THE JONATHON B. CHASE PAPER

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QUANTITATIVE JUSTICE: HAVE THE FEDERAL SENTENCING GUIDELINES FORSAKEN QUALITY?

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INTRODUCTION

Although until recently sentencing was considered an essential judicial function, under the United States Sentencing Guidelines (Guidelines) sentencing has become a "mathematical task akin to filling out a tax return."[1] This analogy is apt in two respects. Most obviously, the tax return analogy presents the heightened role of the sentencing computation, what I term the "quantification problem." While sentencing always involved an ultimate calculation of the number of months or years of incarceration to be imposed,[2] analogizing a sentencing determination to a tax return illuminates the fact that the Guidelines have effectively reduced sentencing to that calculation.

To arrive at income tax due, the taxpayer begins by aggregating income into gross income, which is then adjusted for various credits and deductions.[3] After figuring taxable income, the taxpayer is referred to a highly differentiated matrix with income along the vertical axis and filing status along

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†. *See Dedication*, 13 VT. L. REV. 1 (1988), for a biographical sketch of Dean Chase.

*. To the little research assistant who makes everything more colorful, my son Dylan. I thank David C. Sleigh for the opportunity to draft the unsuccessful Thomas brief to the Second Circuit. Finally, I am grateful to Daniel J. Freed and to Michael J. Graetz for intellectual sustenance extending far beyond this paper.

1. Harvey Berkman, *Court to Take on Sentencing Rules: A 10-year-old dispute between prosecutors, judges over federal guidelines goes to the high court*, NAT'L L. J., Jan. 15, 1996, A1. The article does not name the judge who made the comment.

2. It is important to note however that, since 1910, under pre-Guidelines indeterminate sentencing, a judge's ultimate sentence calculation was not the final one. Rather parole officers made the final low visibility sentencing determination in the sense that they decided when to release an offender. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226-27 (1993).

3. I.R.C. §§ 61-63 (1993) (defining gross income, adjusted gross income, and taxable income).

the horizontal axis.[4] The taxpayer locates the intersection between the two to determine tax due. Often individuals have accountants figure their tax for them.

Similarly, the Guidelines specify an application process to arrive at an adjusted offense level by first determining a base offense level, then adjusting for relevant conduct.[5] Determining a criminal history category, like income tax filing status, usually entails fewer factors than determining the adjusted offense level,[6] though it is not devoid of possibilities for miscalculation or controversy.[7]

After the preliminary calculations are made, an offender's sentence is then derived by reference to a 258-cell grid with adjusted offense levels along the vertical axis and criminal history points along the horizontal axis.[8] The intersection between the two yields a guideline range of months from which the judge chooses the sentence imposed.[9] The judge also has discretion in fairly delimited circumstances to depart upward or downward from the prescribed range.[10] Just as individuals have relied increasingly on accountants and

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4. *See, e.g.*, INTERNAL REVENUE SERVICE, 1995 1040 INSTRUCTIONS 41-52 (1995 Tax Table).

5. *See* U.S. SENTENCING GUIDELINES MANUAL, § 1B1.1(a)-(e) (1995) [hereinafter USSG]. *See also* USSG app. D (sentencing worksheets). In addition to offense characteristics specific to statutory offenses, the Guidelines provide adjustments relating to the victim, the offender's role in the offense, obstruction of justice, and acceptance of responsibility. *See id* § 1B1.1(c), (e). A prominent Guidelines commentator has highlighted the fact that the Guideline application instructions do not follow Congress' prescribed sequence contained in 18 U.S.C. § 3553(a). *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1695 (1992).

6. *Compare* USSG § 1B1.1(f), with USSG § 4(a). Criminal history occupies but one out of the nine Guidelines application steps, and this step references one of the smaller chapters of the Guidelines. USSG § 4A.

7. *See, e.g.*, Scott v. United States, 997 F.2d 340 (7th Cir. 1993) (upholding 57 month sentence based on erroneous increase of offender's criminal history category because same result could have been reached by upward departure; stating misapplication of guidelines is not grounds for collateral attack); Mark D. Harris, *Collateral Attack and the Sentencing Guidelines*, 7 FED. SENTENCING REP. 39 (1994) (arguing that if other courts adopt Seventh Circuit approach availability of post-sentencing remedies should be reconsidered).

8. The Sentencing Table has 43 offense levels and 6 criminal history categories. *See* USSG, *supra* note 5, § 5A. One commentator has denominated the Sentencing Table the "centerpiece" of the Guidelines. *See* Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1110 (1992).

9. *See* USSG, *supra* note 5, § 5A. The range of months from which a judge may choose is relatively narrow. The 43 offense levels are also broken up into zones, which bear on availability of certain options such as probation and home detention. *See id.* § 5B-D. The first 18 levels, encompassing Zones A, B, and half of C, offer only a six month discretionary range. *See id.* § 5A. In zone D, the span between the high and low sentence rapidly increases until, where the sentence approaches life imprisonment, i.e., 30 years or 360 months, the range of judicial discretion spans 81 months (324 - 405). *See id.*

10. *See id.* § 1B1.1(I). "[T]he sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Id.* § 5K2.0 (citing 18 U.S.C. § 3553(b)).

lawyers to figure their taxes, judges have relied increasingly on the recommendations of probation officers to determine sentences.[11]

The second respect in which the tax analogy takes on significance is by connoting what is lost through reduction of sentencing to a purely mathematical calculation. The tax and sentencing calculations described above may be executed in either a perfunctory manner or one invested with a sense of ritual. Filling out an annual tax return and paying taxes due were once rituals symbolic of citizenship, which have now become perfunctory tasks relegated to tax professionals.[12] As a noted tax professor has remarked, dad is not at the dining room table anymore doing the taxes.[13] With respect to sentencing, one might question whether the judge is on the bench anymore.[14] Just as we have lost the sense of paying our dues as citizens in filling out our

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11. Probation officers must conduct a presentence investigation and report to the court before imposition of a sentence. *See* FED. R. CRIM. P. 32(c)(1); USSG, *supra* note 5, § 6A1.1. The report must include calculation of an offender's offense level and criminal history category, a suggested guideline range, and an explanation of factors bearing on the appropriateness of departure from the suggested range or on a particular sentence within the suggested range. *See* FED. R. CRIM. P. 32(b)(4)(B)-(C). The probation officer's recommended sentence, however, in no way officially binds the court. *See* United States v. Belgard, 894 F.2d 1092, 1097 (9th Cir. 1990). While "imposition of the Sentencing Guidelines is the duty of the court," 18 U.S.C. § 3553(a)(4), (b) (1988), commentators have debated whether probation officers' recommended sentences carry greater weight with judges after implementation of the Guidelines than previously, and whether probation officers now play more the role of an advocate than they did before the Guidelines. Early commentators concluded that, although probation officers accrued enhanced duties under the Guidelines, their traditional role of neutral advisors to the courts remained intact. *See* Charlie E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 FED. SENTENCING REP. 63 (1991); *see also* Magdeline E. Jensen, *Has the Role of the U.S. Probation Officer Really Changed?*, 4 FED. SENTENCING. REP. 94 (1991) (answering question negatively); Michael Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 96 (1991); United States v. Woods, 907 F.2d 1540, 1544 (5th Cir. 1990) (stressing probation officer's independence of prosecution and obligation to recommend sentence believed to be correct).

More recently, commentators have noted that, despite their official authority, judges have become passive in the sentencing process, tending to adopt probation officers' recommendations. *See* Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 934 (1995); *see also* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); Stephen R. Sady, *Eliminating the Adversarial Role of the Probation Office*, 8 FED. SENTENCING REP. 28 (1995) (arguing for elimination of probation officer advocacy allowed by Ninth Circuit).

12. *See* MICHAEL J. GRAETZ, *Dad is Not at the Dining Room Table Anymore, in* THE DECLINE (AND FALL?) OF THE INCOME TAX 68-69 (1997).

13. *See id.*

14. According to Judge Weinstein, "We find ourselves giving probation reports cursory attention because we are usually just checking the probation officer's addition. Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats." Weinstein, *supra* note 11, at 364. Another judge stated, "[I]t is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers . . . ." United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part).

tax returns, so too in sentencing have judges, as well as defendants, lost the sense that the offender is receiving his due.[15]

Thus, the tax return analogy quickly yields the apparent answer to this paper's title question: yes. Yes, the Guidelines have forsaken quality for quantity and fairness for efficiency in sentencing. After discussing the lack of coherent mens rea standards under the Guidelines in Part I, and taking a look at a mens rea issue in narcotics cases in Part II, I show the accuracy of that answer in Part III by examining an emerging mens rea problem under the specific offense characteristics for firearms violations. I argue that denigration of mens rea at sentencing has resulted, not only from the Commission's failure to include, or even articulate, mens rea standards, but also from a mind-numbing numerical mentality invading the province of culpability. The erosion of mens rea, a lack of sufficient fact finding, and low evidentiary and burden of proof standards at sentencing combine to create sentencing disparity and unfairness, some of which could be mitigated by valuing relevant conduct at a lower level than the offense of conviction.[16] Even under the present Guidelines, however, vigorous exercise of what little judicial discretion remains could ameliorate some disparity and unfairness,[17] but judges appear hesitant to employ it.[18]

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15. United States District Judge Thomas F. Hogan decried the 50 year sentences for police officers convicted of taking $2000 bribes from FBI agents posing as drug dealers. *See* Berkman, *supra* note 1, at A1. United States District Judge Harold Honorable. Greene denounced the unjust leniency of the five year ceiling on the sentence of an investor who defrauded 400 clients out of $20 million. *See id.*; *see also* United States v. Marshall, 908 F.2d 1312, 1332-33 (7th Cir. 1990) (Posner, J., dissenting) (saying it is "loony" to punish LSD dealer based on weight of vehicle conveying LSD instead of dose conveyed); Saundra Torry, *Some Federal Judges Just Say No to Drug Cases*, WASH. POST BUS. WKLY, May 17, 1993, at 7 (cataloguing growing number of federal judges refusing to handle drug cases due to cruel sentences mandated).

16. Judge Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, recently criticized the "full pricing" of relevant conduct, i.e., as equivalent to the offense of conviction. He has recommended that the new Sentencing Commission ameliorate the degree of punishment for relevant conduct, in order to limit the ability of investigative agents to manipulate sentences, and in order to increase judicial discretion. *See* Jon O. Newman, *The New Commission's Opportunity*, 8 FED. SENTENCING REP. 8, 8-9 (1995).

17. Professor Freed has noted a lapse in court interpretation of the Guidelines. He criticizes the courts for not holding the Sentencing Commission to the Sentencing Reform Act (SRA). The SRA includes at least three instructions to reduce disparity. Congress charged judges with avoiding "unwarranted sentence disparities," 18 U.S.C. § 3553(a)(6), and charged the Sentencing Commission with promulgating guidelines that accentuate "certainty and fairness" and "avoid[ ] unwarranted sentencing disparities," 28 U.S.C. §§ 991(b)(1)(B), 994(f). When district court judges have departed to equalize sentences among co-defendants, the appellate courts have overturned them. Appellate courts have also refused to review failures to depart, failed to take account of disparities hidden by low visibility trial court decisions, and failed to consider the consequences of sentencing judges' reliance on illegal evidence. *See* Freed, *supra* note 5, at 1737-40.

18. *See, e.g.*, Koh, *supra* note 8, at 1111 (arguing that the "administrative, mathematical matrix improperly fosters judicial abdication of the duty of . . . conscientious sentencing"); *see also* Weinstein, *supra* note 11, at 364 (pointing out that judges are becoming rubber-stamp bureaucrats); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*,

In conclusion, I recommend that, in its continuing reexamination of the Guidelines,[19] the Commission should restructure them to reestablish the fundamental role of mens rea and culpability. The Commission should formulate and define mens rea standards from the outset and include mens rea as a regular feature of the relevant conduct provisions. As part of a fundamental reordering, the Commission should adopt a guided discretion approach along the lines of the Model Penal Code (MPC) and the Federal Rules of Evidence.

I. THE QUANTIFICATION PROBLEM: THE GUIDELINES' QUANTITATIVE APPROACH TO MENS REA

The United States Supreme Court stated in 1951 that a mens rea element is presumed in criminal jurisprudence as the rule rather than the exception.[20] In that same year, the American Law Institute (ALI) undertook the creation of the MPC. Rather than defining culpability prescriptively, the MPC drafters made a conscious choice to define culpability in broad terms by streamlining the common law categories of offenses.[21] This approach recognized the impossibility of entirely eradicating discretion and at the same time acknowledged discretion was and should be exercised by several actors in the criminal justice system, including judges, prosecutors, and parole officers.[22]

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79 CAL. L. REV. 1, 40-41 (1991) (arguing that to sustain Commission's effectiveness, courts must monitor sentencing policy more vigorously than they have been willing to do so far).

19. The Commission normally transmits proposed changes to the Guidelines to Congress every May 1, which then become effective November 1 of the same year, unless Congress takes action on the amendments. In 1996, however, in order to undertake a more thorough re-examination of the Guidelines the Commission did not make any amendments. Earlier that year, the Commission released several proposed changes for public comment. *See* 60 CRIM L. REP. 2019, 2087 (1997). The Commission has submitted proposed amendments to the Congress for 1997, though many of the issues for public comment did not make it to the amendment stage—at least this year. *See* 61 CRIM L. REP. 2081 (1997).

20. *See* Dennis v. United States, 341 U.S. 494, 500 (1951). Commentators have noted that the exceptions soon overran the rule. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.4(a) (1986 & supp. 1993); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 138. Nonetheless, as Judge Weinstein has argued, "this erosion is not decisive in addressing new problems of criminal law." United States v. Cordoba-Hincapie, 825 F. Supp. 485, 504-05 (E.D.N.Y. 1993). In fact, the Supreme Court has recently reiterated the *Dennis* rule perhaps signaling an increasing concern with the growth of the exceptions. *See* Staples v. United States, 511 U.S 600, 605 (1994) (citing, instead of *Dennis*, a case which cites *Dennis*, United States v. United States Gypsum Co., 438 U.S. 422, 436-37 (1978)).

21. *See* Gerard Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENTENCING REP. 112, 112 (1994).

22. *See* Frank J. Remington, *The Federal Sentencing Guidelines as a Criminal Code: Why the Model Penal Code Approach is Preferable*, 7 FED. SENTENCING REP. 116, 116 (1994) (reciting discussion between Herbert Weschler and Jerome Michael that took place during ALI meeting on MPC). Discretion in the criminal justice system also extends to police decision-making, though this fact is less well-recognized. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the*

With respect to mens rea, the MPC adopted the modern view of culpability as graduated.[23] By defining four gradations of mens rea—purposely, knowingly, recklessly, and negligently[24]—applicable to each material element of an offense,[25] the drafters of the MPC sought to dispel the opacity with which mens rea had been treated at common law.[26] The MPC also mounted a frontal attack against strict liability by establishing a presumption that a statute, silent as to mens rea, included it as a requirement unless a contrary legislative intent plainly appeared.[27] While most states have revised their penal codes in response to the MPC, the federal effort at penal code reform never made it through Congress.[28] Consequently, a patchwork of federal criminal statutes still govern mens rea for the offense of conviction and, sometimes, as in the case of mandatory minimums, for assessing the penalty as well. Where a

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Administration of Justice, in CRIME, LAW AND SOCIETY 145, 145 (Abraham S. Goldstein & Joseph Goldstein, eds. 1971).

23. Judge Weinstein has noted that ancient English laws tended toward strict liability, with the most "primitive" laws holding men liable for acts of their chattel, but that our modern conception of culpability entails gradations of mental states. *See Cordoba-Hincapie*, 825 F. Supp. at 490-91, 501. While this is true if we take a long-term historical view, this century has seen a return of objective or strict liability in many areas of criminal law. *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 682-83; *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections On The Disappearing Tort/Crime Distinction In American Law*, 71 B.U. L. REV. 193, 219 (1991) (questioning advisability of attempting social control through imposition of criminal sanctions on the basis of strict liability and vicarious responsibility, but noting this as trend in environmental and corporate law).

24. *See* MODEL PENAL CODE § 2.02(1).

25. *See id.* § 2.02(4).

26. *See id.* § 2.02 cmt. at 230.

27. *See id.* §§ 2.02(3), 2.05, 2.05 cmt. at 282; *see also Cordoba-Hincapie*, 825 F. Supp. at 501-02.

28. Approximately two thirds of the states' penal codes now reflect the influence of the MPC. *See* Herbert Weschler, *Foreword* to MODEL PENAL CODE at xi (1985); *see also* Lynch, *supra* note 19, at 112. On the federal level, the Brown Commission's 1971 recommendation to codify criminal law met with over a decade of failed attempts to move penal code legislation past eight Congressional power centers (House and Senate subcommittees and full committees, the House rules committee, and the full House and Senate). Ultimately, only sentencing reform was passed. Procedurally, though not conceptually, the Guidelines were at a distinct advantage over the criminal code because the Sentencing Reform Act permits the Sentencing Commission's proposed sentencing guidelines to become law if Congress does not disapprove them within six months. *See* Stith & Koh, *supra* note 2, at 294; *see also* Robert Honorable. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 FED. SENTENCING REP. 118, 118-19 (1994). Indeed, Congress has acted to reject only one Guidelines amendment proposed by the Sentencing Commission: the equalization of crack and cocaine quantity provisions. *See* 58 CRIM L. REP. 1086, 1109 (1996); *see also* David Yellen, *Reforming Cocaine Sentencing: The New Commission Speaks*, 8 FED. SENTENCING REP. 54 (1995). The Commission is again seeking to equalize the crack/cocaine sentencing provisions. On April 29, 1997, it sent a special report to Congress recommending raising the mandatory minimum threshold for crack and lowering the threshold for cocaine to bring the two levels closer together. 61 CRIM L. REP. 1135, 2073 (1997).

statute does not set a mandatory minimum sentence, the Guidelines command the mens rea requirements for punishment.[29]

In accord with the Supreme Court's view of mens rea as fundamental and the MPC's view of mens rea as related to each element of an offense, the Sentencing Commission early on set forth a blanket rule of construction requiring consideration of the offender's state of mind as part of the relevant conduct determination.[30] Although, unlike the MPC, this early version of the Guidelines did not define specific types of mens rea, it did at least state that the court should take into account "the defendant's state of mind, intent, motive, and purpose in committing the offense."[31] The Commission, however, quickly deleted even this provision as "unnecessary."[32] It replaced the state of mind requirement with a general provision requiring consideration of "any other information specified in the applicable guideline,"[33] what we might call a "read-the-Guidelines-and-commentary" requirement.[34]

Where the Guidelines specify a mens rea such as "knowingly" that resonates with the MPC, courts generally have looked to the MPC for guidance. The sentencing provisions for property crimes involving damage from explosives, for example, stipulate a greater offense level if the defendant knowingly "created a substantial risk of death or serious bodily injury to any

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29. Even where an offense carries a mandatory minimum sentence, the Guidelines now include a "safety valve" limiting their application in some cases. *See* USSG, *supra* note 5, § 5C1.2; *see also id.* app. C, amend. 509 (stating new Guideline § 5C1.2 and revised commentary in §§ 2D1.1 and 2D1.2 reflect addition of 18 U.S.C. § 3553(f)(1)-(5) through enactment of section 80001 of Violent Crime Control and Law Enforcement Act of 1994); H.Rep. No. 103-460 (1994) (expressing intent for provision to foster greater coordination between mandatory minimum sentencing and Guidelines system). Moreover, even prior to enactment of the safety valve provision mandatory minimum sentences were supposed to be applied under, not outside of, the Guidelines because they were incorporated into the Guidelines through § 5G1.1. *See* United States v. Madkour, 930 F.2d 234, 236 (2d Cir. 1991).

