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But I'm Not Twenty-One Yet: How Section 3B1.4 of the United States Sentencing Guidelines Ignored Congress's Intent to Enhance Sentences Only for Adults at Least Twenty-One-Years of Age Who Corrupt Minors by Using Them to Commit Federal Offenses – And What Federal District Courts Can Do About It

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BUT I'M NOT TWENTY-ONE YET: HOW
SECTION 3B1.4 OF THE UNITED STATES
SENTENCING GUIDELINES IGNORED
CONGRESS'S INTENT TO ENHANCE SENTENCES
ONLY FOR ADULTS AT LEAST TWENTY-ONE-
YEARS OF AGE WHO CORRUPT MINORS BY
USING THEM TO COMMIT FEDERAL
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TORY L. LUCAS*

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I. INTRODUCTION

Assume that five unrelated actors use minors to commit five similar crimes at exactly the same time in five different states. First, seventeen-year-old defendant *A* uses various other minors who are actually older than defendant *A* to purchase and sell heroin in New York.¹ Second, eighteen-year-old defendant *B* uses a sixteen-year-old minor and a seventeen-year-old minor to utter counterfeit money in Michigan.² Third, eighteen-year-old defendant *C* uses a sixteen-year-old minor and a seventeen-year-old minor to rob a bank in Minnesota.³ Fourth, twenty-year-old defendant *D* uses a seventeen-year-old minor to rob a bank in Tennessee.⁴ Fifth, nineteen-year-old defendant *E* uses his seventeen-year-old girlfriend to purchase

1. See *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *2 (S.D.N.Y. Apr. 27, 2006).

2. See *United States v. Borkowski*, 21 F. App'x 345, 346 (6th Cir. 2001).

3. See *United States v. Wingate*, 369 F.3d 1028, 1029–30 (8th Cir. 2004), *opinion reinstated*, 415 F.3d 885, 889 (8th Cir. 2005).

4. See *United States v. Butler*, 207 F.3d 839, 842 (6th Cir. 2000).

substances used to manufacture methamphetamine in Iowa.⁵ Section 3B1.4 of the United States Sentencing Guidelines (Guidelines) mandates a two-level sentence enhancement for defendants who use minors to commit federal crimes.⁶ One would assume that each of these five defendants would receive the same two-level sentence enhancement for using a minor to commit a crime. Not so fast. Instead of a uniform application of section 3B1.4's use-of-minor enhancement, the defendants who committed these five similar crimes with minors will not be treated similarly when they stand before federal sentencing courts in different jurisdictions. Defendants *C*⁷ and *E*⁸ will receive the enhancement; defendants *A*,⁹ *B*,¹⁰ and *D*¹¹ will not. What accounts for this disparity in sentencing these similarly situated federal defendants who used minors to commit these offenses?

The sentencing disparity results from a split of authority on the issue of whether the United States Sentencing Commission (Sentencing Commission) exceeded its authority in promulgating a use-of-minor enhancement for every defendant, regardless of age, who uses a minor to commit a federal offense. Congress directed the Sentencing Commission to promulgate a use-of-minor enhancement that ensures that the defendant's age is relevant by focusing on adult defendants at least twenty-one years old who use minors to commit federal offenses. The Sentencing Commission defied Congress's directive by making a defendant's age absolutely irrelevant for purposes of the use-of-minor enhancement. Federal courts' divergent approach to the Sentencing Commission's expanded use-of-minor enhancement created the sentencing disparities referred to above. Instead of none of the defendants listed above receiving the use-of-minor enhancement, which would track Congress's intent, some defendants receive the enhancement; some do not.

This Article takes a systematic and thorough approach to explaining how federal district courts can respond to the Sentencing Commission's defiance of congressional intent and unlawful expansion of its limited authority. This Article will explain how federal sentencing courts can carry out Congress's intent to impose

5. See *United States v. Harris*, 390 F.3d 572, 572 (8th Cir. 2004).

6. U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2011).

7. See *Wingate*, 369 F.3d at 1032.

8. See *Harris*, 390 F.3d at 572-73.

9. See *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *5 (S.D.N.Y. Apr. 27, 2006).

10. See *United States v. Borkowski*, 21 F. App'x 345, 346-47 (6th Cir. 2001).

11. See *United States v. Butler*, 207 F.3d 839, 849 (6th Cir. 2000).

use-of-minor enhancements only on adult defendants at least twenty-one years of age who use minors to commit federal offenses.

Part II develops the plain language of the congressional directive to the Sentencing Commission to promulgate a use-of-minor enhancement with an age restriction for defendants. Specifically, Congress instructed the Sentencing Commission to enhance sentences for defendants at least twenty-one years of age who use minors to commit federal offenses and, in doing so, to consider the proximity in age between the defendant and minor. Part III shows how the Sentencing Commission responded to the congressional directive by promulgating a use-of-minor enhancement that altogether eliminated the relevance of a defendant's age. Part IV then recounts the split among federal courts over the issue of whether the Sentencing Commission exceeded its congressional authority in promulgating a use-of-minor enhancement that makes the age of the defendant irrelevant. Notably, the United States Court of Appeals for the Sixth Circuit is on one side of the debate—the minority side, and the side on which this Article stakes its position—with the United States Courts of Appeals for the Fourth, Seventh, Eighth, and Tenth Circuits on the other side.

Because district courts will undoubtedly continue to confront the issue of whether section 3B1.4 can be applied to defendants under the age of twenty-one, this issue needs to be explored and analyzed more fully than it already has. This Article seeks to add a stronger voice and a more solid foundation for the conclusion that the Sentencing Commission exceeded its authority by eliminating the relevance of the defendant's age in applying a two-level use-of-minor enhancement. To that end, the analysis in Part V provides additional support for the conclusion that Congress did not intend that defendants under the age of twenty-one who use minors to commit federal offenses should receive sentence enhancements; it also maintains that Congress certainly did not intend that the age of the defendant and the proximity in age between the defendant and minor would be rendered wholly irrelevant. In a nutshell, Part V argues that the congressional directive's plain language, legislative history, and context in which it was enacted require the conclusion that Congress intended the Sentencing Commission to retain age as a relevant factor in applying the use-of-minor enhancement. Applying this reasoning, district courts can adopt what this Article describes as the "no-authority option" to hold that because the Sentencing Commission exceeded its authority in promulgating a use-of-minor enhancement without age

restrictions for defendants, section 3B1.4 will not be applied to defendants under the age of twenty-one. Until the Supreme Court of the United States adopts or rejects the no-authority option, defendants under the age of twenty-one will receive markedly disparate sentences depending on where they commit their federal offenses.

Notwithstanding the circuit split on the issue of the Sentencing Commission's authority to promulgate section 3B1.4 without age restrictions, all district courts—no matter in which circuit they reside—have the discretion to abrogate the Sentencing Commission's expansion of the use-of-minor enhancement that makes the defendant's age irrelevant. District courts are not necessarily confronted with a take-it-or-leave-it proposition to utilize the no-authority option. On the contrary, Part VI explains that regardless of a court's—or even the Court's—position on the soundness of adopting the no-authority option, every district court has the authority under an advisory-guidelines system to reject the application of the use-of-minor enhancement to defendants under the age of twenty-one. First, district courts can utilize what this Article calls the “policy-disagreement option” to explicitly lodge a policy disagreement against the Sentencing Commission's expanded use-of-minor enhancement by rejecting its application to defendants under the age of twenty-one. Second, district courts can decide, on a case-by-case basis, to adopt what this Article calls the “individualized-assessment option” to determine that section 3B1.4's two-level use-of-minor enhancement should not be applied to a particular defendant under twenty-one years of age in a particular case because it would result in an excessive sentence.

No matter whether federal courts ultimately adopt the no-authority option, policy-disagreement option, or individualized-assessment option, this Article should equip federal courts with a three-part analytical framework that can be used to reject the Sentencing Commission's expansion of its authority and open defiance of Congress's intent. By choosing one of these three options, federal courts will carry out Congress's intent to apply the use-of-minor enhancement only to defendants at least twenty-one years of age.

II. CONGRESS DIRECTED THE SENTENCING COMMISSION TO PROMULGATE A USE-OF-MINOR ENHANCEMENT FOR DEFENDANTS AT LEAST TWENTY-ONE YEARS OF AGE WHO USE MINORS UNDER

THE AGE OF EIGHTEEN TO COMMIT FEDERAL OFFENSES

Eighteen years ago, Congress enacted the substantial Violent Crime Control and Law Enforcement Act of 1994 (Crime Bill).¹² According to the United States Department of Justice, the Crime Bill took “six years of hard work” to enact and “is the largest crime bill in the history of the country.”¹³ As a small part of this massive piece of legislation, Congress drafted eight sections specifically dealing with youth violence.¹⁴ In section 140008, entitled “Solicitation of Minor to Commit Crime,” Congress directed the Sentencing Commission to “promulgate guidelines or amend existing guidelines to provide that a defendant *21 years of age or older* who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant *involved a minor* in the commission of the offense.”¹⁵ Congress further instructed the Sentencing Commission as follows:

provide that the guideline enhancement . . . shall apply for any offense in relation to which the defendant has solicited, procured, recruited, counseled, encouraged, trained, directed, commanded, intimidated, or otherwise used or attempted to use any person *less than 18 years of age* with the intent that the *minor* would commit a Federal offense.¹⁶

A fair characterization of this congressional directive is that Congress intended that the Sentencing Commission adopt a use-of-minor enhancement for adult defendants at least twenty-one years of age who use minors under the age of eighteen to commit federal offenses.

Congress did not simply direct the Sentencing Commission to adopt a use-of-minor enhancement with a twenty-one-year-old age restriction without providing additional instruction. Congress also charged that when promulgating a guideline, the Sentencing Commission must consider, among other factors, “the possible relevance of the *proximity in age* between the offender and the minor(s) involved in the offense.”¹⁷ By instructing the Sentencing

12. Pub. L. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered titles of U.S.C.).

13. U.S. Dep’t of Justice, Fact Sheet, *Violent Crime Control and Law Enforcement Act of 1994* (Oct. 24, 1994), <http://www.ncjrs.gov/txtfiles/billfs.txt>.

14. See §§ 140001–140008, 108 Stat. at 2031–33.

15. *Id.* § 140008(a)(1) (emphasis added).

16. *Id.* § 140008(a)(2) (emphasis added).

17. *Id.* § 140008(b)(4) (emphasis added); see also *id.* § 140008(b)(1)–(3) (charging the Sentencing Commission to also consider the following: “(1) the severity of the crime that the defendant intended the minor to commit; (2) the number of minors that the defendant

Commission to consider the proximity in age between the defendant and the minor, Congress continued to reveal its intent that the age of the defendant is important in applying a use-of-minor enhancement. Congress revealed its belief that the greater the age proximity, the greater the importance that a defendant at least twenty-one years old should receive enhanced punishment for using a minor to commit a federal offense. Congress expressed less concern about enhanced punishment in cases where a defendant and a minor are close to being the same age. Notably, Congress revealed no intent that the Sentencing Commission should consider eliminating the relevance of the defendant's age or the proximity in age between the defendant and the minor used.

Viewing all pieces of the congressional directive—the age restriction of “21 years of age or older” for defendants, the age restriction of less than eighteen years of age for minors, the “proximity in age” restriction, and the directive's title—Congress revealed its intent to punish adults at least twenty-one years of age who use younger minors under the age of eighteen to commit federal offenses. If the Sentencing Commission chose to increase punishment for adult defendants much older than the minor used, then nothing in the directive foreclosed such a decision. If the Sentencing Commission chose to eliminate the relevance of a defendant's age altogether, however, then Congress's efforts to focus enhanced punishment on adult defendants who are older than the minors used are rendered impotent. The most reasonable interpretation of the congressional directive's plain language indicates an intent to enhance the sentences of adults who corrupt young people by recruiting them into crime; it does not indicate an intent to enhance sentences for defendants who are nearly the same age or younger than the minors used. Although the term *use-of-minor enhancement* readily rolls off the lips, it actually misdirects the debate by scrubbing any reference to an age restriction for defendants. Perhaps a term that more accurately reflects Congress's intent would be a *corruption-of-a-minor-by-an-adult-at-least-twenty-one-years-of-age enhancement*. Notwithstanding the technical accuracy of that term, it is not exactly a tongue-friendly description of the enhancement.

used or attempted to use in relation to the offense; [and] (3) the fact that involving a minor in a crime of violence is frequently of even greater seriousness than involving a minor in a drug trafficking offense, for which the [G]uidelines already provide a two-level enhancement”).

No matter the proper coinage for the enhancement, a simple reading of the directive's text shows that Congress purposefully listed the defendant's age and the proximity in age between the defendant and minor to ensure that the Sentencing Commission promulgated an enhancement to punish the appropriate defendants who use minors to commit federal offenses. Can Congress's directive to the Sentencing Commission to promulgate a use-of-minor enhancement be reasonably interpreted to encompass every defendant, regardless of age? Is it a reasonable interpretation of the plain language of section 140008's directive to conclude that Congress did not in any way restrict the Sentencing Commission from adopting a use-of-minor enhancement that eliminated the relevance of the defendant's age? As described in Part III, the Sentencing Commission eliminated any age restriction for defendants when it promulgated the use-of-minor enhancement, making the defendant's age entirely irrelevant in sentencing.

III. SENTENCING COMMISSION PROMULGATED A USE-OF-MINOR ENHANCEMENT TO APPLY TO ALL DEFENDANTS, REGARDLESS OF AGE

Acting under the specific congressional directive detailed in section 140008, the Sentencing Commission faithfully implemented a sentence enhancement for adult defendants at least twenty-one years of age who use minors to commit federal offenses. The Sentencing Commission did not stop with adult defendants who are at least twenty-one years old, however. By its own admission, the Sentencing Commission promulgated a use-of-minor enhancement "in a slightly broader form"¹⁸ than directed by Congress: "If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels."¹⁹ The result of the Sentencing Commission's broadening of the enhancement's reach is that every defendant, regardless of age, will receive the same two-level enhancement for using a minor to commit a federal offense. The Sentencing Commission rendered the defendant's age and the proximity in age between the defendant and minor irrelevant for sentencing purposes.

18. U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 527 (2003).

19. U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2011).

The process of promulgating the use-of-minor enhancement (or any guideline for that matter) did not end with the Sentencing Commission's creation of the enhancement. The Sentencing Commission is required to submit its proposed guidelines and reasons for promulgating them to Congress.²⁰ Congress gave itself a 180-day review period during which it can reject, modify, or approve a proposed guideline.²¹ If Congress takes no action on a proposed guideline, then it automatically takes effect.²² In submitting the use-of-minor enhancement without age restrictions to Congress, the Sentencing Commission provided shallow support for the enhancement: "Reason for Amendment: This amendment implements the directive in Section 140008 of the [Crime Bill] (pertaining to the use of a minor in the commission of an offense) in a slightly broader form."²³ The Sentencing Commission provided no policy reasons why it eliminated age as a relevant factor for sentencing defendants who use minors to commit federal offenses. Congress did not take action to reject or modify the Sentencing Commission's use-of-minor enhancement; therefore, the proposed guideline automatically took effect as section 3B1.4.

Although Congress did not reject the Sentencing Commission's use-of-minor enhancement's "slightly broader form," Congress did express its disapproval for another proposed guideline that was submitted to Congress along with the use-of-minor enhancement.²⁴ Specifically, Congress reiterated its support for treating crack cocaine much harsher than powder cocaine under the Guidelines by disapproving the Sentencing Commission's proposed guideline "that would have eliminated the 100:1 sentencing ratio that treats one who deals in a given quantity of crack cocaine the same as it treats one who deals in 100 times as much powder cocaine."²⁵

By laying out the congressional directive and the Sentencing Commission's response, the stage has been set for a discussion of whether the Sentencing Commission exceeded its congressional authority by scrubbing any reference to the age of a defendant in

20. See 28 U.S.C. § 994(p) (2000).

21. See *id.*

22. See *id.*

23. Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25086 (May 10, 1995).

24. See *id.* at 25076-77 (proposing a guideline to lessen the sentencing disparities between crack cocaine and powder cocaine).

25. *United States v. Butler*, 207 F.3d 839, 845 n.1 (6th Cir. 2000); see also Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995).

imposing the same enhanced sentence for every defendant who uses of a minor to commit a federal offense. This Article asks whether Congress's directive—including its plain language, legislative history, and the context in which it was enacted—can be fairly interpreted as depicting an intent to apply the same two-level use-of-minor enhancement to every defendant regardless of the defendant's age or the proximity in age between the defendant and the minor used. Federal courts have disagreed on the answer to this consequential question. This Article contends that Congress used clear, direct, unambiguous, and specific language to ensure that the age of the defendant was relevant for sentencing purposes, particularly when the plain language of the directive's text is read in context with other parts of the Crime Bill and the directive's legislative history. Based on Congress's intent to enhance sentences only for adult defendants at least twenty-one years of age who use minors to commit federal offenses, the Sentencing Commission exceeded its authority by ignoring Congress's focus on age and instead promulgated a use-of-minor enhancement that applies the same enhancement to every defendant—no matter how old or how young.

