
**DEPARTURES FROM THE
FEDERAL SENTENCING GUIDELINES
BASED ON PRIOR DISSIMILAR
NONCONVICTED CONDUCT:
A CALL FOR A FINDING OF
RELATEDNESS**

BENJAMIN R. KING*

I. INTRODUCTION

The United States Sentencing Guidelines (“Guidelines”), which took effect in November 1987, are one of the most revolutionary aspects of the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984).¹ Congress, by enacting the Guidelines, set out to achieve three main goals: (1) honesty in federal sentencing; (2) reduction of unwarranted sentence disparity; and (3) proportionality, whereby sentences would reflect the varying degrees of severity of criminal conduct.² Some have argued that the second of these goals, the reduction of unwarranted disparity, is the most important, because it promotes uniformity and fairness in sentencing.³ Nevertheless, a split of authority among the federal circuit courts has developed that threatens a measure of that uniform-

* J.D., 1999, University of Southern California Law School; B.A., 1991, University of Southern California. I would like to thank Professor Charles Weisselberg for his invaluable comments and guidance throughout this Note’s development. David Hitchcock, Kevin Roosevelt, and Marc Williams also deserve thanks for their suggestions for improvement.

1. See U.S. SENTENCING GUIDELINES MANUAL ch.1, pt.A(2), intro. cmt. (1998) [hereinafter GUIDELINES MANUAL].

2. See *id.* at ch.1, pt.A(3), intro. cmt.; Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 99-100 (1992).

3. See William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 64 (1993).

ity. The disagreement centers around section 4A1.3 of the Guidelines, entitled “Adequacy of Criminal History Category (Policy Statement).” That section allows a judge to depart from the Guidelines where she finds that “reliable information indicates that the [defendant’s] criminal history category does not adequately reflect the seriousness of [the defendant’s] past criminal conduct or the likelihood that [the defendant] will commit other crimes.”⁴ Section 4A1.3 states that such “reliable information” may include, *inter alia*, “prior similar adult criminal conduct not resulting in a criminal conviction.”⁵

Circuit courts disagree over whether this section grants sentencing judges the authority to depart on the basis of prior *dissimilar* adult criminal conduct that did not result in a conviction. The disagreement was highlighted by the First Circuit in *United States v. Brewster*.⁶ There, the court held that prior criminal conduct which was dissimilar to the underlying crime of conviction could support a criminal-history departure under section 4A1.3.⁷ The court in *Brewster* based its holding on the belief that the question was “neither dictated nor informed” by the section itself.⁸ The *Brewster* court noted that its conclusion, while in alignment with the Seventh Circuit, was contrary to that reached by the Second Circuit.⁹

This Note focuses on the disagreement among the courts of appeal on this issue and looks at the application of section 4A1.3 to dissimilar non-convicted conduct in light of the underlying purposes of both the section itself and the Guidelines as a whole. Part II looks specifically at section 4A1.3 and the cases which have addressed this issue, and examines how the courts and the United States Sentencing Commission (“Commission”), which authors the Guidelines, handled a similar disagreement involving the use of prior dissimilar *convictions* as a basis for departure under the section. Part II next discusses the distinction between convictions and conduct, and demonstrates why the Commission’s response to the earlier disagreement does not inform the current debate.

Part III examines the purposes of the Guidelines, and those of section 4A1.3 in particular, and discusses how some of these purposes are dis-

4. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s.

5. *Id.* § 4A1.3(e).

6. 127 F.3d 22 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998).

7. *See id.* at 27.

8. *Id.* at 26. For a more in-depth analysis of the court’s bases for its holding, see *infra* notes 23-26.

9. *See Brewster*, 127 F.3d at 27.

served by the disparate judicial treatment of prior dissimilar nonconvicted conduct as a basis of departure from the Guidelines.

Part IV proposes that courts of appeal which sanction such departures require that sentencing judges articulate some convincing degree of “relatedness” between the prior dissimilar nonconvicted conduct and the underlying crime of conviction. The Note concludes that a “relatedness requirement” is the best method available by which to achieve the purposes dictated by section 4A1.3 because it would help to identify the unusual cases where the section is most implicated.

II. CURRENT TREATMENT OF DEPARTURES BASED ON PRIOR SIMILAR VERSUS DISSIMILAR NONCONVICTED CONDUCT

A. SECTION 4A1.3

The Commission issues policy statements and commentary in the United States Sentencing Guidelines Manual to assist judges in applying the Guidelines.¹⁰ Section 4A1.3 is a policy statement, not a guideline. While questions arose with regard to the authoritative value of policy statements in the early application of the Guidelines, the U.S. Supreme Court in *Stinson v. United States*¹¹ held that policy statements are as authoritative as are the Guidelines themselves.¹² The Court wrote, “[t]he principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.”¹³ Quoting *Williams v. United States*,¹⁴ the Court added that policy statements are “authoritative guide[s] to the meaning of the applicable Guideline.”¹⁵

Sentences are calculated under the Guidelines according to a sentencing table that has on its vertical axis a list of forty-three “offense levels,” and on its horizontal axis six categories related to the offender’s

10. See generally GUIDELINES MANUAL, *supra* note 1.

11. 508 U.S. 36 (1993).

12. See *id.* at 42. But see Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1731-32 (1992). Prior to the Supreme Court’s ruling in *Stinson*, Freed argued that policy statements differ from guidelines in the sense that the latter have “presumptive authority”—they are subject to legislative review by Congress prior to taking effect—while the former do not. *Id.* He criticized lawyers and judges for not recognizing the “non-binding” status of policy statements. *Id.*

13. *Stinson*, 508 U.S. at 42.

14. 503 U.S. 193 (1992).

15. *Stinson*, 508 U.S. at 42 (quoting *Williams v. United States*, 503 U.S. 193 (1992)). Even prior to *Stinson*, Daniel J. Freed observed that lawyers and judges usually accord policy statements the same degree of authority as they do guidelines. See Freed, *supra* note 12, at 1731-32.

criminal history (called "Criminal History Category" (CHC)).¹⁶ Section 4A1.3 advises federal judges to adjust a particular offender's CHC upward or downward where the ordinary determination under the Guidelines leads to a category which would not adequately represent the seriousness of the defendant's criminal past or the likelihood that the defendant would commit future crimes.¹⁷ The section states that such adjustments should be based on "reliable information" and notes that such information "may include, but is not limited to," information concerning "prior similar adult criminal conduct not resulting in a conviction."¹⁸ These provisions form the heart of the current dispute among the circuits.

B. DISAGREEMENT OVER WHETHER DEPARTURES BASED ON DISSIMILAR CONDUCT ARE PROPER UNDER SECTION 4A1.3

As a result of the express authorization in section 4A1.3, federal courts do not hesitate to depart upward based on prior similar adult criminal conduct that did not result in a conviction.¹⁹ In *Brewster*, the First Circuit extended this basis for departure to dissimilar conduct by holding that, in an appropriate case, judges could depart from a defendant's CHC on the basis of "prior dissimilar conduct that was neither charged nor the subject of a conviction."²⁰ There, the defendant pleaded guilty to charges of making false statements on a firearm application and being a felon in possession of a firearm.²¹ The district court, with some reservation, departed upward from the defendant's calculated CHC based in part on evidence at

16. See generally GUIDELINES MANUAL, *supra* note 1.

17. See *id.* § 4A1.3, p.s. The commission gives several examples of how a criminal history category might underrepresent a defendant's criminal past:

Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense.

Id.

18. *Id.* § 4A1.3(e).

19. See, e.g., *United States v. Goshea*, 94 F.3d 1361 (9th Cir. 1996) (prior conduct of impersonating a military officer to obtain a job was sufficiently similar to the current offense of impersonating a military officer to obtain money); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994) (prior bank robberies not resulting in conviction were proper basis for departure where the current offense also was bank robbery).

20. *United States v. Brewster*, 127 F.3d 22, 27 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998).