30. *See* USSG, *supra* note 5, app. C, amend. 76 § 1B1.3(a)(4) (providing full reprint of deleted 1988 guidelines).

31. *Id.*

32. USSG, *supra* note 5, app. C, amend. 76 § 1B1.3(a)(4). This may be in accordance with the Supreme Court's view as well, given that the Court's rulings on mens rea have been aptly summarized as: "Mens Rea is an important requirement, but it is not a constitutional requirement, except sometimes." Packer, *supra* note 18, at 107. While the Supreme Court recently reaffirmed the importance of mens rea in *Staples*, the Court did not clarify the constitutional status of mens rea. *See* Staples v. United States, 511 U.S. 600 (1994).

33. USSG, *supra* note 5, § 1B1.3(a)(4). Prior to the 1989 amendments, this broad provision appeared in section 1B1.3(a)(5) following the state of mind requirement in section 1B1.3(a)(4). Amendment 76 then deleted section 1B1.3(a)(4) and renumbered (a)(5) as (a)(4). *See* USSG app. C, amend. 76.

34. Courts must give controlling weight to commentary in the Sentencing Guidelines Manual. *See* United States v. Stinson, 508 U.S. 36, 45 (1993) (holding that as long as Commission's commentary does not run afoul of Constitution or federal statute and is not plainly erroneous or inconsistent with guidelines, it is binding). Consequently, the section 1B1.3(b)(4) mandate to consider other information specified in the Guidelines may be construed to include the commentary as well.

other person."[35] To interpret the applicability of the enhanced level in a section 2K1.4 case, the Eleventh Circuit explicitly adopted the MPC's definition of "knowingly" as meaning the defendant was aware it was practically certain his criminal conduct would cause a certain result.[36] Similarly, in applying an earlier version of section 2K1.4, the Ninth Circuit derived the meaning of "knowingly" and "recklessly" from the MPC because the Guidelines failed to define the terms.[37] The Seventh Circuit has also highlighted the subjective nature of "knowingly" in *United States v. Bader*.[38] The court stated that in criminal law "knowledge" is equivalent to actual consciousness and that the "should have known" standard, which the district court had employed, is closer to negligence than knowledge. For that reason, the court rejected the district court's use of "should have known" as an inadequate standard for knowledge.[39]

Two other types of mens rea questions, more problematic than "knowingly" or "recklessly," have arisen under the Guidelines: (1) whether to apply a mens rea requirement to relevant conduct factors where the Guidelines do not expressly state one; and (2) how to define the mens rea standard where the stated requirement has less well-articulated precedent from which to draw than the four MPC mens rea levels. In the first situation, courts have often applied strict liability. The firearms guidelines, for instance, contain an enhancement of two levels if the offense involves a stolen firearm or one with an altered or obliterated serial number.[40] The Seventh Circuit justified application of the enhancement on a strict liability basis because previous language requiring that the defendant "knew or had reason to believe" was

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35. *See* USSG, *supra* note 5, § 2K1.4(a)(1)(A).

36. *See* United States v. Honeycutt, 8 F.3d 785, 787 (11th Cir. 1993).

37. *See* United States v. Karlic, 997 F.2d 564, 569 (9th Cir. 1993). In 1990, the Commission deleted the entire section 2K1.4 guideline, and replaced it with another version containing higher offense levels. USSG, *supra* note 5, app. C, amend. 330. The old version provided for a base offense level of 6, § 2K1.4(a), and specific offense characteristic enhancements ranging from two to 18 levels, § 2K1.4(b)(1)-(6). *See* USSG, *supra* note 5, app. C, amend. 330 § 2K1.4. The *Karlic* court distinguished the subjective question of mens rea—whether the defendant acted knowingly or recklessly—from its necessary predicate, an objective inquiry into whether the surrounding circumstances showed the defendant's actions created a substantial risk of death or injury. *See Karlic*, 997 F.2d at 569.

38. United States v. Bader, 956 F.2d 708, 710 (7th Cir. 1992) (relying partly on MPC).

39. *See id.*

40. *See* USSG, *supra* note 5, § 2K2.1(b)(4). Originally, the enhancement provision lacked an express mens rea element under section 2K2.1 (possession by prohibited persons) and under section 2K2.2 (receipt, possession or transportation in violation of the National Firearms Act). However, under section 2K2.3 (prohibited firearms transactions or transportation), the enhancement applied if the defendant "knew or had reason to believe" the firearm was stolen or had an obliterated serial number. *See* USSG, *supra* note 5, app. C, amend. 189 (providing full reprint of deleted guidelines).

eliminated,[41] no reference to mental states remained, and section 1B1.3(a)(4) no longer mandated a mens rea element in all relevant conduct determinations.[42] Other circuits likewise find strict liability justifiable for this firearms enhancement.[43]

An application note in the Guidelines confirms this view as consonant with the Sentencing Commission's intent.[44] Despite the presumption against strict liability in criminal law, courts have sustained the absence of a state of mind requirement in the stolen gun or obliterated serial number enhancement against due process challenges.[45] The courts' rulings are perhaps not surprising given that stolen firearms and obliterated serial numbers fall within the type of public welfare offense[46] for which the Supreme Court has upheld strict liability, though such regulatory violations were traditionally accompanied by light punishment, not incarceration.[47] The courts themselves,

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41. In 1989, when the Commission consolidated section 2K2.3 (unlawful transactions and transportation) into section 2K2.2 (unlawful trafficking), the "knew or reason to believe" language disappeared. *See supra* note 38, discussing USSG app. C, amend. 189.

42. *See* United States v. Schnell, 982 F.2d 216, 220 (7th Cir. 1992).

43. *See, e.g.*, United States v. Goodell, 990 F.2d 497, 499 (9th Cir. 1993) (upholding strict liability enhancement of sentence of convicted felon for possessing stolen firearm); United States v. Litchfield, 986 F.2d 21, 23 (2d Cir. 1993) (per curiam) (holding Guideline increasing sentence for possession of stolen firearm did not require knowledge firearm was stolen); United States v. Mobley, 956 F.2d 450, 452 (3d Cir. 1992) (implying no scienter requirement in enhancement for possession of stolen firearm by convicted felon); United States v. Singleton, 946 F.2d 23, 25 (5th Cir. 1991) (same).

44. "The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number." USSG, *supra* note 5, § 2K2.1, cmt. 19. The application note was added in the 1993 amendment. *See id.* app. C, amend. 374 (effective Nov. 1, 1993).

45. *See, e.g.*, United States v. Williams, 49 F.3d 92, 93 (2d Cir. 1995) (holding imposition of strict liability in 2-level enhancement for felon in possession of obliterated serial number does not violate due process); United States v. Griffiths, 41 F.3d 844 (2d Cir. 1994) (holding 2-level enhancement for felon's possession of stolen firearm did not violate due process where defendant did not know it was stolen); United States v. Richardson, 8 F.3d 769, 770 (11th Cir. 1993) (holding lack of mens rea element in sentencing guideline enhancement for possession of stolen firearm does not offend due process); *Mobley*, 956 F.2d at 459 (holding presumption against strict liability in criminal law does not preclude finding no scienter element required by sentencing enhancement for convicted felon's possession of stolen firearm); *Goodell*, 990 F.2d at 499 (holding due process not violated by omission of mens rea requirement from stolen firearm sentencing enhancement); United States v. Taylor, 937 F.2d 676 (D.C. Cir. 1991) (same).

46. Firearms violations are classified under Part K, Chapter 2 of the Guidelines, which is captioned "Offenses Involving Public Safety." USSG, *supra* note 5, § 2K.

47. Criminal liability attaches to public welfare offenses without regard to fault where regulation of the social order is more important than punishment of the offender. *See* United States v. Morissette, 342 U.S. 246, 253-60 (1952) (describing trend, arising in part from industrial revolution, toward imposition of new duties and crimes without regard to intent wherein accused, though not willing the violation, was in position to prevent it). Such punishment, however, involves light penalties like fines, not imprisonment. *See* United States v. Staples, 511 U.S. 600, 616 (1994). The Supreme Court recently stated that *Morissette* and *Staples* stand for the general presumption that a scienter requirement applies to each of the statutory elements which criminalize otherwise innocent conduct. *See* United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (holding conviction under 18 U.S.C. § 2252 requires that defendant know he is trafficking in child pornography).

however, justify strict liability for section 2K2.1(b)(4) by the fact the enhancement does not create a statutory offense (that is, a crime separate and apart) but only increases the level of punishment of an already convicted offender.[48] While this justification is in line with the conventional distinction between the conviction and sentencing stages, the justification, like the distinction, is misplaced in a system where the offense of conviction has become largely irrelevant.[49]

In contrast to the above application of strict liability, the Second Circuit has applied the mens rea from an underlying criminal statute to a Guidelines enhancement that lacked an express mens rea element itself. In *United States v. Corso*, the defendant was convicted of engaging in business as a firearms manufacturer without having registered as a manufacturer.[50] On mens rea grounds, Corso attacked the enhancement of his sentence under section 2K2.1(b)(1)(B) for an offense involving five to seven firearms.[51] He allegedly believed that two of the silencers involved were fake and that the two machine gun receivers were legal absent possession in conjunction with other machine gun component parts.[52]

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48. *See, e.g., Richardson*, 8 F.3d at 770 (holding guideline does not offend due process because it does not create crime separate and apart from underlying felony); *Schnell*, 982 F.2d at 219 (holding strict liability for § 2K2.1(b)(4) not violation of substantive due process because defendants were in no worse position as result of obliterated serial number since it was merely sentencing factor); *Mobley*, 956 F.2d at 455 (claiming defendant confuses fundamental distinction between conviction and sentencing, and between definition of crime and sentence enhancement); *Singleton*, 946 F.2d at 26 (Guidelines did not create crime which would not otherwise exist); *see also* United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985) (holding sentence enhancement provisions may constitutionally exclude any mens rea requirement and do not criminalize otherwise innocent activity).

It is noteworthy that these courts have taken such care to distinguish the Guidelines from underlying statutory crimes in order to uphold the § 2K2.1(b)(4) enhancement against due process challenges, when at the same time courts have failed to distinguish carefully between the Guidelines and their own enabling legislation, the Sentencing Reform Act. *See* Freed, *supra* note 5, at 1737-40.

49. *See* Lynch, *supra* note 19, at 114-15 (arguing that Guidelines have displaced criminal statutes by rendering offense of conviction ordinarily insignificant for sentencing purposes and that defining crimes should be matter for public legislation rather than anonymous regulation); *see also* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992).

50. *See* United States v. Corso, 20 F.3d 521 (2d Cir. 1994).

51. *See id.* at 523-24.

52. *See id.*

The court recognized that the defense raised two issues: (1) whether the Guidelines incorporate the mens rea of the underlying statute; and (2) if so, what type of mens rea is specified by the statute.[53] Although section 2K2.1(b)(1) does not state a mens rea element for the enhancement, the court found guidance from the Sentencing Commission's accompanying commentary.[54] Application note nine provides in pertinent part, "[f]or purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed."[55] The *Corso* court determined that the words "unlawfully possessed" in the application note referred back to "whatever scienter requirements exist in the statute" respecting possession.[56] "By using the word unlawfully, the same requirement of scienter as exists under the statute is incorporated into the Sentencing Guidelines, and becomes a requirement for enhancement."[57] The *Corso* court apparently took seriously

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53. *See id.* at 524. The court's resolution of the first issue in the affirmative is still good law despite the fact that the *Staples* decision effectively overrules the court's holding on the second issue. *See infra* note 55, and accompanying text.

54. *See Corso*, 20 F.3d at 524.

55. *Id.* at 524 (citing USSG, *supra* note 5, § 2K2.1, cmt. 9).

56. *Id.* at 525.

57. *Id.* The court went on to find that in the underlying statute, the National Firearms Act, the possession element "requires proof of general intent, or knowledge that the items possessed are firearms." *Id.* at 526 (citing United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan, J. concurring)). The *Freed* majority had held only that the National Firearms Act did not require specific intent or knowledge of the non-registration of hand grenades. *See Freed*, 401 U.S. at 607. In his concurring opinion, Justice Brennan elaborated on the holding. *See id.* at 612. He stated that possession of unregistered hand grenades was not a strict liability offense per se, but rather, the offense contained one strict liability element, status of the hand grenades as unregistered. *See id.* To establish the other two elements of the offense, defined by Justice Brennan as defendant's possession of certain items and the fact that the items possessed by defendant were hand grenades, the government still had to prove knowledge, or general intent. *See id.*

The *Corso* court surveyed the tests employed in different circuits to establish the requisite general intent or knowledge of unlawful possession under the National Firearms Act. *See Corso*, 20 F.3d at 527 (citing United States v. Harris, 959 F.2d 246, 260-61 (D.C. Cir. 1992); United States v. Anderson, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc, 8-7 decision); United States v. Williams, 872 F.2d 773, 777 (6th Cir. 1989)). The court rejected the "statutory meaning" test, used in the Fifth, Sixth, and D.C. Circuits, as supplying too broad a defense. *See id.* The statutory meaning test, the minority view at that time, required proof of a defendant's knowledge he possessed a firearm as defined by the statute. *See id.* The *Corso* court also rejected the "general meaning" test, used in the Fourth, Seventh, and Eleventh Circuits, as too vague. *See Corso*, 20 F.3d at 527 (citing United States v. Shilling, 826 F.2d 1365, 1368 (4th Cir. 1987); United States v. Gonzalez, 719 F.2d 1516, 1522 (11th Cir. 1983); United States v. Ranney, 524 F.2d 830, 832 (7th Cir. 1975)). Under the general meaning test, the government was not required to prove that a defendant had actual or specific knowledge of a weapon's physical properties. *See id.* Rather, the government had only to show that defendant knew he possessed a firearm in the general meaning of the term. *See id.* The *Corso* court then adopted the "dangerous device" test: whether the defendant knew that he possessed a dangerous device of such type as would alert one to the likelihood of regulation." *Id.* at 526 (citing United States v. Staples, 971 F.2d 608, 612 (10th Cir. 1992), *cert. granted*, 511 U.S. 600 (1993); United States v. Kindred, 931 F.2d 609, 612 (9th Cir. 1991); United States v. DeBartolo, 482 F.2d 312, 316-17 (1st Cir. 1973)).

the Guidelines' eroded mens rea requirement, i.e., the directive to read the Guidelines and commentary for indications of mens rea requirements.[58]

In the strict liability applications of the enhancements for stolen firearms and altered or obliterated serial numbers, the courts likewise appeared to take seriously the Commission's directive to read the Guidelines and commentary. For instance, several courts mentioned both that the enhancement lacked an express mens rea and that the Guidelines no longer mandated a defendant's state of mind be taken into consideration for every enhancement.[59]

In contrast to these firearms enhancements (sections 2K1.4 and 2K2.1(b)(4)), confusion and strong disagreement has developed in the courts in other situations where the Guidelines do not state a mens rea, e.g., drug quantity,[60] as well as where the Guidelines specify an undefined mens rea standard, e.g., "knew or had reason to believe."[61] Some of the confusion arises from the very "cornerstone"[62] of the Guidelines—Relevant Conduct—and its unclear relationship to specific offense and offender characteristics. The relevant conduct rule, section 1B1.3(a), begins with the exception: "unless otherwise specified."[63] While the exception does not state where the deviations from the rule are specified, presumably it relates to the applicable Guideline and commentary, as does section 1B1.3(a)(4).[64] Originally, the Relevant Conduct Guideline contained another mens rea provision, in addition to the previously discussed rule of construction requiring consideration of a defendant's state of mind,[65] which was reminiscent of mens rea language in

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Two months after the *Corso* court adopted the dangerous device test, the Supreme Court issued the opinion in *Staples* reversing the Tenth Circuit's use of that test. *See* Staples v. United States, 511 U.S. 600 (1994). The *Staples* Court essentially adopted the statutory meaning test which *Corso* had rejected. *See id.* at 618-19. *Staples* held that the government is required to prove the defendant knew the firearm had characteristics that brought it within the statutory definition of machine gun, i.e., that he knew it had been altered from a single to a multiple-firing weapon. *See id.* Consequently, the second holding of *Corso* has been effectively overruled by *Staples*.

58. *Compare* USSG, *supra* note 5, § 1B1.3(a)(4)-(5) (1988), *with* USSG § 1B1.3(a)(4) (1995); *see also*, *supra* notes 53-55 and accompanying text.

59. *See* cases cited *supra* notes 41, 43 and accompanying text.

60. *See infra* Part II.

61. *See infra* Part III.

62. *See, e.g.*, Freed, *supra* note 5, at 1712; William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S. C. L. REV. 495 (1990).

63. USSG § 1B1.3(a).

64. *See* USSG § 1B1.3(a)(4). This is the section I have called the "read the Guidelines and commentary" requirement.