IV. FEDERAL COURTS SPLIT ON WHETHER THE SENTENCING COMMISSION EXCEEDED ITS AUTHORITY IN PROMULGATING SECTION 3B1.4 WITHOUT AN AGE RESTRICTION FOR DEFENDANTS

Courts have inconsistently interpreted the scope of the Sentencing Commission's authority when promulgating section 3B1.4's use-of-minor enhancement. The United States Court of Appeals for the Sixth Circuit held that the Sentencing Commission exceeded its authority for two reasons.²⁶ First, Congress's words must have meaning; they lose meaning when the Sentencing Commission ignores Congress's plain language—a use-of-minor enhancement without any age restriction contradicts the congressional directive to include an age restriction. Second, Congress's intent is gleaned from the directive's text and legislative history, not from its silent failure to reject the Sentencing Commission's expanded enhancement during a review period. Four circuit courts—the United States Courts of Appeals for the Fourth, Seventh, Eighth, and Tenth Circuits—determined that the Sentencing Commission acted within its significant discretion in adopting the enhancement without any age

26. See *Butler*, 207 F.3d at 849.

restrictions for defendants.²⁷ These courts provide one or more of the following reasons for deferring to the Sentencing Commission's decision to eliminate the relevance of a defendant's age in applying the use-of-minor enhancement. First, the enhancement is technically not at odds with the directive because defendants at least twenty-one years of age will always receive the enhancement. Second, the Sentencing Commission could have determined that every defendant—regardless of age—can exert as much negative influence over minors as twenty-one-year-old defendants. Third, because Congress did not reject the Sentencing Commission's expanded enhancement during the 180-day review period, Congress displayed its true intent not by the language used in the directive, but by its silence in not rejecting the proposed guideline. Finally, a federal district court in New York refused to apply the use-of-minor enhancement to a defendant who was himself a minor and used minors who were older than he to commit a federal offense. This Article will now explore these decisions in turn.

A. *Sixth Circuit Held that the Sentencing Commission Exceeded Its Congressional Authority in Promulgating Section 3B1.4 Without an Age Restriction*

Of the federal circuit courts that have addressed the issue of whether section 3B1.4 constitutes a reasonable implementation of Congress's directive, the Sixth Circuit is the only court to hold that the Sentencing Commission had no authority to enact it without age restrictions.²⁸ Similar to the split among the circuit courts, the issue did not enjoy unanimity from the Sixth Circuit panel that decided it.²⁹

In *United States v. Butler*, twenty-year-old Julius Retic and a seventeen-year-old minor robbed a bank.³⁰ Retic pleaded guilty to armed bank robbery and to the use of a firearm during the robbery.³¹ Imposing a two-level use-of-minor enhancement under section 3B1.4,

27. See *United States v. Wingate*, 369 F.3d 1028, 1031–32 (8th Cir. 2004), *opinion reinstated*, 415 F.3d 885, 889 (8th Cir. 2005); *United States v. Kravchuk*, 335 F.3d 1147, 1158–59 (10th Cir. 2003); *United States v. Murphy*, 254 F.3d 511, 513 (4th Cir. 2001); *United States v. Ramsey*, 237 F.3d 853, 855–56 (7th Cir. 2001).

28. See *Butler*, 207 F.3d at 849.

29. See *id.* at 841 (explaining that the separate opinion of Judge Jones in Part II.B.1. is the majority opinion and “constitutes the opinion of the court on the issue addressed in Part II.B.1.”).

30. *Id.* at 842.

31. *Id.*

the district court sentenced Retic to 120 months' imprisonment.³² On appeal, Retic argued that because section 3B1.4 applies to defendants of any age, it exceeded the scope of Congress's mandate to the Sentencing Commission that included a twenty-one-year-old age restriction.³³

Over the voice of a dissenting judge, the two-judge majority concluded "that the United States Sentencing Commission failed to comport with a *clear congressional directive* when it eliminated the requirement that the defendant be at least twenty-one years old to be subject to enhancement under [section] 3B1.4."³⁴ Evincing a clear understanding that Congress delegated significant discretion to the Sentencing Commission to promulgate guidelines, the Sixth Circuit observed that the Supreme Court has made clear that the Sentencing Commission must still "bow to the specific directives of Congress."³⁵ Citing its own Sixth Circuit precedent, the court further recognized that courts must only defer to the Sentencing Commission's interpretation of a congressional directive if the interpretation is "sufficiently reasonable."³⁶

Confronting the reasonableness of the Sentencing Commission's decision to remove age restrictions from the use-of-minor enhancement, the Sixth Circuit stated that it could "not conceive of a clearer example than that presented here where the [Sentencing] Commission has so flatly ignored a clear Congressional directive."³⁷ Despite the clear directive to the Sentencing Commission to promulgate guidelines "to provide that a defendant *21 years of age or older* who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense,"³⁸ the Sixth Circuit was alarmed that "the [Sentencing] Commission simply removed the age restriction."³⁹ "Looking at the face of both the directive and the guideline," the court declared that it was "not convinced that the [Sentencing] Commission's interpretation of the age restriction is 'sufficiently reasonable.'"⁴⁰ Instead, the court concluded that the Sentencing

32. *See id.*

33. *See id.* at 844.

34. *Id.* at 849 (emphasis added).

35. *Id.* at 850 (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)).

36. *Id.* (quoting *United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995)).

37. *Id.*

38. *Id.* (quoting Pub. L. No. 103-322, § 140008(a)(1), 108 Stat. 1796, 2033 (1994)).

39. *Id.*

40. *Id.*

Commission's proposed guideline "was a direct overruling of an explicit Congressional declaration because it eliminated the age limit, lock, stock[,] and barrel."⁴¹

The Sixth Circuit flatly rejected the Sentencing Commission's characterization that it simply implemented the congressional directive in a "slightly broader form."⁴² The court believed that by "reflexively relying" on how the Sentencing Commission characterized its own proposed guideline, courts would, in effect, be improperly abandoning their judicial role in deciding whether a guideline accurately reflected congressional intent.⁴³ The court was hardly persuaded that the wholesale elimination of the minimum-age requirement was simply "slightly broader" than Congress's directive.⁴⁴ Calling section 3B1.4 "far more dramatic" than Congress's directive, the court highlighted some foreseeable consequences stemming from the elimination of an age restriction: "As this case demonstrates, without the age limit that Congress originally authorized, the guideline introduces a whole host of situations where defendants under age twenty[-]one can receive enhancements for engaging in criminal activities with youths of similar age, or perhaps even older than the defendants themselves."⁴⁵

The Sixth Circuit explained that the age restriction was "a core aspect" of the congressional directive to the Sentencing Commission.⁴⁶ The court surmised that Congress created the age restriction out of a "concern that the existence of an age differential allows an older, adult party to influence a minor to engage in wrongful or dangerous behavior."⁴⁷ The court explained that it "is hardly a novel concept" for the law to consider the ages of an adult defendant and a minor accomplice in lawmaking.⁴⁸

41. *Id.*

42. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 527 (2003)).

43. *Id.* (citing *United States v. LaBonte*, 520 U.S. 751, 757 (1997)).

44. *Id.* at 850-51.

45. *Id.*

46. *Id.* at 851.

47. *Id.*; see also *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1114 (10th Cir. 2008) (revealing that the district court believed that "[t]he spirit of the [section 3B1.4] enhancement is to punish adults who exploit minors" such that section 3B1.4 does not apply to a defendant who begins using minors when the defendant is also a minor).

48. *Butler*, 207 F.3d at 851 (citing MODEL PENAL CODE § 213.3(1)(a) (Proposed Official Draft 1962); CAL. PENAL CODE § 261.5(d) (West 2008) ("Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony . . .")).

Finally, the Sixth Circuit confronted the so-called congressional silence theory that Congress's failure to reject the Sentencing Commission's expanded use-of-minor enhancement during the review period revealed that Congress implicitly accepted the enhancement as a true reflection of congressional intent.⁴⁹ Noting that the Supreme Court has counseled that "[n]ot every silence is pregnant" and that silence is not dispositive "when it is contrary to all other textual and contextual evidence of congressional intent," the Sixth Circuit determined that "the original twenty-one[-]year[-]old age limit is sufficiently clear to overcome an argument from silence."⁵⁰ Expounding on why it would not rely on the congressional silence theory to allow the Sentencing Commission to remove all age restrictions from a use-of-minor enhancement, the Sixth Circuit explained that to do "so would lead courts wholly to abandon their role of assessing whether enacted guidelines comport with congressional intent."⁵¹ The court cautioned that because every proposed guideline is subject to congressional review and every enacted guideline has survived congressional rejection, blind adherence to the congressional silence theory "would thus dictate that all enacted guidelines inherently satisfied [c]ongressional intent, and would eliminate [the judiciary's] vital role . . . of squaring the enacted guideline with the original statutory language."⁵² The Sixth Circuit pleaded for courts to "hold[] the [Sentencing] Commission accountable as an agency of limited powers."⁵³

Not all of the judges on the *Butler* panel agreed that the Sentencing Commission had exceeded its authority in promulgating section 3B1.4. Judge Clay issued a dissenting opinion in which he first acknowledged that Congress had limited the enhancement to defendants at least twenty-one years of age, while the Sentencing Commission dropped the age restriction entirely, "rendering the sentence enhancement applicable to defendants of all ages."⁵⁴ Judge Clay further acknowledged that "[a]t first blush, it appears . . . that Congress intended—and provided in *unambiguous terms*—for sentence enhancement for solicitation of a minor to commit crime

49. *See id.*

50. *Id.* (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991)).

51. *Id.*

52. *Id.*

53. *Id.* at 852 (first alteration in original) (quoting Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1748 (1992)).

54. *Id.* at 844 (Clay, J., dissenting).

only for defendants age 21 and older.”⁵⁵ Judge Clay even declared, “A clearer expression of congressional intent is unimaginable.”⁵⁶ Conceding that there is “some facial appeal” to the argument that defendants under the age of twenty-one should not receive a use-of-minor enhancement, Judge Clay was not persuaded that the plain language of Congress’s directive controls the issue.⁵⁷

According to Judge Clay, “Congress’[s] expression of intent as to [section] 3B1.4 did not begin and end with its enactment of [section] 140008.”⁵⁸ Instead of focusing on the congressional directive as indicative of Congress’s intent, Judge Clay chose to focus on the 180-day review period, under which Congress’s failure to reject the Sentencing Commission’s proposed guideline carried consequences.⁵⁹ Judge Clay explained that the Sentencing Commission had expressly informed Congress that it had implemented the congressional directive in a “slightly broader form,” which did not persuade Congress to reject the proposed guideline.⁶⁰ Judge Clay also found it telling that Congress did not reject the proposed use-of-minor enhancement even though Congress rejected some of the Sentencing Commission’s other proposed guidelines that were submitted at the same time.⁶¹

Based on “this historical backdrop” and “context,” Judge Clay determined that Congress’s failure to reject the Sentencing Commission’s use-of-minor enhancement “even when notified that it was different from the directive enacted in [section] 140008, Congress, in effect, approved of [the enhancement] as an appropriate reflection of its policy on the sentencing of those who involved minors in their crimes.”⁶² Judge Clay actually agreed that Congress’s “initial intent” to limit the enhancement to defendants at least twenty-one years old would have been at odds with section 3B1.4.⁶³ But Judge Clay was persuaded that “the history behind the passage of [section] 3B1.4 compels a finding that the intent of Congress *changed*” when “Congress ultimately failed to express disagreement with expansion of

55. *Id.* at 845 (emphases added).

56. *Id.*

57. *Id.* at 844–45.

58. *Id.* at 845.

59. *Id.* at 844.

60. *Id.* at 845 (quoting Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25086 (May 10, 1995)).

61. *See id.*

62. *Id.* at 845–46.

63. *Id.* at 846.

the enhancement to include defendants under the age of [twenty-one].”⁶⁴ Based on this reasoning, Judge Clay would have held that section 3B1.4 was not at odds with the intent of Congress.⁶⁵

Less than two years after *Butler*, the Sixth Circuit again confronted the issue of whether the Sentencing Commission exceeded its authority in promulgating section 3B1.4. In *United States v. Borkowski*, Melisa Borkowski pleaded guilty to uttering counterfeit currency when she was eighteen years old.⁶⁶ Because Borkowski had used two minor friends, one who was seventeen years old and the other sixteen, the district court applied a two-level use-of-minor enhancement under section 3B1.4.⁶⁷ The enhancement resulted in a sentencing range of between twenty-one and twenty-seven months’ imprisonment.⁶⁸ The district court sentenced Borkowski to twenty-one months’ imprisonment.⁶⁹

Borkowski appealed her sentence, claiming that section 3B1.4’s use-of-minor enhancement exceeded congressional authorization.⁷⁰ Addressing the issue on appeal, the Sixth Circuit explained that after oral arguments but before the panel could issue a decision, another Sixth Circuit panel had already decided *Butler*, which “explicitly” held that section “3B1.4 was invalid to the extent that it applied to criminals who committed their crimes when under the age of twenty-one.”⁷¹ The *Borkowski* panel noted that this issue had split the *Butler* panel and that the two-judge majority decision had rejected “the cogent reasoning” of the lone dissenting judge.⁷² Gleefully noting that three circuit courts had disagreed with *Butler*,⁷³ such that the Sixth

64. *Id.* (emphasis added).

65. *See id.*

66. 21 F. App’x 345, 346 (6th Cir. 2001).

67. *See id.*

68. *See id.*

69. *Id.*

70. *Id.*

71. *Id.* (citing *United States v. Butler*, 207 F.3d 839, 849–52 (6th Cir. 2000)).

72. *Id.* (citing *Butler*, 207 F.3d at 844–46).

73. *See id.* at 346–47 (citing *United States v. Ramsey*, 237 F.3d 853, 855–58 (7th Cir. 2001); *United States v. McClain*, 252 F.3d 1279, 1287–88 (11th Cir. 2001); *United States v. Murphy*, 254 F.3d 511, 512–13 (4th Cir. 2001)). The assertion that the Eleventh Circuit had disagreed with *Butler* on the Sentencing Commission’s authority to promulgate a use-of-minor enhancement without an age restriction is inaccurate. As seen in Part IV.B., the Eighth Circuit has also made the same erroneous assertion about the Eleventh Circuit. *See United States v. Ramirez*, 376 F.3d 785, 787–88 (8th Cir. 2004) (citing *United States v. McClain* as support that the Eleventh Circuit, among other circuits, has concluded that the Sentencing Commission did not exceed its authority when the Commission determined that section 3B1.4 applies to those under the age of twenty-one). In *McClain*, a case involving adults who used a sixteen-year-old minor to cash counterfeit checks, the

Circuit was “clearly in a minority,” the *Borkowski* panel applauded the notion that the “clear circuit conflict” would ultimately have to be resolved by the Supreme Court.⁷⁴ Notwithstanding the panel’s obvious distaste for the *Butler* decision, the panel in *Borkowski* nonetheless acknowledged that it was “bound by the holding in *Butler*.”⁷⁵ As such, the court held that it had no choice but to “reverse and remand with instructions for the district court to resentence in accordance with this opinion and with *Butler*.”⁷⁶ When the two-level enhancement is not used in calculating Borkowski’s offense level, her sentencing range dropped from between twenty-one and twenty-seven months’ imprisonment to between fifteen and twenty-one months’ imprisonment.

The precedential value of *Butler* is not as clear as the *Borkowski* court believed. Instead, it is controversial, at least to me, to declare that the Sixth Circuit actually held in *Butler* that the Sentencing Commission exceeded its authority when it promulgated section 3B1.4. Although it is true that two judges agreed with that conclusion while one judge did not, all three judges on the panel agreed that section 3B1.4’s use-of-minor enhancement should not have been applied to Retic because the prosecution had failed to prove that Retic actually used a minor in committing the federal offense.⁷⁷

Eleventh Circuit did not actually address the issue of whether the Sentencing Commission had acted within its authority in promulgating section 3B1.4. *See McClain*, 252 F.3d at 1281–82. Instead, the Eleventh Circuit only focused on (1) whether section 3B1.4 contains a scienter requirement, i.e., whether the defendant knew that he was using a minor, and (2) “whether section 3B1.4 applies to the jointly undertaken criminal activity of co-conspirators.” *Id.* at 1284–88. Perhaps surprisingly, however, the court seemed to actually dismiss the idea that Congress intended to support the Sentencing Commission’s broadening of the use-of-minor enhancement to include every defendant, regardless of age:

Ideally, broad application of section 3B1.4 will deter *adult* criminals from committing crimes with even those persons who, although they are over the age of seventeen, *appear* to be minors. We believe that a construction promoting this broad deterrent effect, rather than one encouraging willful blindness, effectuates Congress’s intent in enacting the sentencing provision.

Id. at 1286–87 (first emphasis added). This understanding tends to imply that the Eleventh Circuit believes that section 3B1.4 is only valid to the extent that it applies to adult defendants, and not to all defendants regardless of age. Regardless of one’s ability to read tea leaves about the Eleventh Circuit’s presumed position on the section 3B1.4 issue, it is impossible to firmly place the Eleventh Circuit on either side of this debate.

74. *See Borkowski*, 21 F. App’x at 347.

75. *Id.*

76. *Id.*

77. *See United States v. Butler*, 207 F.3d 839, 846–49 (6th Cir. 2000) (stating that Judges Jones and Cole concurred “in the judgment announced by Judge Clay, and with

Because the panel unanimously held that the district court had erroneously applied a use-of-minor enhancement under section 3B1.4, there was no reason to seek a point of disagreement by addressing the Sentencing Commission's authority to promulgate section 3B1.4. The split decision on the Sentencing Commission's authority was arguably unnecessary—why resolve a controversial, circuit-splitting, and panel-splitting issue when the resolution of the issue is not required to decide the case? Had the *Borkowski* panel applied that line of reasoning, it would not have been bound by the apparent dicta from the *Butler* panel. Instead, the *Borkowski* panel could have addressed the issue anew, giving whatever deference it wanted to the two opinions emanating from the *Butler* panel. Given the rhetoric used by the *Borkowski* panel, it is likely that the Sixth Circuit would not have found itself as the lone dissenter on the section 3B1.4 issue. That distinction would have been left for this Article.

Fortunately, there is one circuit opinion—the Sixth Circuit's fractured opinion in *Butler*—that creates a circuit split and lends judicial support to this Article's contention that the Sentencing Commission exceeded its authority in promulgating section 3B1.4. As with any legal conclusion, however, the persuasiveness of the reasoning in reaching that conclusion is far more important than simply looking around to see who else agrees with it (but it certainly helps when impressive authorities agree with your reasoning and legal conclusion). Part V of this Article will expound on the *Butler* court's reasoning and demonstrate why the Sixth Circuit—even though in a clear minority among the federal circuit courts—correctly determined that the Sentencing Commission exceeded its congressional authority and defied Congress's intent by promulgating a use-of-minor enhancement that made the age of the defendant entirely irrelevant.

