definition.¹⁰¹ The *Sarmiento-Funes* court examined a Missouri statute defining sexual assault as a situation in which the defendant "has sexual intercourse with another person knowing he does so without that person's consent."¹⁰² The court found that this language criminalized conduct that neither described a type of bodily injury nor involved "forcible compulsion."¹⁰³ The opinion noted that several states had "modernized and liberalized their rape laws . . . in a few cases even eliminating the force requirement," but, relying on cases decided more than a decade earlier (and therefore not reflective of changes in rape laws), interpreted this trend only as a way for states to distinguish between sex offenses that do and do not require force.¹⁰⁴ Though the sentence under review was imposed under the 2002 version of the Guidelines,¹⁰⁵ the court acknowledged the Commission's statement, accompanying the 2003 amendments, that enumerated offenses were crimes of violence regardless of whether the use of force was an element.¹⁰⁶ The Fifth Circuit failed to find guidance as to the proper reading of "forcible sex offense" in this clarification.¹⁰⁷

In 2005, however, the Third Circuit faced the same question in the case of *United States v. Remoi*.¹⁰⁸ The *Remoi* opinion held that a conviction under a New Jersey sexual assault statute that did not require physical force

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 256 (citing *United States v. Sarmiento-Funes*, 374 F.3d 336, 344 (5th Cir. 2004); *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1145 (9th Cir. 2007)).

¹⁰² *Sarmiento-Funes*, 374 F.3d at 343 (quoting MO. REV. STAT. § 566.040(1) (1999)).

¹⁰³ *Id.* at 344. For an interesting discussion applying a "commodity" theory of sex crimes proposed by Donald Dripps—separating sex offenses into sexually-motivated physical assaults and (non-violent) violations of personal autonomy—to the circuit split, see Lucas R. Franklin, Note, *The Laboratory of Judicial Debate: Examining a Commodity Based Approach to Punishing Sex Offenses*, 57 CLEV. ST. L. REV. 309 (2009).

¹⁰⁴ *Sarmiento-Funes*, 374 F.3d at 344-45 & n.12. In particular the court noted that Missouri had a separate statute outlawing "forcible rape." *Id.* at 338.

¹⁰⁵ The reviewing court considers the version of the Guidelines under which the sentence was imposed, rather than the current version at the time of the review or any later amendments. However, where an amendment is a clarification of an earlier version, rather than a substantive change, the court may properly take it into consideration. See *infra* note 135 and accompanying text.

¹⁰⁶ *Sarmiento-Funes*, 374 F.3d at 344.

¹⁰⁷ *Id.*

¹⁰⁸ 404 F.3d 789 (3d Cir. 2005).

was nonetheless a “forcible sex offense” for the purposes of the crime of violence enhancement.¹⁰⁹ The statutory section at issue criminalized intercourse with a physically helpless victim.¹¹⁰ While noting that its decision was consistent with understandings of statutory rape and sexual abuse of minors as crimes of violence, this approach was novel as applied to sex offenses against adult victims.¹¹¹

The primary differences between the outcomes in the Third and Fifth Circuits stemmed from different approaches to statutory construction. Both courts considered the pre-2003 definition of crime of violence in light of the 2003 amendments but, though both ostensibly began with the “plain language,” identified different starting points for interpretation. The Third Circuit applied a disjunctive approach to the two-tiered definition, considering the enumerated offenses—as directed by the 2003 amendments—without regard for whether those offenses required proof of physical force.¹¹² The court looked next to the whole of the Guideline’s text to interpret the meaning of “forcible” in context. The analysis included the fact that the commentary used the modifier “physical” in front of “forcible” elsewhere in the same comment, suggesting that the absence of the modifier was a purposeful omission.¹¹³ The court also noted that the enumerated offenses included several crimes that did not require physical force, including sex offenses that required only a legal inability to consent.¹¹⁴ The Tenth Circuit adopted the reasoning of *Remoi* when faced with this question, as did the Fourth Circuit in *Chacon*.¹¹⁵

¹⁰⁹ *Id.* at 794.

¹¹⁰ *Id.* at 793 (quoting N.J. STAT. ANN. § 2C:14-2c (West 1990)).

¹¹¹ *Id.* at 795-96. The *Remoi* decision acknowledged the Fifth Circuit’s recent *Sarmiento-Funes* conclusion but found it distinguishable: “The state statute in that case included *any* non-consensual intercourse, whether or not the victim was a minor or incapacitated.” *Id.* at 796.

¹¹² *Id.* at 794 & n.2, 796. In adopting the disjunctive reading, the Third Circuit noted that it joined the Tenth, Eleventh, Seventh, Ninth, Fifth, and Eighth Circuits. *Id.* at 794 n.2 (citing *United States v. Munguia-Sanchez*, 365 F.3d 877, 880-81 (10th Cir. 2004); *United States v. Vargas-Garnica*, 332 F.3d 471, 473-74 (7th Cir. 2003); *United States v. Pereira-Salmeron*, 337 F.3d 1148, 1151-53 (9th Cir. 2003); *United States v. Fuentes-Rivera*, 323 F.3d 869, 872 (11th Cir. 2003); *United States v. Rayo-Valdez*, 302 F.3d 314, 319-20 (5th Cir. 2002); *United States v. Gomez-Hernandez*, 300 F.3d 974, 978-79 (8th Cir. 2002)). While this observation was accurate at the time, the Fifth and Ninth Circuits, as discussed in this Part, altered that interpretation in cases following *Remoi*.