65. In fact, the Relevant Conduct section originally placed the required consideration of acts "relevant to the defendant's state of mind or motive in committing the offense of conviction" in section 1B1.3(a)(2). USSG, *supra* note 5, app. C, amend. 3 (replacing original § 1B1.3(a)(2) effective January 15, 1988; setting forth deleted section). Note that the replacement Guideline carried similar language as a blanket provision for relevant conduct in section 1B1.3(a)(4).

the MPC. The Guidelines originally set forth accountability for "harm" which the defendant "caused intentionally, recklessly, or by criminal negligence in the course of conduct relevant to the offense of conviction."[66]

Instead of such mens rea language, the current section delineates the factors relevant to determination of a defendant's Guideline range almost entirely as "acts." It holds a defendant accountable at sentencing for "all acts and omissions, committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[67] This section, 1B1.3(a)(1)(A), now lacks any explicit mention of a defendant's state of mind. Although "willfully caused" could be construed as an oblique reference to mens rea, it appears merely as an enumeration of act types. Thus, it seems that a defendant is held strictly liable for his or her own direct participation in an offense. The Commission states that "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities with which he is directly involved." It then goes on to emphasize that "reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others" and "does not apply to conduct that the defendant personally undertakes."[68]

In offenses involving fungible items, such as drugs, guns, or money, this means a defendant is held strictly liable for the quantity of items with which he had some direct contact, however fleeting.[69] The Commission illustrates direct participation liability with the example of a defendant who is hired along with ten others to off-load a shipment of marijuana.[70] The defendant is accountable at sentencing for the entire ton of marijuana aboard the ship, regardless of how many bales he unloaded and regardless of foreseeability, because off-loading the entire shipment is the specific objective of the offense.[71] Although the Commission does not use the term "strict liability," the commentary on and illustration of direct participation liability makes it clear that it is the standard contemplated.

Additionally, section 1B1.3(a)(1)(B) of the Guidelines holds a defendant accountable for the conduct of others that was reasonably foreseeable and in

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66. *See* USSG, *supra* note 5, app. C, amend. 3 (full reprint of original section 1B1.3(b)), and amend. 76 (deleting similar language which had replaced original).

67. *See id.* § 1B1.3(a)(1)(A).

68. *See id.* § 1B1.3 cmt. 2.

69. *See infra* Part II.

70. *See* USSG, *supra* note 5, § 1B1.3 cmt. 2.

71. *See id.*

furtherance of criminal activity jointly undertaken with the defendant.[72] In its "Answers to Frequently Asked Questions," the Commission claims that "reasonably foreseeable" refers not to a defendant's state of mind but to what the reasonable defendant would foresee.[73] An objective test of what abstract reasonable persons would have foreseen in practice becomes what was actually possessed,[74] and thus does not constitute much of a mens rea requirement. Courts have not, however, entirely accepted this objective standard for reasonable foreseeability[75] and the weight of the Commission's statement is questionable given that it does not comprise part of the official commentary.[76]

Apart from the foreseeability limitation, the defendant's responsibility for the conduct of others is delimited by the scope of criminal activity the defendant agreed to undertake.[77] The latter limitation may fall away, however, depending on whether and how the subsequent provision is applied. That provision, section 1B1.3(a)(2), makes a defendant responsible for acts forming part of the "same course of conduct or common scheme."[78] According to a Federal Judicial Center study, the most egregious application error in the

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72. *See id.* § 1B1.3(a)(1)(B).

73. *See id.* app. E (answer to question four). One might wonder whether a "reasonable defendant" is an oxymoronic creature because engaging in criminal activity, assuming the government has proven the defendant guilty or the defendant has pled guilty, indicates the defendant has already exceeded the bounds of what society deems reasonable. See similar query in Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENTENCING REP. 121, 122-23 (1994) (reasonable and foreseeable mens rea standard pose dilemma of "reasonably foreseeable to whom? A reasonable drug dealer, a reasonable average person, or—most likely—a reasonable member of a court of appeals.").

74. *See* United States v. Ekwunoh, 813 F. Supp. 168, 174 (E.D.N.Y. 1993), *rev'd on other grounds*, 12 F.3d 368 (2d Cir. 1993).

75. *See, e.g.*, United States v. Zarnes, 33 F.3d 1454, 1474 (7th Cir. 1994) (stating reasonable foreseeability means more than subjective awareness on part of individual defendants; conduct of co-conspirators can be considered reasonably foreseeable to particular defendant if that defendant has demonstrated substantial degree of commitment to conspiracy's objectives, either through words or conduct) (citing United States v. Edwards, 945 F.2d 1387, 1393-94 (7th Cir. 1991)); *Ekwunoh*, 813 F. Supp. at 174 (stating it is unclear whether "reasonably foreseeable" implies an objective or subjective test or some combination thereof).

76. *See* Stinson v. United States, 508 U.S. 36, 43-44 (1993) (holding Commission's commentary binding on courts if it does not run afoul of Constitution or federal statute and is not plainly erroneous or inconsistent with guidelines).

77. *See* USSG, *supra* note 5, § 1B1.3 cmt. 2. Thus, the scope of liability may be different for each participant in a conspiracy. *See id.*

78. *Id.* § 1B1.3(a)(2). This provision addresses conduct that could constitute another offense and, if it were charged as such and if the defendant were convicted of it as well as of the instant offense, it would fall under this grouping provision. Critics have focused particularly on this section of Relevant Conduct for encompassing too much unconvicted conduct. *See, e.g.*, Hon. Boyce F. Martin, Jr., *The Cornerstone has no Foundation: Relevant Conduct in Sentencing & the Requirements of Due Process*, 3 SETON HALL CONS. L.J. 25 (1993); *see also* Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 FED. SENTENCING REP. 334, 335 (1992) (discussing revisions effective Nov. 1, 1992, found in USSG app. C, amend. 439, which were enacted "[i]n light of many reports of problems with the relevant conduct guideline.").

relevant conduct section has been applying the "common scheme" provision to low-level participants in contraband conspiracies.[79]

Another point of confusion has arisen from inclusion of "aided or abetted" in the acts enumerated as part of a defendant's direct participation.[80] Aiding and abetting conduct may usually be found relevant under both the section concerning defendant's own actions, § 1B1.3(a)(1)(A), and the section concerning conduct of others in jointly undertaken activity, § 1B1.3(a)(1)(B).[81] Only conduct that comprises the "specific objective" of the offense, however, will fall under defendant's aiding and abetting. The Commission illustrates the conceptual difference between the two with the example of a getaway driver who, as an aider and abettor, would be accountable under § 1B1.3(a)(1)(A) for all the money stolen in a bank robbery because stealing money constitutes the specific objective of the crime.[82] If a co-defendant injured the bank teller, the getaway driver's responsibility would not accrue under § 1B1.3(a)(1)(A) because the injury was not a specific objective of the crime.[83] Rather, the getaway driver would be held accountable under § 1B1.3(a)(1)(B) for the co-defendant's injury of the teller because it was in furtherance of jointly undertaken activity and was reasonably foreseeable.[84] Nonetheless, since the Guidelines include "aided and abetted" within relevant conduct regardless of the reasonable foreseeability limitation in § 1B1.3(a)(1)B), labeling an offender as an aider and abettor can serve as a kind of trump to the accountability limitations in § 1B1.3(a)(1)(B)'s jointly undertaken provision. That is, the conduct at issue could be considered relevant without satisfying the foreseeability and scope of agreement requirements.[85]

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79. *See* Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline* § 1B1.3, 4 FED. SENTENCING REP. 330, 332 (1992). The application error was uncovered by a Federal Judicial Center study of probation officers. *See id.* at 331-34. Hofer is optimistic that the Commission's 1992 revisions to the relevant conduct guideline will avoid this particular error. *See* Hofer, *supra* note 76, at 335. I am not as optimistic; a change that would more effectively dispense confusion is one that judges and probation officers have proposed: redefining relevant conduct as a defendant's direct participation in an offense and conduct of others from which the defendant benefitted or expected to benefit. This would avoid attributing an entire drug conspiracy to low-level participants.

80. *See* Hofer, *supra* note 76, at 335; *see also* USSG, *supra* note 5, § 1B1.3(a)(1)(A).

81. *See* USSG, *supra* note 5, § 1B1.3 cmt. 2. The one ton shipment of marijuana discussed above, see note 69 and accompanying text, is the Commission's first illustration of "aided or abetted." The illustration notes the defendant would also be accountable under the jointly undertaken criminal activity section. *See id.*

82. This is the second illustration the Commission proffers under application note 2. *See id.*

83. *See id.* While the illustration is silent on this precise point, I infer it because the ostensible purpose of the Commission here was to differentiate the two and this is the only point of difference arising from the example.

84. See discussion of this illustration in Hofer, *supra* note 76, at 335 (pointing out that this "example appears to be a case where sentencing accountability is the same as criminal liability.").

85. *See* Hofer, *supra* note 76, at 335.

This confusing section of the Guidelines, which is all but devoid of mens rea considerations, is nonetheless central to a defendant's ultimate criminal culpability as reflected by the sentence imposed.[86] The first application note to the Relevant Conduct Guideline maintains that a defendant's sentencing accountability is different than his or her criminal liability.[87] In other words, sentencing accountability encompasses a much broader spectrum of conduct than the offense of conviction. While sentencing determinations have long taken into account factors beyond the offense at hand,[88] the Guidelines' over-emphasis on quantifiable conduct, and consequent disregard of culpable conduct, has inserted the primitive wedge of strict liability[89] between accountability and culpability.

The getaway driver illustration evinces the Commission's tendency to eschew mens rea issues in that the Commission defines the acts of aiding or abetting by the specific objective of the offense, not the offender. A slight variation on the illustration demonstrates the problem that this focus on the offense, to the exclusion of the offender, may pose for achieving a sentence in proportion to a defendant's culpability.[90] If the hypothetical getaway driver were mentally disabled and had been duped into committing the offense—having only agreed to be a designated driver for a joy ride—pleading guilty to a lesser charge could expose him to vastly greater accountability than merited by his individual culpability. At sentencing, his mental state would not mitigate the relevant conduct and he would be held accountable for the injury to the bank teller as well as for the money stolen.[91]

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86. Mens rea emerged as a basic principle unique to criminal law following from and arising because of a corresponding emergence of punishment as distinct from tort sanctions such as compensatory remedies. *See* Gardner, *supra* note 21, at 643. Mens rea provides the link between punishment and individual culpability. *See* Weinstein & Bernstein,, *supra* note 71, at 121.

87. *See* USSG, *supra* note 5, § 1B1.3 cmt. 1.

88. *See* Williams v. New York, 337 U.S. 241 (1949) (holding sentencing judges may rely upon information that would not be admissible at trial).

89. *See* United States v. Cordoba-Hincapie, 825 F. Supp. 485, 490-91 (E.D.N.Y. 1993) (discussing primitive English laws holding men strictly liable for acts of their property, including animals and inanimate objects).

90. *See* Freed, *supra* note 5, at 1704-06 (discussing goal of proportionality versus disparity); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 4 FED. SENTENCING REP. 161 (1991).

91. This would most likely be the case if the sentencer follows the Commission's policy statements in Chapter 5 of the Guidelines. Professor Freed has commented that the Commission's view of Chapter 5 offender characteristics as "not ordinarily relevant" is a policy statement, not a Guideline, and therefore not binding on sentencing judges. Nonetheless, judges hesitate to contravene the policy statements. *See* Freed, *supra* note 5, at 1715. Under USSG section 5H1.3, a defendant's emotional and mental condition are not ordinarily relevant. They are relevant only if the defendant committed a nonviolent offense while suffering from a diminished capacity not induced from voluntary ingestion of drugs or other intoxicants, or if the defendant's diminished capacity contributed to commission of the offense and the defendant's criminal history

Of course, the sentencing judge faced with such a defendant could choose to depart downward from the guidelines,[92] but a decision not to depart would be unreviewable.[93] Whereas the elaborated getaway hypothetical presents a somewhat obvious case for downward departure,[94] other cases may entail a less readily apparent mismatch between culpability and sentencing accountability.[95] Such circumstances may arise, for instance, in the most highly quantified sections of the Guidelines—offenses involving drugs, money, or firearms—where the quantity attributed to the defendant is the most significant factor in determining the sentence range.[96]

II. THE MENS REA QUESTION IN DRUG QUANTITY ATTRIBUTION

Judge Weinstein concurred with the Sentencing Commission's estimation of the original mens rea provision as "unnecessary."[97] He finds it unnecessary, however, because mens rea is so patently fundamental for distinguishing intentional, and therefore culpable, conduct from inadvertent conduct. Thus, in *United States v. Ekwunoh*, he eloquently argued the obverse by stating the

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does not indicate a need for incarceration to protect the public. *See* USSG, *supra* note 5, § 5K2.13. The mentally disabled getaway driver may fit into the latter exception. *But see* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995).

92. *See* USSG, *supra* note 5, § 5K2.0.

93. *See* Freed, *supra* note 5, at 1738 (recommending reconsideration of current appeals court rule that it lacks jurisdiction to review judge's failure to depart).

94. A recent article commented on the fact that federal judges are remarkably inconsistent in their reading of "mentally disabled." The commentators attribute the inconsistency to federal judges' lack of understanding of mental disability and its potential interrelationship with criminal conduct, an ambivalence about mental disability as exculpatory evidence, and federal prosecutors' attitude that it is merely a sympathy factor which is inappropriate at sentencing. *See* Perlin & Gould, *supra* note 89, at 433-35.

95. *See* United States v. Imariagbe, 999 F.2d 706, 708 (2d Cir. 1993) (per curiam) (stating it is possible to imagine situation where "the gap between belief and actuality was so great as to make Guideline grossly unfair in application" and warrant downward departure). The Second Circuit envisions such downward departure circumstances as "narrow and novel." United States v. Lara, 47 F.3d 60, 62 (2d Cir. 1995) (holding sentencing judge may depart downward where aggregate quantity of narcotics attributable to defendant, assessed in light of time period during which quantity was distributed and small quantities distributed at any one time, overstates defendant's culpability). Yet, "mules," or couriers, and low-level drug dealers generally have been overly punished under the current regime while the more culpable defendants in the drug conspiracies have managed to have their sentences reduced for substantial assistance to the government in convicting the lower level players. *See* Freed, *supra* note 5, at 1704-05; Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP. 63 (1990).

96. *See* USSG, *supra* note 5, § 2D1.1(c); Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 FED. SENTENCING REP. 247 (1994); Douglas J. Quivey, Note, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653; Stephen J. Schulhofer, *Excessive Uniformity—And How to Fix It*, 5 FED. SENTENCING REP. 169 (1992).

97. Weinstein & Bernstein, *supra* note 71, at 121.

poignant need for mens rea standards to combat the bureaucratization of sentencing:

> If a narcotics defendant's culpability must turn on the rigid operation of mathematical schemes based upon the objective weight of the drugs, that defendant is at least entitled to hold the government to some burden of proof (or to permit the defendant to assume some burden of proof) regarding the defendant's state of mind with respect to that quantity. Otherwise our system of individualized justice based upon blameworthiness is placed at risk by the gradual encroachment of a mechanical regulatory system that neither knows nor cares about the critical mental states of those individuals who come before the courts.[98]

As a district court judge in the Eastern District of New York, Judge Weinstein has presided over innumerable narcotics cases[99] and it is in this context that he raises the problem of a defendant's mental state. Quantity and type of drugs are not generally essential elements of drug offenses and therefore are not relevant at the conviction stage.[100] Where they are not elements of an offense the government does not have to prove quantity and type beyond a reasonable doubt. Rather, the factual determination is delayed until sentencing[101] at which stage the standard of proof is merely preponderance of the evidence,[102] information need not be admissible under the

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98. United States v. Ekwunoh, 813 F. Supp. 168, 177-78 (E.D.N.Y. 1993), *rev'd on other grounds*, 12 F.3d 368 (2d Cir. 1993).

99. *See id.* at 174 (stating judges in Eastern District of New York grapple with problem of drug quantity attribution hundreds of times a year).

100. *See, e.g.*, United States v. Moore, 968 F.2d 216, 224 (2d Cir. 1992) (quantity is solely for sentencing judge to consider); United States v. Sotelo-Rivera, 931 F.2d 1317, 1319 (9th Cir. 1991) (quantity is not element of substantive § 841(a) offense but is relevant at sentencing under § 841(b)); *see also* United States v. Cordoba-Hincapie, 825 F. Supp. 485, 528 (E.D.N.Y. 1993) (holding that, while defendant's knowledge that substance imported is *some* type of narcotic suffices for conviction under statute prohibiting importation of controlled substances, sentencing phase requires court to determine whether defendant's knowledge of substance type and quantity is relevant to application of statute's penalty provisions). *But see* Chicone v. State, No. 85,136 (Fla. S. Ct., Oct. 25, 1996) (discussed in 60 CRIM. L. REP. 1156 (1997)). On the state level, the Florida Supreme Court has held that, "although the statutes [drug possession and paraphernalia] do not contain an explicit scienter element, the seriousness of the offenses makes them akin to other offenses that presume a scienter requirement absent an express contrary intent." 60 CRIM. L. REP. 1156 (1997).

101. *See* United States v. Campuzano, 905 F.2d 677, 679 (2d Cir. 1990).

102. The Sentencing Commission believes the preponderance of the evidence standard is appropriate for Guidelines sentencing. *See* USSG, *supra* note 5, § 6A1.3 cmt. Most circuit courts have relied on a pre-Guidelines Supreme Court case, McMillan v. Pennsylvania, 477 U.S. 71, 91 (1986), which held that the preponderance of the evidence standard satisfies due process at sentencing. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991); United States v. Frederick, 897 F. 2d 490, 492-93 (10th Cir. 1990); United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990); United States v. Guerra, 888 F.2d

Federal Rules of Evidence,[103] and no mens rea requirement is imposed for quantity and type.[104] Under the current Guidelines regime, i.e., according to § 1B1.2(a)(1)(A), defendants are strictly liable for the actual quantity and type of drugs possessed.[105]

In two sentencing opinions, Judge Weinstein fashioned a reasoned approach to mens rea in such cases—a reasoned approach that the Second Circuit nonetheless rejected. Judge Weinstein's scheme would have established the following set of principles: (1) where a defendant is a minor participant, she would be accountable at sentencing for the smaller amount of (a) the actual quantity of drugs possessed, or (b) the quantity of drugs she believed she possessed; (2) where a defendant has no limiting belief or is willfully blind to the amount of drugs possessed, she would be accountable for the amount actually possessed; (3) where a defendant is a central or directing figure in a conspiracy, the actual amount possessed would be presumptively attributable to her;[106] (4) defendant would likewise be presumed to know the type of narcotic possessed, but would have an opportunity to rebut the presumption.[107] In fashioning these rules, Judge Wenstein remained cognizant

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247, 251 (2d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir. 1989); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989); United States v. Gooden, 892 F.2d 725, 727-28 (8th Cir. 1989). The Third Circuit stands out as a notable exception in holding the clear and convincing evidence standard governs facts that have a substantial impact on the sentence range under the Guidelines. United States v. Kikumura, 918 F.2d 1084, 1101-02 (3d Cir. 1990). The Second Circuit has indicated that a series of sentencing enhancements involving conduct proved by a bare preponderance may justify a downward departure. *See* United States v. Gigante, 39 F.3d 42, 48 (2d Cir. 1994).