B. Fourth, Seventh, Eighth, and Tenth Circuits Held that the Sentencing Commission Acted Within Its Congressional Authority in Promulgating Section 3B1.4 Without an Age Restriction

Notwithstanding the Sixth Circuit's conviction that the Sentencing Commission failed to follow Congress's directive, the vast amount of judicial authority supports the Sentencing Commission's promulgation of section 3B1.4 in its expanded form. The Fourth,

most of Judge Clay's well-reasoned opinion," including Judge Clay's opinion as it related to the inapplicability of section 3B1.4 to Retic).

Seventh, Eighth, and Tenth Circuits have all held that the Sentencing Commission acted within its broad authority in promulgating section 3B1.4 without age restrictions for defendants.

The Seventh Circuit was the first circuit court to hold that the Sentencing Commission did not abuse its discretion in promulgating section 3B1.4 to include all defendants, regardless of age, who use minors to commit federal offenses.⁷⁸ In *United States v. Ramsey*, nineteen-year old Joseph Ramsey used his sixteen-year old brother to sell crack cocaine to an undercover federal agent.⁷⁹ After Ramsey pleaded guilty to distributing crack cocaine, the district court applied a two-level enhancement under section 3B1.4 for using a minor to commit the federal offense and sentenced Ramsey to 121 months' imprisonment.⁸⁰ Even though Ramsey had failed to challenge the Sentencing Commission's authority to promulgate section 3B1.4 before the district court, the Seventh Circuit nonetheless felt "compelled to address the validity of section 3B1.4."⁸¹

Rejecting the Sixth Circuit's holding in *Butler*, the Seventh Circuit held "that the Sentencing Commission did not abuse its discretion when it promulgated section 3B1.4 to include all defendants, regardless of age."⁸² The court recognized that even though Congress had directed the Sentencing Commission to promulgate a guideline that applied to defendants twenty-one years of age or older, the Sentencing Commission nonetheless eliminated the age requirement altogether and made it "applicable to defendants of all ages."⁸³ Setting the stage to explain its holding, the Seventh Circuit noted that the Sentencing Commission "enjoys significant discretion in formulating guidelines."⁸⁴ The court also evinced an understanding that the Sentencing Commission's discretion is not limitless: "Broad as that discretion may be . . . it must bow to the specific directives of Congress . . . [as reflected in] the statutory language."⁸⁵ With that understanding of the scope of the Sentencing Commission's discretion to promulgate guidelines, the Seventh Circuit asked "whether the [Sentencing] Commission obeyed the specific directive of Congress . . .

78. See *United States v. Ramsey*, 237 F.3d 853, 855–56 (7th Cir. 2001).

79. See *id.* at 854–55.

80. See *id.* at 855.

81. *Id.*

82. *Id.* at 855–56.

83. See *id.* at 856.

84. *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989)).

85. *Id.* (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)).

that an enhancement be applied to all defendants age twenty-one and older.”⁸⁶

The Seventh Circuit first acknowledged that the Sixth Circuit had decided that section 3B1.4 could not be applied to defendants younger than twenty-one years of age because the Sentencing Commission’s total elimination of the age restriction constituted “a direct overruling of an explicit Congressional declaration.”⁸⁷ But the Seventh Circuit did not see things as black and white as the Sixth Circuit did. From the Seventh Circuit’s viewpoint, “the [Sentencing] Commission did promulgate a guideline that encompassed the directive of Congress.”⁸⁸ According to the court, section 3B1.4 follows the congressional directive that “defendants age twenty-one or older will receive a sentence enhancement,” and that it “*simply expanded* the provision to encompass a greater number of defendants” who are younger than twenty-one.⁸⁹ The Seventh Circuit opined that because the guideline was not “at odds” with Congress’s directive, the Sentencing Commission enjoyed the discretion “to enlarge the category of defendants to whom” the enhancement would apply.⁹⁰

The Seventh Circuit then noted that the Sentencing Commission is required to consider more than just Congress’s directive when amending the Guidelines.⁹¹ The court explained that in promulgating guidelines, the Sentencing Commission must consider a defendant’s age,⁹² “the possible relevance of the proximity in age between the offender and the minor(s) involved in the offense,”⁹³ and how best to ensure that sentences are uniform across the country.⁹⁴ The Seventh Circuit speculated that “[i]t is possible that . . . the [S]entencing [C]ommission concluded that a nineteen[-]year old defendant” can exert as much influence over and cause the same amount of harm to a minor as a twenty-one year old defendant, requiring “equal punishment” under the Guidelines.⁹⁵

The Seventh Circuit, however, did not view the validity of section 3B1.4 as an open-and-shut issue. The court acknowledged that section

86. *Id.*

87. *Id.* at 856–57 (quoting *United States v. Butler*, 207 F.3d 839, 850 (6th Cir. 2000)).

88. *Id.* at 857.

89. *Id.* (emphasis added).

90. *Id.*

91. *Id.*

92. *Id.* (citing 28 U.S.C. § 994(d)(1) (2000)).

93. *Id.* (quoting the Crime Bill, Pub. L. No. 103-322, § 140008(b)(4), 108 Stat. 1796, 2033 (1994)).

94. *Id.* (citing 28 U.S.C. § 991(b)(1)(B) (1994)).

95. *Id.*

140008's legislative history weakened the conclusion that the Sentencing Commission obeyed Congress's directive in eliminating the age restriction.⁹⁶ Providing a brief insight into the legislative history behind section 140008 (which I will further illuminate in Part V.B.), the Seventh Circuit noted that the congressional directive to enhance the sentences for defendants at least twenty-one years old originally emanated from the Senate version of the provision that would have applied the enhancement to defendants eighteen years of age or older.⁹⁷ The court thus recognized that the Sentencing Commission's enhancement was broader than the congressional directive, which was broader than the original Senate formulation.⁹⁸ That brief foray into legislative history did not dissuade the court from holding that the Sentencing Commission had not overstepped congressional bounds.

As a final leg of the decision's foundational stool, the Seventh Circuit spun the discussion from whether the Sentencing Commission had exceeded its authority by failing to follow the congressional directive to whether Congress implicitly ratified the Sentencing Commission's expansive guideline. Admitting that "it is possible that the [Sentencing] Commission might not have given sufficient weight to the congressional directive," the Seventh Circuit reasoned that Congress had the opportunity to reject section 3B1.4's "slightly broader form."⁹⁹ Because Congress had specifically rejected some of the guidelines that were proposed on the same date as section 3B1.4, but did not reject section 3B1.4, the Seventh Circuit concluded, "Congress implicitly accepted the [Sentencing] Commission's elimination of the age restriction."¹⁰⁰ Based on this reasoning, the Seventh Circuit held, "We thus find that the Sentencing Commission did not misread congressional intent, but rather was exercising reasonable discretion in promulgating a guideline that reaches defendants under age twenty-one."¹⁰¹

Not long after the Seventh Circuit split from the Sixth Circuit, the Fourth Circuit lined up behind the conclusion that the Sentencing Commission had acted within its authority when it promulgated

96. *Id.*

97. *See id.* at 857–58.

98. *See id.* at 858.

99. *Id.* (quoting Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25086 (May 10, 1995)).

100. *Id.*

101. *Id.*

section 3B1.4 without an age restriction.¹⁰² In *United States v. Murphy*, eighteen-year old Demarco Murphy pleaded guilty to armed carjacking offenses.¹⁰³ Imposing a two-level enhancement under section 3B1.4 for using a minor to commit the offenses, the district court sentenced Murphy to 221 months' imprisonment.¹⁰⁴

Following the Seventh Circuit's lead in resolving the issue of whether the Sentencing Commission exceeded its congressional directive in expanding the use-of-minor enhancement for all defendants, the Fourth Circuit concluded that because "section 3B1.4 is not at odds with Congress'[s] directive," the Sentencing "Commission did not exceed its authority in promulgating the guideline."¹⁰⁵ Also noting that Congress gave significant discretion to the Sentencing Commission to formulate guidelines, and recognizing the Sentencing Commission's expertise in sentencing matters, the Fourth Circuit explained that courts must defer to the Sentencing Commission's interpretations of congressional directives if the interpretations are not "at odds" with the directive's plain language.¹⁰⁶ Citing the Seventh Circuit's decision in *Ramsey*, the Fourth Circuit opined that "absent language in Congress'[s] directive limiting the enhancement *only* to defendants [twenty-one] years of age or older, section 3B1.4 is not at odds with the directive, and the [Sentencing] Commission was within its discretion to broaden the category of defendants eligible for the sentence enhancement."¹⁰⁷ According to the Fourth Circuit's reading of the plain language of the directive, Congress simply intended to require the Sentencing Commission to ensure that defendants at least twenty-one years old who use a minor in committing a federal offense receive the sentence enhancement, and the Sentencing Commission complied with this directive.¹⁰⁸ The Fourth Circuit explained that the Sixth Circuit's contrary holding in *Butler* "failed to appreciate that because Congress did not direct that *only* defendants over age [twenty-one] receive the sentence enhancement, it actually did *not* require the [Sentencing] Commission to limit the application of section 3B1.4 to defendants of a certain

102. See *United States v. Murphy*, 254 F.3d 511, 513 (4th Cir. 2001).

103. *Id.* at 512.

104. *Id.*

105. *Id.* at 513 (citing *United States v. Ramsey*, 237 F.3d 853, 857 (7th Cir. 2001)).

106. *Id.* at 512 (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)).

107. *Id.* at 513 (emphasis in original) (citing *United States v. Ramsey*, 237 F.3d 853, 857 (7th Cir. 2001)).

108. See *id.*

age.”¹⁰⁹ The court was not the least bit concerned by the Sentencing Commission’s decision to expand the scope of the directive to provide the same enhancement for every defendant, regardless of age.¹¹⁰

The Tenth Circuit further expanded the circuit split in favor of concluding that the Sentencing Commission had acted within its congressionally delegated authority in promulgating section 3B1.4. In *United States v. Kravchuk*, Ivan Kravchuk was convicted of theft from an automatic teller machine committed when he was eighteen years old.¹¹¹ To commit the federal offense, Kravchuk had used a “gang” of minor coparticipants.¹¹² At sentencing, the district court assessed a two-level use-of-minor enhancement under section 3B1.4 and sentenced Kravchuk to twenty-seven months’ imprisonment.¹¹³ Kravchuk appealed to the Tenth Circuit, arguing that the congressional directive does not authorize sentence enhancements for defendants under the age of twenty-one.¹¹⁴

Interestingly, the Tenth Circuit presented the issue as “whether the sentencing enhancement under [section] 3B1.4 for use of a minor should be applied to defendants aged eighteen to twenty,” even though section 3B1.4 makes absolutely no reference to the age of the defendant.¹¹⁵ The court briefly—and briefly might be a charitably expansive term—recounted the decisions of the Fourth, Sixth, and Seventh Circuits on the issue.¹¹⁶ Explaining that it must give “great deference” to the Sentencing Commission, the Tenth Circuit stated, “There is no direct conflict in the wording of [section 3B1.4] with Congress’s directive that it apply to defendants age twenty-one and over.”¹¹⁷ In addition to this singular statement on its rationale, the Tenth Circuit also stated that it agreed with “the reasoning of the Fourth and Seventh Circuits.”¹¹⁸ Citing the Fourth Circuit’s decision in *Murphy* and the Seventh Circuit’s decision in *Ramsey*, the Tenth Circuit explained that those circuit courts upheld the validity of section 3B1.4 because although “Congress certainly intended the enhancement to apply to those *over* twenty-one,” the congressional

109. *Id.*

110. *See id.*

111. 335 F.3d 1147, 1151 (10th Cir. 2003).

112. *Id.* at 1152.

113. *See id.* at 1151.

114. *See id.* at 1158.

115. *Id.*

116. *See id.*

117. *Id.*

118. *Id.* at 1158–59.

“directive made no mention of any special policy for those *under* twenty-one” such that the “directive then does not conflict with the plain language of the guideline.”¹¹⁹

The Tenth Circuit also relied on the Seventh Circuit’s explanation in *Ramsey* that Congress had implicitly approved section 3B1.4 because Congress had an opportunity to review the guideline and chose “not to modify or otherwise to disapprove of the amendment extending liability for the use of minors to defendants under the age of twenty-one.”¹²⁰ The Tenth Circuit made no effort to explain—or criticize—the Sixth Circuit’s contrary decision in *Butler* or discuss the relevance of the legislative history behind section 140008. Basing its decision mostly on the work of the Fourth and Seventh Circuits, the Tenth Circuit announced that it was joining its “sister circuits in finding that the Sentencing Guidelines’ enhancement under [section] 3B1.4 for the use of a minor may be applied to defendants between the ages of eighteen and twenty-one.”¹²¹

119. *Id.* at 1158 (citing *United States v. Murphy*, 254 F.3d 511, 512–13 (4th Cir. 2001); *United States v. Ramsey*, 237 F.3d 853, 856–57 (7th Cir. 2001)).

120. *Id.* (citing *Ramsey*, 237 F.3d at 858).

121. *Id.* at 1151; In 2008, the Tenth Circuit again confronted section 3B1.4’s use-of-minor enhancement, this time involving a defendant who began using his minor girlfriend to commit a federal offense when the defendant was also a minor:

Defendant–Appellee Louiz Pena-Hermosillo started dealing drugs in 2001 at the age of sixteen. Around this time, he began living with Ms. Janae Kelly, who was twelve. She gave birth to Mr. Pena-Hermosillo’s child just after her fourteenth birthday. She began to perform drug-selling activities a month before the child was born, in April 2003. From that time until Mr. Pena-Hermosillo was arrested two years later, Ms. Kelly sold cocaine and methamphetamine and made between thirty and forty trips to Utah and an unstated number of trips to Colorado to deliver money and retrieve drugs.

United States v. Pena-Hermosillo, 522 F.3d 1108, 1109 (10th Cir. 2008). The defendant, who “was three and a half years older than” his girlfriend, used her to make drug-running trips since she was thirteen, and his use of her “continued for more than a year and a half after his eighteenth birthday.” *Id.* at 1114. Confronted with the argument that section 3B1.4 does not apply to defendants under the age of eighteen who use minors to commit crimes, the Tenth Circuit avoided the issue by explaining that “for more than a year and a half, including most of the conduct on which the government relies, [the defendant] was eighteen or older.” *Id.* at 1115. Notwithstanding the court’s holding that section 3B1.4 applies to defendants at least eighteen years of age, which simply followed circuit precedent from *Kravchuk*, 335 F.3d at 1158 (holding that section “3B1.4 is valid as applied to defendants aged eighteen to twenty”), the court curiously explained that “the three and a half year differences in their ages is surely large enough to satisfy the nonproximity requirement, if there is one.” *Pena-Hermosillo*, 522 F.3d at 1115. Finally, the court pointed out that “the defendant was a junior in high school when [his girlfriend] was still in seventh grade,” which “is a large enough difference in ages to enable him to take advantage of her.” *Id.* at 1115–16. Even though the Tenth Circuit simply followed circuit precedent in holding that section 3B1.4 applied to a defendant at least eighteen, the court displayed some concern that the Sentencing Commission’s promulgation of section 3B1.4 without

Last but not least, the Eighth Circuit expanded the circuit split to four-to-one in favor of deciding that the Sentencing Commission had acted within its congressionally delegated authority in promulgating section 3B1.4 to apply a use-of-minor enhancement to any defendant regardless of age. In *United States v. Wingate*, Peter Wingate pleaded guilty to an armed robbery of a bank.¹²² As part of his robbery scheme, Wingate enlisted the assistance of two minors, one age seventeen and the other age sixteen.¹²³ Even though Wingate was only eighteen years old when he robbed the bank, the district court assessed a two-level enhancement under section 3B1.4 for using a minor to commit the bank robbery, which resulted in a sentence of seventy-eight months' imprisonment.¹²⁴ Wingate appealed to the Eighth Circuit, arguing that "the enhancement for use of a minor under section 3B1.4 exceeds [the Sentencing Commission's] authorizing legislation and does not apply to a defendant under twenty-one years of age."¹²⁵

Acknowledging the Sentencing Commission's discretion and sentencing expertise, the Eighth Circuit explained that "section 3B1.4's wording does not directly conflict with the plain language of Congress's directive, which requires the enhancement apply to defendants age twenty-one and over."¹²⁶ The Eighth Circuit concluded that section 3B1.4 literally "encompassed Congress's directive because . . . defendants over age twenty-one will [still] receive the enhancement."¹²⁷ In the court's view, the expanded enhancement under section 3B1.4 "merely extends the application to defendants under age twenty-one."¹²⁸ Finally, the court reasoned that "[a]lthough Congress stated the guideline 'shall' apply to defendants over twenty-one years old, the guideline does not automatically exclude its application to those under age twenty-one."¹²⁹ The Eighth Circuit declared, "We join the Fourth, Seventh, and Tenth Circuits in holding

age restrictions might conflict with Congress's directive. *See id.* at 1115 ("We need not resolve whether [the] legislative history [behind the congressional directive that makes the defendant's age relevant] prevails over the plain language of the Guideline [which makes age irrelevant].").

122. 369 F.3d 1028, 1029 (8th Cir. 2004), *opinion reinstated*, 415 F.3d 885, 889 (8th Cir. 2005).

123. *See id.*

124. *See id.* at 1030.

125. *Id.*

126. *Id.* at 1031.

127. *Id.*

128. *Id.* (citing *United States v. Ramsey*, 237 F.3d 853, 858 (7th Cir. 2001)).