¹¹³ *Id.*

¹¹⁴ *Id.* Statutory rape and sexual abuse of a minor are both crimes that are defined by the victim’s legal inability to consent based on his or her age; consent-in-fact is not considered a factor in determining liability. For an interesting discussion of the problem of using legal inability to consent as a proxy for violence, see Shani Fregia, *Statutory Rape: A Crime of Violence for Purposes of Immigration Deportation?*, 2007 U. CHI. LEGAL F. 539, 552-57.

¹¹⁵ See *United States v. Romero-Hernandez*, 505 F.3d 1082, 1088 (10th Cir. 2007);

The Fifth Circuit in *Sarmiento-Funes* did not detail the reasons for its holding, relying instead on an earlier case that interpreted a statutory rape law¹¹⁶ and simply deciding that “forcible” offenses required “something more” than the conduct criminalized by the statute at issue.¹¹⁷ In subsequent decisions, the Fifth Circuit continued to look back to its own decisions rather than addressing the plain language of the statute in front of the court.¹¹⁸ Perhaps as a consequence, the court continued to use the formula that if consent in fact was possible under the statutory definition (even if the person giving consent is not legally “able” to do so), the offense could *not* be considered forcible.¹¹⁹

While the Tenth, Third, and Fourth Circuits rejected the Fifth Circuit’s reading, only the Ninth Circuit agreed that enumerated “crime of violence” offenses required “proof of force” as an element for a prosecution to be successful.¹²⁰ However, while the Ninth Circuit reads the “crime of violence” definition as a layered proposition, its decisions clearly address the state statute at issue rather than relying on precedential interpretations of dissimilar state laws as the Fifth Circuit tends to do.¹²¹ The result appeared the same at first: in 2007, the Ninth Circuit, in *United States v. Beltran-Munguia*, held that to qualify as a forcible sex offense under the enumerated part of the section 2L1.2 definition, a statute must “criminalize acts that necessitate the use of force”; in other words, the use of force beyond that required to achieve penetration must be an element of the crime.¹²² A few months later, however, the court stepped back from *Beltran-Munguia*, holding that the criminalized act must necessitate “force” but *not* force of

accord United States v. Gonzalez-Jaquez, 566 F.3d 1250, 1252-53 (10th Cir. 2009); United States v. Yanez-Rodriguez, 555 F.3d 931, 944-45 (10th Cir. 2009). In both *Gonzalez-Jaquez* and *Yanez-Rodriguez*, defendants relied on Ninth and Fifth Circuit cases to argue that statutes that can be violated by non-violent conduct cannot be crimes of violence, an argument the Tenth Circuit dismissed as foreclosed by *Romero-Hernandez*. *Gonzalez-Jaquez*, 566 F.3d at 1252-1253; *Yanez-Rodriguez*, 555 F.3d at 944-45.

¹¹⁶ The case, *United States v. Houston*, 364 F.3d 243 (5th Cir. 2004), found that consensual sex made nonconsensual only by the victim’s inability to consent because of her age was not “forcible” as construed in light of U.S. Sentencing Guidelines Manual section 4B1.2.

¹¹⁷ United States v. Sarmiento-Funes, 374 F.3d 336, 345 (5th Cir. 2004).

¹¹⁸ See United States v. Gomez-Gomez (*Gomez I*), 493 F.3d 562, 566-67 & n.5 (5th Cir. 2007), *rev’d en banc*, United States v. Gomez-Gomez (*Gomez II*), 547 F.3d 242 (5th Cir. 2008); United States v. Meraz-Enriquez, 442 F.3d 331, 333 (5th Cir. 2006); United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2006).

¹¹⁹ See cases cited *supra* note 118.

¹²⁰ See United States v. Beltran-Munguia, 489 F.3d 1042 (9th Cir. 2007); United States v. Bolanos-Hernandez, 492 F.3d 1140 (9th Cir. 2007).

¹²¹ *Beltran-Munguia*, 498 F.3d at 1046-48.

¹²² *Id.* at 1048.

the “heightened level” or “violent nature” needed to meet the “element test” prong of section 2L1.2.¹²³

To this point, the Commission had been silent on the proper definitions of “crime of violence” and “forcible sex offense” since the 2003 changes. Continuing divergence in interpretation signaled the need for further clarification as the time came to propose amendments in 2008. Before any proposed amendments were published, however, the Fifth Circuit, in *United States v. Gomez-Gomez (Gomez I)*,¹²⁴ suggested that it was *impossible* under the circuit’s case law for any statute that did not independently meet the “element test” to ever be a forcible sex offense.¹²⁵ A strongly worded concurring opinion, however, portended the demise of this line of reasoning. Recognizing the need to follow precedent, Judge Jolly stated that doing so “leads to nonsensical results” and “frustrates the intent of the Sentencing Guidelines”; the *Sarmiento-Funes* analysis, he claimed, “strips ‘forcible sex offense’ of any significance independent from the elements test, and in doing so, tends to contradict rules of statutory construction requiring that we not render statutory language meaningless.”¹²⁶ A month earlier, Ninth Circuit Judges Rymer and Tallman made similarly damning observations about their own circuit’s case law, the reasoning of which they claimed “minimizes a crime effected by exploiting a victim’s helplessness.”¹²⁷ Perhaps in response to these public denouncements, the Commission placed section 2L1.2 squarely back in the crosshairs of its 2008 proposed amendments.