103. FED. R. EVID. 1101(d)(3). The court may consider relevant information without regard to admissibility provided that the information has "sufficient indicia of reliability to support its probable accuracy." USSG, *supra* note 5, § 6A1.3(a). Commentators have pinpointed coconspirator's hearsay, introduced through government agents regarding quantity of drugs defendant possessed or quantity involved in the conspiracy, as a frequent source of unreliable factfinding at sentencing. *See* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 342 (1994); Deborah Young, *Untested Evidence: A Weak Foundation for Sentencing*, 5 FED. SENTENCING REP. 63, 64-65 (1992); *see also* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153 (1993); Herman, *supra* note 47, at 292 (arguing unexamined assumption that sentencing is distinct and secondary phase of criminal proceeding is inappropriate and that radical differences in procedural protections is unfounded). Others have protested the use of illegally seized evidence at sentencing. *See* Clinton R. Pinyan, Comment, *Illegally Seized Evidence at Sentencing: How to Satisfy the Constitution and the Guidelines with an "Evidentiary" Limitation*, 1994 U. CHI. LEGAL F. 523; Victor J. Miller, Note, *An End Run Around the Exclusionary Rule: The Use of Illegally Seized Evidence Under the Federal Sentencing Guidelines*, 34 WM.& MARY L. REV. 241 (1992).

104. *See infra* notes 113-124 and accompanying text.

105. *See* USSG, *supra* note 5, § 1B1.3(a)(1)(A).

106. *See* United States v. Ekwunoh, 813 F. Supp. 168, 174 (E.D.N.Y. 1993).

107. *See* United States v. Cordoba-Hincapie, 825 F. Supp. 485, 531-32 (E.D.N.Y. 1993).

of the commonality of the dishonest supplier defense and, thus, the need not to overburden the government with proof on these issues.[108]

Despite the fact that the Second Circuit has foreclosed this reasoned approach to mens rea,[109] the dispute remains important. It supplies evidence of the confusion and dissension in the courts owing to the lack of well-defined mens rea standards in the Guidelines and in federal criminal statutes. As a corollary, it indicates an area the Commission should seriously consider reformulating. Moreover, the opinions merit further commentary because Judge Weinstein's evolving articulation of mens rea standards and types of proof, through his two sentencing opinions and a later article, prove informative for interpretation of other sections of the Guidelines. Additionally, the dispute sketches a potential due process challenge on proportionality grounds,[110] though the paper will not specifically address this.

In the first case, Caroline Ekwunoh, at the behest of her boyfriend, met someone arriving at the airport whom she assumed would be carrying heroin. She testified credibly that she believed he would be carrying around 400 grams because her boyfriend once imported that amount.[111] She accompanied the courier, in fact a confidential informant, to her car in the parking lot where he handed her an attaché case containing just over a kilogram of heroin. She took the case, put it in the trunk of the car, and was then arrested. She was charged with conspiracy and with possession of narcotics with intent to distribute. She pled guilty to the latter charge.[112]

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108. *See id.*; *Ekwunoh*, 813 F. Supp. at 174, 178-79.

109. The Second Circuit reversed *Ekwunoh*, the case establishing the first three rules. *See Ekwunoh*, 813 F. Supp. 168, 174 (E.D.N.Y. 1993), *rev'd*, 12 F.3d 368 (2d Cir. 1993). However, *Cordoba-Hincapie*, the case that established the fourth rule, was not appealed. *See Cordoba-Hincapie*, 825 F. Supp. at 485.

110. *See* Berman, *supra* note 96.

111. *See Ekwunoh*, 813 F. Supp. at 171.

112. *See id.*

The mandatory minimum sentencing provisions of the drug trafficking statute mention no mens rea.[113] Judge Weinstein held the sentencing judge must determine that the defendant had reasonably foreseen the quantity of drugs involved in her own conduct before that quantity could be used to compute sentences under statutory minimums or the Guidelines.[114] Since Judge Weinstein found that Ekwunoh neither "knew nor could reasonably have foreseen" the courier would hand her more than a kilogram of heroin, he did not apply the ten year mandatory minimum for that amount.[115] Instead, he sentenced her to the five year mandatory minimum in accordance with her actual, not hypothetical, belief.[116]

In a subsequent case, *United States v. Cordoba-Hincapie*, the defendants imported a controlled substance in their intestines (such couriers are known as "swallowers") that they believed to be cocaine but which was in fact heroin.[117] No mandatory minimums applied in this case and under the Guidelines heroin importation is punished more severely than cocaine.[118] After reviewing the history of mens rea and its central position in Anglo-American criminal jurisprudence, Judge Weinstein ascribed possible constitutional status to it.[119] Consequently, he held that conviction established a presumption the defendant was aware of the type of narcotic possessed, but the defendant must have an opportunity to rebut that presumption.[120] The government did not appeal the sentencing decision in *Cordoba-Hincapie*, but did appeal in *Ekwunoh*.

On appeal of *Ekwunoh*, the Second Circuit reversed as clearly erroneous the finding that the quantity, over a kilogram, was not reasonably

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113. The section of the statute describing what constitutes unlawful acts specifies that the acts must be committed "knowingly" or "intentionally." 21 U.S.C. § 841(a) (1995). By contrast, the section governing the penalty for the prohibited acts, in which the quantity of drugs involved dictates the punishment meted out, contains no mens rea requirement concerning quantity. *See* 21 U.S.C. § 841(b). Thus, while quantity is the most important factor in determining punishment, at neither the conviction nor sentencing stage must the government prove the offender's intent concerning or knowledge of the amount of drugs involved in the crime. *See* United States v. Velasquez, 28 F.3d 2, 4-5 (2d Cir. 1994) (discussing this aspect of statutes and correlated sentencing guidelines); *see also supra* note 29, discussing recent legislation to make statutorily mandated minimum sentences function better in conjunction with the Guidelines, and noting that mandatory minimums were in fact incorporated into the Guidelines.

114. *See Ekwunoh*, 813 F. Supp. at 178, 179 (arguing that otherwise amount of drugs involved may not reflect culpability and is subject to investigative agent manipulation).

115. *See id.* at 171.

116. *See id.* at 171, 178.

117. *See Cordoba-Hincapie*, 825 F. Supp. at 488.

118. *See* USSG, *supra* note 5, § 2D1.1(c); *see also Cordoba-Hincapie*, 825 F. Supp. at 488-89.

119. *See Cordoba-Hincapie*, 825 F. Supp. at 505-517.

120. *See id.* at 531-32.

foreseeable.[121] In light of the factual posture of the case, it was closer to a conspiracy than a substantive possession case due to Ekwunoh's fleeting possession of the heroin, the court declined to decide whether any mens rea applied to the drug quantity element in a possession case.[122] Subsequently, however, the Circuit Court clarified in *United States v. de Velasquez* that a defendant may be sentenced for the entire amount of drugs in her possession even where the entire quantity was not only unknown but also unforeseeable.[123] Brushing aside due process concerns, the court justified strict liability for drug quantity on assumption of risk grounds.[124]

These opinions display an evolving sense of the mens rea standard applicable to drug quantity determinations in possession cases, thereby demonstrating the slipperiness of the mens rea principles currently employed in the Guidelines and the federal criminal code. When Judge Weinstein first began grappling with the issue in *Ekwunoh*, he phrased his holding in terms of "knew" or "could reasonably have foreseen."[125] He questioned the Second Circuit's use of an objective standard to determine whether other actors' conduct was reasonably foreseeable to the defendant.[126] He then framed the issue as whether the Guidelines' foreseeability approach to drug quantity should be utilized with respect to the mandatory minimum portion of the drug trafficking statute.[127] Both the Second Circuit and a commentator[128] appeared to read the lower court opinion in *Ekwunoh* as extending the reasonable foreseeability limitation in section 1B1.3(a)(1)(B) (defendant's accountability for jointly undertaken criminal activity) to section 1B1.3(a)(1)(A) (accountability for defendant's direct involvement).[129] According to the Commission's commentary and illustrations, however, the direct participation section, § 1B1.3(a)(1)(A), applies on a strict liability basis. While the Second Circuit initially left open the question whether the Constitution might require imputing a reasonable foreseeability standard into the direct participation

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121. *See* United States v. Ekwunoh, 12 F.3d 368, 370-71 (2d Cir. 1993).

122. *See id.* at 370, 372 (Newman, J., concurring).

123. *See* United States v. de Velasquez, 28 F.3d 2, 6 (2d Cir. 1994).

124. *See id.* Framing a defendant's punishment, i.e., sentencing accountability, as part of a criminals' general assumption of risk provides further evidence of the disappearing distinction between tort and criminal law. *See* Coffee, *supra* note 23.

125. *Ekwunoh*, 813 F. Supp. at 171.

126. *See id.*

127. *See Ekwunoh*, 813 F. Supp. at 175 (discussing 21 U.S.C. § 841(b)).

128. Berman, *supra* note 96, at 247.

129. *See Ekwunoh*, 12 F.3d at 370, 371-72 (concurring) (characterizing mens rea standard used by District Court as "reasonable foreseeability"); *see also* Berman, *supra* note 96, at 247.

guideline,[130] it later foreclosed the question in *de Velasquez*, holding to the Commission's guidelines and commentary.[131]

The fact that Judge Weinstein included "knowledge" as part of the mens rea along with reasonable foreseeability suggests that he was doing more than just challenging the Second Circuit's application of reasonable foreseeability on an objective basis. He may also have implicitly read the "knowingly" standard from the underlying statute into the quantity determination at sentencing. The *Corso* Court later explicitly made such a move. The Second Circuit, however, rejected this analysis in *de Velasquez*. In that case, the court held that the quantity determination is not part of the corpus delicti, i.e., the substantive offense, and therefore quantity determines the sentence without regard to state of mind.[132]

In a subsequent commentary, Judge Weinstein criticized the Second Circuit *Ekwunoh* and *de Velasquez* opinions respectively: the former for denigrating mens rea in drug quantity attribution and the latter for abandoning it altogether.[133] He characterized the Second Circuit *Ekwunoh* opinion as imposing a weaker mens rea standard than traditionally permitted in criminal cases: "knew or should reasonably have foreseen."[134] Yet, the appellate language is similar to the mens rea language he used in the opinion below. His commentary, however, frames his lower court opinion as employing a "knew or had reason to believe" standard,[135] a standard the Commission employs without defining in several sections of the Guidelines.[136]

He seems to locate "knew or had reason to believe" at a level between knowledge and reasonable foreseeability. Thus, his lower court opinion did not import the reasonable foreseeability standard from the Guidelines section on accountability for others' conduct, nor did it import "knowingly" from the underlying statute. Rather, his sentencing opinion established a standard between the two as appropriate to save the drug trafficking statute from violating due process.[137] These evolving attempts to articulate the appropriate

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130. *See Ekwunoh*, 12 F.3d at 370.

131. *See Velasquez*, 28 F.3d at 5.

132. *See id.* at 4.

133. *See* Weinstein & Bernstein, *supra* note 73, at 121-23.

134. *See id.* at 121 (internal punctuation omitted).

135. *Id.*

136. The Commission sometimes pairs "reason to believe" with "knew," "intended," or "believed," and sometimes lets it stand alone as a mens rea requirement. *See* USSG, *supra* note 5, §§ 2D1.11(b)(2), 2D1.13(a)(1)-(a)(2), 2K2.1(b)(5), 2L2.1(b)(3), 2M3.3 cmt. 2, background, 2Q1.2 cmt. 2, 5B1.4(b)(23)-(b)(24), 5F1.5(a)(2).

137. *See Ekwunoh*, 813 F. Supp. at 178.

standard, regardless of the fact that the Second Circuit has rejected all mens rea standards for sentencing of drug possession cases, demonstrate the need for either Congress or the Sentencing Commission to articulate common mens rea terminology—if only so that it becomes possible to engage in principled discussion on the issue.[138]

Moreover, the obfuscation of mens rea standards in federal criminal law has helped to erode the distinction between criminal and tort liability. For instance, Judge Weinstein claims that in *Ekwunoh* the Second Circuit imported "reasonable foreseeability"—originally coopted from the doctrine of torts and normally used in criminal law only as the bridge between one person's knowledge and another's actions in conspiracy cases—into *individual* crimes. "In serious criminal cases 'reasonableness,' 'foreseeability,' and 'should have' are inadequate formulations of the necessary mental state."[139]

Use of such standards is tantamount to punishing defendants for negligence, which offends traditional notions of criminal culpability as dependent on mens rea. Whereas the MPC permits criminal liability for negligence only rarely and only for extreme negligence, judicial interpretation of the Guidelines treat knowledge and intent as equivalent to negligence.[140] Judge Weinstein makes the further observation, relegated to a footnote, that reasonable foreseeability may provide some evidence of what was actually known but that under the drug trafficking statute the ultimate inquiry should remain what the defendant knew.[141] Mistaking reasonable foreseeability for the ultimate inquiry of knowledge is akin to the evidentiary ingenue's confusion of admissibility for sufficiency. Here, however, the mistake is not so much attributable to the Second Circuit in the first instance, as to the Commission for prescribing strict liability in section 1B1.3(a)(1)(A).

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138. For discussion of similar problems in the California criminal code, a state that has not adopted any version of the MPC, see Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995).

139. *See* Weinstein & Bernstein, *supra* note 73, at 122; *see also* United States v. Bader, 956 F.2d 708, 710 (7th Cir. 1992) ("[A]lthough guidelines do not define 'knowingly,' we doubt the Commission equated 'knowing' with 'should have known' or 'could have concluded.' Knowledge in criminal law is actual consciousness; 'should have known' is closer to negligence than knowledge.") (citations omitted); *supra* notes 38-39 and accompanying text (discussing *Bader*).

140. *See* Weinstein & Bernstein, *supra* note 73, at 123, 124 nn.29-30 (citing MPC §§ 2.02(2)(d) (defining negligence as a "gross" deviation from standard of care a reasonable person would observe), 2.02(5) (recklessness ordinarily required for criminal liability)).

141. *See* Weinstein & Bernstein, *supra* note 73, at 124 n.28.

Nonetheless, the Second Circuit concurs with the usage of strict liability.[142] Side-stepping the analytical mistake of foreseeability for knowledge by simply asserting neither mens rea is at issue because drug couriers bear the risk of unforeseen quantities merely leads to the more fundamental mistake of quantity for culpability. Quantity serves as an indicator of individual culpability but it is not the entire sum and substance of culpability. Yet, the obviousness of such a mistake escapes recognition where analytical collapse pervades the system.

Analytical collapse is precisely the state of the federal sentencing system authorized by Congress, prescribed by the Guidelines, and accepted by the courts. Congress reduced federal criminal code reform down to sentencing reform.[143] The Sentencing Commission then implemented Guidelines that elicited the distinction between conviction and sentencing and that externalized offender characteristics, including mens rea, as not ordinarily relevant. The courts, in turn, ruled that the old sentencing wrenches (preponderance of the evidence and free admissibility of evidence), are adequate for calibrating the newly bureaucratized and computerized sentencing machine.

The magnitude of mistaking admissibility for sufficiency is consequently diminished at sentencing, at least formally if not substantively, because the threshold of admissibility does not have the same integrity as it does in proceedings where the rules of evidence apply. Although evidence introduced at sentencing must have "sufficient indicia of reliability to support its probable accuracy,"[144] courts for the most part have not seriously enforced the reliability standard.[145] Almost any evidence will be deemed sufficient where relevancy is allowed to stand in for admissibility, where quantifiability circumvents mens rea and appears as the transparent indicator of culpability,

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142. *See* United States v. de Velasquez, 28 F.3d 2, 6 (2d Cir. 1994) (stating that drug couriers bear risk of dishonest suppliers).

143. *See* Stith & Koh, *supra* note 2, at 294.

144. *See* USSG, *supra* note 5, § 6A1.3(a).

145. Courts have not uniformly taken the reliability standard seriously, though some courts have begun to scrutinize hearsay evidence in particular for unreliability. *See, e.g.*, United States v. Fennell, 65 F.3d 812, 813 (10th Cir. 1995) (stating girlfriend's unsworn allegation, included in PSR, that defendant had fired machine gun at her lacked minimal indicia of reliability); United States v. Messino, 55 F.3d 1241, 1255 (7th Cir. 1995) (stating court considered only defendant's responses to CI, not CI's statements, as they were inherently untruthful); United States v. Dodge, 61 F.3d 142, 146-47 (2d Cir. 1995) (relying on defendant's but not government agent's statements in tape-recorded conversation); United States v. Pantelakis, 58 F.3d 567, 568 (10th Cir. 1995) (finding that conclusions in PSR unsupported by facts do not constitute preponderance of evidence (citing United States v. Gomez-Arrellano, 5 F.3d 464, 467 (10th Cir. 1993)); *see also*, Young, *Untested Evidence*, *supra* note 103, at 64-65 (discussing judges' discomfiture with unreliable quantity evidence and ways in which they discount it).

and where the government's burden of proof is merely that a fact is more likely than not.

It is precisely at sentencing that mens rea is most crucial for it provides the link between punishment and individual culpability.[146] Indeed, one commentator posits that the distinction between criminal and tort law is only salvageable at sentencing because that is where the main difference between the two resides: in punishment.[147] A regularized approach to mens rea, such as that proffered by the MPC, applied in conjunction with a "sufficient indicia of reliability" standard that has some bite, could provide the Guidelines regime with some measure of analytical integrity.