21. See *id.* at 24.

sentencing that the defendant had a seventeen-year history of domestic abuse.²²

The First Circuit upheld the district court's departure from the Guidelines on several grounds. First, the court noted that the question whether prior dissimilar nonconvicted criminal conduct properly could form the basis of a departure is "neither dictated nor informed" by section 4A1.3.²³ The court pointed out that the Commission's express mention of prior *similar* adult criminal conduct that did not result in a criminal conviction in section 4A1.3(e) was part of a listing which the Commission specifically flagged as nonexhaustive, and the court therefore refused to recognize a negative implication based on the express mention of "similar."²⁴ Second, the court recognized jurisprudence within the First Circuit which states that courts should not, in the absence of an express prohibition, categorically reject a particular factor as a possible basis for departure.²⁵ Finally, the court rejected the contrary position because it would force courts to view a defendant's criminal history through an artificial lens that filters out prior serious criminal behavior in contravention of the section's express purpose.²⁶ In its opinion, the court noted its agreement with the Seventh Circuit as well as its "respectful disagreement" with the Second Circuit.²⁷

22. *See id.* at 25.

23. *Id.* at 26.

24. *See id.*

25. *See id.* The First Circuit has consistently rejected the "statutory interpretation" approach to the Guidelines followed by other circuits. *See* *United States v. Doe*, 18 F.3d 41, 46 (1st Cir. 1994). In formulating its position with respect to section 4A1.3 that it will only exclude a relevant factor as a basis for departure if there exists an express prohibition in the Guidelines against basing a departure on that particular factor, the First Circuit defers to the Commission's introductory statement in the Guideline's Manual where it stated its intent not "to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Brewster*, 127 F.3d at 26 (quoting GUIDELINES MANUAL, *supra* note 1, at ch.1, pt.A., intro. cmt. 4(b)). However, reliance on the Commission's statement may be problematic. Daniel Freed, for example, expresses how the Commission has sent "mixed messages" with regard to whether rigid adherence or loose application of the Guidelines is required of judges. *See* Freed, *supra* note 12, at 1744. Freed acknowledges that the language of the introductory statement reflects a liberal attitude toward departures, but notes that press reports accompanying the release of the Guidelines touted the intention of the Commission to remove discretion from federal judges. *See id.* Freed further states that while the Commission's introduction to the Guidelines contains many invitations for judges to exercise discretion through departures, "the strict language of the guidelines and policy statements themselves [undercuts the Commission's invitations]." *Id.*

26. *See Brewster*, 127 F.3d at 26.

27. *Id.* A district court in the District of Columbia was presented with facts that were similar to those in *Brewster*, but the court there declined to depart under section 4A1.3. *See* *United States v. Drew*, 23 F. Supp.2d 39, 45 (D.D.C. 1998). Drew pleaded guilty to a firearm offense that derived from an episode of domestic violence. *See id.* at 41. The court, without elaboration, noted that it was "within the power of the court to depart upwards" based on section 4A1.3, but the court (again with-

In *United States v. Schweih*s,²⁸ the Seventh Circuit also upheld the use of prior dissimilar nonconvicted conduct as a basis for departure from the Guidelines.²⁹ In that case, the defendant had been convicted of “affect[ing] commerce by extortion.”³⁰ The district court based its enhancement of his sentence on the conduct of “possession of a wire communication intercepting device.”³¹ Like the First Circuit in *Brewster*, the court argued that no negative implication need be drawn from the express language of section 4A1.3(e).³² The court expressly rejected cases cited by the defendant as contrary, and noted cases where departures based on prior dissimilar conduct *underlying a conviction* (reversed or otherwise) were deemed proper.³³ The opinion, however, cited no precedent favoring enhancements based on prior dissimilar criminal conduct that *did not* result in a conviction.

The Second Circuit is the only circuit court thus far to refuse to allow departures based on prior dissimilar nonconvicted conduct. In *United States v. Chunza-Plazas*,³⁴ the circuit court considered whether the district court properly departed from the Guidelines under section 4A1.3 where the defendant was convicted of possession of false immigration documents and where evidence at sentencing alleged a history of acts of terrorism, homicide, and drug dealing in Columbia.³⁵ Contrary to the First and Seventh Circuit, the court here elected to draw a negative implication from the language of section 4A1.3(e), treating the term “similar” as stating a requirement for proper application of the departure provision.³⁶ The court stated that, “[e]ven assuming that subsection (e) might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is ‘similar’ to the crime of convic-

out elaboration) determined that the facts of that case were distinguishable from *Brewster*. *Id.* at 45 & n.6.

28. 971 F.2d 1302 (7th Cir. 1992).

29. *See id.* at 1319. *See also* *United States v. Anderson*, 72 F.3d 563, 565 (7th Cir. 1995) (following *Schweih*s and stating, “[T]he guideline is explicit that information justifying an adjustment in the criminal history category is not limited to conduct that falls within one or more of the specific categories [including section 4A1.3(e)] in the guideline The text of the guideline and our interpretation of that text make clear that [a judge may base] his upward departure on prior dissimilar criminal conduct”).

30. *Schweih*s, 971 F.2d at 1308.

31. *Id.* at 1318.

32. *See id.*

33. *See id.* at 1319.

34. 45 F.3d 51 (2d Cir. 1995).

35. *See id.* at 56-57.

36. *See id.*

tion,”³⁷ and found no similarity between the crime of conviction and the alleged prior acts.³⁸

Neither the Commission nor the Supreme Court has responded to the current split of authority on this issue. However, the Commission’s past response to a similar split among the circuit courts may shed light on how the Commission might respond to the current split.

C. PRIOR DISAGREEMENT AMONG THE CIRCUITS REGARDING OUTDATED DISSIMILAR CONVICTIONS AND THE COMMISSION’S RESPONSE

From the inception of the Guidelines until November 1992, the circuit courts disagreed about whether outdated dissimilar *convictions* were a proper basis for departure under section 4A1.3.³⁹ The Supreme Court in *Williams v. United States*⁴⁰ was presented with the opportunity to consider the issue but declined to do so.⁴¹ While other circuits aligned themselves on either side of the issue, the First Circuit took a compromise approach.⁴² In *United States v. Aymelek*, the First Circuit stated:

We reject both extremes [never or always upholding departures based on remote convictions], preferring to follow the middle path. We therefore read section 4A1.3 as providing the opportunity to ground a departure on a defendant’s remote convictions when and if those convictions evince some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders.⁴³

The Commission responded directly to the split of authority by amending Note 8 in the commentary to section 4A1.2⁴⁴ to read: “[I]f the court finds that a sentence imposed outside this time period is evidence of

37. *Id.* at 56.

38. *See id.*

39. See Carol A. Shubinski, *Upward Departures from the Sentencing Guidelines: Should Non-similar, Outdated Convictions Provide a Basis for Departure?* *United States v. Diaz Collado*, 981 F.2d 640 (2d Cir. 1992), cert. denied, 113 S. Ct. 2934 (1993), 72 WASH. U. L.Q. 769, 774 (1994); THOMAS W. HUTCHINSON, DAVID YELLEN, PETER B. HOFFMAN & DEBORAH YOUNG, FEDERAL SENTENCING LAW AND PRACTICE 758 n.6 (3d ed. 1997) [hereinafter SENTENCING PRACTICE].

40. 503 U.S. 193 (1992).

41. See Shubinski, *supra* note 39, at 774-75. In the face of the defendant’s challenge to the district court’s enhancement of his sentence based on dissimilar conduct outside the Guideline time period, the Court noted the split of authority among the circuit courts but based its decision to decline review on a more narrow scope of certiorari and inadequate briefing by the parties. See *Williams*, 503 U.S. at 205-06.

42. See Shubinski, *supra* note 39, at 776. See also *United States v. Aymelek*, 926 F.2d 64 (1st Cir. 1991).

43. *Aymelek*, 926 F.2d at 73.

44. This section is entitled “Definitions and Instructions for Computing Criminal History.” GUIDELINES MANUAL, *supra* note 1, § 4A1.2.

similar, *or serious dissimilar*, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under § 4A1.3.⁴⁵ The Commission wrote that the amendment “clarifies that dissimilar, serious prior offenses outside the applicable time period may be considered in determining whether an upward departure is warranted under § 4A1.3.”⁴⁶

The Commission’s amendment, unfortunately, does not address whether prior dissimilar *nonconvicted* criminal conduct may serve as an appropriate basis for departure; the amendment’s language specifically refers to a “sentence” as evidence warranting a departure.⁴⁷ The amendment would only be helpful if there exists no meaningful distinction in this context between conduct proven by “reliable information” of past criminal conduct at sentencing and conduct proven by conviction in a prior adjudication. There are, however, problems that result from failing to recognize a distinction between the two.