D. THE 2008 AMENDMENTS TO THE CRIME OF VIOLENCE DEFINITION

On November 1, 2008, the latest Guideline amendments went into effect; included among them was an updated version of the commentary to section 2L1.2 that unequivocally addressed the definition of “forcible sex offense.” The commentary accompanying the amendment is explicit in clarifying the Commission’s intent with regard to the breadth of crimes the

¹²³ *Bolanos-Hernandez*, 492 F.3d at 1145-46.

¹²⁴ 493 F.3d 562 (5th Cir. 2007).

¹²⁵ *Id.* at 566 n.4. The panel struggled to reconcile its holding with its “outlier” decision in *United States v. Beliew*, 492 F.3d 314 (5th Cir. 2007), which found child molestation to be forcible—a difference the court justified by claiming that *Beliew* involved *constructive force* achieved by “duress” and “psychological intimidation.” *Gomez I*, 493 F.3d at 567 n.6.

¹²⁶ *Gomez I*, 493 F.3d at 569-70 (Jolly, J., concurring). Even the majority recognized it was nearing the brink of conflict, noting the “valuable opportunity for the whole Court to reconsider [its] precedent in this area.” *Id.* at 567 n.6.

¹²⁷ *Beltran-Munguia*, 489 F.3d at 1053 (Tallman, J., concurring). Both Tallman and Jolly urged their respective courts to join the Third Circuit’s interpretation in *United States v. Remoi*, 404 F.3d 789 (3d Cir. 2005). *Beltran-Munguia*, 489 F.3d at 1055; *Gomez I*, 493 F.3d at 570 (Jolly, J., concurring).

term is meant to encompass. The disagreement among the appellate circuits, however, remains.

The new definition is identical to that adopted in 2003 aside from the addition of a parenthetical phrase; it now reads: “‘Crime of violence’ means . . . forcible sex offenses (*including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced*)”¹²⁸

A week before the revised Guidelines went into effect, the Fifth Circuit, sitting en banc, reversed the panel’s ruling in *Gomez I*, holding that a sex offense need not require the amount of force necessary to meet the “element” test under section 2L1.2 in order to be “forcible.”¹²⁹ However, the court refused to remove force from the equation entirely, holding instead that an offense committed using constructive (non-physical) force “that would cause a reasonable person to succumb” is a forcible sex offense within the meaning of section 2L1.2.¹³⁰ Writing for the en banc court in *Gomez II*, Judge Jolly, the author of the concurrence in the panel opinion, attempted to reconcile and limit *Sarmiento-Funes* and decisions construing section 4B1.2’s crime of violence definition with the new holding.¹³¹ In doing so, however, the court both maintained that *Sarmiento-Funes* “stands for the limited proposition that a sex offense does not involve the use of force when the victim *consents in fact*” and failed to adapt its reasoning to the amended definition.¹³²

While the court was correct that the definition “in effect at the time of sentencing governs,”¹³³ it failed to acknowledge the change that was about to take place.¹³⁴ Courts may take amendments of Guidelines that postdate the conviction into account if the purpose of the amendment is to clarify the Commission’s intent.¹³⁵ Since the sole purpose of the commentary is to aid interpretation of the Guidelines by clarifying the Commission’s intent,

¹²⁸ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2008) (emphasis added).

¹²⁹ *United States v. Gomez-Gomez (Gomez II)*, 547 F.3d 242, 248 (5th Cir. 2008) (en banc).

¹³⁰ *Id.*

¹³¹ *Id.* at 246-48.

¹³² *Id.* at 246, 248 n.6 (emphasis added). The court noted that section 4B1.2 does not include statutory rape and sexual abuse of a minor (both of which are based upon legal, rather than factual consent) and declined to decide whether “forcible sex offense” under that section should have the same meaning.

¹³³ *Id.* at 248 n.6 (citing 18 U.S.C. §§ 3553(a)(4)(A)(ii), 3742(g)(1) (2006)).

¹³⁴ *Id.* at 248 n.7.