III. AN EMERGING MENS REA PROBLEM UNDER THE FIREARMS GUIDELINES

In 1991, the Sentencing Commission consolidated three extant firearms Guidelines—section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), and section 2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense)[148]—into one: section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).[149] The first two sections were combined to form the new base Guideline. The third section was subsumed under the newly consolidated Guideline as an enhancement, becoming section 2K2.1(b)(5).

Thus, the specific offense characteristics for firearms offenses has provided, since 1991, for a four-level enhancement:

> If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that

146. *See* Weinstein & Bernstein, *supra* note 73, at 121.
147. *See* Coffee, Jr., *supra* note 23, at 246.
148. *See* USSG, *supra* note 5, app. C, amend. 374 § 2K2.1-3 (text of deleted Guidelines).
149. *See id.*, § 2K2.1.

> it would be used or possessed in connection with another felony offense . . . .[150]

Whereas the previous section 2K2.3 applied on an alternative basis to the unlawful firearms possession and trafficking guidelines,[151] the new section enhances a defendant's base offense level.[152] Despite this difference, the new enhancement serves the same function as the old guideline: ensuring a minimum offense level. The previous section 2K2.3 guaranteed the base offense level for a defendant subject to the Guideline would be at least 12.[153] The Commission's 1991 consolidation also revised adjustments and offense levels upward to better reflect the seriousness of the underlying conduct, particularly for repeat violent or controlled substance offenders.[154] One result is that section 2K2.1(b)(5) now ensures a minimum offense level of 18.[155]

Although the basic function of section 2K2.1(b)(5) is the same as the previous section 2K2.3, the consolidation made it quite dense. The enhancement therefore could benefit from some unpacking. The first clause of the enhancement relates to conduct the defendant has already committed. It indicates no mens rea and under the relevant conduct guideline section 1B1.3(a)(1)(A) a defendant is held strictly liable for his own conduct. The application of the enhancement under the first clause therefore depends solely on a "connection" or nexus between the firearm used or possessed and the felony committed.

By contrast, the second clause, which serves the function of the deleted section 2K2.3, adds a mens rea requirement to the nexus requirement. It mandates that a defendant have "knowledge, intent, or reason to believe" the firearm at issue will be used in connection with another felony offense. Since the second clause encompasses underlying offenses ranging from possession to trafficking, it is somewhat unclear whether all three mens rea elements apply to each. In its previous manifestation (section 2K2.3), the Guideline specified intent as the mens rea for defendant's conduct, and specified knowledge as the

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150. *Id.* § 2K2.1(b)(5).

151. *See id.* app. C, amend. 374 § 2K2.1.

152. *See id.* § 2K2.1.

153. *See id.* app. C, amend. 374 § 2K2.3

154. *See id.* § 2K2.1, and app. C, amend. 374. The Commission stated that the amendment "consolidates three firearms guidelines and revises the adjustments and offense levels to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses." *Id.*

155. If, after the four-level increase, the defendant's offense level is less than 18, the enhancement instructs that it should be increased to 18. *See id.* § 2K2.1(b)(5).

mens rea for another's conduct.[156] Given the functional equivalency of section 2K2.1(b)(5) to section 2K2.3, the break down is probably similar here. Application of the enhancement thus requires establishing a defendant's intent regarding his own future illegal conduct, or knowledge or reason to believe that in transferring the firearms he is acting to facilitate another's future illegal conduct.

Since the second clause of the firearms enhancement unequivocally states a mens rea requirement, strict liability for a defendant's anticipated direct participation, section 1B1.3(a)(1)(A), does not apply, nor does the reasonable foreseeability standard for another's conduct, section 1B1.3(a)(1)(B).[157] The other limiting factor from section 1B1.3(a)(1)(B), the scope of defendant's agreement in the jointly undertaken activity, would arguably still apply. Yet, an alternative construction is also available that would make the scope of the agreement from section 1B1.3(a)(1)(B) inapplicable. The "in connection with" requirement of section 2K2.1(b)(5) could be read as replacing the scope of the agreement limiting principle in section 1B1.3(a)(1)(B).[158] The lack of clarity in whether and how the relevant conduct guideline applies to the knowledge of another felony enhancement serves as but one example of the confusion engendered by relevant conduct as currently conceptualized under the Guidelines. Moreover, while commentators have levied abundant criticism at the relevant conduct portion of the Guidelines,[159] this particular ambiguity in its application has gone unnoted by commentators and the courts alike. Even though courts have examined the meaning of "in connection with,"[160] they have not considered whether that phrase and "scope of the agreement" are either essentially the same limiting principle or somehow mutually exclusive.[161]

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156. The Guideline was captioned, "Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense." *Id.* app. C, amend. 374 § 2K2.1. Note that "reason to believe" was not included as part of the mens rea standard in § 2K2.3, but appears once the Guideline becomes the § 2K2.1(b)(5) enhancement. *See id.* § 2K2.1(b)(5).

157. The read-the-Guidelines-and-commentary requirement comes into play here. *See id.* § 1B1.3(a)(4); *see also id.* § 1B1.3(a) ("Unless otherwise specified . . .").

158. The commentary to section 1B1.3(a)(1)(B) clarifies that the scope of defendant's agreement limits the extent of "jointly undertaken criminal activity" for which defendant is responsible. *See id.* § 1131.3 cmt. 2 (providing that scope of criminal activity jointly undertaken by defendant is not necessarily same as scope of entire conspiracy and hence relevant conduct not necessarily same for every participant).

159. *See supra* note 80.

160. *See infra* notes 162-193 and accompanying text.

161. Where the issue on appeal was applicability of USSG section 4B1.4(b)(3) for use or possession of a firearm in connection with a crime of violence, one court did discuss section 1B1.3(a)(1)(A), aiding and abetting, section 1B1.3(a)(1)(B), in furtherance of jointly undertaken activity, and section 2K2.1(b)(5), use of firearm in connection with another felony, as an alternative basis for the defendant's sentencing accountability. *See* United States v. Guerrero, 5 F.3d 868, 872 (5th Cir. 1993).

The meaning of "in connection with," which appears in both clauses, was the first question to arise under section 2K2.1(b)(5).[162] The firearms enhancement is silent with respect to the requisite connection to another felony.[163] As one court put it, the phrase exists in an "explanatory vacuum."[164] In the absence of explanatory commentary, the circuit courts have utilized two tests for the proper nexus between the weapon and the underlying felony. Some courts have resolved construction of "in connection with" in section 2K2.1(b)(5) along the same lines as section 2D1.1(b)(1), an analogous[165] enhancement for firearms possession in narcotics offenses, while other courts have compared it to the phrase "in relation to" found in an analogous statute, 18 U.S.C. 924(c)(1).

In *United States v. Sanders*, the first case to analogize section 2K2.1(b)(5) to section 2D1.1(b)(1), the defendant was arrested for reckless driving.[166] A search of Sanders revealed that he had small amounts of cocaine and heroin, and substantial cash in his pockets; while an inventory of his car revealed a gun case containing drug packaging materials, as well as two loaded guns in the trunk along with drug paraphernalia.[167] Sanders pled guilty to drug possession and distribution and to being a felon in possession of firearms.[168] In addition, he signed a guilty plea petition that contained the admission he "had guns in the trunk of the car in connection with this intended drug trafficking."[169]

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162. *See* United States v. Sanders, 990 F.2d 582, 585 (10th Cir. 1993) ("This court has not yet had occasion to interpret this recently amended Guideline language."). The enhancement became effective Nov. 1, 1991, but *Sanders* was the first, at least at the appellate level, to address it substantively. *See* United States v. Valencia-Toro, No. 92-50301, 1993 WL 45240, at *2 (9th Cir. Feb. 23, 1993) (discussing whether section 2K2.1(b)(5) provided evidence Commission had taken illegal purpose into account in previous guideline); *see also* United States v. West, No. 92-6198, 1993 WL 26816, at *2 (10th Cir. Feb 5, 1993) (summarily affirming application of section 2K2.1(b)(5)); United States v. Morehead, 959 F.2d 1489, 1510 (10th Cir. 1992) (mentioning § 2K2.1(b)(5) in list of specific offense characteristics District Court must consider on remand).

163. *See* USSG, *supra* note 5, § 2K2.1(b)(5).

164. *See Sanders*, 990 F.2d 582, 585 (10th Cir. 1993).

165. The analogy is not a pure one as the nexus requirement is only mentioned in the commentary, not in the enhancement itself. *See* USSG, *supra* note 5, § 2D1.1 cmt. 3; *see also* United States v. Gomez-Arrellano, 5 F.3d 464, 466-67 (10th Cir. 1993) (noting discrepancies in sections 2K2.1(b)(5) and 2D1.1(b)(1) elements; holding section 2K2.1(b)(5) is more closely analogous to 18 U.S.C. § 924(c)(1)); *Sanders*, 990 F.2d at 585 (analogizing section 2K2.1(b)(5) to section 2D1.1(b)(1) but noting lack of commentary on possession standard accompanying firearms provision).

166. *See Sanders*, 990 F.2d at 583.

167. *See id.*

168. *See id.* Sanders was charged under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 922 (g). *See id.*

169. *Id.* at 585 (internal quotation marks omitted).

The court expressly rejected Sanders' suggestion that the firearms enhancement should take the "ready access" relation standard from a similar federal criminal statute.[170] Instead, the court analogized to section 2D1.1(b)(1), which applies unless the firearm possessed has a "clearly improbable connection" to the drug offense of conviction.[171] Although it rejected the stringent "ready access" test, the court stopped short of adopting the lenient "clearly improbable" standard from the narcotics enhancement statute. Rather, it used the narcotics enhancement as indicative of the Guidelines' overall harsh treatment of the connection between guns and drugs. "[T]he Guidelines commentary explains the enhancement for weapons possession under section 2D1.1(b)(1) as reflecting 'the increased danger of violence when drug traffickers possess weapons.'"[172] The *Sanders* court noted that, since courts are aware of this reality, they have held inferences may be drawn when guns and drugs are in close proximity.[173]

The *Sanders* court found that the types of contraband present and the placement throughout Sanders' vehicle suggested the guns were intermingled with his drug trafficking.[174] Accordingly, it concluded that the enhancement for possession of guns in connection to another felony offense was properly applied. Despite its analogy to section 2D1.1(b)(1), the *Sanders* court characterized its interpretation of the "in connection with" phrase as "straightforward and literal."[175] Initially, courts following *Sanders* adopted a plain or ordinary meaning standard for the phrase.[176]

Subsequently, once the stringent "ready access" test of 18 U.S.C. section 924(c)(1) was superseded,[177] courts moved away from construing the

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170. *See id.* (referencing 18 U.S.C. § 924(c)). This is a pre-Smith case (Smith v. United States, 508 U.S. 223 (1993)) and "ready access," rather than "facilitation" was then the test for 18 U.S.C. § 924(c)(1). For a definition of "ready access," see *Sanders*, 990 F.2d at 585 n.1. The Supreme Court articulated a different standard for "in relation to": the firearm must facilitate or have potential to facilitate drug trafficking crime, i.e., it must have purpose or effect with respect to the drug trafficking crime; mere presence is not enough. *See Smith*, 508 U.S. at 237-39. *See infra* note 177 and accompanying text.

171. *See Sanders*, 990 F.2d at 585 ("The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.") (citing USSG § 2D1.1 cmt. 3.).

172. *Id.* (citing USSG § 2D1.1 cmt. 3).

173. *See id.* at 585.

174. *See id.*

175. *See id.*

176. *See, e.g.*, United States v. Brewster, 1 F.3d 51, 54 (1st Cir. 1993) (following *Sanders* in giving "in connection with" its ordinary meaning).

177. 18 U.S.C. § 924(c)(1) mandates an enhanced sentence for an offender who, "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." 18 U.S.C. § 924(c)(1) (1994). In Smith v. United States, the Court construed the phrase "in relation to" to require that the firearm facilitate or have the potential of facilitating a drug trafficking offense. *See* Smith v. United States, 508 U.S.

"ordinary meaning" of "in connection with" by analogy to 2D1.1(b)(1) and toward the 18 U.S.C. section 924(c)(1) "facilitation" standard for the phrase "in relation to." The Ninth Circuit found the "facilitation" test a more appropriate guide for interpreting section 2K2.1(b)(5) than the narcotics enhancement for firearms possession, section 2D1.1(b)(1). The court stated that "in connection with" and "in relation to" have the same meaning.[178] Even courts that had previously adhered to the loose narcotics enhancement analogy began utilizing the facilitation test. Although the First Circuit had at first used the ordinary meaning standard,[179] it later interpreted "in connection with" broadly to include "aiding or facilitating"[180] Similarly, the Tenth Circuit, which in *Sanders* had rejected the "ready access" test as much higher than that required by section 2K2.1(b)(5),[181] adopted the facilitation test in *United States v. Gomez-Arrellano* but preserved a presumption of connection for guns and drugs in close physical proximity.[182]

Gomez-Arrellano pled guilty to reentry into the United States after deportation, possession with intent to distribute cocaine, possession of marijuana, and being an illegal alien in possession of a firearm.[183] The government dismissed the charge of use of a firearm in connection with a narcotics offense but the PSR concluded that section 2K2.1(b)(5) applied because he was an illegal alien in possession of a gun for use in connection with another felony, possession with intent to distribute cocaine.[184] The court vacated the enhancement because nothing in the PSR or the rest of the record addressed the physical proximity of the gun and drugs, and the government therefore failed to trigger the "connection" presumption.[185]

223, 238 (1993). To the extent the government relies upon physical possession, it must show the firearm was possessed in a manner permitting an inference that it facilitated or had some potential emboldening role in defendant's felonious conduct. *See* United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994).

178. *See Routon*, 25 F.3d at 818 (holding that location of revolver within easy reach of driver's seat indicated gun emboldened defendant to maintain possession of stolen car).

179. *See Brewster*, 1 F.3d at 54.

180. *See* United States v. Thompson, 32 F.3d 1, 6-7 (1st Cir. 1994) (interpreting *Brewster* "ordinary meaning" rule as signifying "facilitation" and construing analogous section 2K2.1(c)(2) to require facilitation in order for defendant's possession of firearm to be causally and logically related to other offense). For discussion of *Brewster*, see *infra* notes 192-204 and accompanying text.

181. *See supra* note 170 and accompanying text.

182. *See* United States v. Gomez-Arellano, 5 F.3d 464, 466-67 (10th Cir. 1993) (analogizing to 18 U.S.C. § 924(c)(1) to hold that section 2K2.1(b)(5) requires government to show weapon facilitates or has potential to facilitate drug offense and that weapon's possession must be more than coincidental; also recognizing presumption of connection created by physical proximity between guns and drugs).

183. *See id.* at 465.

184. *See id.*

185. *See id.* at 467.

After the advent of the Supreme Court's facilitation test in *Smith*, only the Fifth Circuit adopted the *Sanders* line. In *United States v. Condren*, the Fifth Circuit held that simple possession of a firearm in close proximity to drugs reasonably supported the presumption that the gun was used to protect drug activities.[186] At oral argument, Condren's defense counsel claimed that adopting "physical proximity" as the ordinary meaning of "connection" would open the door for automatic section 2K2.1(b)(5) enhancement in crimes, such as bank fraud, where a connection with guns is less obvious and ordinary.[187] In a bank fraud case less than a year later, the Fifth Circuit made clear the narrowness of the *Condren* holding. In *United States v. Fadipe*, the court vacated a section 2K2.1(b)(5) enhancement, holding that, unlike *Condren* where the court took notice of the fact that theft is a close and ever present partner of illicit drugs, where a gun is merely present near some bank fraud instruments in a car, it is not reasonable to assume the gun is present to prevent their theft.[188] "The presence of a gun near instruments of bank fraud does not create the same automatic increase in the danger of physical violence that exists when drugs and guns are present together."[189]

The Fifth Circuit mandated that the connection to bank fraud be proved rather than presumed.[190] Two circuits, faced with factual circumstances strongly evidencing a connection between guns and drugs, decided not to decide between the competing legal standards (facilitation or close proximity) because the section 2K2.1(b)(5) enhancement was supported under either standard.[191] As *Fadipe* demonstrates, however, the judicially constructed

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186. *See* United States v. Condren, 18 F.3d 1190, 1197-1200 (5th Cir. 1994) (holding gun possession by convicted felon logically connected to felony drug possession where drugs were found on top of desk and loaded gun found in desk drawer; stating, like *Sanders*, that inference of connection from physical proximity comported with Commission commentary to USSG app. C, amend. 374 § 2D1.1(b)(1), and superseded USSG § 2K2.2 concerning increased danger of violence when drugs are in close proximity to guns).

187. *See Condren*, 18 F.3d at 1199 n.20.

188. *See* United States v. Fadipe, 43 F.3d 993, 994-95 (5th Cir. 1995). Fadipe was convicted by a jury of bank fraud, in violation of 18 U.S.C. § 1344, and of unlawful possession of a firearm by an illegal alien, in violation of 18 U.S.C. § 922(g)(5). *See id.* at 994.

189. *Id.* at 994-95; *see also* United States v. Burris, No. 95-5049, 1995 WL 551359, at *1 (4th Cir. Sept. 18, 1995) (holding USSG section 2K2.1(b)(5) inapplicable where firearm had no apparent connection to bank fraud).

190. *See Fadipe*, 43 F.3d at 995.

191. *See* United States v. Whitfield, 50 F.3d 947, 948-49 (11th Cir. 1995) (holding, where defendant used gun to threaten bystander between two burglaries, concealed gun in coat at time of arrest, and where arresting officer's averred that defendant had apparently positioned himself to fire weapon at persons coming through front entrance of apartment, enhancement was proper under either of two competing interpretations of USSG § 2K2.1(b)(5)); United States v. Blackmon, No. 94-5146, 1994 WL 524995, at *2 (4th Cir. Sept. 28, 1994) (holding that, although question was one of first impression, it was unnecessary to choose between competing approaches to USSG § 2K2.1(b)(5) where enhancement was correct under either test).

presumption of a "connection" from the fact a gun is present alongside drugs does not necessarily attach where guns are present in close proximity to evidence of some other type of felony.