D. CONVICTIONS COMPARED WITH CONDUCT AND THE NATURE OF “RELIABLE INFORMATION”

When a federal judge departs from the Guidelines based on a defendant’s prior conviction, the information upon which the judge relies enjoys the benefit of having been proven beyond a reasonable doubt before a jury of the defendant’s peers. Section 4A1.3, by expressly allowing for departures based on “reliable information” of conduct that did not result in a criminal conviction, raises the question of what, in the absence of a conviction, constitutes “reliable information.”⁴⁸ This question is implicated by the fact that the standard of proof at sentencing in federal courts is not “beyond a reasonable doubt” but is instead “by a preponderance.”⁴⁹ Eliza-

45. *Id.* at App. C, amend. 472 (adopted Nov. 1, 1992) (emphasis added). *See* Shubinski, *supra* note 39, at 778.

46. GUIDELINES MANUAL, *supra* note 1, at app. C, amend. 472.

47. *Id.*

48. *See id.* § 4A1.3, p.s.

49. *See* Darren M. Gelber, *The Federal Sentencing Guidelines: Is Discretion Still the Better Part of Valor?*, 9 N.Y.L. SCH. J. HUM. RTS. 355, 359 (1992) (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where the Supreme Court, in a case decided before the Guidelines took effect, held that due process at sentencing is satisfied by the preponderance standard of proof). Although there have been constant due-process challenges to the practice of enhancing sentences based on conduct proven only by a preponderance, Elizabeth Lear notes that courts have relied on a historical distinction between punishment and enhancement to invalidate such challenges. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1184-85 (1993). She cites as an example of the courts’ callousness toward such challenges a comment by the Fourth Circuit declaring that “[a] verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant’s innocence.” *Id.* at 1185 (quoting *United States v. Isom*, 886 F.2d 736, 738 (4th

both Lear notes that the relaxed standards at sentencing are reflected by the following: (1) the “quantum and quality” of evidence necessary to establish factual findings at sentencing is well below that required at trial; (2) neither the Confrontation Clause nor the Federal Rules of Evidence are applied at sentencing; and (3) though the defendant must be given an opportunity to contest allegations made at the sentencing hearing, there is no right to an evidentiary hearing regarding disputes.⁵⁰ The result is that courts often rely on hearsay statements contained in the pre-sentence report as the sole evidentiary basis for a sentence enhancement.⁵¹

The Commission’s “clarification” in favor of allowing departures based on dissimilar convictions does not inform the current debate, primarily due to the fundamental difference between facts that are established in support of a conviction, which are based on evidence proven beyond a reasonable doubt, and facts established at sentencing, which are based on evidence proven only by a preponderance. The Commission may have favored dissimilar convictions as a basis for departure particularly because they benefit from the fairness and reliability protections of the criminal trial process. While the Commission has indicated that it favors departures based on dissimilar convictions and that it sanctions departures based on prior similar nonconvicted conduct, the Commission has not expressly clarified that it favors (or disfavors) departures based on prior dissimilar nonconvicted conduct.

As previously noted, the Commission stated in section 4A1.3 that it intended to limit departures to those based on “reliable information.”⁵² The Commission’s concern that unreliable information might lead to unfair departures is highlighted by its position that “a prior arrest record itself

Cir. 1989)). Indeed, courts have consistently held that due process is not violated even where the enhancement is based on conduct for which the defendant has been *acquitted*. See generally Marvin Spouse, *A Sentence for Acquittal: The Supreme Court Holds That Sentences May Be Enhanced for “Conduct” for Which Persons Have Been Tried and Acquitted*; United States v. Watts, 117 S. Ct. 633 (1997), 28 TEX. TECH L. REV. 963 (1997) (discussing key cases in which courts have allowed sentence enhancements based on acquitted conduct).

50. See Lear, *supra* note 49, at 1202-03. See also United States v. Brewster, 127 F.3d 22, 28 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998) (stating that “sentencing courts may elect to embrace divers [sic] kinds of information, even hearsay evidence that has never been subject to cross-examination.”).

51. See Lear, *supra* note 49, at 1202-03. See also Brewster, 127 F.3d at 28 (stating that “factual averments contained in the PSI [Pre-Sentence Investigation] Report usually are deemed reliable enough to be used for sentencing purposes.”).

52. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s.

shall not be considered under § 4A1.3.”⁵³ The Commission’s prohibition offers the inference that an arrest record alone does not amount to “reliable information” of the underlying conduct. Given the Commission’s reliability concerns, it is the Commission’s place—not that of the circuit courts—to decide the question whether evidence at sentencing of prior dissimilar nonconvicted conduct presumably has the requisite reliability to serve as the basis of a section 4A1.3 departure.

The purpose of this Note is not to guess the Commission’s intentions or to predict the eventual outcome. Instead, this Note examines the traditional justifications for punishment, the purposes of the Guidelines, and the purposes of section 4A1.3 in order to formulate a better scheme for departures based on prior dissimilar nonconvicted conduct. The next section addresses those justifications and purposes.

II. THE PURPOSES OF THE GUIDELINES AND SECTION 4A1.3

A. THE SENTENCING REFORM ACT OF 1984 AND THE PURPOSES OF THE GUIDELINES

Congress, through The Sentencing Reform Act of 1984, created the Commission and charged it with the responsibility of developing sentencing guidelines that fulfill the traditional goals of punishment: deterrence, incapacitation, just punishment (sometimes referred to as “retribution” or “just deserts”) and rehabilitation.⁵⁴ Additionally, the Guidelines were developed to address deficiencies that arose in prior sentencing practice by focusing on three goals: (1) honesty in sentencing; (2) reduction of unwarranted sentence disparity; and (3) proportionality in sentencing.⁵⁵ The sections below discuss the tensions among these various goals, look specifically at the goal of reducing unwarranted sentence disparity, and focus on the historical context in which these goals have emerged.

53. Some federal courts have held that an arrest record can nonetheless constitute part of a body of evidence at sentencing in order to prove allegations upon which a departure might be based so long as it is not the sole evidence of the defendant’s prior criminal conduct. *See, e.g.*, *United States v. Terry*, 930 F.2d 542, 545 (7th Cir. 1991) (denying defendant’s challenge to the use of his arrest record as “reliable information” upon which his departure was based); *United States v. Williams*, 910 F.2d 1574, 1579 (7th Cir. 1990) (“[T]he guidelines allow the district court to go beyond the arrest record itself and to consider whether the underlying facts evidence ‘prior similar adult conduct not resulting in a criminal conviction.’”).

54. *See* GUIDELINES MANUAL, *supra* note 1.

55. *See id.* at ch.1, pt.A(3), intro. cmt.; Dunworth & Weisselberg, *supra* note 2.

1. *Tensions Among Sentencing Purposes*

Critics of the existing sentencing framework urged the Commission to favor particular justifications for punishment in drafting the Guidelines, but the Commission expressly declined to do so.⁵⁶ The Commission wrote that, “[a]s a practical matter . . . this choice was unnecessary because in most sentencing decisions the application of [either deterrence, incapacitation, or retribution] will produce the same or similar results.”⁵⁷ Despite the Commission’s indifference, Marc Miller points out that many who criticize the current system cite a failure by the Commission to incorporate and advance any one of these basic purposes.⁵⁸

Given such a wide variety of sentencing goals, it is no wonder that tensions would evolve among them. As Lisa Rebello states:

Clearly the Guidelines cannot fulfill the purposes of sentencing of retribution, deterrence, incapacitation, and rehabilitation while at the same time accomplishing [c]ongressional objectives of honesty, proportionality, and uniformity. These are competing goals that need to be addressed on a case-by-case basis. To the extent that judges are permitted to depart from the Guidelines, creating the risk of unwarranted disparity, the Commission’s ideal is thwarted.⁵⁹

The Commission itself noted another example of such a conflict—that between “the mandate of uniformity and the mandate of proportionality.”⁶⁰ The conflict is evidenced by the fact that the most uniform state possible (one where all sentences are of the same length) would fail the test of proportionality (which requires that sentences vary depending on the degree of seriousness of each defendant’s crime).⁶¹

2. *The Mandate to Reduce Unwarranted Sentence Disparity*

Perhaps the most difficult goal to achieve, and the one most implicated by the problem at hand, is the mandate to eliminate unwarranted sentence disparity.⁶² Miller states: “Though the term ‘disparity’ seems to connote disapproval, Congress recognized that there are appropriate grounds for disparity, perhaps better termed ‘variation.’ . . . Congress em-

56. See GUIDELINES MANUAL, *supra* note 1, at ch.1, pt.A(3), intro. cmt.

57. *Id.*

58. See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 419 (1992).

59. Lisa M. Rebello, Note, *Sentencing Under the Guidelines: Five Years of “Guided Discretion,”* 26 SUFFOLK U. L. REV. 1031, 1060-61 (1992).