¹³⁵ *See, e.g., United States v. Remoi*, 404 F.3d 789, 795 (3d Cir. 2005) (“[W]hen an amendment is a mere clarification, rather than a substantive change to the Guidelines, its application does not violate the ex post facto clause.” (quoting *United States v. Brennan*, 326 F.3d 176, 197 (3d Cir. 2003))).

courts should properly take any further clarification into account.¹³⁶ *Gomez II* split hairs among the circuit's own precedent, rather than heeding the clear directives of the Commission. The Commission went so far as to cite the case law of the Fifth Circuit as the impetus for further amendment, stating that the new definition "would result in an outcome that is contrary to cases excluding crimes in which 'there may be assent in fact but no legally valid consent' from the scope of 'forcible sex offenses.'"¹³⁷ As examples of such cases, the Commission listed *Gomez I*,¹³⁸ *United States v. Luciano-Rodriguez*,¹³⁹ and *United States v. Sarmiento-Funes*,¹⁴⁰ all of which are Fifth Circuit cases decided after the enactment of the 2003 amendments.

IV. OVERLAP WITH, AND IMPLICATIONS FOR, RAPE LAW

While the circuits may have split over statutory interpretation, the backbone of the conflict is the vast array of state laws criminalizing rape and other sexual misconduct.¹⁴¹ Because the controversy over "crime of violence" and "forcible sex offense" has to do with the presence (or absence) of physical force, it is important to consider the meaning and use of force in the context of sex crimes.

A. A BRIEF HISTORY OF U.S. RAPE LAW

Three major concepts dictate the definitions and discussion surrounding rape law: force, resistance, and consent.¹⁴² William Blackstone, writing in the eighteenth century, defined rape as "carnal knowledge of a woman forcibly and against her will,"¹⁴³ but included within the crime "cases in which intercourse was had without conscious or voluntary consent."¹⁴⁴ However, rape law throughout much of the history of the United States has required that force be present and that its presence be demonstrated through resistance by the victim. Laws range from

¹³⁶ *Stinson v. United States*, 508 U.S. 36, 46 (1993) ("Amended commentary is binding on the federal courts . . . , and prior judicial constructions of a particular guideline cannot prevent the [Sentencing] Commission from adopting a conflicting interpretation"); see also *Remoi*, 404 F.3d at 795.

¹³⁷ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 632 (2008).

¹³⁸ 493 F.3d 562 (5th Cir. 2007).

¹³⁹ 442 F.3d 320 (5th Cir. 2006).

¹⁴⁰ 374 F.3d 336 (5th Cir. 2004).

¹⁴¹ See *supra* notes 67-68 and accompanying text.

¹⁴² STEPHEN J. SCHULHOFER, UNWANTED SEX 18 (1998).

¹⁴³ 4 WILLIAM BLACKSTONE, COMMENTARIES *210 (1769).

¹⁴⁴ Norman S. Goldner, *Rape as a Heinous but Understudied Offense*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 402, 402 (1972) (quoting BLACKSTONE, *supra* note 143).

requiring a victim to “resist to the utmost”¹⁴⁵ to defining force as that which would overcome reasonable resistance.¹⁴⁶

The late twentieth century saw significant movement in the development of rape law, as reformers pushed to remove resistance requirements and, more generally, to move the focus of rape law away from the actions of the victim.¹⁴⁷ The Model Penal Code, for example, removed consent from the definition of rape¹⁴⁸ in an attempt to focus on the conduct of the perpetrator, and most state laws by the mid-1970s had (at least on their faces) abandoned resistance requirements.¹⁴⁹ Feminist reformers, even while attempting to frame rape as a violation of personal autonomy and free choice, supported the move to a focus on force, as removing focus from the actions of the victim simultaneously helped to combat myths and stereotypes attached to victims of sex crimes.¹⁵⁰

However, the result was a recodification of the traditional conception of rape as a “crime of *physical violence*,” a definition that continues to inform the law surrounding sex offenses.¹⁵¹ The allegorical story of the stranger jumping out of the bushes with a knife to rape an unsuspecting victim is an appealing means of creating distance between “regular” and criminal sexual behavior, but statistics show this kind of scenario is by far the minority even among reported cases of sexual assault.¹⁵² Indeed, almost three-fourths of sexual assaults are perpetrated by someone the victim knows.¹⁵³ Two-thirds of these incidents take place in the victim’s home or that of a friend, neighbor, or relative.¹⁵⁴

¹⁴⁵ Only one state currently retains this extreme version of resistance; the Louisiana definition of aggravated rape requires force that overcomes efforts to “resist the act to the utmost,” though forcible rape requires only “reasonable” efforts to resist. LA. REV. STAT. ANN. §§ 14:42, 14:42.1 (2007).

¹⁴⁶ See, e.g., MODEL PENAL CODE § 213.1(2)(a) (1962) (defining “Gross Sexual Imposition,” a third-degree felony, as sexual intercourse to which the victim is compelled to submit “by any threat that would prevent resistance by a woman of ordinary resolution”).

¹⁴⁷ SCHULHOFER, *supra* note 142, at 31.

¹⁴⁸ MODEL PENAL CODE § 213.

¹⁴⁹ SCHULHOFER, *supra* note 142, at 31-36.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 39 (emphasis added); see also, e.g., *In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992) (“The [State] Legislature’s concept of sexual assault and the role of force was significantly colored by its understanding of the law of assault and battery.”).