129. *Id.*

section 3B1.4 is not contrary to the Congressional directive, and section 3B1.4 validly applies to defendants under age twenty-one.”¹³⁰

In an apparent mix-up in identifying recently decided circuit precedent, another Eighth Circuit panel also fully addressed the validity of section 3B1.4 just six weeks after *Wingate* was decided.¹³¹ In *United States v. Ramirez*, Robert Ramirez pleaded guilty to manufacturing methamphetamine when he was nineteen years old.¹³² Because Ramirez had used several minors to commit the federal offense, the district court applied a two-level use-of-minor enhancement and sentenced Ramirez to ninety-three months' imprisonment.¹³³ Before the Eighth Circuit, Ramirez argued “that because he was only nineteen years old at the time of sentencing he was not subject to an upward adjustment for his use of minors to commit a crime” because “the Sentencing Commission exceeded its authority in its decision to apply [section] 3B1.4 to those under the age of twenty-one.”¹³⁴ Providing an extended recitation of the reasoning employed by the Fourth, Sixth, and Seventh Circuits, the Eighth Circuit held “that the Sentencing Commission did not exceed the scope of its delegated authority when it promulgated [section] 3B1.4 to include all defendants, regardless of age,” because section “3B1.4 is not ‘at odds’ with Congress’s directive.”¹³⁵ The Eighth Circuit had (again) rejected the Sixth Circuit’s approach in *Butler* and announced

130. *Id.* at 1032.

131. In *United States v. Ramirez*, the Eighth Circuit made the following telling statement that indicated that the panel that issued the decision was apparently unaware of the *Wingate* panel’s prior decision on the section 3B1.4 issue until the panel actually went to issue its opinion:

We note that on June 2, 2004, another Eighth Circuit panel handed down an opinion addressing this same issue. Our conclusion in the current matter is consistent with the decision of the *Wingate* panel. When read together, the two opinions thoroughly address this court’s position on the scope of the Sentencing Commission’s delegated authority in relation to [section] 3B1.4.

376 F.3d 785, 788 n.3 (8th Cir. 2004) (citation omitted). Had the Eighth Circuit panel in *Ramirez* been aware of the *Wingate* panel’s prior decision, then the *Ramirez* panel would have simply cited *Wingate* as controlling on the section 3B1.4 issue. The *Ramirez* panel’s apparent mix-up in not identifying prior circuit precedent is telling in that two more federal judges—the *Ramirez* panel of judges less Judge Heaney, as discussed in the text below—lined up behind the viewpoint that the Sentencing Commission did not exceed its authority in making the age of the defendant and the proximity in age between the defendant and the minor wholly irrelevant for federal sentencing purposes.

132. *See id.* at 786.

133. *See id.*

134. *Id.*

135. *Id.* at 787–88.

that it had joined “the Fourth, Seventh, Tenth[,] and Eleventh Circuits.”¹³⁶

In a companion case to *Ramirez* that relied on the holdings in both *Wingate* and *Ramirez*, the Eighth Circuit again rejected a challenge to the validity of the expanded use-of-minor enhancement under section 3B1.4.¹³⁷ In *United States v. Harris*, nineteen-year-old Kody Harris used his seventeen-year-old girlfriend to purchase substances used in the manufacture of methamphetamine.¹³⁸ Because Harris had used a minor to commit a federal offense, the district court applied a two-level enhancement under section 3B1.4 and sentenced Harris to 188 months’ imprisonment.¹³⁹ Noting that the Eighth Circuit had already squarely addressed the validity of section 3B1.4 and had held “that the guideline promulgated by the [Sentencing] Commission is not contrary to Congress’s directive,” the Eighth Circuit affirmed Harris’s sentence.¹⁴⁰

Had the *Ramirez* panel decided the section 3B1.4 issue before the *Wingate* panel, however, the Eighth Circuit more than likely would have joined the Sixth Circuit as having been unable to muster a unanimous panel opinion. In a reluctant concurrence based on binding circuit precedent, Judge Heaney separately wrote in *Ramirez*, “I believe the Sentencing Commission exceeded its authority by applying [section] 3B1.4 to defendants less than twenty-one years of age because Congress directed that the enhancement should apply *only* to those twenty-one and over.”¹⁴¹ For support, Judge Heaney found persuasive the legislative history that Congress had “considered and rejected a directive that would apply the enhancement to all defendants eighteen and over, instead settling on one that would apply only to those twenty-one and over.”¹⁴² Because the Eighth Circuit had “decided [in *Wingate*] that the [Sentencing] Commission

136. *Id.* As explained in note 73, the Eighth Circuit’s proclamation that the Eleventh Circuit had decided the section 3B1.4 issue is inaccurate. *See supra* note 73 (explaining how both the Sixth Circuit in *Borkowski* and the Eighth Circuit in *Ramirez* erroneously assert that the Eleventh Circuit has squarely addressed the issue of whether the Sentencing Commission exceeded its authority in promulgating section 3B1.4 without an age restriction).

137. *See United States v. Harris*, 390 F.3d 572, 572–73 (8th Cir. 2004).

138. *Id.* at 572.

139. *Id.*

140. *Id.* at 573–74.

141. *Ramirez*, 376 F.3d at 788–89 (Heaney, J., concurring) (emphasis added).

142. *Id.* at 789 (citing *United States v. Ramsey*, 237 F.3d 853, 857–58 (7th Cir. 2001)).

was within its authority to promulgate the enhancement as it is,” Judge Heaney concurred.¹⁴³

C. *New York District Court Held that the Sentencing Commission Exceeded Congressional Authority in Promulgating Section 3B1.4 by Making It Apply to Defendants Who Are Younger than the Minors Used in Committing the Federal Offense*

Of the five federal circuit courts that have addressed the issue of whether the Sentencing Commission had the authority to promulgate section 3B1.4 without age restrictions for defendants, all of those courts confronted defendants who were not yet twenty-one years old but were still adults over the age of eighteen. A federal district court in New York confronted a case where the defendant was a minor himself when he used other minors to commit a federal offense. In *United States v. Delarosa*, the United States District Court for the Southern District of New York issued an interesting unpublished opinion that sentenced David Delarosa to 188 months' imprisonment for conspiring to distribute and possessing with the intent to distribute heroin.¹⁴⁴ As a seventeen-year old minor, Delarosa had assumed a leadership role of a criminal heroin organization operating out of the Bronx in New York.¹⁴⁵ As a leader of this drug operation, Delarosa employed numerous minor co-conspirators, many, if not all, of whom were actually older than Delarosa.¹⁴⁶ Apparently, Delarosa was able to assume the leadership role despite his age because the criminal enterprise had been “run by Delarosa's father, uncles, and older brother until their arrests.”¹⁴⁷

While prosecutors sought a two-level use-of-minor enhancement, Delarosa countered that such an enhancement was inappropriate “because (1) Congress did not empower the Sentencing Commission to make the adjustment applicable to defendants who are themselves under twenty-one years of age, and (2) because Delarosa was apparently the youngest member of the conspiracy.”¹⁴⁸ The district court recognized that its appellate court, the Second Circuit, had “not yet addressed the question whether the adjustment for use of a minor

143. *Id.* (citing *United States v. Wingate*, 369 F.3d 1028, 1032 (8th Cir. 2004), *opinion reinstated*, 415 F.3d 885, 889 (8th Cir. 2005)).

144. No. 04 CR. 424-1 (RWS), 2006 WL 1148698, at *1 (S.D.N.Y. Apr. 27, 2006).

145. *See id.* at *2.

146. *See id.* at *4.

147. *Id.* at *2.

148. *Id.* at *3-4.

should apply to cases in which the defendant is less than twenty-one years of age.”¹⁴⁹ The district court next acknowledged the federal circuit split:

[T]he Sixth Circuit has held that the enhancement may not be applied to defendants under the age of twenty-one because the Sentencing Commission “failed to comport with a clear Congressional directive,” . . . while the Fourth, Seventh, and Tenth Circuits have concluded that the Guideline’s elimination of the age requirement was a permissible interpretation of Congress’[s] intent.¹⁵⁰

Although the district court found “the Sixth Circuit’s reasoning” in *Butler* “compelling,” the court found it unnecessary “to choose sides in this circuit split.”¹⁵¹ The district court deemed it significant that the decisions by the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits all “involved defendants who, though under the age of twenty-one, were over the age of eighteen, and, even more significantly, were older than the minors whose involvement provided the basis for the enhancements.”¹⁵² According to the district court, those facts “stand in stark contrast to the facts of [Delarosa’s] case, involving a defendant who was a minor himself . . . and was apparently younger than all of the other minors involved in the offense.”¹⁵³ Relying on the Seventh Circuit’s decision in *Ramsey* that “detailed extensively” the Crime Bill’s legislative history, the district court concluded, “Congress never intended the enhancement to apply to a defendant who was younger than the minors he recruited.”¹⁵⁴ Explaining that the Sixth Circuit’s concern in *Butler* “that the existence of an age differential allows an older, adult party to influence a minor to engage in wrongful or dangerous behavior”¹⁵⁵ was not present in Delarosa’s case, the district court held that applying section 3B1.4 to Delarosa “would impermissibly conflict with a clear

149. *Id.* at *5.

150. *Id.* (citing *United States v. Ramirez*, 376 F.3d 785, 788 (8th Cir. 2004), *United States v. Kravchuk*, 335 F.3d 1147, 1158–59 (10th Cir. 2003), *United States v. Murphy*, 254 F.3d 511, 513 (4th Cir. 2001), *United States v. Ramsey*, 237 F.3d 853, 856 (7th Cir. 2001)). Although the *Delarosa* court never explicitly listed the Eighth Circuit as agreeing with the Fourth, Seventh, and Tenth Circuits, it cited the Eighth Circuit’s *Ramirez* case with its cohorts. *See id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* (citing *Ramsey*, 237 F.3d at 857–58).

155. *Id.* (citing *United States v. Butler*, 207 F.3d 839, 851 (6th Cir. 2000) (Clay, J., concurring)).

congressional directive.”¹⁵⁶ Based on this reasoning, the district court did not apply a two-level use-of-minor enhancement to Delarosa’s sentence.¹⁵⁷

D. Sentencing Disparities Will Continue Until the Supreme Court Decides Whether the Sentencing Commission Exceeded Its Authority in Promulgating Section 3B1.4 Without an Age Restriction

This Article contends that only the Sixth Circuit and the New York District Court have correctly decided that the Sentencing Commission exceeded its authority by defying the clear congressional directive to promulgate a use-of-minor enhancement that made the age of the defendant relevant for sentencing purposes. To be sure, the issue of the Sentencing Commission’s authority to promulgate section 3B1.4 without age restrictions has vexed numerous courts and is still alive and well. For example, in a 2010 case out of Iowa, twenty-year old Travis Hawkins used a seventeen-year old minor to try to steal a diamond ring in a nighttime robbery.¹⁵⁸ Hawkins pleaded guilty to possessing a sawed-off shotgun and a firearm with an obliterated serial number in connection with the robbery.¹⁵⁹ Applying a two-level use-of-minor enhancement, the district court calculated a total offense level of 32 and a criminal history category of I, leaving a Guidelines range of 121 to 151 months’ imprisonment.¹⁶⁰ The district court sentenced Hawkins to 121 months in prison.¹⁶¹ On appeal, Hawkins argued that the Eighth Circuit should adopt the Sixth Circuit’s holding in *Butler* “that the use-of-a-minor enhancement does not apply to defendants who committed their crimes when less than twenty-one years old.”¹⁶² Based on the binding precedent of *United States v. Ramirez*, the Eighth Circuit rejected Hawkins’s argument.¹⁶³

The application of the two-level use-of-minor enhancement significantly increased Hawkins’s punishment. If the two-level enhancement had not been applied, Hawkins’s offense level would have been 30. With an offense level of 30 and a criminal history

156. *Id.*

157. *See id.*

158. *See United States v. Jones*, 612 F.3d 1040, 1043, 1048 (8th Cir. 2010).

159. *See id.* at 1043.

160. *See id.* at 1043–44.

161. *Id.* at 1044.

162. *Id.* at 1048 (citing *United States v. Butler*, 207 F.3d 839, 849 (6th Cir. 2000)).

163. *See id.* (citing *United States v. Ramirez*, 376 F.3d 785, 788 (8th Cir. 2004)).

category of I, the guideline's sentencing range would have been between 97 and 121 months' imprisonment.¹⁶⁴ As can readily be seen, Hawkins was subject to two additional years in prison based on the application of the use-of-minor enhancement. The proper resolution of this issue matters.

Additionally, a recent case in Tennessee, which falls in the Sixth Circuit, further revealed that federal courts are still struggling with this issue, even when circuit precedent already controls the issue. Despite the Sixth Circuit's holding in *Butler* that section 3B1.4 cannot be applied to defendants younger than twenty-one years of age,¹⁶⁵ the United States District Court for the Western District of Tennessee still apparently applied a use-of-minor enhancement to Edgar Sanchez, who was eighteen years old when he used two minors to sell drugs.¹⁶⁶

Until the Supreme Court resolves the circuit split and decides whether the Sentencing Commission exceeded its authority in promulgating a use-of-minor enhancement that made the age of a defendant wholly irrelevant, sentencing disparities will continue to exist for defendants who use minors to commit federal offenses depending on where they commit the offenses. Additionally, federal courts will continue to apply use-of-minor enhancements to increase the sentences of defendants under the age of twenty-one (and even under the age of eighteen, for that matter). By providing in-depth analysis of the limited scope of the Sentencing Commission's authority to promulgate a use-of-minor enhancement under the congressional directive, this Article allows federal courts to adopt the no-authority option by providing a strong analytical framework to ensure that only adult defendants at least twenty-one years of age receive the use-of-minor enhancement.

164. See U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2011).

165. See *United States v. Butler*, 207 F.3d 839, 849–51 (6th Cir. 2000).

166. See Brief of Defendant–Appellant at 8, *United States v. Sanchez*, 2009 WL 2390037 (July 24, 2009) (No. 08-6068).

V. BECAUSE THE SENTENCING COMMISSION IGNORED A CLEAR CONGRESSIONAL DIRECTIVE AND DEFIED CONGRESS'S INTENT BY ELIMINATING AGE RESTRICTIONS FROM THE USE-OF-MINOR ENHANCEMENT, DISTRICT COURTS CAN UTILIZE THE NO-AUTHORITY OPTION TO REMEDY THE PROBLEM

In deciding whether the Sentencing Commission exceeded its congressional authority in promulgating section 3B1.4, courts must first understand the nature and scope of the Sentencing Commission's authority. Congress created the Sentencing Commission to promulgate guidelines to be used by district courts when sentencing defendants convicted of federal offenses.¹⁶⁷ Congress requires that the Sentencing Commission only promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute."¹⁶⁸ Federal courts have recognized that the Sentencing Commission enjoys broad discretion in promulgating guidelines, even though such a view was challenged shortly after Congress created the Sentencing Commission. In *Mistretta v. United States*, a criminal defendant argued that the Guidelines are unconstitutional because the establishment of "the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the [Sentencing] Commission to structure the Guidelines."¹⁶⁹ In holding the Guidelines constitutional, the Supreme Court did not dispute that Congress had given "significant discretion" to the Sentencing Commission to promulgate guidelines.¹⁷⁰ The Court made clear, however, that "the [Sentencing] Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period . . . or at any time."¹⁷¹

Although Congress acted within its constitutional authority in granting the Sentencing Commission significant discretion to

167. See 28 U.S.C. § 994(a)(1) (2000).

168. *Id.* § 994(a).

169. 488 U.S. 361, 370 (1989).

170. See *id.* at 377. John Locke expressed a different opinion in his *Two Treatises of Government*:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

JOHN LOCKE, *Two Treatises of Government* § 141 (10th ed. 2005).

171. See *Mistretta*, 488 U.S. at 393–94.

promulgate guidelines, Congress did not bless the Sentencing Commission with “unbounded discretion.”¹⁷² Indeed, the Sentencing Commission must always “bow to the specific directives of Congress.”¹⁷³ To determine whether a guideline accurately carries out congressional intent, courts must review the plain language of a congressional directive;¹⁷⁴ if a guideline is “at odds” with the plain language, the guideline fails.¹⁷⁵

Importantly, in asking whether the Sentencing Commission exceeded its authority in promulgating a guideline pursuant to the plain language of a congressional directive, courts “do not start from the premise that [Congress’s] language is imprecise.”¹⁷⁶ The opposite is true—courts must assume that when Congress drafts legislation, “Congress said what it meant.”¹⁷⁷

Thus, courts must ask whether “Congress said what it meant” when it directed the Sentencing Commission to provide an enhancement for defendants twenty-one years of age or older who use minors to commit federal offenses and to consider the proximity in ages between the defendant and minor. Congress’s plain language does not stand naked, however, as there are other indicators expressing Congress’s intent. The plain language of Congress’s directive, the legislative history behind the directive, and the context in which the directive was created demonstrate that “Congress said what it meant”—the age of the defendant who uses a minor to commit a federal offense matters. Congress’s focus on age was not excess and useless verbiage.

A. *The Sentencing Commission Performed Linguistic Gymnastics to Conclude that the Congressional Directive’s Plain Language Was Ambiguous as to Congress’s Intent to Make the Age of a Defendant Relevant for Purposes of the Use-of-Minor Enhancement*

After reading Parts I through III of this Article, did you believe that the Sentencing Commission complied with the congressional directive to enhance the sentences of defendants at least twenty-one years of age who use minors to commit federal offenses? Did you at

172. See *United States v. LaBonte*, 520 U.S. 751, 753 (1997).

173. *Id.* at 757.

174. See *id.*

175. *Id.*

176. *Id.*

177. *Id.*

least conclude that Congress intended age to be a relevant sentencing factor for purposes of the use-of-minor enhancement? As you studied Part IV's discussion of the reasoning behind the decisions of the federal courts that have addressed this issue, which were more persuasive on the issue of whether section 3B1.4 is at odds with the congressional directive? No matter where you stand at this point, this part of the Article expounds on the reasons why the Sentencing Commission exceeded its authority in promulgating a use-of-minor enhancement that makes the age of the defendant wholly irrelevant.