Most of these cases interpreting the nexus requirement in section 2K2.1(b)(5), involve the first clause of the enhancement, which entails a connection to conduct already committed and which lacks a mens rea standard.[192] In possession cases it may be unclear whether the enhancement applied under the first or second clause. Courts scrutinizing the meaning and scope of section 2K2.1(b)(5), in cases where its application is questioned under the second clause of the enhancement, stick to analyzing the "in connection with" phrase and take little notice of the fact that the second clause also contains a mens rea requirement. In contrast to the "dearth of expository comment[ary]" concerning the nexus requirement under section 2K2.1(b)(5),[193] the Commission has taken pains to define the type of offense to which the firearm must be connected in order for the four-level upward adjustment to apply. The Commission's definitions of "another felony offense" have implications for the mens rea standard and the type of proof necessary to sustain the enhancement by a preponderance of the evidence.

Application note 7 defines "felony offense" expansively to mean, in section 2K2.1(b)(5), "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained."[194] A year after enactment of the firearms consolidation amendment, the Commission set forth a limiting principle that narrowed defendants' sentencing accountability for offenses subsequently committed with the firearm(s) at issue. The Commission added application note 18, stating that "[a]s used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses."[195] The commentary, which is binding on the courts, thus requires that the other offense have the

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192. *See Fadipe*, 43 F.3d at 993 (vacating enhancement for gun possession in connection with conviction felony of bank fraud); *Gomez-Arrellano*, 5 F.3d at 464 (vacating enhancement for gun use in connection with conviction felony of possession with intent to distribute cocaine); *Routon*, 25 F.3d at 819 (upholding gun possession in connection with conviction felonies of interstate transportation of and unlawful possession of stolen car); *Condren*, 18 F.3d at 1190 (upholding gun possession in connection with conviction felony of drug trafficking); *Sanders*, 990 F.2d at 582 (upholding gun possession in connection with conviction felony of drug trafficking). *But see* United States v. Brewster, 1 F.3d 51 (1st Cir. 1993) (upholding gun possession in connection with conviction felony of distributing cocaine).

193. *Brewster*, 1 F.3d at 54.

194. USSG, *supra* note 5, § 2K2.1 cmt. 7

195. *Id.* § 2K2.1 cmt. 18.

character of a felony in some jurisdiction for example, that it have a character more grave in caliber than a misdemeanor but other than gun trafficking or firearms possession.[196]

For the enhancement to apply, the defendant in an illegal possession case must have more in mind than continued possession of firearms as that would entail just another possession offense. He must have more in mind than transferring firearms to a convicted felon since, again, that would entail a subsequent possession offense falling outside the purview of the enhancement. The defendant in an illegal transfer case must know or have reason to believe more than that the purchaser is a convicted felon. He must likewise know or have reason to believe that, after transfer of the firearms, the transferee will do more than just turn around and resell them. Subsequent gun trafficking offenses, like subsequent illegal gun possession offenses, fall outside the circumscription of the enhancement.

United States v. Brewster, in which Brewster sold drugs and a gun to a federal undercover agent, provides a good example of the way that courts have generally overlooked the mens rea requirement of the second clause.[197] Brewster pled guilty to distributing cocaine and to being a convicted felon in possession of a firearm.[198] Though the plea included an agreement that the government would recommend the low end of the sentencing range, the agreement did not establish the range itself.[199]

The presentence investigation (PSI) report recommended the four-level enhancement for transferring a firearm with reason to believe it would be used in a future felony offense.[200] At the sentencing hearing, the undercover agent testified that, from the outset of the negotiations, he told Brewster he wanted the gun because he intended to become a drug dealer and needed a gun to facilitate the plan.[201] Brewster testified that the first time he heard the agent declare his intentions for the gun was in court.[202] The sentencing judge chose

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196. One circuit has construed "firearms" as applying to "trafficking" as well as "possession," thereby foreclosing a defendant's argument that drug trafficking offenses fell outside the felony offenses cognizable under the enhancement. *Gomez-Arrellano*, 5 F.3d at 466. Other circuits do not appear to have faced the issue, but the language seems rather obvious in light of the Commission's commentary expressing concern over the presence of guns and drugs together. *See* USSG, *supra* note 5, § 2K2.1 & app. C, amend. 374; *see also* § 2D1.1 cmt. 3.

197. *See Brewster*, 1 F.3d at 52.

198. *See id.*

199. *See id.*

200. *See id.* at 52.

201. *See id.* at 53.

202. *See id.* at 55.

not to credit Brewster's account and applied the enhancement.[203] On appeal, Brewster added the alternative argument that "no reasonable person would believe the self-aggrandizing pipe-dreams of a person who bought a mere twenty dollars worth of crack."[204]

The *Brewster* court gave the challenge a bifurcated review.[205] It reviewed the scope and meaning of the enhancement de novo and the sentencing court's factual determinations for clear error.[206] In its scope and meaning review, the court addressed only the "in connection with" phrase.[207] The court held that, where a defendant sold a gun with reason to believe that customer planned to use it in connection with protection of drug trafficking activities, a sufficient nexus existed between the weapon and the drug trafficking to warrant the four-level section 2K2.1(b)(5) enhancement.[208] The court characterized the mens rea determination as a credibility issue and discerned no clear error in the sentencing court's decision to credit the agent's testimony.[209]

While proof of mens rea may often come down to credibility, some mens rea inquiries properly belong to "scope and meaning" de novo review.[210] Given that mens rea standards are nowhere defined in the Guidelines, the courts should at least define the section 2K2.1(b)(5) mens rea standards as part of de novo review. A court might state, for instance, that "know" and possibly also "intend" should be applied like the term "knowingly" in the MPC.[211] Since "reason to believe" was the mens rea at issue in *Brewster*, the court might have noted that the precursor guideline, section 2K2.3, contained only "knowledge" and "intent," not "reason to believe."[212] Or, the court could have defined "reason to believe" as parallel to the MPC's threshold bar to willful blindness.[213] Absent that, it might have differentiated "reason to believe" from the default mens rea under section 1B1.3(a)(1)(A) of

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203. *See id.*

204. *Id.*

205. *See id.* at 53-54.

206. *See id.* at 54.

207. *See id.*

208. *See id.* at 55.

209. *See id.* at 54-55.

210. *See supra* note 209 and accompanying text.

211. *See supra* notes 36-37 and accompanying text.

212. *Compare* USSG, *supra* note 5, § 2K2.1(b)(5) *with* USSG app. C, amend. 374 (text of deleted section 2K2.3).

213. *See* MODEL PENAL CODE § 2.02(7). "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." *Id.*

"reasonable foreseeability" of others' conduct.[214] It might then have held that "reason to believe" is the higher mens rea of the two because it is closer to knowledge than "reasonable foreseeability," which is closer to negligence.[215] Such analysis should be a part of any court's inquiry into the scope and meaning of the section 2K2.1(b)(5) enhancement.

In *Brewster*, scrutiny of the mens rea element as part of de novo review probably would not have altered the outcome. In fact, the *Brewster* situation exemplifies the need to include "reason to believe" in the mens rea standard. Without it, Brewster would have had a potentially viable defense (claiming no one would take seriously a buyer's statement that he was going to start his own drug operation when the buyer only bought twenty dollars of crack along with the gun). Inclusion of "reason to believe" may represent a policy decision by the Commission to ease the government's burden of proof.[216] Where the government produces evidence that an agent or confidential informant posing as a gun purchaser gave a defendant "reason to believe" he intended to commit a future felony offense with the gun (besides gun trafficking or possession), "reason to believe" disallows a defendant's incredulity defense, leaving little room for a defendant to willfully turn a blind eye.[217]

An inquiry into mens rea might not have changed the outcome in *Brewster*, but how a court defines "reason to believe" can make a difference in other situations. "Reason to believe" need not be a defendant's actual, subjective belief. But this does not resolve the question of whether "reason to believe" is measured against a subjective standard or an objective, reasonable person standard similar to "reasonable foreseeability" in section 1B1.1(b)(5). The need to distinguish between a subjective and an objective "reason to believe" does not arise as long as the mens rea evidence is strong, and the necessary inferential step is therefore short.

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214. *See* USSG, *supra* note 5, § 1B1.3(a)(1)(B).

215. *See supra* notes 35-39 and accompanying text (rejecting sentencing court's use of "should have known" because such standards are closer to negligence than knowledge); *See also* Weinstein & Bernstein, *supra* note 73, at 123 (stating sentencing defendants on basis of reasonable foreseeability is tantamount to sentencing them for negligence).

216. *See supra* note 91 and accompanying test, Part II, especially notes 97-101 and accompanying text.

217. In the context of undefined standards, disallowing a defendant's willful mistake of fact mitigates against application of "knew" as an actual knowledge standard. Nonetheless, inclusion of "reason to believe" without giving it a definition or proclaimed purpose has also allowed courts to interpret it as more of a negligence standard than a knowledge standard.

In transfer cases under the second clause of the enhancement, evidence of the requisite mens rea is usually garnered from pre-arrest investigation.[218] Accountability for the four-level section 2K2.1(b)(5) sentencing enhancement typically accrues from a government agent's testimony regarding defendant's pre- or post-arrest statements, as in *Brewster*,[219] or from a confidential informant's tape-recorded conversation with the defendant,[220] in which the defendant incriminates himself with respect to his knowledge that the firearm would be used in connection with a future felony offense.

A Seventh Circuit case serves as an example of the type of inculpatory evidence a confidential informant (CI) may easily gather. In *United States v. Messino*, the CI posed as a criminal engaged in selling narcotics and guns.[221] Messino first sold cocaine to the CI and then later agreed to procure weapons for him.[222] Subsequently, Messino sold the CI a pistol, a sawed-off shotgun, and a fully automated machine gun with a silencer from which the serial numbers had been scratched off.[223] Thereafter, Messino sold the CI a semi-automatic pistol with a silencer, both of which also had obliterated serial numbers.[224]

During the course of their interactions, all of which were tape-recorded and observed by federal agents, the CI boasted of his association with several well-known, local crime gangs.[225] The CI spoke of drug "scores" he was planning for the near future, and he told Messino that he was willing to commit murder.[226] He offered the CI three kilograms of cocaine in exchange for killing his ex-girlfriend, who he believed was responsible for giving information to authorities that resulted in drug-related forfeitures of his property.[227]

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218. Evidence of intent is similarly gathered in possession cases to meet the mens rea requirements of the second clause. *See, e.g.*, United States v. Dodge, 61 F.3d 142, 146 (2d Cir. 1995).

219. *See Brewster*, 1 F.3d at 54 (holding knowledge that gun and drug purchaser wanted gun to facilitate his plan of becoming a drug dealer sufficient reason to believe gun would be used in future felonies).

220. *See* Dodge, 61 F.3d at 144 (upholding section 2K2.1(b)(5) enhancement in pipe bomb possession where defendant told CI in recorded conversations he wanted a bomb that could go through wall and take out five or six feet or possibly set a fire on roof, and that he needed timer on bomb for alibi purposes); United States v. Messino, 55 F.3d 1241, 1255-56 (7th Cir. 1995) (holding evidence CI told defendant he was connected to crime gangs and was willing to commit murder, and evidence defendant solicited CI to murder his ex-girlfriend, enough to support finding of knowledge under section 2K2.1(b)(5)).

221. *See Messino*, 55 F.3d at 1244.

222. *See id.* at 1244-45.

223. *See id.* at 1245.

224. *See id.*

225. *See id.* at 1244.

226. *See id.* at 1244-45, 1255-56.

227. *See id.* at 1245.

The court held that these factors gave Messino reason to believe future felonies would be committed with the weapons transferred to the CI.[228] The court also held that the same factors created a sufficient nexus between the weapons Messino sold and the proposed felonies to warrant imposition of the section 2K2.1(b)(5) enhancement.[229] The court's reliance on the same evidence to establish both the requisite mens rea and nexus demonstrate that the two concepts are closely intertwined. This interrelationship—in conjunction with the fact that the nexus requirement appears in both clauses of section 2K2.1(b)(5) whereas only the second clause sets forth a mens rea—may partly account for courts' predilection for analyzing the nexus carefully while assuming the necessary mens rea exists.

In *United States v. Cutler*,[230] the government likewise presented several pieces of evidence relevant to both Cutler's mens rea and the connection of firearms to future felonies.[231] The court analyzed the proper legal interpretation of "another felony offense," and reviewed the factual determination that a nexus existed.[232] Although the court did not expressly analyze the mens rea element, its nexus analysis contained mens rea implications.[233]

Cutler obtained a firearms license and over a six month period bought 184 guns, the majority of which he sold to his neighbor.[234] The parties also stipulated "that although Cutler did not know the identity of the people to whom [the neighbor] supplied guns, he did know that [the neighbor] kept company with young persons who drove expensive cars in run-down urban sections of Baltimore City."[235] These circumstantial facts may have supported an inference that Cutler had reason to believe the neighbor was transferring guns to drug dealers; but it was unnecessary for the court to make that inference since Cutler stipulated to it.[236] In addition to these stipulated facts, a government agent testified at the sentencing hearing that, when he arrested Cutler, the defendant waived his right to remain silent and told the agent that "the guns were sold to violent drug dealers and that if he [Cutler] told us who

228. *See id.* at 1256.
229. *See id.* at 1255-56.
230. United States v. Cutler, 36 F.3d 406 (4th Cir. 1994).
231. *See id.* at 407.
232. *Id.* at 408.
233. *See id.*
234. *See id.* at 407.
235. *Id.*
236. *See id.*

they were, he feared for his family's safety, that they would kill his family."[237] Thus, if the testimony is credited, Cutler himself suggested a future non-firearms felony offense that might be committed with the guns: killing informant's families.

In light of the evidence, the Fourth Circuit agreed with the District Court that Cutler had reason to believe firearms he sold to his neighbor were thereafter transferred to people engaged in a continuing conspiracy to distribute controlled substances.[238] This, the court held, provided a sufficient connection between the firearms sold and future drug-trafficking felonies.[239] The court briefly touched on the mens rea issue in considering Cutler's argument that the enhancement required knowledge of a *specific* felony to be committed with the firearm at issue.[240] The *Cutler* court found the term "another felony offense" clear on its face.[241]

> While appellant argues that the section requires knowledge of some specific offense, the use of the word "another" as the sole modifier of "felony offense" does not command such a narrow reading. As used in this context, "another" merely means "additional, one more." While appellant would like the section to read "another *specific* felony offense," it does not.[242]

It is interesting that the *Cutler* court calls "another" the sole modifier of "felony offense" when in fact two application notes are devoted to both defining and modifying the term. Although neither application note would have directly resolved the issue faced by the court, the Commission's commentary on the same term nonetheless should bear mentioning. On the one hand, application note 18, the limiting principle to "felony offense," furnishes some support for the defendant's narrow reading of the term. On the other hand, application note 7, the expansion principle to "felony offense," supports the court's holding that foreknowledge of a specific felony is not required for the section 2K2.1(b)(5) enhancement to apply.

Out of the three mens rea standards in the enhancement, the *Cutler* court's borderline de novo review of the meaning of "another felony offense"

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237. *Id.*
238. *See id.* at 408.
239. *See id.*
240. *See id.*
241. *See id.*
242. *Id.* (citation omitted).

only references "knowledge."[243] Yet, *Cutler*, like *Brewster* and *Messino*, is a "reason to believe" case. The issue was whether Cutler's knowledge that the guns he sold were being subsequently transferred to drug dealers was sufficient reason for him to believe the guns would be used in future felonies.[244] Since the court decided foreknowledge of a specific future offense was not required, the knowledge Cutler had about the firearms' destination established sufficient "reason to believe."[245] While the evidence did not show that Cutler had reason to believe the guns would be used in connection with a *specific* future felony offense, the government presented specific evidence he had reason to believe the guns would be used in association with a *class* of future felonies, namely drug trafficking.[246]

The *Cutler* holding is of the same species as part of the Second Circuit's holding in *United States v. Corso*.[247] The *Corso* court held that the mens rea from a federal criminal statute, the National Firearms Act, applied to an analogous sentencing enhancement, section 2K2.1(b)(1), which incrementally increases a defendant's base offense level according to the number of firearms involved in the offense.[248] The court went on to construe the statute, silent as to mens rea, as necessitating only general, not specific, intent or knowledge.[249] That is, intent or knowledge was required for most elements of unlawful possession of firearms, but not required for the specific fact that the item possessed fits within the statutory definition of an illegal firearm.[250]

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243. *See id.* at 407. When reviewing a district court's legal interpretation of a Guideline term, the Fourth Circuit uses a close to de novo review standard. *See id.*

244. *See id.* at 407-08.

245. *See id.* at 408.

246. *See id.* In ruling that section 2K2.1(b)(5) does not require knowledge of a specific future felony, the court relied on previous cases where defendants were aware of a class of future felonies. *See id.*; *see also* United States v. Brewster, 1 F.3d 51, 54 (1993) (defendant sold drugs and gun to undercover agent who expressed interest in dealing illegal drugs and wanted gun to facilitate plan); United States v. Cummings, No. 90-2037, 1994 WL 91825 (6th Cir. March 22, 1994) (defendant stole firearms and sold them at low prices to people who knew guns were stolen and who Cummings acknowledged to be involved in criminal behavior).

247. *See* United States v. Corso, 20 F.3d 521 (2d Cir. 1994).

248. *See id.* at 524-25.

249. *See id.* (citing United States v. Freed, 401 U.S. 601, 607 (1971)); *see also supra* notes 51-58 and accompanying text. The MPC, in an attempt to get away from the common law morass of intent, avoided the dubious distinction between specific and general intent. Nonetheless, as no federal criminal code reform ever passed and the Supreme Court used the terms in 1971, they comprise part of the mens rea toolbox currently available in the federal system.

250. *See Corso*, 20 F.3d at 524-26. Although the *Corso* court's adoption of the "dangerous device" test as the type of general intent required was shortly thereafter mooted by *Staples v. United States*, 511 U.S. 600 (1994), this is, nonetheless, the type of serious consideration courts should be giving mens rea requirements under the guidelines.

The *Cutler* court similarly, though implicitly, created a rule that "knowledge, intent, or reason to believe" is a general intent requirement, and the specific future felony to be committed is an element for which mens rea is not necessary.[251] This rule leaves open the question of precisely what elements require "knowledge, intent, or reason to believe." For instance, *Cutler* appears to require at least general knowledge or reason to believe a class or type of felony will be committed with the firearms at issue. This would comport with application note 18 which requires that the future offense be of a non-firearms nature.[252] Moreover, the *Cutler* rule leaves open the question what constitutes general intent evidence sufficient for the government to bear its burden of proof. That is, what facts permit an inference of knowledge or reason to believe.