60. GUIDELINES MANUAL, *supra* note 1, at ch.1, pt.A(3), intro. cmt.

61. *See id.*

62. *See supra* text accompanying note 2.

phasized that the key word in discussing unwarranted disparities is 'unwarranted.' Determining which disparities are unwarranted necessarily requires some standard of 'unwarrantedness' *other than disparity itself*.⁶³

If some disparities are to be labeled as "warranted," then the goal becomes that of identifying those disparities that are to be considered "unwarranted." As applied to the issue of Guideline departures, the fact that such departures lead to disparity in sentencing is not necessarily problematic, but is so only if the resulting disparity is "unwarranted" as contemplated by Congress.

The mandate for uniformity or reduction of unwarranted sentence disparity is best understood if viewed in its historical context. Specifically, the history of sentencing practice exposes a fundamental tension between the desire to view each offender as a unique individual deserving of specific consideration and the desire to construct and maintain a sentencing system that promotes uniformity and fairness through minimal sentence disparity among like offenders.

The Supreme Court described early sentencing practices in *United States v. Grayson*:⁶⁴ "[I]n the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment."⁶⁵ The rigidity that this system produced, however, gave way to a more flexible framework whereby the legislature would issue a sentencing range for each crime and courts would have "untrammelled discretion" within these statutory limits.⁶⁶ As *Grayson* points out, both of these approaches focused more on the crime committed than on the criminal himself, and made retribution (just punishment) the central goal of sentencing.⁶⁷

In *Williams v. People of State of New York*,⁶⁸ the Supreme Court described the next historical phase whereby the view emerged that the "pun-

63. Miller, *supra* note 58, at 424 (footnote omitted).

64. 438 U.S. 41 (1978).

65. *Id.* at 45.

66. Louis B. Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 657 (1981). See *Grayson*, 438 U.S. at 45-46.

67. See *Grayson*, 438 U.S. at 46.

68. 337 U.S. 241 (1949).

ishment [given] should fit the offender and not merely the crime.”⁶⁹ The Court wrote:

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. Today’s philosophy of individualizing sentences makes sharp distinctions between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of old rigidly fixed punishments. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.⁷⁰

As the rehabilitative model exerted increased influence over the sentencing process, the goal of individualizing sentences received greater attention. The system described in *Williams* was one whereby the judge would issue a maximum sentence prescribed by the legislature, and the United States Board of Parole (retitled the “United States Parole Commission” in 1976) then had the discretion to release any prisoner who had served at least one-third of his sentence and who the parole board had deemed to be “rehabilitated.”⁷¹

Victoria J. Palacios states, however, that “[t]he promise of the rehabilitative model was short-lived.”⁷² Criticisms of the rehabilitative model focused on several practical difficulties: (1) the abuses resulting from the vast discretion granted to the parole board; (2) the seemingly arbitrary nature of release decisions; (3) the lack of a correlation between good behavior while incarcerated and good behavior in the community; and (4) the tendency of judges to adjust decisions regarding imposition of legislatively prescribed maximum sentences based on the expectation that the parole board would grant early release.⁷³ These specific criticisms evolved along with—and contributed to—more general criticisms of indeterminate sentencing, which focused primarily on the problems of sentence disparity and

69. *Id.* at 247.

70. *Id.* at 247-48 (citations omitted).

71. See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 567-68 (1994). See also Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)*, 61 FED. PROBATION 23, 25 (Sept. 1997) (detailing requirements for parole eligibility).

72. Palacios, *supra* note 71, at 570.

73. See *id.* at 570-71; Schwartz, *supra* note 66, at 659-60. See also Freed, *supra* note 12, at 1688 (noting that the sentencing judge “lacked power to revise the sentence if her expectations regarding the timing of parole proved incorrect.”).

perceptions of systemic unfairness and racial discrimination.⁷⁴ Congress responded to these criticisms by: (1) abolishing parole; (2) creating the Commission; and (3) mandating that the Commission produce sentencing guidelines.

The United States Board of Parole (“parole board”) serves as an historical microcosm, exhibiting over time the same tension between the desire to individualize sentences and the need to avoid unwarranted disparity among sentences. Congress charged the parole board with the task of making individual determinations with respect to whether particular prisoners were fit for release, and, as stated above, granted it wide discretion to that end.⁷⁵ The parole board took this mandate to heart, believing initially that it could identify the “magic moment” at which a particular offender was maximally rehabilitated and suited for release.⁷⁶ The parole board’s confidence, however, proved later to be bravado. After years of attempting to do so, the difficulty in exercising unfettered discretion in a rational manner eventually forced the parole board to concede explicitly that it could not divine that “magic moment.”⁷⁷

The parole board—in a move that should now ring familiar—responded to the difficulties resulting from the unfettered exercise of discretion by issuing guidelines upon which individual release decisions could be based.⁷⁸ These guidelines later gained statutory approval as part of the Parole Commission and Reorganization Act.⁷⁹ The purposes of the parole guidelines were to “provide a scientific and objective means of structuring and institutionalizing discretion in parole release decision-making [and to]

74. See Freed, *supra* note 12, at 1685. See also Samuel L. Meyers, *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 781 (1993) (stating that “[r]acial disparities in punishment are a by-product of the operation of a criminal justice system that labors under . . . conflicting objectives in sentencing and imprisonment.”).

75. See *supra* text accompanying note 71. See also Palacios, *supra* note 71, at 568 (describing inmates’ perception of the parole board as “God-like”).

76. See PIERCE O’CONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* 27 (1977).

77. See John C. Coffee, Jr., *The Repressed Issues of Sentencing, Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 990 (1978); O’CONNELL ET AL., *supra* note 76 (discussing findings which were the “final blow” to the “magic-moment” approach to parole). See generally David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 883 (1996) (stating that “it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”).

78. See Note, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 822 (1975). For an example of the application of the parole guidelines, see *Campbell v. United States Parole Comm’n*, 704 F.2d 106 (3d Cir. 1983) (involving a decision under the parole guidelines to refuse release based on the aggravating factor of prior evidence of complicity in murder).

79. Pub. L. No. 94-233, 90 Stat. 219, 219-33 (codified at 18 U.S.C. §§ 4201-18 (1994)).

minimize the effects of sentencing disparity.”⁸⁰ The drafters of the statute stated their intent “that the [parole] guidelines serve as a national parole policy which seeks to achieve both equity between individual cases and a uniform measure of justice.”⁸¹ Likewise, the United States Parole Commission (“Parole Commission”) states as a general policy objective its intent to “promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration.”⁸² Yet as demonstrated earlier, consistency and uniformity at the systemic level often come at the expense of equity at the individual level.

The parole guidelines, nonetheless, led to parole procedures that were perceived by many to be more fair, and as Peter Hoffman notes, “[t]he decision [by Congress] to establish sentencing guidelines was based in substantial part on the success of the U.S. Parole Commission in developing and implementing its parole guidelines.”⁸³ The current Sentencing Guidelines were in fact developed with the Parole Commission’s previous experience in mind.⁸⁴

The parole guidelines and the Sentencing Guidelines are similar in many respects. Both rely on a matrix, with offense characteristics on the vertical axis and offender characteristics on the horizontal axis. As with the Sentencing Guidelines, the parole guidelines authorize decisions outside the guidelines in certain circumstances.⁸⁵ The parole guidelines also contain provisions that are similar in some respects to section 4A1.3 of the Sentencing Guidelines. The similarities between the parole guidelines and the Sentencing Guidelines are not accidental; the Sentencing Commission looked to the parole commission’s prior work when it designed its own offender-characteristics scheme.⁸⁶

The parole guidelines list certain factors which might indicate that an offender is a more serious parole risk than indicated by his score on the matrix. For example, the parole guidelines permit departure in the case

80. Note, *supra* note 78, at 822-23.

81. UNITED STATES PAROLE COMMISSION, U.S. PAROLE COMMISSION RULES & PROCEDURES MANUAL § 2.20-01(B) (1995) [hereinafter PAROLE COMMISSION].