The first order of business is to compare the plain language that Congress used to direct the Sentencing Commission to promulgate a use-of-minor enhancement for defendants at least twenty-one years old with the Sentencing Commission's "slightly broader" guideline that contains absolutely no reference to the age of the defendant. Does the plain language used by Congress in its directive to the Sentencing Commission reflect clear or ambiguous guidance on Congress's intent to make the age of defendants relevant for sentencing purposes? If the answer is that Congress clearly intended to make the defendant's age a relevant factor in sentencing, then section 3B1.4's wholesale elimination of an age restriction is at odds with the congressional directive. If, on the other hand, Congress failed to demonstrate its intent to make a defendant's age a relevant sentencing factor, then the Sentencing Commission acted within its authority in making the age of the defendant irrelevant for sentencing purposes.

Congress explicitly directed the Sentencing Commission to promulgate a guideline to enhance the sentence for defendants who are at least twenty-one years of age who use minors under the age of eighteen to commit a federal offense. Thus, Congress used age restrictions twice in the directive itself, once to describe the age of the defendant subject to the enhancement and once to describe the age of the minor used in the offense. The ages of the defendant and the minor are not the only examples of Congress's plain language expressing the importance of age restrictions. Congress also explicitly directed the Sentencing Commission to consider the difference in the ages between the adult defendant and the minor used. Admitting that it promulgated a use-of-minor enhancement in a "slightly broader form," the Sentencing Commission eviscerated any age requirement for defendants to receive an enhancement. Under section 3B1.4's use-of-minor enhancement, the age of the defendant is wholly irrelevant, as is the proximity in age between the defendant and the minor used

to commit the offense. The result is that every defendant—no matter how old or how young—will receive the same two-level sentence enhancement for using a minor to commit a federal offense. For example, a forty-year-old adult who uses a seventeen-year-old minor receives the same two-level enhancement as an eighteen-year-old defendant who uses a seventeen-year-old minor who is two or three days younger than the defendant. Did Congress intend that the ages of these two defendants—and the proximity in ages between the defendants and minors—would be wholly irrelevant such that each defendant receives the same enhancement? Additionally, a defendant who is the same age as—or younger than—the minor used will also receive the same two-level sentence enhancement as a defendant who is much older than the minor he used. Do these results comply with Congress's directive? Are they at odds with Congress's intent?¹⁷⁸

In simply reviewing the plain language of the directive, federal courts have been unable to agree on whether the Sentencing Commission exceeded congressional authority in promulgating section 3B1.4. On the one hand, the Sixth Circuit announced that it could “not conceive of a clearer example than that presented here where the [Sentencing] Commission has so flatly ignored a clear [c]ongressional directive” as when it “simply removed the age restriction . . . lock, stock[,] and barrel.”¹⁷⁹ Importantly, the Sixth Circuit was unanimous in concluding that the Sentencing Commission had completely ignored a clear congressional directive, at least when the three judges on the panel looked only at the plain language of the directive. Even Judge Clay, in his dissent in *Butler*, wrote, “At first blush, it appears . . . that Congress intended—and provided in *unambiguous terms*—for sentence enhancement for solicitation of a minor to commit crime [sic] *only* for defendants age 21 and older.”¹⁸⁰ And Judge Clay was hardly lukewarm in his conclusion that Congress unequivocally and clearly directed the Sentencing Commission to

178. Consider the admittedly troubling crime of child pornography as a possible illustration of comparing two defendants engaged in the same conduct to explore whether Congress intended that both defendants would receive the same use-of-minor enhancement. First, seventeen-year-old *A* uses his sixteen-year-old brother to tape sexual relations between two minors. Second, fifty-year-old adult *B* uses a seventeen-year-old minor to tape sexual relations between two minors. Assuming that both *A* and *B* committed federal offenses and used minors to do so, did Congress intend that both *A* and *B* would receive the same two-level sentence enhancement? Did Congress express its intent that the age of the two defendants and the proximity in age between them and the minors used should be irrelevant for sentencing purposes?

179. *United States v. Butler*, 207 F.3d 839, 850 (6th Cir. 2000).

180. *Id.* at 845 (Clay, J., dissenting) (emphasis added).

enhance sentences *only* for defendants at least twenty-one years old, proclaiming, “A clearer expression of congressional intent is unimaginable.”¹⁸¹ In addition to the *Butler* panel’s unanimous conclusion as to the clarity of congressional intent gleaned from the plain language of the congressional directive, Judge Heaney of the Eighth Circuit also concluded that Congress’s intent was that *only* defendants at least twenty-one years of age would receive a use-of-minor enhancement.¹⁸² Finally, although the federal district court in *Delarosa* deemed it unnecessary “to choose sides in this circuit split” based on what the court deemed to be the unique facts of the case in which the defendant was actually younger than the minors used, the court still found “the Sixth Circuit’s reasoning” in *Butler* “compelling.”¹⁸³

Four circuits, on the other hand, have reached the opposite conclusion. The Seventh Circuit—later joined by the Fourth, Eighth, and Tenth Circuits—concluded that Congress’s only expression of intent was that defendants twenty-one years of age or older must receive the enhancement.¹⁸⁴ As long as the Sentencing Commission promulgated an enhancement that ensured that those defendants would receive an enhancement, the Seventh Circuit was content to conclude that anything else that the Sentencing Commission did would also reflect congressional intent. This conclusion encompassed the Sentencing Commission’s ultimate expansion of the use-of-minor enhancement to include every defendant, as opposed to defendants of a certain age, regardless of the proximity in age between the

181. *Id.* Perhaps tellingly, a law student’s published comment on section 3B1.4 expressed a very straightforward reading of Congress’s intent to focus the use-of-minor enhancement only on adults who corrupt minors: “In order to deter *adult* criminals from committing crimes with the assistance of minors, the United States Sentencing Commission adopted section 3B1.4 of the [Guidelines]. Section 3B1.4 is a sentencing enhancement penalty for *adults* who use minors to commit a crime.” John J. DiChello Jr., Comment, *Crossing Textualist Paths: An Analysis of the Proper Textualist Interpretation of “Use” Under Section 3B1.4 of the United States Sentencing Guidelines for “Using” a Minor To Commit a Crime*, 107 DICK. L. REV. 359, 360 (2002) (emphasis added). Indeed, the most basic reading of the plain language of the congressional directive cries out that Congress focused its intent on enhancing sentences for adult criminals who corrupt minors by using them to commit federal offenses.

182. *See* *United States v. Ramirez*, 376 F.3d 785, 788–89 (8th Cir. 2004) (Heaney, J., concurring).

183. *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *5 (S.D.N.Y. Apr. 27, 2006).

184. *See* *United States v. Ramsey*, 237 F.3d 853, 857–58 (7th Cir. 2001). Curiously, the Seventh Circuit expressed skepticism that, without considering Congress’s failure to reject the proposed guideline during the review period, the Sentencing Commission gave “sufficient weight to the congressional directive.” *Id.* at 858.

defendant and the minor. In a much more bold opinion on the scope of the Sentencing Commission's discretion to comply with the congressional directive, the Fourth Circuit suggested that the *only* way that Congress could have limited the Sentencing Commission's discretion was by using the word *only* in front of the age of twenty-one.¹⁸⁵

There is no doubt that the Sentencing Commission complied with the plain language of the congressional directive to the extent that defendants who are at least twenty-one years old will receive a use-of-minor enhancement under section 3B1.4 (which all of them will). Everyone can agree on that. It does not likewise logically follow that the Seventh Circuit is correct in then concluding that stripping any relevance of age is thus not "at odds" with Congress's directive, such that the Sentencing Commission enjoyed unbridled and limitless discretion "to enlarge the category of defendants to whom" the enhancement would apply.¹⁸⁶ Words must have meaning, and Congress's repeated references to age must be given effect.

Although courts undoubtedly must give some deference to the Sentencing Commission as long as reasonable minds can differ on congressional intent, no deference is allowed if reasonable minds cannot differ. Instead of simply rehashing the arguments in terms of section 3B1.4's wholesale elimination of the relevance of a defendant's age, perhaps the issue can be enlightened by inverting and testing it in changing circumstances to challenge the conclusion that as long as a use-of-minor enhancement includes the group of defendants targeted by Congress (i.e., defendants at least twenty-one years old), then the guideline will not be at odds with congressional intent no matter who else the enhancement captures in its net.

If the twenty-one year old age restriction and the age proximity requirement used by Congress simply required the Sentencing Commission to ensure that defendants at least twenty-one years old received enhancements but in no way limited the Sentencing Commission from abrogating any relevance of age, then the same conclusion should result regardless of the ages that Congress actually used to describe defendants or minors. Presumably, both ages either matter or they do not. If the Sentencing Commission was free to

185. See *United States v. Murphy*, 254 F.3d 511, 513 (4th Cir. 2001) (citing *Ramsey*, 237 F.3d at 857). This concentrated and narrow reading of Congress's plain language seems to turn the tables on who is granting authority to whom, where the presumption seems to be that the Sentencing Commission has boundless authority unless Congress tightly focuses every word in its desire to limit the Sentencing Commission's authority.

186. *Ramsey*, 237 F.3d at 857.

entirely delete the twenty-one year old age restriction and the proximity in age requirement, then it likewise would have been free to discard any other age restriction, as long as defendants over the age of twenty-one were still given the enhancement. If the Sentencing Commission had promulgated an enhancement for any defendant who uses any person, regardless of age, to commit a crime, would this guideline comply with the congressional directive? A few hypothetical situations might clarify this point.

Assume that in carrying out Congress's intent as seen in the Crime Bill's directive, the Sentencing Commission promulgated a use-of-a-person enhancement instead of a use-of-minor enhancement. This use-of-a-person enhancement applied a two-level enhancement to any person who uses another person to commit a federal offense. If an eighty-five year old resident of a nursing home used another eighty-five year old resident of the nursing home to commit a federal offense, should a two-level use-of-a-person enhancement be applied? If the source of the Sentencing Commission's authority to promulgate such an enhancement is the congressional directive to promulgate a use-of-minor enhancement, it would seem laughable to conclude that applying such an enhancement to an eighty-five year old person who uses another eighty-five year old person followed Congress's intent. Simply brushing off this expansion of the Sentencing Commission's authority by saying that at least defendants over the age of twenty-one who use minors under the age of eighteen would still receive a use-of-minor enhancement seems misplaced. But if the Sentencing Commission has the authority to wholly discard the relevance of the defendant's age for purposes of the use-of-minor enhancement, then it would seem likewise allowable for the Sentencing Commission to disregard the class of individuals that Congress sought to protect—minors—in order to protect everyone else. At some point, such interpretations render Congress's expressed intent meaningless and allow for unlimited expansion of the Sentencing Commission's authority in the face of Congress's limitations on that authority.

What if the Sentencing Commission had kept the age restriction for defendants as directed by Congress (twenty-one), but had only changed the age of the person used in the commission of the federal offense? Assume that the Sentencing Commission had promulgated a guideline that would enhance sentences for adult defendants at least twenty-one years of age who use anyone under the age of twenty-five (rather than minors under the age of eighteen) to commit a federal offense. Undoubtedly, the entire class of defendants who use minors

under the age of eighteen would still receive an enhancement. Is it fair to conclude that Congress's only intent was to ensure that this class of defendants received the enhancement? What relevance, if any, should be given to the age of the person used in the offense—in Congress's decision, minors—if the ages of the defendants and the proximity in the ages between the defendant and the minor have been declared to be absolutely irrelevant? Once courts conclude that Congress's references to the age of the defendant and the proximity in ages between defendants and minors have no meaning—even though Congress specifically used defendants at least twenty-one years old and deemed as relevant the proximity in age between the defendant and the minor—then the age of the person used in the offense likewise could have no meaning. Thus, we would be led to believe that even though Congress specifically sought to protect minors under the age of eighteen from being used to commit crimes—as seen by Congress's references to minors four times in the directive and in the directive's title—the only true expression of congressional intent was that any defendant who uses a minor would receive a use-of-minor enhancement.

As another example, what if Congress had directed the Sentencing Commission to enhance sentences for defendants at least sixty years of age who use minors under the age of twelve and to also consider the proximity in ages between the defendants and the minors? According to the Fourth, Seventh, Eighth, and Tenth Circuits, if the Sentencing Commission then promulgated the current section 3B1.4 that applies enhancements to all defendants who use minors under the age of eighteen years, that guideline would not be at odds with the congressional directive. These circuit courts would be required to reach that holding because (1) nothing in the directive indicates that *only* defendants at least sixty years old should receive an enhancement, (2) nothing in the directive indicates that *only* the use of minors under twelve years of age should result in an enhancement, (3) the guideline simply expands the class of defendants to whom the enhancement would apply, and (4) the guideline ensures that those defendants at least age sixty who use minors under the age of twelve would receive the enhancement. Thus, even a fifteen-year-old defendant who uses a seventeen-year-old minor would receive a sentence enhancement. Would that result be at odds with the congressional directive? Such results seem nonsensical given Congress's focus on the ages of adult defendants—sixty—and the minors used—twelve. When you also consider that Congress

specifically directed the Sentencing Commission to consider the age proximity between the defendant and minor, common sense seems to dictate that grand legal analysis is not required to recognize that the ages of the defendant and minor must remain relevant for purposes of sentence enhancements.

Similarly, what if Congress had directed the Sentencing Commission to enhance the sentence of any defendant who uses a minor who is at least half the age of the defendant and further instructed the Sentencing Commission to consider the proximity in age between the defendant and the minor used when considering an enhancement? If the Sentencing Commission then promulgated a guideline like section 3B1.4 without any age restrictions for defendants, the federal circuit courts that have blessed section 3B1.4 would be hard pressed to rationally explain why they would not be bound to conclude that the Sentencing Commission again acted within its authority. This result should follow particularly because all of the defendants identified by Congress would still receive a sentence enhancement and Congress did not sufficiently demonstrate that *only* those defendants should receive an enhancement. But this leap of faith seems to require a suspension of disbelief to pull off, let alone the wholesale elimination of any critical legal analysis.

Even though changing the ages used by Congress seems persuasive to show the unreasonableness of the Sentencing Commission's elimination of the relevance of Congress's age restrictions for defendants, we should return to the actual use-of-minor enhancement in section 3B1.4 and compare it to congressional intent. Creating a few more scenarios might help determine whether section 3B1.4's use-of-minor enhancement squares with Congress's directive. What if twins commit a federal offense on their eighteenth birthday at the urging of one of them? As it turns out, the older or first-born twin, *T1*, actually recruited the younger or second-born twin, *T2*, to help *T1* commit the offense. It also turns out that although *T1* was eighteen years old at the time that the offense was committed, *T2* was not technically eighteen because the crime was committed after the time of *T1*'s birth but before the time of *T2*'s birth. Are the ages of the twins relevant for sentencing purposes or did Congress intend that *T1* would receive a use-of-minor enhancement?

To press this line of reasoning further, what if a sixteen-year-old defendant used a seventeen-year-old minor to commit a federal offense? What if a seventeen-year-old defendant used a friend who was a few days older to commit a federal offense? To further illustrate

that the ages of the defendant and minor must be relevant, what if a twelve-year-old minor used a seventeen-year-old minor to commit a federal offense? Finally, in a scenario that reflects an actual federal case that challenged section 3B1.4's application to defendants under the age of twenty-one, what if a seventeen-year-old defendant led a group of older, but still minor, participants to commit federal offenses?

In every one of these scenarios, numerous circuit courts would be forced to conclude—or have already impliedly concluded—that nothing in Congress's directive to the Sentencing Commission reflected its intent that these defendants should not receive a use-of-minor enhancement in the same way that older adults would. Indeed, four circuit courts have already blessed the application of section 3B1.4—which makes the age of the defendant irrelevant—to defendants between the ages of eighteen and twenty-one. Once a court blesses the Sentencing Commission's authority to decrease the age of eligible defendants by three years, it becomes a difficult proposition to then determine at which particular age that discretion ends.

The last scenario just described, as you may recall, recounts the facts of *Delarosa*.¹⁸⁷ In that case, the district court deemed it significant that the decisions by the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits all “involved defendants who, though under the age of twenty-one, were over the age of eighteen, and, even more significantly, were older than the minors whose involvement provided the basis for the enhancements.”¹⁸⁸ According to the district court, those facts “stand in stark contrast to the facts of [Delarosa's] case, involving a defendant who was a minor himself . . . and was apparently younger than all of the other minors involved in the offense.”¹⁸⁹ Admitting that the age of the defendant and the proximity of the ages of the defendants and minors used must be relevant, the district court refused to apply section 3B1.4's use-of-minor enhancement to this young defendant.¹⁹⁰ Given Congress's commitment on three occasions within the directive to make the defendant's age a relevant sentencing factor, the *Delarosa* opinion ensures that age remains a relevant sentencing factor regardless of the Sentencing Commission's decision

187. See *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *2, 4-5 (S.D.N.Y. Apr. 27, 2006).

188. *Id.* at *5.

189. *Id.*

190. See *id.*

to eliminate its relevance altogether. The *Delarosa* court gave no deference to the Sentencing Commission's decision to enact a "slightly broader" use-of-minor enhancement. Because the *Delarosa* court's analysis tracks Congress's intent, it is difficult to criticize; instead, the opinion seems inherently correct.