¹⁵² The Rape, Abuse & Incest National Network estimates that 60% of sexual assaults are unreported. See Rape, Abuse & Incest National Network, *Reporting Rape*, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Sept. 18, 2009).

¹⁵³ *Id.*; Rape, Abuse & Incest National Network, *The Offenders: The Rapist Isn’t a Masked Stranger*, <http://www.rainn.org/get-information/statistics/sexual-assault-offenders> (last visited Sept. 18, 2009).

¹⁵⁴ *Id.*

Based in part on improved (if far from perfect) information, modern scholarship attempts to frame sex offenses based not on the *physical* harm they incur, but rather on the violation of the victim's dignity or autonomy. As a California court put it,

[T]he fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent [I]n this scenario, "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.¹⁵⁵

Such a view encompasses an understanding that the thin line between consensual sexual contact and forcible sex offenses turns on the factual (and legally recognized)¹⁵⁶ consent of one party rather than the use of any kind of force—physical, constructive, or otherwise.

This distinction is one reason why sex offenses are categorically difficult to define and police: the acts that constitute many such crimes are not illegal in and of themselves. Similarly, consent is not a defense in other offenses involving the infliction of serious bodily injury. Liability for sexual contact fundamentally turns on the consent of the victim regardless of whether the particular state statute expresses that concept by way of force, resistance, nonconsent, or lack of affirmative consent. Some states and courts recognize consent as determinative and have adjusted their laws (or interpretations of their laws) accordingly; a handful are even edging toward requiring proof of *affirmative* consent to avoid liability.¹⁵⁷ This approach, however, remains distinctly in the minority; one extreme of a spectrum countered at the opposite end by esoteric schemes based on outmoded moral underpinnings.¹⁵⁸

B. COMPARING RAPE AND SEXUAL ASSAULT STATUTES

By way of illustration, compare the underlying definitions of two state statutes considered by the Fifth Circuit. The circuit's confusing case law attempts to draw a line between sexual contact that is legally, as opposed to

¹⁵⁵ *People v. Cicero*, 157 Cal. App. 3d 465, 475 (Cal. Ct. App. 1984).

¹⁵⁶ The distinction noted is that a victim who is *legally* unable to consent by virtue of age, mental incapacity, or incapacitation due to alcohol or drug use may consent "in fact," but that consent is not legally valid.

¹⁵⁷ See KADISH ET AL., *supra* note 68, at 307-08.

¹⁵⁸ *Id.*; see also *supra* note 145 and accompanying text. Resistance requirements have traditionally been seen as acceptable because women, it was assumed, would fight to the utmost to protect their virginity or remain sexually pure. For further discussion of the impact of changing views on women on rape laws, see Erin G. Palmer, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should Be a Crime in North Carolina*, 82 N.C. L. REV. 1258 (2003).

factually, unconsented and relies heavily on the semantic differences among statutes.

In *Sarmiento-Funes*, the court interpreted a narrow Missouri statute which defines sexual assault as sexual intercourse accomplished in the absence of consent.¹⁵⁹ The court found it important (if not “determinative”) that Missouri had a separate statute criminalizing forcible rape.¹⁶⁰ Missouri separates sexual offenses into twenty sections, defining with some precision the narrow category of conduct proscribed by each.¹⁶¹ The Missouri legislature defined its most serious category of sex offenses to reflect the common law understanding of rape: “physical force that overcomes reasonable resistance, or a threat that places a person in reasonable fear of death, serious physical injury or kidnapping.”¹⁶² The choice to align a single statutory section with the common law definition does not, as the Fifth Circuit suggests, imply that the Missouri legislature intended sexual penetration *only* under these circumstances to be considered forcible.¹⁶³ The legislature simply opted to delineate and grade sexual offenses narrowly, reflecting a desire to mete out punishment proportionate to the crime.

By contrast, the California Penal Code contains the entirety of its criminal sanctions for rape and related offenses within a single provision.¹⁶⁴ The Fifth Circuit recognized in *Sarmiento-Funes* that the wording of a statute does not necessarily answer the question of whether the crime it describes “inherently involves the use of force.”¹⁶⁵ However, where *Sarmiento-Funes* analyzed a discrete slice of an extensive code, *Gomez I* and *Gomez II* (along with several other decisions of the Ninth Circuit) considered all of the conduct criminalized under California sex offense law. *Gomez I* concluded that a crime of violence enhancement was improper because one could violate a single subsection of that law by threatening “hardship” upon a victim to obtain consent.¹⁶⁶ Of the entire body of rape

¹⁵⁹ 374 F.3d 336, 338 (5th Cir. 2004) (quoting MO. REV. STAT. § 566.040(1) (1999)).

¹⁶⁰ *Id.* at 339.

¹⁶¹ MO. REV. STAT. §§ 566.030-566.151 (1999 & Supp. 2008). This number does not include offenses such as sex trafficking, forced labor, registration requirements, or definitions of terms and defenses.

¹⁶² MO. REV. STAT. § 566.030, Comment to the 1973 Proposed Code (1999).

¹⁶³ See *supra* Parts III.C & IV.A (discussing the expansion of the common law concept of force).

¹⁶⁴ CAL. PENAL CODE § 261 (1999).