82. *Id.* § 2.20(a).

83. Hoffman, *supra* note 71, at 23-24.

84. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19 (1988).

85. See *Campbell v. United States Parole Comm’n*, 704 F.2d 106, 111 (3d Cir. 1983) (“Although the [Parole] Commission must, in the first instance, use the guidelines in determining the release of a prisoner, it is not limited by them.” (citation omitted)).

86. See Breyer, *supra* note 84.

where the offender's "salient factor score" (similar to the CHC calculation under the Sentencing Guidelines) does not take into account one or more of the following: (1) the offender's "history of repetitive assaultive behavior"; (2) the offender's "history of repetitive sophisticated criminal behavior"; and/or (3) the offender's "*extensive and serious prior record*."⁸⁷ Both the calculation of the offender's "salient factor score" under the parole guidelines and the offender's CHC under the Sentencing Guidelines focus primarily on past convictions.⁸⁸ The analogue to section 4A1.3 in the parole guidelines refers specifically to convictions, and does not appear to grant discretion to the Parole Commission decisionmakers to consider nonconvicted conduct.⁸⁹ Finally, just as section 4A1.3 allows for downward as well as upward departures from the Sentencing Guidelines,⁹⁰ the parole guidelines provide for downward departures where required due to the fact that a particular offender is a "better parole risk" than his salient factor score indicates.⁹¹

The Sentencing Commission, like the Parole Commission before it, and despite its congressional mandate for uniformity, recognized that all discretion could not be withdrawn from the sentencing decisionmaker: Indeed, some disparities must be tolerated in order to achieve other goals such as fairness and proportionality.⁹² Congress provided courts with the authority to depart from the Guidelines by instructing them "[to] impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds there exists an aggravated or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."⁹³ Despite this grant of discretion, the Commission seemingly provided for departures from the Guidelines in order to assure that they remain the exception rather than the rule.⁹⁴ Section 4A1.3 is one such attempt at "guided discretion."⁹⁵

B. THE PURPOSES OF SECTION 4A1.3

The most authoritative source available regarding the purposes behind section 4A1.3 is the commentary thereto. There, the Commission wrote,

87. PAROLE COMMISSION, *supra* note 81, § 2.20-05(B)(4) (emphasis added).

88. *See* Breyer, *supra* note 84, at 19 n.97.

89. *See* PAROLE COMMISSION, *supra* note 81.

90. *See infra* text accompanying note 102.

91. PAROLE COMMISSION, *supra* note 81, § 2.20-05(C)(7).

92. *See* Rebello, *supra* note 59.

93. 18 U.S.C. § 3553(b) (1994).

94. *See* GUIDELINES MANUAL, *supra* note 1, at ch.1, pt.A(4)(b), intro. cmt.

95. Rebello, *supra* note 59, at 1031.

“[t]his policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur.”⁹⁶ The Commission further stated that “[the] policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or the likelihood of recidivism.”⁹⁷ This section provides for two separate circumstances where a departure is appropriate: (1) where the defendant’s criminal history score does not adequately reflect the seriousness of the defendant’s criminal past; and (2) where the defendant’s criminal history score does not adequately reflect the defendant’s propensity for future crime.⁹⁸

The language of the policy statement narrows the judge’s discretion to unusual cases by specifically authorizing departures only in certain “limited circumstances.”⁹⁹ The circuit courts have further limited use of the provision by requiring that district court judges give a clear statement of reasons supporting any departure under section 4A1.3.¹⁰⁰ These limitations, however, run counter to the language in the introduction to the Guidelines, where the Commission claimed that by providing specific grounds for departure, it did not intend “to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.”¹⁰¹

In drafting section 4A1.3, the Commission also noted that “[t]here may be cases where the [sentencing] court concludes that a defendant’s criminal history category *over-represents* the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.”¹⁰² The Commission gives as an example the case of a defendant who incurred two misdemeanor convictions close to ten years prior to the offense for which he is currently being sentenced with no evidence of intervening criminal activity, and states that a court may conclude that a

96. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, commentary.

97. *Id.*

98. See SENTENCING PRACTICE, *supra* note 39, at 757 n.4.

99. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s.

100. See SENTENCING PRACTICE, *supra* note 39, at 757 n.3; *United States v. Lambert*, 984 F.2d 1318, 1325 (3d Cir. 1993); *United States v. Dawson*, 1 F.3d 457, 463-65 (7th Cir. 1993); *United States v. St. Julian*, 922 F.2d 563, 570 (10th Cir. 1990); *United States v. Coe*, 891 F.2d 405, 409 (2d Cir. 1989). A statement of reasons is similarly required of Parole Commission decisionmakers for decisions rendered outside of the parole guidelines. See PAROLE COMMISSION, *supra* note 81, § 2.20-05.

101. GUIDELINES MANUAL, *supra* note 1, at ch.1, pt.A(4)(b), intro. cmt. See *Freed*, *supra* note 12, at 1731.

102. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s. (emphasis added).

downward departure is appropriate in such a case.¹⁰³ Therefore, in drafting section 4A1.3, the Commission sought to provide grounds for departure where a defendant's CHC either underrepresents *or* overrepresents the seriousness of the defendant's criminal past, or the likelihood that he will commit future crimes.

As to the purpose of section 4A1.3(e), or more specifically its mention of "prior similar adult criminal conduct," the Guidelines are silent.¹⁰⁴ The Seventh Circuit noted this silence and stated, "In the absence of guidance there is little alternative to taking the word ["similar"] in its ordinary-language sense."¹⁰⁵ The lack of a clearly articulated purpose for section 4A1.3, when combined with an interpretation of "similar" as a suggestion and not a requirement, encourages courts confronted with the issue to give the section little or no bite.¹⁰⁶

C. PURPOSES OF SENTENCING AND DEPARTURES BASED ON DISSIMILAR NONCONVICTED CONDUCT

1. *The Traditional Justifications for Punishment*

Though the Commission declined to select a particular philosophical position on punishment when it formulated the Guidelines,¹⁰⁷ section 4A1.3 seems to focus primarily on the goals of retribution and incapacitation. With respect to retribution, the section operates to assure that a defendant receives a sentence that reflects the culpability of that defendant as a repeat offender by considering the seriousness of the defendant's criminal past. The situations described specifically in section 4A1.3, including that where a defendant engaged in prior similar conduct established in a civil or administrative proceeding or where the defendant was pending trial

103. *See id.*

104. *See* United States v. Anderson, 72 F.3d 563, 566 (7th Cir. 1995).

105. *Id.* Chief Judge Posner took his own guess as to the purpose of "similar" in section 4A1.3: Here is a stab at the purpose or function of the provision. It is a provision, remember, for adjusting a defendant's criminal history score when his record of actual convictions understates his criminal history. The focus will therefore be on crimes that the defendant committed but was not convicted of or with respect to which he was allowed to plead to a lesser offense If these prior crimes are similar to the offense of conviction, the inference arises that the defendant through aptitude or experience has become skilled in the commission of a particular type or class of crimes and as a result is able to get away with most of them. This would be a clear ground for a heavier sentence.

Id.

106. *See, e.g., id.* ("It is difficult to apply a statute or rule without a clue to its purpose or function, and one hesitates to do so blindly when the consequence is to add years to a person's prison sentence.")