Tellingly, the Tenth Circuit might part ways with the Fourth, Seventh, and Eighth Circuits in cases like *Delarosa* that involve minor defendants. Somewhat surprisingly and without authority, the Tenth Circuit intimated that section 3B1.4 only applies to defendants who are themselves adults, concluding that the Sentencing Commission merely expanded the class of defendants from those over twenty-one years of age to those at least eighteen.¹⁹¹ In *Kravchuk*, the Tenth Circuit's dicta that section 3B1.4 only applies to defendants at least eighteen years old would prohibit a minor defendant like *Delarosa* from receiving a use-of-minor enhancement. There is nothing in section 3B1.4 that makes the defendant's age relevant for application of the two-level use-of-minor enhancement. Unfortunately, the Tenth Circuit did not explain why the Sentencing Commission had the authority to modify the twenty-one year age restriction for defendants, but it nonetheless lacked the authority to make it lower than the age of eighteen. At a minimum, the Tenth Circuit conceded that the age of the defendant must be relevant for sentencing purposes such that the Sentencing Commission acted without authority in promulgating an enhancement where the age of the defendant is wholly irrelevant.¹⁹²

191. See *United States v. Kravchuk*, 335 F.3d 1147, 1158–59 (10th Cir. 2003).

192. In *United States v. Pena-Hermosillo*, the Tenth Circuit conceded that there is "some support in the [Crime Bill's] legislative history for the defendant's argument" that section 3B1.4 should not apply to defendants who are minors who use other minors to commit federal offenses. 522 F.3d 1108, 1115 (10th Cir. 2008). The court acknowledged that the Sentencing Commission, in enacting section 3B1.4 pursuant to an express congressional directive, "included neither an age limitation [for defendants] nor any limitation based on proximity in ages" between the defendant and minor used. *Id.* But the court also understood that "Congress took no step to override" the Sentencing Commission's decision to remove the relevance of the defendant's age from the decision to apply a use-of-minor enhancement. *Id.* Even though the court did not need to decide the issue of whether section 3B1.4 applies to defendants under the age of eighteen because this particular defendant used a minor when the defendant was over eighteen (but started using the minor when the defendant was also a minor), the court still spent a few sentences explaining that there was "a large enough difference in ages to enable [the defendant] to take advantage of" the minor. *Id.* at 1115–16. Even though section 3B1.4 makes the age of the defendant and the proximity in age between the defendant and minor used entirely irrelevant for sentencing purposes, the Tenth Circuit again demonstrated that there is a conflict between Congress's focus on the defendant's age and the Sentencing Commission's decision to make the defendant's age absolutely irrelevant. No matter how much courts

The Sixth Circuit spent some time developing the theme that Congress instructed the Sentencing Commission to make age relevant for sentencing purposes. Calling section 3B1.4 “far more dramatic” than Congress’s directive, the Sixth Circuit predicted some of the foreseeable consequences of the Sentencing Commission’s decision to eliminate the relevance of age: “As this case demonstrates, without the age limit that Congress originally authorized, the guideline introduces a whole host of situations where defendants under age twenty-one can receive enhancements for engaging in criminal activities with youths of similar age, or perhaps even older than the defendants themselves.”¹⁹³ Describing Congress’s age restriction as “a core aspect of that directive,” the Sixth Circuit explained that the twenty-one year old age restriction played a bright-line role in Congress’s directive.¹⁹⁴ According to the Sixth Circuit’s interpretation of congressional intent, Congress created the age restriction out of a “concern that the existence of an age differential allows an older, adult party to influence a minor to engage in wrongful or dangerous behavior.”¹⁹⁵ This interpretation tracks the directive’s plain language that requires the Sentencing Commission to promulgate an enhancement for defendants at least twenty-one years of age who use minors under the age of eighteen, and in doing so, to consider the age differences between the two. As will be shown in Part V.B., this determination that the focus of the directive is on minors who are corrupted by adults is consistent with the legislative history behind the congressional directive.

Words must have meaning, or else plain language loses its ability to act as an indicator of intent. Courts engage in dangerous interpretations of congressional intent when they conclude that Congress’s words are ambiguous such that an agency like the Sentencing Commission, which only gets its powers and authority from Congress, has unbridled, bottomless discretion to eliminate words altogether from legislation. Three times within the directive itself Congress revealed its intent that age restrictions for defendants were an important part of its contemplated use-of-minor enhancement. Not only did Congress use the ages of twenty-one for

wish to defer to the Sentencing Commission’s decision to promulgate section 3B1.4 in a “slightly broader form” without any age restrictions for defendants, courts still must confront cases in which the age of the defendant seems to be a glaring and obvious factor in sentencing, precisely as Congress instructed.

193. *United States v. Butler*, 207 F.3d 839, 851 (6th Cir. 2000).

194. *Id.*

195. *Id.*

defendants and less than eighteen for minors, Congress also made clear that the age differences between the two classes were important in meting out appropriate punishment. It is difficult to describe as reasonable the Sentencing Commission's decision to create an enhancement that completely discards two of the three references to age. The result was that the Sentencing Commission made the considerations of a defendant's age and the age differences between the defendant and minor wholly irrelevant for sentencing purposes. Given the directive's plain language and considering the scenarios laid out above, Congress intended that age can be, should be, and is a relevant consideration in applying a use-of-minor enhancement.¹⁹⁶

As I conclude this part of the Article, I want to make clear that I am not contending that the Sentencing Commission had only one option—promulgating one use-of-minor enhancement for all defendants at least twenty-one years of age. Admittedly, the Sentencing Commission enjoys broad discretion when it comes to setting national sentencing policy as long as it does not abuse or exceed its authority by defying Congress's intent. Consistent with the congressional directive to ensure that the defendant's age is relevant for sentencing purposes, it might have been reasonable for the Sentencing Commission to increase the level of enhancement for defendants as the age disparity between defendants and minors increased. For example, the Sentencing Commission could have determined that a defendant at least forty years old who uses a minor under the age of twelve should receive a greater enhancement than a twenty-one year old adult who uses a seventeen-year-old minor. Additionally, as long as the Sentencing Commission carried out

196. As can be expected from its title, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634, prohibits age discrimination in employment. *Id.* § 623. However, the ADEA does not ban all age discrimination; it limits protection to individuals forty years of age or older. *Id.* § 631(a). In enacting the ADEA, Congress authorized the Equal Employment Opportunity Commission (EEOC) to “issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA], and [to] establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest.” *Id.* § 628. Although this admittedly is an apples-to-oranges comparison, no rational person could fathom the EEOC's creating regulatory rights by interpreting the ADEA in a way that would allow persons under forty years of age to be able to claim age discrimination under the ADEA. Congress did not need to say that *only* persons forty and older are given protection under the ADEA because the words it used had already said precisely that. Given the Sentencing Commission's expertise in national sentencing policy and the significant discretion that it enjoys in sentencing matters, however, this is absolutely an apples-to-oranges comparison. But it nonetheless might illustrate that Congress's words must be given effect when it grants authority to a body with limited power to carry out Congress's intent.

Congress's intent to make age relevant, one could expect the Sentencing Commission to create increased enhancements based on the age of the defendant (e.g., one-level enhancements for twenty-one to thirty year old adults, two-level enhancements for thirty-one to forty year old adults) or the proximity in age between the defendant and minor (e.g., one-level enhancements for adult defendants over the age of twenty-one who are within five years of the minor, two-level enhancements for defendants over the age of twenty-one who are between five and ten years older than the minor). It was unreasonable, however, to eliminate the relevance of the defendant's age altogether.

As you reach this point in the Article,¹⁹⁷ my goal is that your willingness to defer to the Sentencing Commission's decision to eliminate the relevance of a defendant's age for purposes of applying a use-of-minor enhancement has exceeded its logical limit (or is at least seriously waning). But the ground on which to reject the Sentencing Commission's promulgation of section 3B1.4 has not been fully traveled. In addition to viewing the explicit text of the congressional directive to glean Congress's intent, we also have at our disposal the legislative history behind the directive, including the context in which the directive was enacted. When the text and legislative history are reviewed together, the small amount of daylight that some see cascading upon the Sentencing Commission's discretion disappears entirely. The resulting conclusion is an unmistakable sense that the Sentencing Commission's decision to enact a use-of-minor enhancement devoid of age restrictions for defendants took place in utter darkness (i.e., without congressional authority).

B. Legislative History Reveals that Congress Intended that the Age of a Defendant Is Relevant for Sentencing Purposes to Ensure that Only Adults at Least Twenty-one Years of Age Receive Sentence Enhancements for Corrupting Minors

After comparing the plain language of the congressional directive to section 3B1.4, you might find yourself agreeing with this Article's analysis and conclusion that the Sentencing Commission exceeded its authority in promulgating section 3B1.4. On the other hand, you may also find yourself grudgingly conceding that because the Sentencing Commission enjoys broad discretion in promulgating guidelines and

197. As all authors impliedly do, thank you for reaching this point of the Article! Please continue reading.

Congress was not crystal clear in demonstrating that *only* defendants at least twenty-one years of age should receive a use-of-minor enhancement, section 3B1.4 might loosely comply with Congress's intent. Obviously, you still must wrestle with the knowledge that the defendant's age is now wholly irrelevant for purposes of the use-of-minor enhancement. Was that Congress's intent? Fortunately, we are not left entirely to our own devices to simply parse words to glean the intent behind the congressional directive. Clear, unmistakable, and uncontroverted legislative history underscores the plain language of the congressional directive to further reveal that age restrictions for defendants are mandatory, not discretionary. When the congressional directive's plain language and the legislative history are viewed together, it becomes apparent that Congress intended that only adult defendants at least twenty-one years old who corrupt minors under the age of eighteen would receive a use-of-minor enhancement. Although the directive's legislative history is not going to make a dramatic entry into this argument, it is a persuasive piece of my argument that might sway you closer to concluding that the Sentencing Commission exceeded its authority by not heeding Congress's intent that the age of a defendant who uses a minor to commit a federal crime must be relevant in federal sentencing.

Federal courts have mostly avoided the legislative history behind the congressional directive in determining whether the Sentencing Commission exceeded its authority in eliminating age restrictions for defendants from its use-of-minor enhancement. Of the five federal circuit courts that have addressed the use-of-minor issue, the Seventh Circuit in *Ramsey* was the only court to really attempt to reveal Congress's intent by reviewing the congressional directive's legislative history.¹⁹⁸ But even the Seventh Circuit made only a cursory pass at the legislative history. Specifically, the Seventh Circuit recognized that the age restriction in the directive actually became more restrictive as the legislation made its way through Congress, since the restriction originally applied to defendants who were eighteen years of age and then was amended to only apply to defendants at least twenty-one years of age.¹⁹⁹ Based on this realization, the Seventh Circuit acknowledged that the legislative history made it more difficult to conclude that section 3B1.4 complied with Congress's intent.²⁰⁰

198. See *United States v. Ramsey*, 237 F.3d 853, 857–58 (7th Cir. 2001).

199. See *id.*

200. See *id.*

In a classic example of how the same information can be processed to reach a different conclusion, the district court in *Delarosa* relied on the Seventh Circuit's decision in *Ramsey* that "detailed extensively" the Crime Bill's legislative history to conclude that "Congress never intended the enhancement to apply to a defendant who was younger than the minors he recruited."²⁰¹ Explaining that the Sixth Circuit's concern in *Butler* "that the existence of an age differential allows an older, adult party to influence a minor to engage in wrongful or dangerous behavior"²⁰² was not present; the district court held that applying section 3B1.4 to *Delarosa* "would impermissibly conflict with a clear Congressional directive."²⁰³ In rejecting section 3B1.4's application, the district court in *Delarosa* was mostly influenced by the directive's plain language, but it was also convinced that the legislative history proved that Congress never intended for defendants under the age of eighteen, and younger than the minors used, to receive a use-of-minor sentence enhancement.²⁰⁴

In addition to the impact that the legislative history had on the district court in *Delarosa*, Judge Heaney of the Eighth Circuit was also convinced by the legislative history that Congress intended that *only* defendants at least twenty-one years old would receive a use-of-minor enhancement.²⁰⁵ Unlike the Seventh Circuit, Judge Heaney found persuasive the legislative history that Congress had "considered and rejected a directive that would apply the enhancement to all defendants eighteen and over, instead settling on one that would apply only to those twenty-one and over."²⁰⁶ As acknowledged by the Seventh Circuit, the district court in *Delarosa*, and Judge Heaney, the legislative history behind the congressional directive provides strong support for the conclusion that Congress intended that only adult defendants at least twenty-one years of age should receive use-of-minor sentence enhancements.

Even though the legislative history behind the congressional directive is vitally important in that it buttresses the congressional intent gleaned from the directive's plain language, it is not easy to

201. *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *5 (S.D.N.Y. Apr. 27, 2006) (citing *Ramsey*, 237 F.3d at 857–58).

202. *Id.* (quoting *United States v. Butler*, 207 F.3d 839, 851 (6th Cir. 2000)).

203. *Id.*

204. *See id.*

205. *See United States v. Ramirez*, 376 F.3d 785, 788–89 (8th Cir. 2004) (Heaney, J., concurring).

206. *See id.* at 789 (citing *Ramsey*, 237 F.3d at 857–58).

track. The reason that it is challenging to uncover the legislative history is because the congressional directive to promulgate a use-of-minor enhancement was only a small piece of a massive piece of omnibus legislation. To be sure, the congressional directive's legislative history is somewhat mired in the murk of a confusing legislative process that was used to pass the gigantic Crime Bill. Once discovered, however, the legislative history uniquely and persuasively informs us on congressional intent as to the relevance of a defendant's age.

How did Congress come upon the idea to direct the Sentencing Commission to enhance sentences for adult defendants who use minors to commit federal offenses? As discussed in Part II, Congress used the Crime Bill to direct the Sentencing Commission to promulgate a use-of-minor enhancement. On October 26, 1993, Congressman Brooks of Texas started the ball rolling by introducing House Bill 3131, the U.S. House of Representatives' version of the Crime Bill.²⁰⁷ On November 1, Senator Biden of Delaware introduced Senate Bill 1607, the Senate's version of the Crime Bill.²⁰⁸ Neither of the original versions of the Crime Bill contained a directive to the Sentencing Commission to promulgate a use-of-minor enhancement. On November 3, the House passed its version of the Crime Bill.²⁰⁹

On November 10, after a few weeks of activity on the Crime Bill during that session, Senator Pressler of South Dakota offered Amendment 1170 to Senate Bill 1607, which contained, for the first time, a directive to the Sentencing Commission to promulgate a use-of-minor enhancement.²¹⁰ On November 11, Amendment 1170 passed by voice vote and became section 5130 of the Senate's Crime Bill.²¹¹ Amendment 1170 mostly tracks the actual language that was eventually passed in section 140008 of the Crime Bill. The only major difference—but critical at that—between the final legislation and the original amendment is that Amendment 1170 directed the Sentencing Commission to enhance sentences for *defendants at least eighteen*

207. See 139 CONG. REC. E2532 (daily ed. Oct. 26, 1993) (statement of Hon. Jack Brooks).

208. See 139 CONG. REC. S14774 (daily ed. Nov. 1, 1993) (statement of Sen. Joe Biden).

209. See 139 CONG. REC. H8723 (daily ed. Nov. 3, 1993); see also H.R. REP. NO. 103-324 (1993).

210. See 139 CONG. REC. S15644-46 (daily ed. Nov. 10, 1993) (statement of Sen. Larry Pressler).

211. See 139 CONG. REC. S17095, S17191 (daily ed. Nov. 24, 1993).

years of age who use minors under the age of eighteen to commit federal offenses.²¹²

It is important to understand that the original amendment focused on adults at least eighteen years old, while the final version applied only to adults at least twenty-one years old. In addition to understanding that the age for defendants subject to an enhancement increased, it is equally important to review the policy reasons given by the directive's sponsor. Showing concern over "the rising wave of juvenile violence," Senator Pressler explained that he offered the directive to address "particularly heinous circumstance[s] of an *adult criminal using children* to commit their crimes."²¹³ Believing that the directive was "simple and straightforward," Senator Pressler reiterated that all that is involved with the directive is the following principle: "If an *adult* uses a child under 18 years of age to commit a [f]ederal offense," then that *adult* must be subjected to heightened punishment.²¹⁴

Senator Pressler further explained that the directive targeted two types of crimes. First, the directive targeted gang crimes.²¹⁵ Stating that "[g]ang violence is rising as fast as the age of gang members is declining" and that gang crime has grown increasingly more sophisticated and complex, Senator Pressler explained that "*young gang members* do not have the knowledge and experience to pull off sophisticated crimes."²¹⁶ To effectively pull off these sorts of crimes, Senator Pressler explained, those young gang members "must be taught—and they are—by *adults*."²¹⁷ The second type of crime targeted by Senator Pressler's directive was when adults enlist children to commit bank robberies.²¹⁸ Senator Pressler explained that "some *adults* recruit *vulnerable young kids*, mostly drug addicts, and [then] train them in the ways of crime."²¹⁹ Indeed, Senator Pressler anguished that many young people are not "being recruited [by adults] for the football or debating teams," but they are instead being "encouraged by *adults* to join another kind of team—criminal gangs."²²⁰

212. See 139 CONG. REC. S15644 (daily ed. Nov. 10, 1993).

213. *Id.* (statement of Sen. Larry Pressler) (emphasis added).

214. *Id.* (emphasis added).

215. *Id.* at S15645.

216. *Id.* (emphasis added).

217. *Id.* (emphasis added).

218. *See id.*

219. *Id.* (emphasis added).

220. *Id.* (emphasis added).

When illustrating how the directive should be applied, Senator Pressler parsed no words in detailing how adults who use minors—and certainly not minors who use minors—must be given longer sentences than those adults who do not use minors to commit federal offenses. For example, he said: “Any *young person* who has been solicited or encouraged by an *adult* to commit a crime should know that the law is on his side. With my amendment, the law will be.”²²¹ Additionally, Senator Pressler made clear that the directive focused on adult defendants who corrupt minors:

Adults who use our children to commit crimes should be made to pay—and pay dearly. They must be punished not just because of the crime itself. They must be punished for attempting to recruit and train the next generation of criminals.