¹⁶⁵ *Sarmiento-Funes*, 374 F.3d at 339 n.4.

¹⁶⁶ *United States v. Gomez-Gomez (Gomez I)*, 493 F.3d 562, 564-65 (5th Cir. 2007), *rev'd en banc*, *United States v. Gomez-Gomez (Gomez II)*, 547 F.3d 242 (5th Cir. 2008). California removed “hardship” from the definition of duress before *Gomez I* was decided but after the defendant was convicted. *Gomez I*, 493 F.3d at 565 n.2. The Fifth Circuit noted

law, the court found this single word negated the “forcible” nature of the crime, since “hardship” did not imply physical duress.¹⁶⁷ Notably, though the *Sarmiento-Funes* panel deemed the existence of a separate “rape” statute under Missouri law instructive,¹⁶⁸ the same court in the *Gomez* decisions explicitly refused to take any meaning from the fact that the California legislature decided to label the crime at issue “forcible rape.”¹⁶⁹

V. WHY SHOULD WE BE CONCERNED—AND WHAT SHOULD BE DONE ABOUT IT?

While the issues encountered by the circuit split are interesting questions, one may wonder just why the definition of a single phrase in the commentary attached to one of several subsections of a single advisory sentencing guideline is important. In many individual cases, the answer is that it is not. How the definition of “forcible sex offense” is resolved generally, however, has implications for federalism, rape law, the purposes of punishment advanced by the Guidelines, and the criminalization of immigration offenses. While the resolution offered by the Commission’s 2008 amendments should improve the clarity of sentencing decisions from a judicial perspective (if not from that of the offenders), the repercussions for the meaning of rape and other sex offenses is less clear.

A. PRACTICAL IMPLICATIONS

Whether the Commission’s clarifications will, on balance, lead to overall positive effects is an open question. The criminalization of illegal reentry has had a major impact on the character of federal criminal enforcement. Section 2L1.2 provides the sentencing structure for one of the most commonly prosecuted federal offenses; of the 76,669 cases in the last fiscal year in which a court applied any Sentencing Guideline, 13,627 of those cases (or 19.3%) used section 2L1.2 as the primary Guideline.¹⁷⁰ Immigration offenders received 28.2% of all Guidelines sentences last year.¹⁷¹ The only Guideline applied more frequently¹⁷² is section 2D1.1,

that this amendment would likely have changed the outcome of the case. *Id.* Indeed, the en banc court, interpreting “hardship” differently, reversed the panel decision, finding that the enhancement was appropriate where “constructive force” (such as that created by hardship) was present. *Gomez II*, 547 F.3d at 249.

¹⁶⁷ *Gomez I*, 493 F.3d at 564-65.

¹⁶⁸ *Sarmiento-Funes*, 374 F.3d at 339.

¹⁶⁹ *Gomez I*, 493 F.3d at 566 n.3.

¹⁷⁰ U.S. SENT’G COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 (2008).

¹⁷¹ *Id.* tbl.10.

¹⁷² *Id.* tbl.17.

which provides sentencing for a large number of federal offenses relating to the manufacture, importation and exportation, and even simple possession of illegal drugs.¹⁷³ Non-citizens made up 37.4% of all offenders sentenced under the Guidelines last year and more than 90% of all immigration offenders received prison time.¹⁷⁴

Many politicians embrace being “tough” on immigration in the same way in which they embrace being tough on crime.¹⁷⁵ The result has been a dramatic rise in charges filed against illegal immigrants both at the point of initial entry and upon reentry.¹⁷⁶ The Departments of Justice and Homeland Security are working with the federal district courts to meet a goal of processing one hundred immigration prosecutions *per day*.¹⁷⁷ In some ways, the overlap of criminal and immigration law makes perfect sense: both areas of law deal with the status of an individual’s relationship with the state and operate essentially to include or exclude an individual from society.¹⁷⁸ However, criminal law is traditionally a state function, governed by a variety of constitutional guarantees that do not apply to noncitizens¹⁷⁹ with well-defined objectives informing the punishment scheme.¹⁸⁰

Considering the objectives that the Sentencing Guidelines seek to promote—“just punishment, rehabilitation, deterrence, and incapacitation”¹⁸¹—the immigration context seems an unlikely avenue for success. When the state imprisons someone they intend to deport upon release, there is no motivation to rehabilitate that individual.¹⁸² Because the

¹⁷³ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2008).

¹⁷⁴ U.S. SENT’G COMM’N, 2007 ANNUAL REPORT 27-28 (2007). The Commission noted that the annual report relies on the appropriate documentation being sent in on time, and often the report does not reflect all sentences determined within the relevant timeframe. *Id.* at 25.

¹⁷⁵ See Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASH. POST, June 2, 2006, at A1.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* Of course, these include misdemeanor illegal border-crossing prosecutions, but the increase in resource allocation and prosecutorial attention is indicative of the sea change in criminal enforcement.

¹⁷⁸ See, e.g., Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 403-12 (2006).