107. *See supra* text accompanying note 56.

or sentencing on another charge at the time the crime was committed, indicate the Commission's intent to target the "career criminal" who presumably has no respect for the law.¹⁰⁸

Section 4A1.3 serves the goal of retribution well when applied to criminals who repeatedly engage in the same or similar criminal conduct. There are many recidivist statutes on the books driven by the concept that repeated violations, as evidenced by a defendant's prior criminal convictions, warrant greater punishment—they are in fact a mainstay in contemporary American criminal-justice schemes.¹⁰⁹ These schemes contemplate that "harsher punishment is warranted not simply because of the repetitive criminal nature of the defendant, but also because of the defendant's 'incurably anti-social' nature."¹¹⁰

Punishment based on dissimilar conduct does not, however, benefit equally from the retributive justification. The criminal in question does not necessarily have a history of repeated violations. A defendant who has never been convicted of a particular type of conduct, and who may never have engaged in the behavior for which he is currently being sentenced, is seemingly less culpable than a defendant with prior convictions for the same or similar conduct. Extending the increased punishment sanctioned by section 4A1.3 to offenders who have engaged in prior dissimilar non-convicted conduct ignores this variance of culpability.

In addition to the goal of retribution, the Commission respected the goal of incapacitation by drafting a departure provision that protects against future harm by the defendant, or the "likelihood of recidivism." A defendant who has engaged in conduct before and has suffered punishment for it, but who nonetheless proceeds to engage in it again, appears to be a greater recidivist risk than one who has not necessarily engaged in the same or similar behavior constituting the instant offense. The former defendant, based on the recidivist justification, probably would warrant a greater sentence under section 4A1.3, whereas the latter would not.

However, the appeal of the recidivist justification and the related need for extended incapacitation appear diminished when applied to an offender

108. See GUIDELINES MANUAL, *supra* note 1, § 4A1.3(c)-(d), p.s.

109. See Leonard N. Sosnov, *Due Process Limits on Sentencing Power: A Critique of Pennsylvania's Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction*, 32 DUQ. L. REV. 461, 474-75 (1994). Many jurisdictions have enacted "three-strikes" laws, which provide for increased mandatory sentences for repeat offenders. For an overview of such legislation, see Michael G. Turner, Jody L. Sundt, Brandon K. Applegate & Francis T. Cullen, "Three Strikes and You're Out" *Legislation: A National Assessment*, 59 FED. PROBATION 16 (Sept. 1995).

110. Sosnov, *supra* note 109, at 475.

who has not necessarily engaged on a prior occasion in the same or similar behavior for which that offender is being punished. Most are familiar with the phrase, “he’s done it before and he’ll do it again.” Applying the additional punishment provided by section 4A1.3 to dissimilar conduct which does not necessarily establish that the offender has “done it before” risks incapacitating that offender beyond the point justified by the risk that he will “do it again.”

2. *The Purposes of the Guidelines*

Of the Commission’s several congressionally mandated goals for the Guidelines, section 4A1.3 arguably most strongly impacts the goal of uniformity (or the reduction of unwarranted sentence disparity). By definition, departures serve to reduce the uniformity of sentences. Departures therefore serve congressional goals only when they are warranted,¹¹¹ or help to achieve other goals such as honesty in sentencing, fairness, or proportionality.

But punishment based on dissimilar nonconvicted conduct does not better achieve these alternative goals. The risk of allowing virtually any prior conduct to justify a departure under section 4A1.3 is that offenders convicted of similar crimes of similar seriousness may nonetheless receive significantly disparate sentences. Both the goals of proportionality and fairness may be harmed by such disparate treatment. Further, the honesty of the sentencing process grows more questionable as judges are granted greater discretion—a concern the Commission intended the Guidelines to address.

Furthermore, the split of authority among the circuit courts regarding section 4A1.3 departures magnifies concern for another form of uniformity—that of jurisdictional uniformity. At the federal level, defendants should expect that their sentences will not vary depending on the jurisdiction in which their crimes were committed. Yet, while the defendant in *Brewster* did not gain the benefit of a negative implication from the express language of section 4A1.3(e), the defendant in *Chunza-Plazas* did.¹¹² Disagreement among the circuits may be the worst form of unwarranted disparity, because the same sentencing provisions provided to all circuits are applied in an unequal manner.

111. See *supra* notes 62-63 and accompanying text.

112. See *supra* notes 24, 32, 36 and accompanying text.

3. *The Purposes of Section 4A1.3*

The Commission promulgated section 4A1.3 to ensure that sentences reflect the seriousness of the defendant's criminal past and the likelihood of future violations. Courts should, therefore, depart based on that section only in cases where these concerns are paramount. Concededly, instances arise where knowledge of prior dissimilar criminal conduct will indicate to a judge that a particular defendant's criminal past is more serious than it would appear without such information. In *Brewster*, for example, the defendant was shown at sentencing to have engaged in a continuous seventeen-year reign of terror over his spouse.¹¹³ It is difficult to argue that the defendant's criminal past in that case does not appear more serious in light of this information, and situations such as this make the strongest argument for allowing prior dissimilar nonconvicted conduct to form the basis of a departure. If upward departures under section 4A1.3 are to be justified on the grounds that prior adult criminal conduct, even if dissimilar, makes a defendant's criminal background appear significantly more serious, then courts must focus their efforts on identifying cases where it is appropriate to depart.

With respect to the "likelihood that the defendant will commit other crimes,"¹¹⁴ the Commission did not specifically limit this concern to crimes of the type for which the defendant is being sentenced. Thus, departures based on prior dissimilar conduct are not necessarily inconsistent with the Commission's purpose. In *Brewster*, for example, the information that the defendant had abused his wife over a seventeen-year period may not be enlightening with respect to the likelihood that he would continue to possess firearms as a convicted felon in the future, but it is relevant with respect to the likelihood that he would abuse his wife again in the future.¹¹⁵ The focus here must also be on identifying specific cases where the defendant's prior dissimilar nonconvicted conduct most indicates a likelihood that he may engage in future crime.

The discussion above outlines the complexity and variety of interests that the Commission must consider when it decides the question of whether departures based on prior dissimilar nonconvicted conduct are proper under section 4A1.3. Further, the discussion above demonstrates that such departures, as they are currently applied, do not maximally serve

113. See *United States v. Brewster*, 127 F.3d 22, 25 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998).

114. GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s.

115. See *Brewster*, 127 F.3d at 25.

the justifications and purposes behind the current sentencing scheme. The next part proposes a judicial solution—a “relatedness requirement”—that would better serve those interests. Any judicial solution, however, will only serve as a patch. The Commission may provide a comprehensive solution by adopting a position with respect to departures based on prior dissimilar nonconvicted conduct under section 4A1.3 that is consistent with the proposal below.

IV. PROPOSAL FOR A “RELATEDNESS REQUIREMENT”

As discussed earlier, the circuit courts clearly disagree with respect to whether prior dissimilar nonconvicted conduct may form the basis of a departure under section 4A1.3. The First Circuit stated that the question is “neither dictated nor informed” by section 4A1.3,¹¹⁶ and the Seventh Circuit agreed, while the Second Circuit viewed the same provision as a requirement of similarity.¹¹⁷ Until the question is resolved by the Commission or the Supreme Court, circuit courts that do allow departures based on dissimilar conduct should do so only in appropriate cases. The *Brewster* court expressly recognized the need for such a discriminating approach.¹¹⁸ This Note urges a case-by-case approach for such departures. Further, this Note proposes that those circuits which allow departures based on prior dissimilar nonconvicted conduct require that district court judges find “relatedness” between the prior dissimilar conduct and that resulting in the instant conviction.

A. THE NEED FOR A CASE-BY-CASE APPROACH

Section 4A1.3, by its terms, is intended to apply only in “limited circumstances.”¹¹⁹ The court in *Brewster* interpreted the language of section 4A1.3, which states that “[the] policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur,” to provide a mandate for a case-by-case approach.¹²⁰ While narrowing its holding to appropriate cases, the court clarified the manner by which sentencing courts should

116. *Id.* at 26.

117. *See supra* notes 19-38 and accompanying text.

118. *See Brewster*, 127 F.3d at 27 (stating, “we hold that, *in an appropriate case*, a criminal history departure can be based upon prior dissimilar conduct that was neither charged nor the subject of a conviction.” (emphasis added)).

119. *See supra* notes 99-101 and accompanying text.