Once *children* are turned down the path of crime and violence, it becomes difficult, if not impossible, to turn them away.²²²

After making his impassioned plea to protect America’s youth against recruitment by adults to commit federal crimes, Senator Pressler offered a *New York Times* article supporting his position that the use of minors by adults to commit federal crimes is a real problem in America.²²³ The *New York Times* article tells a gripping story of how “modern-day Fagins” are “training young boys . . . to invade banks with automatic weapons, terrorize patrons and tellers[,] and flee with money in high-speed freeway getaways in stolen cars.”²²⁴ With a wonderful analogy to the fictional character, Fagin, from Charles Dickens’s *Oliver Twist*, the *New York Times* article explains that life is now imitating art, but at an alarming rate of growth of debauchery and terror.²²⁵ The *New York Times* article quotes two assistant United States attorneys who describe two notorious *adult* bank robbers as “appalling corrupters of *youth*.”²²⁶ In eerie detail, the article depicts how *adult* bank robbers recruit, train, and use *minors* to carry out daring and vicious bank robberies with no regard for human life, including the life of the recruited minor.²²⁷ The congressional

221. *Id.* (emphasis added).

222. *Id.* (emphasis added).

223. *See id.* at S15645–46.

224. *Id.* at S15645.

225. *See id.*

226. *Id.* (emphasis added).

227. *See id.*

directive's focus is squarely spotlighted on older adult defendants recruiting much younger minors into a life of crime.²²⁸

On November 19, the Senate abruptly ended its progression of Senate Bill 1607, voting to indefinitely postpone it, and instead enacted the language of Senate Bill 1607, including Amendment 1170, as part of the House's Crime Bill, House Bill 3355.²²⁹ Also on November 19, the Senate sought a conference between the House and Senate to consider the different versions of the Crime Bill. After months of activity on the Crime Bill that is irrelevant for our purposes, on March 24, 1994, Congressman Bishop of Georgia voiced his support for the Crime Bill that would, in his words, "increases penalties for *adults* who employ *children* in their misconduct."²³⁰ At no point did a Member of Congress rise to voice his or her support for enhancing sentences for young defendants who use other young defendants to commit crimes.

When the Crime Bill returned from conference, the directive's age restriction for the use-of-minor enhancement had been raised from eighteen to twenty-one.²³¹ I cannot locate any references to why

228. The debate on the use-of-minor enhancement was not conducted in a vacuum. The Crime Bill's focus to protect children from adult predators also encouraged debate on whether the United States Code should be amended to include stiffer penalties for adults who use minors to commit federal offenses. When offering such an amendment, Senator Seymour of California vividly explained why *adults* who corrupt *minors* by recruiting them into a life of crime should face stiffer penalties than other criminals:

[Y]oung kids are already being recruited as foot soldiers by *adults* with more expansive organized crime activities, such as gambling, money laundering, and extortion.

Sadly, rather than being recruited for football or the debating team, *young kids* are being encouraged to join different kinds of teams—teams who believe that the best offense is a good terrorist who can beat the competition with the plunge of a knife or the squeeze of a trigger.

Those who recruit them, induce them, and coerce them must be held accountable. They must pay and pay dearly.

And pay they will if my amendment is adopted. If an *adult* uses any *kid* to commit any [f]ederal crime, he can expect to face a maximum 10-year sentence in addition to other sentences that might be levied against him.

Kids are our most valuable, our most precious human resource. We have heard the old axiom that children represent the promise of tomorrow. But in too many cases, criminals see kids as a promise of future crimes committed.

137 CONG. REC. S8886 (daily ed. June 27, 1991) (statement of Sen. John Seymour) (emphasis added).

229. See 139 CONG. REC. S16302 (daily ed. November 19, 2003) (statement of Sen. Joe Biden); 139 CONG. REC. S17095 (daily ed. November 24, 1993).

230. 140 CONG. REC. E559 (daily ed. March 24, 1994) (statement of Hon. Sanford D. Bishop Jr.) (emphasis added).

231. See 140 CONG. REC. H8836 (daily ed. Aug. 21, 1994) (directing the Sentencing Commission to "promulgate guidelines or amend existing guidelines to provide that a

the conferees raised the age restriction; I also cannot locate any floor speeches or conference reports that explain why Congress chose to increase the age restriction for defendants who would receive a use-of-minor enhancement.²³² It simply appears that during various conferences in July and August 1994, the Crime Bill's use-of-minor directive actually increased the age restriction from eighteen to twenty-one years of age, focusing on older adult defendants.²³³ On August 21, the House passed the Crime Bill,²³⁴ followed by the Senate's passing of the Crime Bill on August 25.²³⁵ The President signed the Crime Bill into law on September 13, 1994, at which point the Sentencing Commission was directed to promulgate a use-of-minor enhancement.²³⁶

defendant *21 years of age or older* who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense”) (emphasis added); *see also* 140 CONG. REC. H7442 (daily ed. Aug. 10, 1994).

232. *See also* United States v. Ramsey, 237 F.3d 853, 858 (7th Cir. 2001) (“Though we found no discussion in the record explaining the change [from eighteen to twenty-one], the eighteen year old formulation was eventually rejected in favor of the narrower formulation. The final version of the provision, codified in Pub. L. 103–322, section 140008, used the House’s twenty-one years or older formulation.”).

233. *See generally* 140 CONG. REC. S12283 (daily ed. Aug. 22, 1994) (statement of Sen. Slade Gorton) (“A proposal originally presented to the House of Representatives and meant to be presented to the Senate on a take-it-or-leave-it basis has now, in fact, been changed in a number of material ways. It is unfortunate that that crime bill, originally reported from a conference committee, was written largely in secret by a small handful of [m]embers . . .”); 140 CONG. REC. E1738 (daily ed. Aug. 16, 1994) (statement of Hon. Jim Kolbe) (complaining that the legislative process used by the House of Representatives did not give members “the opportunity to read and understand the crime bill before we vote on it” because “[m]embers . . . had barely [six] hours to examine the 450-plus page conference report which just appeared in the Congressional Record.”); 140 CONG. REC. H5933 (daily ed. July 20, 1994) (statement of Hon. Henry Hyde) (explaining that after nearly three months since both houses sent their versions of the Crime Bill to conference, the legislative process remained “in the deep freeze, frozen in amber, immovable, intransigent. Nothing is happening . . . [except] one meeting of the conferees And then it has been Death Valley. Nothing is going on that we know of . . . [except perhaps] stealth meetings” not necessarily in “smoke-filled rooms, but they are going on behind closed doors.”); 140 CONG. REC. H5934 (daily ed. July 20, 1994) (statement of Hon. Bob Filner) (complaining that although Congress sent the Crime Bill “to a conference committee on June 16, the crime bill has been held hostage in committee for [thirty-four] long days”); 140 CONG. REC. H5935 (daily ed. July 20, 1994) (statement of Hon. Betty McCollum) (explaining that if there were negotiations on the Crime Bill by conferees taking place, “we do not know what they are”).

234. *See* 140 CONG. REC. H2585–640 (daily ed. Apr. 21, 1994) (discussing and ultimately voting to pass the crime bill).

235. *See* 140 CONG. REC. S12487–674 (daily ed. Aug. 25, 1994) (discussing and ultimately voting to pass the crime bill).

236. *See* Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994, 2 PUB. PAPERS 1539–41 (Sept. 13, 1994).

It becomes abundantly clear from reviewing the congressional directive's legislative history that at no time was Congress concerned about enhancing sentences for every defendant, regardless of age, who used a minor to commit a crime. Instead, the directive's purpose was to enhance sentences for adults who use minors to commit federal offenses, which could turn out to be recruitment to a larger life of crime. Although Congress initially was confronted with a proposal to direct the Sentencing Commission to promulgate a use-of-minor enhancement for adult defendants at least eighteen years of age who use minors who are younger than eighteen, this approach was ultimately rejected in favor of focusing on older adults—those at least twenty-one years old—who recruit minors into a life of crime by using them to commit federal offenses. If various courts are correct in concluding that the Sentencing Commission had the authority to eliminate the relevance of a defendant's age altogether, then it apparently would not have mattered if Congress had openly debated the age at which an enhancement should be applied, whether eighteen, twenty-one, or even ninety for that matter. Not only did Congress deem age a relevant sentencing factor, it stressed the importance of an age differential between defendants and minors. When this historical record is added to the plain language of the directive that requires the Sentencing Commission to specifically consider the proximity in age between the adult defendant and minor used in promulgating a use-of-minor enhancement, it becomes attenuated to then declare that the only congressional intent that one can glean is a desire that as long as defendants who are at least twenty-one years old receive an enhancement, then every defendant—no matter how old or how young—can also receive the same sentence enhancement.

There is absolutely no indication—in the plain language of the directive or in the legislative history—that Congress sought to enhance sentences for defendants under the age of twenty-one who use minors to commit federal offenses. Additionally, there is no indication that Congress sought to ensure that defendants who are themselves minors and use other minors—and perhaps even peers, classmates, relatives, or friends—would receive the same sentence enhancement as adult defendants who use minors to commit federal offenses. Congress simply did not demonstrate that its concern was the societal problem of minors using minors to commit federal offenses.

It nearly defies logic to base a use-of-minor enhancement on the foundation that young people are vulnerable, unsophisticated, and in need of protection from predatory adults who seek to recruit minors into a life of crime and then conclude, in the very same breath, that all of those very same minors—the ones who apparently need protection from adult recruitment because of various vulnerabilities—are also predators from which other minors need protection. Because Congress focused its directive on protecting minors from adults who prey on children to commit federal offenses, it is unreasonable to then conclude that Congress's actual intent was that everyone who uses a minor would receive the same sentence enhancement. Courts should adopt the no-authority option to reject the Sentencing Commission's open defiance of congressional intent when it promulgated a use-of-minor enhancement where a defendant's age is irrelevant.

C. The Context in Which Congress Directed the Sentencing Commission to Promulgate a Use-of-Minor Enhancement Further Reveals Congress's Intent that the Age of the Adult Who Corrupts Minors Must Be Relevant for Sentencing Purposes

As the evidence of Congress's intent to focus on adults who corrupt minors mounts, the reasonableness of the Sentencing Commission's unsubstantiated decision to eliminate the relevance of the defendant's age diminishes. In addition to the directive's three references to the defendant's age and the legislative history's passionate focus on protecting vulnerable minors from sophisticated adult criminals, there is still more evidence that Congress intended that only defendants at least twenty-one years of age would receive sentence enhancements.

Another aspect of the congressional directive's legislative history is to place it in context of the Crime Bill itself. As the Supreme Court has recognized, congressional intent can often be discovered by viewing both the text and context of legislation.²³⁷ Are there any other indicators within the same piece of legislation that created the congressional directive to the Sentencing Commission that might further express whether Congress intended that any defendant, regardless of age, would receive a sentence enhancement or whether Congress intended that only defendants at least twenty-one years old would receive sentence enhancements?

237. See *Burns v. United States*, 501 U.S. 129, 136 (1991).

Title XIV of the Crime Bill, titled “Youth Violence,” contained eight sections.²³⁸ One of these is section 140008, titled “Solicitation of Minor to Commit Crime,”²³⁹ the congressional directive at the center of this Article. Two other nearby provisions in the “Youth Violence” section shed additional light on Congress’s intent in section 140008. The first relevant provision is section 140001, titled “Prosecution as Adults of Certain Juveniles for Crimes of Violence,”²⁴⁰ which amended 18 U.S.C. § 5032 to lower the age at which some defendants who are minors could be prosecuted as adults in federal courts.²⁴¹ This amendment unmistakably demonstrates that Congress knew how to communicate when it was dealing with minors and when it was dealing with adults.²⁴² Thus, sections 140001 and 140008 both focus on the differences between adults and minors. Additionally, because Congress decided in section 140001 to specifically deal more harshly with certain identified minors in the criminal system, had Congress wanted to continue that enhanced treatment of minors in section 140008, it would have done so explicitly. That is, Congress had already considered enhanced punishment for minors in the same section of the Crime Bill. A contextual reading of the two sections indicates that Congress did not intend to enhance the sentences of minors under section 140008’s directive to the Sentencing Commission to promulgate a use-of-minor enhancement. Instead, as Congress transitioned from section 140001 to section 140008, its focus shifted entirely from enhancing punishment for certain minors to protecting minors from adult defendants at least twenty-one years old.

A second nearby provision that was part of the “Youth Violence” section of the Crime Bill further demonstrates Congress’s intent to treat adults who corrupt minors more severely than other defendants. Section 140006, titled “Increased Penalties for Employing Children to Distribute Drugs Near Schools and Playgrounds,” amended the Controlled Substances Act to increase the sentences of adults “at least 21 years of age” who use minors “under 18 years of age” to distribute drugs near playgrounds and schools.²⁴³ When Congress used the ages of twenty-one and eighteen in section 140008, it was not its first expression of intent to enhance punishment for adults who corrupt

238. See Crime Bill, Pub. L. 103-322, tit. XIV, 108 Stat. 1796, 2031–33 (1994).

239. *Id.* § 140008.

240. *Id.* § 140001.

241. *See id.*

242. *See id.*; see also 18 U.S.C. § 5032 (2006) (authorizing prosecution of juvenile offenders as adults for certain gang activity).

243. See § 140006, 108 Stat. at 2032; see also 21 U.S.C. § 860(c) (1994).

minors. Instead, it was part of a pattern of protecting children from adults who would change the course of a young person's life and direct it toward crime.

Even though it might be true that some young people have the potential to manipulate, coerce, and intimidate other young people, Congress was not addressing that issue when it focused on adults who corrupt minors. Significantly, when the Sentencing Commission promulgated section 3B1.4, it did not provide a detailed analysis or explanation of why minors (or even young adults under the age of twenty-one) who negatively impact the lives of minors should receive the same punishment as adults older than twenty-one who do so. This is particularly so when you view Congress's directive through a lens with an indelible focus on adults at least twenty-one years old on the one hand and minors under the age of eighteen on the other. The Sentencing Commission simply mistook Congress's focus and, by doing so, defied Congress's intent by eliminating the relevance of a defendant's age.

In addition to the congressional directive's plain language and legislative history that focus exclusively on the ages of the defendant and minor used, the Sentencing Commission must also comply with its own implementing legislation. In meting out the appropriate punishment through the application of defendant-specific guidelines, the Sentencing Commission must consider the age of the defendant.²⁴⁴ In establishing the Sentencing Commission to promulgate guidelines, Congress instructed the Sentencing Commission to consider, among other things, a defendant's age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, family ties and responsibilities, and community ties.²⁴⁵ In carrying out Congress's intent in promulgating a use-of-minor enhancement, the Sentencing Commission provided no explanation as to why the age of the defendant became a wholly irrelevant factor at sentencing. Given Congress's specific direction to focus on the ages of the defendant and the minor, especially in light of Congress's general direction to also consider age and maturity issues, the Sentencing Commission responded with its explanation that it was simply promulgating a guideline in a "slightly broader form" than what Congress directed.²⁴⁶

244. See 28 U.S.C. § 994(d)(1) (2000).

245. See § 994(d)(1)–(8), (e).

246. See *supra* note 18 and accompanying text.

When a defendant's age is no longer relevant for sentencing purposes, the form of punishment morphs into something entirely different than what was sought. One can imagine multiple scenarios—including the facts of the cases that have challenged section 3B1.4's application to defendants under the age of twenty-one as well as the hypothetical scenarios depicted in Part V.A.—that reveal vast policy differences in sentencing defendants who use minors. On one extreme is Congress's approach that focuses on the age of the defendant and the proximity in age between the defendant and minor; on the other end of the spectrum stands the Sentencing Commission's approach to discard any relevance of the age of the defendant or the proximity in age between the defendant and minor. Congress focused on particular defendants; the Sentencing Commission focused on every conceivable defendant. The Sentencing Commission's approach is not a subset within the congressional directive, nor is Congress's approach simply a subset of section 3B1.4. The two approaches are different approaches that address different societal problems. For purposes of addressing those adult defendants who prey on vulnerable young people to recruit them into a life of crime, age matters. Because the Sentencing Commission chose to ignore the relevance of age in punishing defendants who use minors to commit federal offenses, it defied Congress's objective to focus on age.

Finally, on the same day that Senator Pressler offered his amendment to the Senate's Crime Bill that directed the Sentencing Commission to adopt a use-of-minor enhancement for defendants at least twenty-one years old, another amendment was offered that sought to provide enhanced penalties for defendants who use minors to make pornography that is imported into the United States.²⁴⁷ This amendment lacked any age restriction for defendants—it did not contain an age restriction for the defendant or reference the proximity in age between the defendant and the minor used. Congress again showed that it knew how to express its intent to enhance penalties for persons without age restrictions. Congress also knew how to say what

247. See 139 CONG. REC. S15643 (daily ed. Nov. 10, 1993) (Amend. No. 1168); see also 21 U.S.C. § 861 (2006) (making it unlawful for all defendants to use minors under the age of eighteen in various criminal drug activity); *United States v. McClain*, 252 F.3d 1279, 1285 (11th Cir. 2001) (explaining that 21 U.S.C. § 861 is "similar in language and purpose to" section 3B1.4).

it meant when it came to a use-of-minor enhancement—the defendant's age matters.²⁴⁸

D. Inferring Congressional Intent from Congress's Silence During the Guidelines' Review Period Involves No Legal Analysis, Unnecessarily Expands the Sentencing Commission's Power, and Runs into the Political Reality that Members of Congress Do Not Run "Get-Weak-on-Crime" Campaigns

After the Sentencing Commission presented section 3B1.4 to Congress in a "slightly broader form," Congress had 180 days to review and reject the proposed guideline. Congress did not reject it. Some courts contend that Congress thus ratified the expanded use-of-minor enhancement, impliedly revealing that it did not care whether the age of the defendant was relevant at sentencing, as long as every defendant at least twenty-one years old who used a minor to commit a federal offense received a sentence enhancement. This after-the-fact reasoning defies congressional intent as seen in the plain language of its legislation and legislative history, wholly abandons any judicial role in ensuring that a body of limited power like the Sentencing Commission complies with congressional directives, and ignores the political reality that sounding weak on crime rarely works out in congressional campaigns.