While courts occasionally have engaged in serious analyses of mens rea for other sections of the Guidelines,[253] courts' legal analysis with respect to section 2K2.1(b)(5) has focused on the nexus requirement, almost to the exclusion of the mens rea requirement. *Cutler* thus represents the beginnings of judicial analysis regarding the section 2K2.1(b)(5) mens rea requirement. It is a beginning, however, that has yet to be elaborated. Additionally, most section 2K2.1(b)(5) cases arise in the possession context. Of the few transfer cases to receive appellate review, only *Cutler*, *Messino*, and *Brewster* seriously scrutinize the sufficiency of the nexus as it relates to transfer, rather than possession, of firearms.[254]

The Second Circuit, in a possession rather than transfer case, quickly concurred with *Cutler* that section 2K2.1(b)(5) does not require knowledge of a *specific* offense to be committed.[255] Soon thereafter, the Seventh Circuit established a similar rule, though without citing *Cutler*.[256] Yet, neither court moved the mens rea discussion forward into the terrain left open by *Cutler*.

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251. *See Cutler*, 36 F.3d at 408.

252. *See* USSG, *supra* note 5, § 2K2.1 cmt. 18.

253. *See, e.g.*, *Corso*, 20 F.3d at 521; United States v. Cordoba-Hincapie, 825 F. Supp. 485 (E.D.N.Y. 1993); United States v. Ekwunoh, 813 F. Supp. 168 (E.D.N.Y. 1993), *rev'd on other grounds*, 12 F.3d 368 (2d Cir. 1993). The fact that the second *Corso* holding was indirectly overturned, and *Ekwunoh* was actually reversed, may demonstrate why courts hesitate to engage in such analysis. Yet, appellate courts should not shrink from the task of providing guidance for lower courts in construing the Guidelines.

254. *See Cutler*, 36 F.3d at 407-08; *Messino*, 55 F.3d at 1255-56; *Brewster*, 1 F.3d at 54-55.

255. *See* United States v. Dodge, 61 F.3d 142, 146 (2d Cir. 1995). "Section 2K2.1(b)(5) does not require knowledge of the specific offense to be committed, *see* United States v. Cutler, 36 F.3d 406, 408 (4th Cir. 1994), nor does it require that the defendant be convicted of another felony offense, *see* USSG § 2K2.1 application note 7." *Id.*

256. *See Messino*, 55 F.3d at 1256. "The defendant may not have known *exactly* how and when the CI was going to use the weapons, but he did personally solicit the CI to commit the crime of murder with those weapons, and knew that the CI planned to use them in future drug 'scores.'" *Id.*

In opinions just months later, and without significant analysis of the issue, the Second and Seventh Circuits both expanded the rule that no knowledge or reason to believe of a specific future felony is required. Apparently, the Second and Seventh Circuits now do not even require a defendant to have knowledge of a *class* or type of future non-firearms felonies for section 2K2.1(b)(5) to apply.[257] The Seventh Circuit has at least evinced a willingness to take up the mens rea issue in the future. Both circuits however have upheld application of the knowledge of another felony enhancement on weak evidentiary foundations lacking the typical agent, confidential informant, or confession evidence about the defendant's "knowledge, intent, or reason to believe."

In *United States v. Rogers,* the defendant pled guilty to possessing four firearms as a convicted felon.[258] The plea agreement stipulated that this was the latest act in a larger course of conduct in which he had acquired fifty-nine weapons over a twenty-one month period, most of them semi-automatics.[259] Police reports showed that sixteen of the guns previously purchased by Rogers had ended up in the hands of persons subsequently charged with felony crimes.[260] Rogers testified that he worked two jobs to purchase the guns and that he bought them out of an interest in firearms and a need for protection against violent crimes.[261] He claimed he did not sell any of the guns.[262] To explain the guns in the hands of other felons, he stated some were stolen and some were confiscated by police.[263]

The sentencing judge did not find Rogers credible.[264] He found that not all fifty-nine guns could be justified by sport-usage, collection, and self-defense.[265] The base offense level for the firearms Guideline, however, already

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257. *See* United States v. Martin, 78 F.3d 808 (2d Cir. 1996); United States v. Gilmore, 60 F.3d 392 (7th Cir. 1995); United States v. Rogers, 46 F.3d 31 (7th Cir. 1995). It should be noted that the First Circuit, even prior to *Cutler*, seemed to dispense with requiring knowledge of any type of future felony. *See* United States v. Romero, No. 93-1573, 1993 WL 478497 (1st Cir. Nov. 22, 1993) (per curiam) (convicted felon purchased multiple, inexpensive handguns on behalf of another and then delivered guns to that person in New York City). The case was unpublished, and therefore *Brewster*, issued just a few months prior to *Romero*, remains the case in the First Circuit with precedential value. Nonetheless, given that then Chief Judge Breyer, who had a significant part in sentencing reform, was on the panel, the paucity of analysis in the case is surprising as is the willingness to cure sentencing errors by creative transcript reading.

258. *See Rogers*, 46 F.3d at 32.

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

takes into account at least some level of illegal purpose for the guns because a demonstrated legal purpose affords defendants a substantial reduction from the base level.[266] Despite this and despite the fact the government did not produce evidence that Rogers voluntarily transferred the guns to other persons, the sentencing judge held that the flow of funds necessary to purchase the guns and the lack of legal justification for the guns reasonably supported the inference Rogers had sold a substantial portion of the guns.[267]

Just as the government did not come forward with evidence of voluntary firearms transfer, leaving the court to presume it instead, the government was likewise unable to produce evidence pertaining to Rogers' state of mind regarding the presumed transfers.[268] Undaunted, the court employed compounded presumptions. From the quantity and type of guns and from their presumed transfer, the court inferred that Rogers had "reason to believe" the guns would be used in connection with another felony offense.[269] Yet, the quantity of guns, fifty-nine, involved in Rogers' course of conduct would already be accounted for in the offense level under (b)(1). While a single act may justify two sentencing increases without constituting double counting, a court may not rely on the same facet of a defendant's conduct for two enhancements.[270] The firearms provision related to quantity already takes account of a defendant's disregard that a large number of guns increases the likelihood they will be used in future illegal conduct.[271] Thus, punishing a defendant under (b)(5) impermissibly cumulates the punishment under (b)(1) unless a defendant has a reason to believe the guns will be connected with

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266. *See* USSG, *supra* note 5, § 2K2.1(b)(2). The provision provides, "[i]f the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6." *Id.* The exceptions to this provision all involve either a felon previously convicted for crimes of violence or controlled substances or a weapon prohibited by statute, or both. *See id.* § 2K2.1(a)(1)-(5). A defendant convicted under (a)(6) has an offense level of 14 and a defendant convicted under (a)(7) has an offense level of 12. Thus, (b)(2) represents a respective 8 and 6 level reduction. Since the base offense level under (a)(8) is 6, a defendant whose offense involved only one or two guns would not receive a benefit from the lawful purpose reduction. If, however, more than two guns were involved in the offense, a defendant sentenced under (a)(8) could receive a 1 to 6 level lawful purpose reduction, depending on the number of guns. *See id.* § 2K2.1(a)(6)-(8), (b)(1)-(2). Consequently, if the sentencing judge had believed Rogers' story of lawful possession and stolen weapons, his offense level could have been reduced from 12 to 6. *See also* United States v. Bass, 54 F.3d 125, 132 (3d. Cir. 1995) (stating base offense level of 1989 firearms Guideline already takes account of the speculation that illegally sold guns may eventually be used in other crimes).

267. *See Rogers*, 46 F.3d at 32-33.

268. *See id.* at 33.

269. *See id.*

270. *See* USSG, *supra* note 5, § 1B1.1 cmt. 4; *see also* United States v. Greenfield, 44 F.3d 1141, 1146 (2d Cir. 1995).

271. *See* USSG, *supra* note 5, § 2K2.1(b)(1); *see also Bass*, 54 F.3d at 125.

future felonious conduct more specific than statistical or quantitative speculation.

The type of firearm might supply additional "reason to believe." But use of this as a factor is also questionable. Here again, the lawful purpose reduction has interpretative significance unrecognized by the court. In applying note 10 to section 2K2.1, the Commission sets forth factors, including quantity and type of firearms, relevant to determining whether "surrounding circumstances" indicate "lawful sporting purposes or collection."[272] This is the only provision for which the Commission explicitly authorizes consideration of the type of legal firearms. Separate offense level increases take account of firearms that are illegal.[273] Implicitly, then, the Commission has rejected use of the type of legal firearms as a factor, except to the extent a reduction in offense level is warranted. As the Commission had previously noted, the type of firearm is not a reliable indicator of unlawful intent.[274] Furthermore, some courts have recognized that one type of weapon may be intended for unlawful use as easily as another.[275]

Finally, the court refuted Rogers' argument that section 2K2.1(b)(5) requires a direct nexus between the firearms transferred and the future felony by merely noting that the enhancement speaks to "reason to believe" and not merely "knowledge."[276] The summary dismissal of the nexus argument recognizes the interrelationship between it and the mens rea requisite, but it obviously fails to discuss a legal standard for either. The court almost seems to treat the mens rea requirement as eliminating the need for a nexus.

Not only does the nexus requirement lack substance in *Rogers*, but the evidence recited for application of the enhancement further denigrates the mens rea of "reason to believe." Reasonable foreseeability may provide *evidence* of

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272. *See* USSG, *supra* note 5, § 2K2.1 cmt. 10. The relevant factors include the quantity and type of firearms and ammunition, location and circumstances of actual possession and/or use, previous firearms convictions, and extent of local law restrictions. *See id.*

273. *See id.* § 2K2.1(a)(1), (a)(3), (a)(4)(B), (a)(5), (b)(3), (b)(4).

274. *See id.* app. C, amend. 189 § 2K2.1.

275. *See id.* app. C, amend 189 § 2K2.2, cmt. 1 (full text of guideline deleted in 1989); *see also* United States v. Valencia-Toro, No. 92-50301, 1993 WL 45240 (9th Cir. Feb. 23, 1993) (holding inference from quantity and type of firearm that defendant had "reason to believe" was improper as Commission already took those factors into account in other offense levels); United States v. Enrique-Muñoz, 990 F.2d 1356, 1360 (9th Cir. 1990) (stating Guidelines give specific and limited role to type of firearm in determining appropriate sentence because type is not reliable indicator of intended lawful or unlawful use). This proposition relies on commentary appearing in an earlier version of the Guidelines. The fact that the comment was not carried forward into the current version may weaken, but not eliminate, its relevancy. Indeed, in fashioning the presumption of a connection from the physical proximity between guns and drugs, courts relied partly on superseded section 2K2.1 commentary. *See supra* note 186 and accompanying text.

276. *See Rogers*, 46 F.3d at 33.

knowledge or reason to believe, but standing alone, reasonable foreseeability does not satisfy the ultimate inquiry of knowledge or reason to believe.[277] Since quantity and type are, qualitatively speaking, evidence of foreseeability, they would provide insufficient evidence of reason to believe but sufficient evidence of reasonable foreseeability. Effectively, both the sentencing judge and the Seventh Circuit reduce the mens rea standard in section 2K2.1(b)(5) down to the default "reasonable foreseeability" standard of the relevant conduct section 1B1.3(a)(1)(B). The standard endorsed by the court fails to give effect to the Guidelines because the Commission must have intended the legal standard for "reason to believe" to be higher than the default mens rea set forth for third party conduct.

The Commission's application note 18, which limits the enhancement to future non-firearms offenses, supplies further support for requiring some specific evidence of a defendant's subjective reason to believe under section 2K2.1(b)(5). Although the court states that sixteen guns traceable to Rogers were recovered with persons charged with felony offenses, it does not specify whether the offenses were firearms possession and trafficking or other types of felonies.[278] Nor does the court explain how a lack of legal uses for the guns along with the quantity and type of guns manifest Rogers' reason to believe the guns would be used in future non-firearms felonies as opposed to other kinds of future felonies. Even if the court had detailed the sixteen felony offenses, including some non-firearms offenses, subsequently committed with the guns traceable to Rogers, this retrospective fact would not necessarily demonstrate Rogers prospective reason to believe. To evidence Rogers' "reason to believe" future non-firearms felonies would be committed with the guns at issue requires, if not a direct nexus, at least a more specific reason to believe in a connection than what the government was able to show in this case.

As a succinct dissent put it in *United States v. Gilmore*, a Seventh Circuit decision following closely on the heels of *Rogers*:

> This is a very straight-forward failure of proof case. The government had the burden of showing that the defendant had reason to believe that the firearms he possessed would be used in criminal activity. It simply never proved what it had alleged. The consequences in such a situation present

277. *See supra* Part II, notes 140-41 and accompanying text.

278. *See Rogers*, 46 F.3d at 32.

> no great question of law: the government simply loses on the point it did not prove. End of case.[279]

This is as true for *Rogers* as it is for *Gilmore*. Instead of vacating the enhancement for insufficient proof, the sentencing judge created and the Seventh Circuit accepted a presumption of "reason to believe" based on the quantity and type of guns.[280] The presumption shifted the burden of proof to Rogers. Since the sentencing judge did not credit his testimony that he lacked the requisite mens rea, the presumption applied.[281] This scheme of presumption and burden shifting is much like the approach suggested in *Cordoba-Hincapie* for proving knowledge of the type of narcotic possessed.[282] Judge Weinstein suggested this rule in a context where the relevant conduct guideline mandates holding the defendant strictly liable.[283] He proposed a rebuttable presumption, instead of strict liability, in order to inject a measure of fairness into sentencing evidence and procedure, consistent with his view of due process. Unlike strict liability for narcotic type, here the enhancement sets forth a mens rea, and fairness only requires that the courts heed the Guidelines.

The Commission furnished a similar presumption in providing a two level increase to narcotics offenses "[i]f a dangerous weapon (including a firearm) was possessed."[284] Courts then held that the "clearly improbable" standard for possession, set forth in an application note,[285] shifts the burden to the defendant to disprove a connection between the weapon and the drug offense.[286] Unlike section 2D1.1(b)(1), the Commission has not established a presumption of a connection in section 2K2.1(b)(5) between guns and future

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279. United States v. Gilmore, 60 F.3d 392, 394 (7th Cir. 1995) (Ripple, J. dissenting).

280. *See id.* at 392-94.

281. *See id.*

282. *See supra* Part II; *see also Cordoba-Hincapie*, 825 F. Supp at 485.

283. *See supra* Part II; *see also Cordoba-Hincapie*, 825 F. Supp at 485.

284. USSG § 2D1.1(b)(1).

285. *See* USSG, *supra* note 5, § 2D1.1 cmt. 3. Application note 3 provides in pertinent part: "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *Id.*

286. *See* United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995) (holding that "[o]nce the prosecution has shown by a preponderance of the evidence that the firearm was present at the site of the charged conduct, the evidentiary burden shifts to the defendant to show that a connection between the firearm and the offense is clearly improbable"); United States v. Cochran, 14 F.3d 1128, 1132 (6th Cir. 1994) (same); United States v. Cantero, 995 F.2d 1407, 1410 (7th Cir. 1993) (same); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992) (same); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992) (same); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989) (same). *But see* United States v. Khang, 904 F.2d 1219, 1223 n.7 (8th Cir. 1990) (holding to the contrary).

non-firearms felony offenses. Furthermore, the judicially created presumption established under section 2K2.1(b)(5) (the presumption of a connection between guns and drugs in physical proximity to each other) relied on the Commission's expressed purpose of increasing offense levels for offenders involved with both drugs and guns.[287] No such Commission commentary exists concerning firearms' quantity and type (at least within the class of firearms legal to possess) that justifies creation of a presumed connection between guns and future non-firearms felonies. Even courts that have resorted to section 2D1.1(b)(1) for guidance on application of section 2K2.1(b)(5) have only gone as far as adopting a presumption of a connection based on physical proximity between guns and drugs. Given the textual differences in the narcotics and firearms enhancements and their respective commentaries, courts have refused to shift the burden of disproving a connection to the defendant under section 2K2.1(b)(5).[288] Yet, that is precisely what the *Rogers* court does with respect to mens rea.

The Seventh Circuit may have retreated slightly from its position in *Rogers*. At the very least it has indicated a willingness to consider the mens rea issue. In *Gilmore*, which quickly followed *Rogers* and was written by the same judge, the court distinguishes *Rogers* because of the sentencing judge's finding as a fact that the defendant had sufficient "reason to believe."

Gilmore, a convicted felon who is therefore prohibited from owning a gun, purchased twenty-five guns over a two and a half year period.[289] Thirteen of the guns were recovered from gang members in whose territory Gilmore lived and in circumstances where the guns were being or about to be used in connection with felonious conduct.[290] None of the persons from whom the

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287. *See* USSG, *supra* note 5, app. C, amend. 374 (offense levels increased under newly consolidated firearms guideline to reflect seriousness of underlying conduct in crimes involving violence or controlled substances); USSG § 2D1.1 cmt. 3 (enhancement for weapon possession reflects increased danger of violence when drug traffickers possess weapons).

288. *See* United States v. Condren, 18 F.3d 1190, 1197-1200 (5th Cir. 1994) (stating inference of connection from physical proximity comported with Commission commentary concerning increased danger of violence when drugs are in close proximity to guns); United States v. Gomez-Arrellano, 5 F.3d 464, 466-67 (10th Cir. 1993) (vacating § 2K2.1(b)(5) enhancement where government failed to come forward with evidence of physical proximity between gun and drugs found at defendant's residence at time of arrest); United States v. Sanders, 990 F.2d 582, 585 (10th Cir. 1993) (analogizing section 2K2.1(b)(5) to section 2D1.1(b)(1) but noting lack of commentary on possession standard accompanying firearms provision); *see also supra* notes 150-74 and accompanying text.

289. *See Gilmore*, 60 F.3d at 393.