¹⁷⁹ The rights of criminal defendants are guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments, whereas immigration proceedings generally are subject only to the due process guarantees of the Fifth Amendment. See Stumpf, *Penalizing Immigrants*, *supra* note 9, at 265 & n.36.

¹⁸⁰ *Id.*; see also Stumpf, *Cimmigration*, *supra* note 178.

¹⁸¹ See 2007 ANNUAL REPORT, *supra* note 174, at 1.

¹⁸² See, e.g., *United States v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990) (“When setting the offense level for entry after deportation, the Sentencing Commission would certainly have been aware of the practice of promptly deporting aliens after they serve such sentences.”).

reentry statute is essentially “strict liability” (and therefore nearly always results in a guilty plea),¹⁸³ the sentence turns solely on the categorical or modified categorical interpretation of the statute defining the underlying offense; there is no room in either the guilt or sentencing phases for individualization. While the presence of a “prior felony” or “aggravated felony” under 8 U.S.C. § 1326(b) remains insulated from the constitutional guarantee that facts leading to conviction be found by a jury,¹⁸⁴ a vague understanding of these terms only further obfuscates the goal of transparency in sentencing and increases sentencing disparities. A crime of violence enhancement can double, triple, or quadruple a sentence (or more, if the crime also qualifies under the career offender provision of section 4B1.2 as a “crime of violence”—a lower standard).¹⁸⁵ The categorical inquiry that appears so sterile can seriously threaten the liberty interests of the defendant where the procedural guarantees normally in place are not present.

Though some argue that an individual defendant’s liberty interests are not threatened under a system of advisory Guidelines because the sentencing court is not obligated to impose the recommended sentence, the influence of the Guidelines remains strong. Federal prosecutors, following the direction of top officials, continue to request sentences consistent with the Guidelines’ ranges.¹⁸⁶ The composition of the federal judiciary, which, at the time of the implementation of the Guidelines, expressed strong resistance to the stifling of their sentencing discretion, has also changed. Judge Nancy Gertner of the District of Massachusetts laments the “extraordinary attitudinal shift” she observes among her peers: more judges expressing a belief that the Guidelines achieve the purposes of sentencing—but also expressing a distinct lack of confidence in their ability to exercise discretion.¹⁸⁷

¹⁸³ The Sentencing Commission reported that 99.3% of offenders convicted of immigration crimes plead guilty in order to obtain departures under plea bargains. 2008 SENTENCING STATISTIC SOURCEBOOK, *supra* note 170, fig.A.

¹⁸⁴ *Almendarez-Torres v. United States*, 523 U.S. 224, 234-35 (1998) (finding that 8 U.S.C. § 1326(b) lays out sentencing factors rather than a separate criminal offense from that defined by § 1326(a)). For further discussion, see *supra* note 23 and accompanying text.

¹⁸⁵ See U.S. SENTENCING GUIDELINES MANUAL § 5A, sent’g tbl. (2008).

¹⁸⁶ On January 28, 2005, a few days after the *Booker* opinion was released, Deputy Attorney-General James B. Comey issued a memorandum to all federal prosecutors charging that they “must take all steps necessary to ensure adherence to the Sentencing Guidelines . . . [and] must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.” Memorandum from James B. Comey, Deputy Att’y Gen., to All Federal Prosecutors (Jan. 28, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf.

¹⁸⁷ Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO. ST. J. CRIM. L. 523, 538 (2007).

Without the exercise of some discretion, however, the amended definition of “forcible sex offense” subjects offenders to the strictest interpretation found among any of the states: that *any* nonconsensual sexual contact merits the same enhancement as murder, assault, or extortion.¹⁸⁸

This conflation also implicates rape and sex offense law on a more general scale. On the one hand, a hardline view that all unconsented contact is equally culpable simplifies judicial administration and promotes the goal of consistency in one sense. By calling all sex offenses forcible, the Commission states that sex offenders are a danger to the public regardless of the means by which they accomplish their purpose, because the harm caused does not depend on the method employed. On the other hand, however, this leveling also recodifies, yet again, the idea that rape is, at its core, a crime of violence. This result not only ignores the important characteristics that make sex crimes unique but also frustrates the Commission’s purpose of using the “crime of violence” distinction to create graded offenses.

A striking example of this “right analysis, wrong outcome” comes from the Tenth Circuit in *United States v. Romero-Hernandez*.¹⁸⁹ The defendant was removed from the country after serving time for his conviction for unlawful sexual contact in Colorado.¹⁹⁰ Unlawful sexual contact is a misdemeanor under Colorado law¹⁹¹ but was characterized as a felony for purposes of federal sentencing because certain parts of the statute are punishable by more than a year in prison.¹⁹² The court, applying a modified categorical approach and following the logic recently approved by the Commission, found that Romero-Hernandez’s conduct warranted a crime of violence enhancement as a forcible sex offense.¹⁹³ The presentence report revealed that Romero-Hernandez grabbed the breasts and thigh of his (clothed) victim but retreated after she slapped him away.¹⁹⁴ Reprehensible? Of course. A crime of violence, equivalent to murder and deserving of a sentence enhanced four to five times in length? Surely not.