120. *Brewster*, 127 F.3d at 26 (quoting GUIDELINES MANUAL, *supra* note 1, § 4A1.3, p.s.).

identify those cases which are appropriate for departures based on dissimilar nonconvicted conduct. The court observed:

To be sure, we should approach “dissimilar conduct” departures, like all other departures, with great circumspection. Our holding will have force only in instances in which the uncharged, dissimilar conduct is so serious that, unless it is factored into the sentencing calculus, the resultant CHC will be manifestly deficient as a measure of the defendant’s past criminality and/or likely recidivism.¹²¹

The case-by-case approach demonstrated by the language above is consistent with the commentary of others who state that justice is best done by a sentencing judge knowledgeable of the particular facts of the controversy at hand.¹²² The Supreme Court in *Koon v. United States*¹²³ also recognized the importance of a case-by-case approach:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the Congressional purpose to withdraw all sentencing discretion from the U.S. District Judge.¹²⁴

As the Court in *Koon* recognized, the case-by-case approach has the additional benefit of effectuating the historical sentencing objective of recognizing each offender as an individual.¹²⁵ Just as the Parole Commission sought to institutionalize uniform sentencing that nonetheless recognized the unique circumstances of the individual, departures under section 4A1.3 can also best serve these goals by looking at each case and identifying those where departure is most warranted. Given the reliability concerns discussed earlier,¹²⁶ a case-by-case approach is particularly desirable where departures are based on prior dissimilar nonconvicted conduct.

While validating the need for a case-by-case approach, the *Brewster* court failed to provide adequate guidance for sentencing courts regarding their use of sentencing discretion provided by section 4A1.3. The court

121. *Id.* at 27 n.3.

122. *See* Miller, *supra* note 58, at 418. Miller states, “Judges ought to evaluate purposes at sentencing—linking facts about the offense and offender to the sentence—in every case.” *Id.* Given the facts that criminal sentences are the culmination of the criminal justice system, and that they represent enormous state power over the individual, Miller believes that criminals deserve a “clearly articulated purpose” at sentencing. *Id.* at 414.

123. 518 U.S. 81 (1996).

124. *Id.* at 113.

125. *See supra* notes 68-71 and accompanying text.

126. *See* discussion *supra* Part II.D.

merely stated that the prior dissimilar conduct should be “so serious” as to trigger the need for representation in the defendant’s sentence.¹²⁷ Given the purposes of section 4A1.3, however, courts should not base departure decisions solely on the degree of seriousness of the past criminal conduct. Any standard for application of section 4A1.3 must also invite judges to consider in their decision the likelihood that the defendant will engage in future crime.

B. THE “RELATEDNESS REQUIREMENT”

This Note proposes that those circuit courts which allow departures based on prior dissimilar nonconvicted criminal conduct under section 4A1.3 require that district courts make an explicit finding of “relatedness” between the prior criminal conduct and that underlying the conviction. Relatedness, as meant here, is found where there exists a “dangerous synergy” between the two crimes that appears to increase the likelihood that the defendant will engage in future criminal conduct. The major aspects of this proposal are discussed below.

1. *Explicit Finding by the Sentencing Judge*

It is not unusual to require federal judges to articulate purposes for departures from the Guidelines. In fact, most federal appellate courts currently require that district court judges explicitly justify departures from the Guidelines based on section 4A1.3.¹²⁸ This Note merely proposes that circuit courts also require sentencing judges to make an explicit finding of relatedness between the crime of conviction and the prior conduct when departing from the Guidelines under section 4A1.3. Such a requirement would force judges to consider relatedness when making such decisions.

2. *“Dangerous Synergy”*

Finding relatedness, or a “dangerous synergy” between the dissimilar nonconvicted conduct and the crime of conviction, involves looking beyond the labels of the two offenses and finding a form of “quasi-similarity” between them. For instance, a flame and a flammable substance are not similar, and yet no person would want to stand nearby if the two were to meet. Likewise, domestic abuse and being a felon in posses-

127. *United States v. Brewster*, 127 F.3d 22, 27 n.3 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998). See *supra* note 121 and accompanying text.

128. See SENTENCING PRACTICE, *supra* note 39, at 757 n.3; PAROLE COMMISSION, *supra* note 81; *supra* note 100 and accompanying text.

sion of a firearm are not facially similar. Nevertheless, the *Brewster* court recognized how the interrelation between the two offenses is disturbing.¹²⁹

[T]here is indeed a nexus in this case between Brewster's history of spousal abuse and his felon-in-possession offense. . . . [T]he discovery of the offense conduct arose directly from an incident of domestic violence, and, although the record contains no inkling that Brewster used the guns to menace his wife, we cannot fault the district judge's conclusion that the presence of guns in the home was "a reasonable source of sufficient fear" to prevent Mrs. Brewster from seeking outside assistance in an effort to end the unremitting abuse.¹³⁰

Despite the court's observation of the relationship between the two behaviors, the court unfortunately did not directly rely on that relatedness as a basis for its holding.

A relatedness rationale might better justify the result in *Schweih's* as well.¹³¹ There, the defendant was convicted of "conspiring . . . to affect commerce by extortion," and his sentence was enhanced for possession of a wire communication intercepting device.¹³² The conduct underlying the conviction arose from organized-crime activity.¹³³ The crimes, therefore, were related in the sense that wire interception devices are tools that may allow criminals who engage in organized crime to monitor communications that may help facilitate extortion, or alternatively, might serve as an aide in evading capture.¹³⁴

Chunza-Plazas presents facts which arguably satisfy the relatedness requirement, but there the court declined to allow a departure based on dissimilar nonconvicted conduct.¹³⁵ The defendant was convicted of pos-

129. See *Brewster*, 127 F.3d at 29.

130. *Id.* The court's reference to the relationship between the discovery of the offense conduct and domestic abuse derives from the following facts:

In August 1996, police officers responded to a report of domestic violence [at the Brewsters' home]. The officers observed Mrs. Brewster's injuries . . . and arrested the appellant. While being transported to the county jail, Brewster spoke volubly about his ardor for hunting and described firearms . . . that he owned and kept in his house. When a routine criminal record check disclosed a prior felony conviction for armed robbery, the police repaired to the house and, with Mrs. Brewster's consent, seized . . . two weapons.

Id. at 24.

131. See *United States v. Schweih's*, 971 F.2d 1302 (7th Cir. 1992); *supra* notes 28-32 and accompanying text.

132. *Schweih's*, 971 F.2d at 1302.

133. See generally *Schweih's*, 971 F.2d 1302.

134. The argument here is not as strong as in *Brewster*, which may suggest that the underlying dissimilar conduct in *Schweih's* was not of the type that should have justified a departure under section 4A1.3. A similar argument was rejected in *Chunza-Plazas*. See *United States v. Chunza-Plazas*, 45 F.3d 51, 57 (2d Cir. 1995). There, the court stated, "§4A1.3(e) requires conduct that is 'similar' to the convicted conduct, not conduct that was designed to further other, dissimilar, criminal conduct." *Id.*

135. See *Chunza-Plazas*, 45 F.3d at 57; *supra* notes 34-38 and accompanying text.

sessing false immigration documents in the United States, and the district court enhanced his sentence based on alleged acts of terrorism, homicide, and drug trafficking in Columbia.¹³⁶ A dangerous synergy clearly exists between these offenses. The crimes of terrorism and drug trafficking have a serious international component. The defendant's possession of false immigration documents in the United States leads to the obvious fear that the documents will be used as tools to facilitate the related offense behavior. While the court expressly rejected this argument from the government, it did so based on the view that section 4A1.3 does not permit departures based on prior dissimilar nonconvicted conduct.¹³⁷ Had this case been considered in a circuit that recognizes such departures, the circuit court could have convincingly justified a departure under section 4A1.3 with a finding of relatedness between the past conduct and the crime of conviction.

The criminal law recognizes that certain combinations of criminal behavior are particularly volatile. Most notably, federal law provides for harsher sentences in cases where an offender uses a firearm in connection with a "crime of violence or drug trafficking crime."¹³⁸ In 1984, Congress enacted 18 U.S.C. § 924(c)(1), which authorizes the increased punishment for such offenders, in response to public concern over a perceived increase in narcotics-related crimes.¹³⁹ The section recognizes that something akin to a "dangerous synergy" exists when firearms are used and carried in conjunction with crimes of violence or drug-trafficking crimes.¹⁴⁰ Another

136. See *Chunza-Plazas*, 45 F.3d at 55.

137. See *id.* at 57; *supra* note 134.

138. 18 U.S.C. § 924(c)(1) (1994). The section provides in relevant part:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years

Id.