290. *See id.*

guns were seized would tell the government how they procured the guns.[291] Gilmore professed that all the guns had been lost or stolen.[292]

The court conceded that the enhancement should be confined to "voluntary" transfers.[293] The sentencing judge had refused to infer that Gilmore had sold or given the guns to the gang members, but had applied the enhancement anyway because of Gilmore's excessively negligent conduct.[294] To uphold the enhancement, the reviewing court shifted from "transfer" to "possession" as the actus reus basis. [295] Thus, the court was able to conclude that, because Gilmore "lost guns the way the rest of us lose pens" and because of where he lived he knew the finders in all probability were thieves and would likely use them in criminal activity, Gilmore possessed the guns with reason to believe they would be used in another felony.[296] Furthermore, the *Gilmore* court assumed without deciding that "reason to believe" is "something of which the defendant is conscious, rather than, as in the tort law of negligence, something of which a reasonable person would be conscious whether or not *this* person, who may have a defective understanding, is conscious of it."[297]

Both Gilmore and Rogers were convicted felons, although no explicit inferences were made from this fact. In *Gilmore* the court cited *United States v. Pantelakis* for the proposition that the cases assume a subjective standard for reason to believe. [298] Given the citation, the court is probably aware *Pantelakis* held it is impermissible to infer felonious intent from the mere fact a convicted felon possesses a gun. The inference is impermissible according to the court because it relies on "status."[299] It is likewise impermissible because it constitutes an objective standard; it disregards the defendant's

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291. *See id.* at 393-94.

292. *See id.* at 393.

293. *See id.*

294. *See id.*

295. *See id.* at 393-94.

296. *See id.* at 393.

297. *Id.* at 394. The *Gilmore* court characterized United States v. Pantelakis, 58 F.3d 567 (10th Cir. 1995), *Cutler*, and *Brewster* (citations omitted), as assuming this fact to be so, without further discussion. *See id.*

298. *See Gilmore*, 60 F.3d at 394.

299. United States v. Ekwunoh, 813 F. Supp. 168, 174 (E.D.N.Y. 1993), *rev'd*, 12 F.3d 368 (2d Cir. 1993). Judge Weinstein sets the hypotheticals (a recent law student graduate or a judge's daughter in his article) with which a prosecutor or a judge could sympathize, i.e., identify. He argues that if the answer to those hypothetical situations, where the person is caught with an amount of narcotics of which she or he is unaware, is that the government is unlikely to bring the Guidelines' harshness to bear on those persons, then "it means our constitutional protections depend on the social status of the defendant." *See id.*; *see also* Weinstein & Bernstein, *supra* note 73, at 122.

subjective intent.[300] In this citation, the Seventh Circuit hints at a small step back from *Rogers*.[301] If the Seventh Circuit had entertained the question in *Rogers* of permissible and impermissible inferences, it might have found the enhancement insupportable because the sentencing judge's inferences were only "reasonable," that is, sufficiently supported, under an objective foreseeability standard.[302]

Beyond the fact that both Gilmore and Rogers were convicted felons, that they both possessed a quantity and type of firearms the courts found suspicious, and that firearms traceable to them were subsequently recovered from persons engaged in felonious conduct, the circumstantial evidence was much greater in *Gilmore* than in *Rogers*. One of the guns traceable to Gilmore was found on his cousin, who was selling narcotics from the Gilmore family home.[303] The court characterizes this as the only piece of hard evidence, but even one piece is more than what was presented in *Rogers*. After the incident with his cousin, Gilmore lost ten more guns.[304] The sentencing judge found the incident placed Gilmore on notice that guns in his possession would end up in the hands of felons.[305] The Seventh Circuit in turn held that the sentencing court's inference concerning Gilmore's state of mind following the cousin incident was not clear error because it was also supported by evidence Gilmore himself was a gang member and was in the narcotics business.[306] The Seventh Circuit thus appears to take the government's burden of proof more seriously in *Gilmore* than it did in *Rogers*.

By contrast, the Second Circuit in a recent section 2K2.1(b)(5) case, *United States v. Martin*, declined to give effect to the government's burden of proof.[307] It also failed to discuss the related questions of permissible and

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300. It is also impermissible because the base offense levels reflect that factor. Moreover, they provide different base offense levels according to the number (one or two) and types (violent or controlled substance) of prior felony convictions. *See* USSG, *supra* note 5, § 2K2.1(a)(1)-(4), (a)(6).

301. Compare *Gilmore*, 60 F.3d at 394 with *Rogers*, 46 F.3d at 33.

302. Traditionally, mens rea standards have been measured subjectively, whereas civil law, tort and contracts, have found objective as well as subjective scienter standards acceptable. The distinction between objective and subjective standards may be a questionable one, especially since the difference in a foreseeability standard may be distilled down to the following: an objective foreseeability standard references an unspecified reasonable person, as opposed to a subjective foreseeability standard, which contextualizes foreseeability with what a reasonable person in like circumstances would foresee. In terms of "reason to believe," the difference may come down to something like: an objective "reason to believe" equates to reasonable foreseeability, and a subjective "reason to believe" is equivalent to knowledge or a high probability of knowledge as in the MPC.

303. *See Gilmore*, 60 F.3d at 394.

304. *See id.*

305. *See id.*

306. *See id.*

307. *See* United States v. Martin, 78 F.3d 808, 810-12 (2d. Cir. 1996).

impermissible inferences in light of the Commission's application note 18 and other commentary.[308] Neither did it take up the emerging question of how to define the legal standard "knew or had reason to believe."[309] Rather, in *Martin* the Second Circuit, much like the Seventh Circuit in *Rogers*, relied on presumptions of a "connection" and a "reason to believe" based on quantity, type, and destination of firearms, and permitted the burden of proof to shift implicitly to the defendant to disprove existence of a connection or reason to believe.[310]

Thomas, Martin's co-defendant, owned a small sporting goods shop in New Hampshire and was a federally licensed firearms dealer.[311] Firearms dealers may only sell to residents of the state where their business is located, unless the purchaser is also a federally licensed firearms dealer.[312] They must also keep detailed records of their transactions.[313]

Three men with facially valid Vermont driver's licenses[314]—Martin (who Thomas knew as a store customer before Thomas' father sold him the business), Velez, and Nieves—bought approximately 100 guns from Thomas over the course of eighteen months.[315] None of the guns were illegal to sell or to possess.[316]

Thomas and the three men falsified the firearm transaction records by filling out two forms: one to indicate erroneously that Thomas had transferred the firearms to his father, a federally licensed firearms dealer just across the river in Vermont, and another to indicate erroneously that Thomas' father had then transferred the guns to Thomas' customers.[317] He also falsely staggered

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308. *See id.* at 811.

309. *See id.* at 812.

310. *See id.*

311. *See id.* at 810.

312. *See id.*

313. *See id.*

314. Their true residency at the point of the various gun sales was not established. The ATF agent testified that they had valid Vermont driver's licenses, i.e., they were residents of Vermont, and that he was unsure if the licenses remained valid. *See* Joint Appendix 184a, 189a (sentencing transcript 30, 35). Despite the fact that the sentencing guidelines do not countenance consideration of co-defendants' sentences as a factor at sentencing, it is interesting to note that Thomas received a sentence of 33 months imprisonment for his sales in violation of firearms laws, whereas the three men who transported guns to New York City and illegally resold them received 30 months (Martin), 18 months (Velez), and 4 months (Nieves). *See* Joint Appendix 194a-96a (sentencing transcript, ATF agent's testimony 4042).

315. *See Martin*, 78 F.3d at 810. The sales occurred from October 1991 to February 1992. *See* Joint Appendix 162a (sentencing transcript, ATF agent's testimony, 8).

316. *See* Joint Appendix 175a-76a (sentencing transcript, ATF agent's testimony, 21-22).

317. *See id.* 220a-22a (sentencing transcript, Thomas' allocution, 66-68). The investigating ATF agent was unsure whether any firearms laws or regulations at that time prohibited the an FFL from acting as an agent of an FFL in a bordering state. *See id.* at 184a-86a. Although Thomas could possibly have sold the guns to

the dates of the three men's purchases when they purchased several guns at once.[318] After the purchases, particularly by Velez, increased in volume and frequency,[319] Thomas of his own accord ceased selling guns to the three men in 1992.[320] He had come to suspect that, despite Velez's Vermont driver's license, Velez was living in New York City.[321]

In 1994, Alcohol, Tobacco, and Firearms (ATF) agents instigated an investigation of Thomas after several of these guns, traced by the serial numbers back to Thomas' store, were recovered from persons arrested for felonies in New York City, New Jersey, and Puerto Rico.[322] ATF agents enlisted as a confidential informant (CI) Figueroa, a man who had bought guns from Thomas on behalf of Velez.[323] The ATF then sent Figueroa to Thomas' sporting goods shop on February 18, 1994, and, in a taped-recorded conversation, Figueroa told Thomas that the ATF was asking him questions about the guns and that he needed falsified documents to show them. As Thomas prepared the false documents, he made comments incriminating himself in the prior illegal firearms sales.[324] Although he clearly displayed his knowledge that the previous sales were illegal and his intention to cover up the previous sales with the false documents he was then preparing, he did not evince any knowledge regarding the purchaser's drug addictions or their plans to sell the guns to drug traffickers in New York City.[325]

An ATF agent then confronted Thomas on February 28, 1994, and he immediately confessed.[326] His signed confession acknowledged that at some

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his father, a Vermont resident, there is no dispute that Thomas did not physically transport the guns to Vermont before transferring them to the three men.

318. *See id.* at 165a-73a (sentencing transcript, ATF agent's testimony and reading of Thomas' signed confession, 21-22). No firearms laws then limited the number of guns an FFL could sell at one time. *See id.* at 178a-79a (sentencing transcript, ATF agent's testimony 24-25).

319. *See id.* at 165a-73a (sentencing transcript, ATF agent's testimony and reading of Thomas's signed confession, 11-19).

320. *See id.* at 188a.

321. *See Martin*, 78 F.3d at 810; *see also* Joint Appendix 172a-73a (sentencing transcript, ATF agent's reading of Thomas' signed confession, 18-19).

322. *See Martin*, 78 F.3d at 810.

323. *See* Joint Appendix 168a-69a, 187a-88a (sentencing transcript, ATF agent's testimony 14-15, 34-35).

324. *See id.* at 188a (sentencing transcript, ATF agent's testimony 34).

325. *See id.* at 216a-17a (sentencing transcript, government's sentencing argument 62-63); *see also* Government's Supplemental Appendix 8-15 (transcript of recorded conversation).

326. *See* Joint Appendix 171a-73a, 188a (sentencing transcript, ATF agent's testimony 16-17, 34).

point he realized Velez was from New York City.[327] Thomas pleaded guilty to conspiracy to illegally transfer firearms.[328]

Despite the fact that in this case, unlike *Rogers* or *Gilmore*, the government had both CI and confession evidence, which typically furnishes a concrete "reason to believe," nothing established Thomas' knowledge or reason to believe that guns would be used in future non-firearms felonies. Arguing in support of the section 2K2.1(b)(5) enhancement, the government gleaned from the CI and confession evidence mainly Thomas' admission that at some point he realized Velez was from New York instead of Vermont.

Neither the sentencing judge nor the Second Circuit read the absence of specific "reason to believe" evidence, in a case where co-defendants had been willing to talk and where the defendant himself had confessed, as indicative of Thomas' sincere lack of knowledge or reason to believe the firearms would be used in future non-firearms felonies.[329] Instead, the Second Circuit upheld application of the four level enhancement, permitting the sentencing judge's "what-else-could-he-have-thought"[330] reasoning. In so doing, the Second Circuit has followed the Seventh Circuit in endorsing an inappropriate scheme of presumption and burden shifting.[331]

The *Martin* court reiterated the rule that "section 2K2.1(b)(5) does not require knowledge of the specific offense to be committed," and then further relied on *Cutler* for the rule: "nor does it require that it be the purchasers of the guns who commit the other felonies."[332] The court ignores the fact that the defendant in Cutler *stipulated* he had reason to believe his neighbor to whom he sold the guns was turning around and transferring them to drug dealers. In ignoring this difference, the Second Circuit, like the Seventh Circuit, in fact expanded the rule that knowledge of a *specific* future offense is not required[333] (which in its original context only meant the defendant did not have to know the where, when, and how of the future felony's commission) to mean that not even knowledge of a type or *class* of felonies is required.

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327. *See id.* at 172a-73a (sentencing transcript, ATF agent's reading of Thomas' signed confession 18-19).

328. *See Martin*, 78 F.3d at 810; *see also* Joint Appendix 148a (judgment).

329. *See Martin*, 78 F.3d at 811-12.

330. *See id.* at 811.

331. *See supra* notes 267-88 and accompanying text discussing *Rogers*.

332. *Martin*, 78 F.3d at 812; *see also Cutler*, 36 F.3d at 408.

333. *See Cutler*, 36 F.3d at 408.

Application note 18 contravenes this expanded rule.[334] The *Martin* court mentioned application note 18 only in passing, thereby falling in line with the paucity of judicial analysis about its implications.[335] In its disregard of note 18, the court has refused to give effect to the Commission's commentary or to explain how the court is relieved from its obligation because the commentary runs afoul of constitutional or statutory principles. Such what-else-could-he-have-thought reasoning also fails to abide by the Commission's read-the-Guidelines-and-commentary requirement.[336] It denigrates the section 2K2.1(b)(5) mens rea to statistical speculation and attenuated inferences, applying at most the default standard of reasonable foreseeability in section 1B1.3(a)(1)(B).

The inability to deal with the "reason to believe" standard in a principled fashion may result from the unnecessarily confusing and overly complex relevant conduct section of the Guidelines. It may also derive in part from the Guidelines failure to use a set group of mens rea standards and to define them up front. Yet, the Second and Seventh Circuits' propensity to view quantity as a window into mens rea probably also arises from the Guidelines overall framing of quantity as a transparent indicator of culpability.

The narcotics, firearms, and property sections of the Guidelines are the most highly quantified. Congress and the Sentencing Commission have moved to lessen the high degree of calibration in a couple of areas,[337] but the changes have been too minimal to have much impact on the stultifying effect of federal sentencing procedure. Despite the changes, judicial application now tends to

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334. *See supra* note 252 and accompanying text.

335. Few opinions have even mentioned the application note and those that do have not analyzed how it effects the nexus or mens rea requirements. *See* United States v. Burris, No. 95-5049, 1995 WL 551359 at *1 (4th Cir. Sept. 18, 1995) (mentioning application note 18 as only limitation on enhancement); United States v. Corley, No. 94-5271, 1995 WL 222204 (4th Cir. April 14, 1995) (rejecting defendant's argument for defining his underlying offense in accordance with application note 18); United States v. Alers, 852 F. Supp. 310, 315 (D.N.J. 1995) (citing application note 18 in conjunction with Kikumura, 918 F.2d 1084, 1097 (3d Cir. 1990) for proposition not all unlawful uses of firearms are equally culpable and some intended unlawful use is incorporated into base offense levels, but upholding upward departure for intended murder as not adequately considered by Guidelines); United States v. Gomez-Arrellano, 5 F.3d 464, 466-67 (10th Cir. 1993) (holding "trafficking" in application note 18 does not encompass drug trafficking, but refers only to firearms trafficking); United States v. Romero, No. 93-1573, 1993 WL 478497, at *3 (1st Cir. Nov. 22, 1993) (claiming, despite fact sentencing judge only specified firearms possession by convicted felons, that district court heeded mandate of application note 18 because it viewed future felony conduct as far broader than firearms related offenses).

336. *See generally* USSG, *supra* note 5, § 1B1.3(a)(1), (a)(4).

337. For example, Congress enacted a "safety valve" to provide relief from mandatory minimums in narcotics cases where drug quantity exceeds culpability. Weinstein & Bernstein, *supra* note 73, at 125 (citing 18 U.S.C. § 3553(f) (1994) and USSG § 5C1.2).

presume culpability from the mere fact of quantity even where the Commission has specified mens rea as a necessary element.

CONCLUSION

Judge Weinstein queried in *United States v. Cordoba-Hincapie* whether: "the requirement of proof of mens rea as a basis for criminal's punishment [can] be circumvented by manipulation of a sentencing system?"[338] Judicial application of the Guidelines as well as the Commission's formulation of them have served to answer the question affirmatively. Not only have the Guidelines circumvented mens rea, but they have also distorted substantive criminal law. The false dichotomy between sentencing quantity and conviction quality has separated out the form of justice from its substance. A just determination of a criminal proceeding requires a certain tension between fairness and efficiency,[339] but this tension has evaporated under the Guidelines. The Guidelines have instituted a sentencing regime that is neither fair nor efficient.

Early on in the history of the Guidelines one judge remarked that they "reflect the fears of discretionary authority, the confidence in rulemaking by administrative agencies drawing upon experts and technology, and the aspiration for a rational-if-not-perfect-order in social affairs so characteristic of the modern age."[340] The same faith in administrative agencies produced the modern welfare state. Faith in the bureaucratized welfare state, however, has long since waned and efforts at lessening the bureaucracy have long since begun.[341] It is well past time for the Sentencing Commission to adopt a similar skepticism about the ultimate efficacy of its faith and for the Guidelines to begin reflecting some of the reforms commentators have articulated.[342]

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338. United States v. Cordoba-Hincapie, 825 F. Supp. 485, 487 (E.D.N.Y. 1993).

339. Federal Rule of Criminal Procedure 2 states that the "rules are intended to provide for the just determination of every criminal proceeding" and that they "shall be construed to secure *simplicity* in procedure, *fairness* in administration and the *elimination of unjustifiable expense and delay*." FED. R. CRIM. P. 2 (emphasis added).

340. United States v. DiBiase, 687 F. Supp. 38, 40 (D. Conn. 1988) (Cabranes, J.).

341. *See, e.g.*, JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986); Joel Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC, The Wisconsin Experience*, 43 SOC. SERV. REV. 12, 29 (1969).

342. The Commission has taken steps in this direction in the past year and a half by seeking public comment on changes to such controversial sections of the Guidelines as acquitted conduct, role in the offense, level of planning, and acceptance of responsibility. *See* 60 CRIM. L. REP. 2019, 2087. Additionally, the Commission recently sent a special report to Congress on perhaps the most controversial section of the Guidelines—the crack/cocaine provisions. *See* 61 CRIM. L. REP. 1135, 2073.

As this paper has suggested, the Commission should regularize mens rea standards by using a delimited set of them explicitly defined from the outset and by featuring mens rea more prominently in the Guidelines. The Commission should also rework the Guidelines to guide judicial discretion, as do both the MPC and the FRE.