B. A PROPOSED SOLUTION: A NEW DEFINITION

Since the 2001 amendment to section 2L1.2 created a more nuanced enhancement scheme, the Commission has continually expanded the definition of “crime of violence.” Given that the stated purpose of the two-

¹⁸⁸ See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2008).

¹⁸⁹ 505 F.3d 1082 (10th Cir. 2007).

¹⁹⁰ *Id.* at 1084.

¹⁹¹ COLO. REV. STAT. § 18-3-404(1) (West 2002).

¹⁹² *Id.*; *Romero-Hernandez*, 505 F.3d at 1084.

¹⁹³ *Romero-Hernandez*, 505 F.3d at 1089.

¹⁹⁴ *Id.* at 1085 n.1.

tiered structure was to *limit* the scope of the greatest enhancement to the most dangerous crimes, this expansion seems counterintuitive.¹⁹⁵ By attempting to keep pace with developing understandings of what conduct is most culpable (and to remain faithful to the state understandings of those crimes), the Commission has run afoul of that purpose.

A crime of violence is just one of seven ways in which a defendant can receive the greatest sentencing enhancement under section 2L1.2. The sixteen-level increase is also applied to felony convictions for “(i) a drug trafficking offense for which the sentence imposed exceeded 13 months . . . ; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense.”¹⁹⁶ Judicial interpretation has so expanded the meaning of “crimes of violence” that nearly all of these separately enumerated offenses could fall under the umbrella of “crime of violence.”¹⁹⁷ By constantly changing the understanding of “violence,” the Commission and the courts dilute the meaning of a powerful term and subsume the nuanced language of the Guideline.

The 2008 amendment is a good example of the problems with expansion. By broadening the definition of “forcible sex offense” to include those situations where consent “is not given or is not legally valid,” the Commission respects the development of rape law and recognizes that the harm of sexual assault comes not from its physical impact, but from the violation of the victim’s ability to make free decisions about sexual contact. However, it also renders the separate inclusion of statutory rape and sexual abuse of a minor superfluous under general rules of statutory interpretation.¹⁹⁸ It also imposes the consequences of a crime of violence

¹⁹⁵ Recall that the purpose of the 2001 amendment was to respond to concerns that the blanket enhancement for “aggravated felony” resulted in no distinction between more and less dangerous offenders and often resulted in overly harsh punishments for the less “dangerous”—and that the Commission severed section 2L1.2 from the section 4B1.2 definition of “crime of violence” because the “substantial risk” test was deemed too low a standard to serve that purpose.

¹⁹⁶ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2008).

¹⁹⁷ For example, the creation and distribution of child pornography is illegal for the very reason that it is deemed *per se* harmful to children. See, e.g., *New York v. Ferber*, 458 U.S. 757, 759 (1982) (“The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . .”).

¹⁹⁸ Though courts attempt to *interpret* statutes so as to give effect to all the words of the statute and not render any language superfluous, see, for example, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), rules of statutory *construction* dictate that the promulgator of the rule should avoid language that may merit such an interpretation or otherwise overstep its authority. Cf. *GHS Health Maint. Org., Inc. v. United States*, 536 F.3d 1293, 1301-02 (D.C. Cir. 2008) (explaining that deference to the agency issuing a regulation was not appropriate where it was unclear from the face of the regulation that the agency was attempting to fulfill its statutory mandate).

on crimes that depend on an understanding of consent, power, and language that may be beyond the understanding of a noncitizen.

The remedy may be so simple as to seem unworkable: remove “forcible sex offenses” from the definition of crime of violence and create a separate category. By doing so, the Commission can still apply a crime of violence enhancement to those sex offenses that are, in fact, violent crimes—but can also make a separate determination as to the appropriate sanction for the dangerousness and threat inherent in sex offenses as they are defined by modern understanding. A separate category would also allow gradation within the Guideline itself rather than only within the commentary, and encourage further study and development of the implications of this type of enhancement. State laws recognize sex offenses as inherently different, and the sentences those crimes elicit should reflect the same. Where exactly this new category of enhancement fits is beyond the scope of this recommendation, but the Commission’s expertise renders it well-suited to such an inquiry.

VI. CONCLUSION

In a contentious circuit split, the Commission has taken the side of the majority, opting to apply a sixteen-level “crime of violence” enhancement for all crimes involving unconsented sexual contact. Even assuming the circuits come into line with the Commission’s clear directive, the continued expansion of the crime of violence enhancement for illegal reentry sentencing may raise more questions than it answers. While the sticky issues surrounding criminal penalties for immigration violations are unlikely to disappear, one way for the Commission to simplify and narrow the implications of section 2L1.2’s sentencing scheme is to remove “forcible sex offense” from the ever-expanding “crime of violence” definition.

By separating sex offenses from crimes that find their origins in the threat of violence or other physical bodily harm, the Commission could incorporate the contemporary understanding of sex offenses as distinct from, but not necessarily less harmful than, crimes of violence. Starting from a clean slate, the Commission could reconsider the utility of sentencing enhancements to punish based on such conduct without the present and precedential ripple effects necessarily created by constantly changing the meaning of “crime of violence.”

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