139. See Michael J. Riordan, *Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1)*, 30 DUQ. L. REV. 39, 40 (1991). See also *United States v. Overstreet*, 40 F.3d 1090, 1094 (1994) (citing the legislative history of section 924(c)(1) as demonstrating congressional intent to "impose a five-year consecutive punishment on anyone who commits a violent crime using a firearm").

140. In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court held that a defendant must "active[ly] employ[]" a firearm in conjunction with a crime of violence or drug-trafficking crime in such a manner as to make the firearm "an operative factor in relation to the predicate offense" in order to qualify for punishment under section 924(c)(1). *Id.* at 143. In rejecting the "proximity and accessibility" test employed by some circuits, the Court noted that the "use" element may be satisfied by "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 148.

example is section 2D1.1(b)(1) of the Guidelines, which allows for a two-level increase in the offender's offense level for the possession of a firearm in connection with a drug-trafficking offense.¹⁴¹ A footnote in the commentary to section 2D1.1 states that "[t]he enhancement for weapon possession reflects the *increased danger of violence when drug traffickers possess weapons*."¹⁴²

Section 924(c)(1) of the United States Code and section 2D1.1(b)(1) of the Guidelines acknowledge and account for the increased threat to public safety which results when criminals combine firearms with certain crimes. Likewise, a relatedness requirement under section 4A1.3 would force judges at sentencing to depart only in those situations where a "dangerous synergy" exists between the underlying offense of conviction and the dissimilar nonconvicted conduct. This approach recognizes that criminals who blend volatile behaviors warrant more severe punishment.

3. *Comparison of the Relatedness Requirement with the Aymelek Compromise*

Recall that in *Aymelek*, the First Circuit took a middle-ground approach to outdated dissimilar convictions under section 4A1.3.¹⁴³ There, the court chose not to categorically allow or disallow the use of outdated dissimilar convictions as a basis for departure, but instead asked lower courts to depart only where the convictions forming the basis for departure "evinced some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders."¹⁴⁴

The *Aymelek* standard recognizes the need for additional punishment both when the defendant's prior criminal conduct is serious and when the defendant exhibits an "unusual penchant" for such conduct. The standard assists First Circuit courts in identifying those cases where departure is most warranted.

The Commission designed section 4A1.3 to allow for departures based on interests similar to those accounted for by the *Aymelek* standard: the seriousness of the defendant's past criminal conduct and the likelihood of recidivism. The relatedness requirement essentially would serve the same purpose and protect the same interests in the context of the current problem as the *Aymelek* standard does in the context of outdated, dissimi-

141. See GUIDELINES MANUAL, *supra* note 1, § 2D1.1(b)(1).

142. *Id.* at commentary, n.3 (emphasis added).

143. See *supra* notes 41-42 and accompanying text.

144. *United States v. Aymelek*, 926 F.2d 64, 73 (1st Cir. 1994).

lar convictions. The First Circuit, therefore, having chosen to allow departures based on dissimilar nonconvicted conduct, should be particularly comfortable applying a relatedness requirement to dissimilar-conduct departure decisions.

4. *Fulfillment of the Justifications for Punishment and Congressional Purposes*

The relatedness requirement would better align sentencing practice under section 4A1.3 with the justifications for punishment that are most implicated by the section. As discussed in Part II.C.1, the retributivist justification does not soundly support departures based on dissimilar conduct. Though the defendant is a repeat offender, he is less offensive to society than a defendant who has engaged in—and suffered punishment for—the same or similar conduct. While the relatedness requirement might not entirely cure this inconsistency, it would help courts identify cases where the defendant's prior dissimilar conduct and his conviction conduct are "quasi-similar." In such situations, the related nature of the offenses increases the need for retributive punishment.

The relatedness requirement would also better serve the goal of incapacitation with respect to departures under section 4A1.3. The need for extended incapacitation seems most pressing where the offender has a history of repeated violations for the same or similar conduct. That need is less apparent in a situation where the prior offense is dissimilar. The relatedness requirement, nonetheless, would assist courts in recognizing volatile situations where the conduct, though dissimilar, indicates a danger to society that warrants greater protection. Departures under section 4A1.3 based on related conduct would thus increase the period of incapacitation for those criminals.

With respect to Congress' specific goals for the Guidelines, a relatedness requirement would provide rationality to the current sentencing practices under section 4A1.3 by furthering the goals of honesty, reduction of unwarranted disparity, and proportionality. First, honesty would be enhanced because courts would do explicitly what they may already be doing implicitly. Recall that the *Brewster* court acknowledged a "nexus" between the prior conduct and the conduct underlying the conviction.¹⁴⁵ If such a "nexus" is to have operative force with respect to a decision as to

145. *United States v. Brewster*, 127 F.3d 22, 29 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1543 (1998). *See supra* text accompanying notes 129-30.

whether a departure is appropriate, courts should explicitly articulate the “nexus” as the *Brewster* court did in dictum.¹⁴⁶

Second, a relatedness requirement would reduce unwarranted disparity by limiting departures based on dissimilar conduct to cases where they are justified, in the sense that they help to achieve the other goals of sentencing. Though the most disturbing form of disparity—jurisdictional disparity—may not be remedied until the current split is resolved, the application of a relatedness requirement would at least guide the discretion of sentencing judges in circuits where such departures are allowed.

Third, proportionality would benefit from a relatedness requirement. An offender who blends conduct in such a way as to increase danger to others is situated differently from one who blends unrelated dissimilar conduct, and proportionality is not offended by disparate treatment of the two. Without a relatedness requirement, the decision as to whether to base a departure on dissimilar conduct in a particular case appears subject to the arbitrary whim of the sentencing judge. The relatedness requirement would remove this appearance by requiring that the sentencing judge provide a sound justification for a departure under section 4A1.3 that is based on dissimilar conduct.

A relatedness requirement would also better actuate the purposes of section 4A1.3. It would provide a standard that judges may effectively apply when determining whether a defendant’s criminal past is “serious” enough to warrant a departure. Note that it will always be possible for judges to point to past criminal conduct, regardless of whether it is similar or dissimilar, to find that the defendant’s criminal past is “serious.” The Commission intended to restrict departures under section 4A1.3 to those “limited circumstances” where past conduct makes the offender’s criminal history appear “significantly” more serious.¹⁴⁷ The relatedness requirement would assist judges in identifying those limited circumstances more effectively. Also, by identifying cases where defendants create a “dangerous synergy,” the relatedness requirement would limit upward departures under section 4A1.3 to cases where the risk of recidivism appears to be maximal.¹⁴⁸

146. See *Brewster*, 127 F.3d at 29; *supra* text accompanying note 130.

147. See *supra* note 99 and accompanying text.

148. While section 4A1.3 provides for both downward and upward departures, the proposal for a relatedness requirement is relevant only to situations where a judge seeks to depart upward. This is so because section 4A1.3(e), which suggests that a departure might be warranted by prior similar non-convicted conduct, does not appear in itself to be relevant to downward departures. Indeed, it is difficult to envision a scenario where the presence of prior similar nonconvicted adult conduct would constitute “reliable information” that might justify a downward departure.

V. CONCLUSION

This Note has focused on the current split between the courts of appeal over the question whether prior conduct that did not result in a conviction and was dissimilar to the underlying crime of conviction may form the basis of a departure from the Sentencing Guidelines under section 4A1.3. The Note concludes that the split of authority, which is based on a fundamental difference in interpretation of the section, may not be resolved absent clarification by the Commission or a ruling by the Supreme Court. The Note proposes that courts of appeal which choose to extend section 4A1.3 to dissimilar nonconvicted conduct require that the sentencing judge, on a case-by-case basis, make a finding of relatedness between the prior dissimilar nonconvicted conduct and the underlying crime of conviction. A relatedness requirement would better serve the goals of punishment, the overall purposes of the Guidelines, and the specific purposes of section 4A1.3.