248. In a case involving capital murder and a jury's ability to consider youth as a mitigating factor in sentencing (the defendant was nineteen years old), the Supreme Court made the following statement about age:

Our cases recognize that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence.

Johnson v. Texas, 509 U.S. 350, 350, 367 (1993) (citation omitted). Although this understanding of the innate differences between minors and adults is not on point to the application of the use-of-minor enhancement, the Supreme Court recognizes that sentencing minors and adults is not the same task that involves the same calculations and serves the same purposes. This reflection on age fundamentally underscores Congress's directive to the Sentencing Commission to enhance sentences for adults at least twenty-one years of age who use minors to commit federal offenses and to consider the proximity in age between the adult defendant and the minor used. It also underscores a major policy distinction between enhancing sentences for adults over the age of twenty-one as opposed to adults—or minors for that matter—under the age of twenty-one.

In his dissent in *Butler*, Judge Clay was clear that he would have concluded that the Sentencing Commission had exceeded its authority in promulgating section 3B1.4 if the only evidence of Congress's intent was section 140008.²⁴⁹ When focusing on the congressional directive's plain language, Judge Clay concluded that "Congress intended—and provided in *unambiguous terms*—for sentence enhancement for solicitation of a minor to commit crime *only* for defendants age 21 and older."²⁵⁰ In Judge Clay's opinion, it was "unimaginable" that Congress could have shown a "clearer expression of congressional intent" than it did in directing the Sentencing Commission to enhance sentences only for defendants at least twenty-one years old who use minors to commit federal offenses.²⁵¹ Judge Clay was not persuaded, however, that Congress had expressed its intent only by the words it used. Judge Clay believed that the best expression of Congress's intent was not its legislative directive; instead, Congress's intent was best discovered by how it reacted to the Sentencing Commission's submission of a guideline that admittedly was in a "slightly broader form."²⁵² Judge Clay was persuaded that because Congress did not reject the use-of-minor enhancement devoid of age restrictions, while rejecting other proposed guidelines, "Congress, in effect, approved of [the enhancement] as an appropriate reflection of its policy on the sentencing of those who involved minors in their crimes."²⁵³ Explaining that Congress had "disapproved of a proposed amendment that would have eliminated the 100:1 sentencing ratio that treats one who deals in a given quantity of crack cocaine the same as it treats one who deals in 100 times as much powder cocaine," Judge Clay thus extrapolated Congress's intent from its failure to reject an expanded use-of-minor enhancement.²⁵⁴

Even though Judge Clay deemed it obvious that "the initial intent of Congress" was to limit the enhancement only to defendants at least twenty-one years old, he nonetheless concluded "that the intent of Congress changed" when "Congress ultimately failed to express disagreement with expansion of the enhancement to include

249. See *United States v. Butler*, 207 F.3d 839, 844–46 (6th Cir. 2000) (Clay, J., dissenting).

250. *Id.* at 845 (emphases added).

251. See *id.*

252. See *id.* at 844–45.

253. *Id.* at 846.

254. *Id.* at 845 n.1 (citing *United States v. Gaines*, 122 F.3d 324, 326–27 (6th Cir. 1997)).

defendants” of every age.²⁵⁵ Judge Clay does not stand alone in adopting this changed intent theory. The Seventh Circuit in *Ramsey* picked up on Judge Clay’s reasoning and also concluded that because Congress had rejected some guidelines but not the expanded use-of-minor enhancement, Congress implicitly ratified the Sentencing Commission’s wholesale elimination of the age restriction.²⁵⁶

Instead of focusing on Congress’s intent from the plain language of the directive or its legislative history, the changed-intent approach discounts the relevance of what Congress said and did at the time it enacted legislation, and chooses to focus on what Congress did not do and did not say at some distant future time. This changed intent theory claims that Congress’s intent is not discovered through a rigorous review of the language it used or the legislative history; rather, intent can be gleaned from a failure to act, despite what the rigorous review concluded.

This after-the-fact changed-intent theory can render congressional language meaningless. What if Congress had directed the Sentencing Commission to enhance sentences “for *only* defendants who are at least twenty-one years of age,” but the Sentencing Commission nonetheless promulgated the section 3B1.4 enhancement for all defendants, regardless of age? According to Judge Clay, that is precisely what took place here. Judge Clay concluded that the plain language of the congressional directive was unmistakably clear that Congress intended that *only* defendants at least twenty-one years old would receive use-of-minor enhancements.²⁵⁷ He nonetheless was convinced that Congress’s intent was not shown through the plain and unmistakable language of the directive, but it was displayed by Congress rejecting some guidelines while not rejecting the expanded use-of-minor enhancement.²⁵⁸ Judge Clay was not persuaded by Congress’s language; he was persuaded by Congress’s silence.

When determining congressional intent, silence should not have such a deafening effect on actual words and positive action. The Supreme Court has cautioned against just this type of after-the-fact discovery of congressional intent: “An inference drawn from congressional silence certainly cannot be credited when it is contrary

255. *Id.* at 846.

256. *See* United States v. Ramsey, 237 F.3d 853, 858 (7th Cir. 2001).

257. *See* Butler, 207 F.3d at 845.

258. *See id.*

to all other textual and contextual evidence of congressional intent.”²⁵⁹ As the Supreme Court has illustrated, basing congressional intent on “congressional ‘silence’” could “render what Congress has *expressly* said absurd.”²⁶⁰ When congressional intent can be determined by legislation’s plain language, history, and purpose, federal courts—and the Sentencing Commission—must give effect to that intent, regardless of Congress’s failure to speak against a conclusion that defies that congressional intent.²⁶¹

Speaking of absurdities, now assume that Congress had directed the Sentencing Commission to enhance sentences “only, only, only, only and only for defendants at least twenty-one years of age (and we really mean only those defendants and nobody else)” who use minors to commit federal offenses. Assume further that Congress later failed to reject a use-of-minor enhancement that scrubbed any relevance of the defendant’s age (i.e., section 3B1.4). Some courts would apparently bless the Sentencing Commission’s expanded enhancement and apply it to any defendant, regardless of age, because Congress’s silence in failing to reject the expanded enhancement was a better indicator of its intent than the unmistakable language it used in directing the Sentencing Commission to promulgate an enhancement in the first place. This changed-intent approach is entirely backwards. Congress’s words—not just its silence—must also be analyzed in determining congressional intent.

The Sixth Circuit likewise dismissed the so-called congressional-silence theory (or as this Article calls it, the changed-intent theory), reasoning that to accept it “would lead courts wholly to abandon their role of assessing whether enacted guidelines comport with [c]ongressional intent.”²⁶² The Sixth Circuit explained that adopting the congressional silence or changed intent theory “would thus dictate that all enacted guidelines inherently satisfied [c]ongressional intent,” because every guideline that goes into effect has gone through the 180-day review period without congressional rejection.²⁶³

The Sixth Circuit’s reasoning cannot be ignored. Because every enacted guideline has survived the 180-day review period, the congressional-silence or changed-intent theory would dictate that Congress intended precisely what the Sentencing Commission

259. *Burns v. United States*, 501 U.S. 129, 136 (1991).

260. *Id.* at 137 (emphasis in original).

261. *See id.* at 137–38.

262. *See Butler*, 207 F.3d at 851.

263. *See id.*

promulgated, regardless of what Congress said and did in directing the Sentencing Commission to act. Instead of playing a crucial role to ensure that the Sentencing Commission, a body with limited power, complies with a grant of authority from Congress, the judiciary would be relegated to courts without a purpose and without reason. The only question under a congressional-silence or changed-intent theory would be whether Congress rejected a proposed guideline from the Sentencing Commission. If the answer to that question is no, then the court must presume that the guideline satisfies Congress's intent. Not only is this approach not the law, it eliminates the role of the judicial function to determine congressional intent, leaving that decision solely to the Sentencing Commission.

One response to this rejection of the congressional-silence or changed-intent theory might be that the 180-day review period plays a critical role in ferreting out Congress's intent. The argument is that if Congress created the review period to give itself a chance to reject or modify proposed guidelines, then Congress implicitly sanctioned the Sentencing Commission's authority to expand on congressional intent if Congress does not expressly reject what the Sentencing Commission does. This approach puts the cart in front of the horse. When the Sentencing Commission acts under the specific guidance and authority of Congress, it must follow congressional intent. To the extent that congressional intent is unambiguous, the Sentencing Commission has no authority to reject Congress's intent. This would expand the Sentencing Commission's authority in the face of Congress's authority. Even though the Sentencing Commission has a fair amount of discretion, that discretion cannot override congressional directives. The issue of congressional intent should never boil down to an analysis of whether Congress had the authority to reject a proposed guideline, because Congress assuredly has that power (which it granted to itself). It would be entirely nonsensical to create legal principles that courts must apply to determine whether the Sentencing Commission exceeded its authority if Congress's intent can always be determined simply by asking whether Congress rejected a proposed guideline during the review period. The outcome of such an approach would be to dismiss the significance of judicial review—in each case, the only question would be whether Congress ratified the Sentencing Commission's work.

Instead of creating a judicial-review function that has nothing to review, the issue in every case challenging the Sentencing Commission's authority to promulgate a guideline that is arguably at

odds with congressional intent is to determine, in the first instance, what Congress intended when it drafted a directive to the Sentencing Commission. If reason dictates a conclusion that the Sentencing Commission defied Congress's intent, then the law requires a decision that the Sentencing Commission exceeded its authority. The only time that the 180-day review period should be relevant to determine Congress's intent is when a congressional directive is unclear and ambiguous. Those situations should be the only universe in which the 180-day review period should be used as an after-the-fact ratification process.

Again, the proponents of a congressional-silence or changed-intent theory could argue that because Congress gave itself the authority to review and reject proposed guidelines, then Congress has elected to be bound by all guidelines regardless of Congress's original approach to an issue as seen in the language it used. Even if this principle changed the judicial function in reviewing the Sentencing Commission's authority by only looking to see if Congress rejected a proposed guideline, the principle's real-world, practical application may fall short. The politics of crime could impact how the congressional-silence or changed-intent theory worked in practice.

The allure of the argument that Congress could have demonstrated its intent by simply rejecting the Sentencing Commission's expansion of the use-of-minor enhancement to include any defendant, regardless of age, may not carry much weight as a political matter. It is a rare sighting, perhaps as rare as seeing *Raphus cucullatus*,²⁶⁴ to see large factions of politicians arguing that criminals should receive lighter sentences.²⁶⁵ The political drumbeat of being "tough on crime" seems to support enhanced and longer sentences, even if the drumbeat of such rhetoric fails to prove successful results such as less crime, manageable court dockets, or effective prison operations.²⁶⁶ During the debate of the Crime Bill itself, Senator Simon of Illinois decried the political urge to "rush to be tough" on crime, exclaiming that the Crime Bill rested "on the seductive belief that we can fight crime simply by passing tougher and tougher sentencing laws."²⁶⁷ The policy concern that tougher sentencing laws do not effectively fight crime is intensified when Congress not only

264. *Raphus cucullatus* is perhaps best known as the dodo bird.

265. See, e.g., Gary Heinlein, *GOP Vows to Fight Granholm Sentencing Plan*, DETROIT NEWS, July 20, 2007 (describing a tough political battle for a governor who wanted to lower sentences to save money in the corrections system).

266. See, e.g., *Sound and Fury*, STAR-LEDGER, May 5, 1996.

267. 139 CONG. REC. S16300 (daily ed. Nov. 19, 1993) (statement of Sen. Paul Simon).

chooses to enhance penalties for crime, but then the Sentencing Commission doubles down to increase those enhanced penalties. By forcing Congress to publicly fight against the Sentencing Commission for less punitive sentences for criminals, the result might be Congress's unwillingness to engage in that debate. Thus, even in the face of clear congressional intent based on a directive's plain language and legislative history, the Sentencing Commission's ultimate rejection of congressional intent in favor of enhanced penalties may face little, if any, political resistance.

One very public display of the political get-tough-on-crime mindset might be the nearly three-decade debate over the reasonableness of imposing much harsher sentences for crimes involving the same amounts of crack cocaine as opposed to powder cocaine.²⁶⁸ Indeed, the so-called 100:1 crack-powder disparity resulted in the same sentences for defendants convicted of drug crimes involving cocaine who possess 100 times more powder cocaine as defendants who possess crack cocaine.²⁶⁹ As will be discussed more fully below, the Supreme Court has been forced to explain the judiciary's role in resolving the conflict between Congress's intent to maintain the 100:1 crack-powder disparity and the Sentencing Commission's desire to decrease the disparity.²⁷⁰ Although it is one thing for the Sentencing Commission to seek to decrease penalties for crime and face congressional rejection of getting weak on crime, it is quite another scenario to reverse the roles and force Congress to become the body that seeks to lessen penalties in the face of a Sentencing Commission that seeks to enhance penalties. The political realities of "fighting" crime might not allow this result.

A recent book argued that the political reality in the United States (as well as in other western countries such as Britain, Canada,

268. See generally, e.g., Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531 (2010) (providing a history of the debate over the 100:1 sentencing disparity between crack and powder cocaine). Please note that this Article has no reason to take a position on the crack-powder debate. Because of the tremendous amount of judicial resources devoted to that issue, however, the resulting decisions in those cases illuminate the path for the proper resolution of the section 3B1.4 issue.

269. See *id.* at 2531.

270. See *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (addressing the public debate between Congress, the Sentencing Commission, and federal courts over the reasonableness of the 100:1 sentencing disparity between crack and powder cocaine and holding that although federal courts must apply the Guidelines in sentencing, courts have the discretionary authority to depart from the Guidelines based upon their disagreement with the crack-powder cocaine disparity).

and Australia) is that fear of crime and tough, punitive sentences appeal to voters.²⁷¹ More recently, the *Economist* issued its magazine with the following cover: “Why America locks up too many people.”²⁷² The magazine’s editor claimed that “lawmakers who wish to sound tough must propose laws tougher than the ones that the last chap who wanted to sound tough proposed.”²⁷³ Explaining that America incarcerates one in one hundred of its adult citizens and has a total prison population of 2,300,000, the editor maintained that the political reality of crime is that “for the past [forty] years American lawmakers have generally regarded selling to voters the idea of locking up fewer people as political suicide.”²⁷⁴ There can be no doubt that more people are being imprisoned these days. In the past forty years, the number of imprisoned Americans has grown from fewer than one in 400 to one in 100.²⁷⁵ According to another story in the *Economist*, American “voters, alarmed at a surge in violent crime, have demanded fiercer sentences,” and “[p]oliticians have obliged.”²⁷⁶ The story also depicts the political difficulty in lowering the penalties for criminals: “Since no politician wants to be tarred as soft on crime, such laws, mandating minimum sentences, are seldom softened. On the contrary, they tend to get harder.”²⁷⁷ An after-the-fact ratification principle that looks to see if Congress reiterated its original intent by fighting the Sentencing Commission to reduce punishment for criminals who use minors to commit crimes is not an appealing option for judicial review of the Sentencing Commission’s compliance with congressional authority.

Do not misunderstand the point of this argument. This Article is not interested in debating the overall effectiveness of our criminal-justice system or whether it is too punitive. This Article also is not taking a position on prison overcrowding or how minors should be treated in our criminal-justice system. This Article does not bemoan

271. See generally JULIAN V. ROBERTS, LORETTA J. STALANS, DAVID INDERMAUR & MIKE HOUGH, *PENAL POPULISM AND PUBLIC OPINION* (Oxford Univ. Press 2003).

272. *ECONOMIST*, July 24, 2010.

273. *Rough Justice*, *ECONOMIST*, July 24, 2010, at 13.

274. *Id.*; see also *Too Many Laws, Too Many Prisoners*, *ECONOMIST*, July 24, 2010, at 26 (“Justice is harsher in America than in any other rich country. Between 2.3 [million] and 2.4 [million] Americans are behind bars, roughly one in every 100 adults. . . . As a proportion of its total population, America incarcerates five times more people than Britain, nine times more than Germany and 12 times more than Japan. Overcrowding is the norm. Federal prisons house 60% more inmates than they were designed for. State lock-ups are only slightly less stuffed.”).

275. See *Too Many Laws*, *supra* note 273 at 26.

276. *Id.*

277. *Id.*

the political notion of being tough on crime or using imprisonment to punish criminals. Additionally, this Article does not even make a case for treating minors as minors and adults as adults.

Instead, this Article focuses on the proper judicial role in ensuring that the Sentencing Commission acts within its limited authority under congressional directives. The political reality of crime is simply being used to counter the alluring principle that the congressional-silence or changed-intent theory ensures that congressional intent can be gleaned by Congress's failure to reject proposed guidelines from the Sentencing Commission. When presented with a proposed guideline like section 3B1.4 that enhances penalties beyond Congress's original intent, Congress may not have the political ability to clarify its original intent. If courts then glean intent from Congress's silence and not from Congress's language, then that silence could be seriously and tragically misinterpreted. That is the point. If this is true, then the congressional-silence or changed-intent theory could have dangerous consequences in that Congress's intent cannot accurately be expressed by its silence; it is instead subverted.

A major purpose behind the creation of the Sentencing Commission, and thus the Guidelines themselves, is to "provide certainty and fairness in meeting the purposes of sentencing [by] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."²⁷⁸ Expounding on this fundamental purpose, Justice Breyer has explained that a "just legal system seeks not only to treat different cases differently but also to treat like cases alike."²⁷⁹ According to Justice Breyer, "[f]airness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences."²⁸⁰ Until the section 3B1.4 enhancement issue is resolved, defendants who are under the age of twenty-one who use minors to commit federal offenses will continue to receive disparate sentences despite Congress's intent to enhance sentences only for adults twenty-one and older who use minors to commit federal offenses. To ensure that

278. 28 U.S.C. § 991 (b)(1)(B) (2000); *see* 28 U.S.C. § 994(f) (2000) (stating that in promulgating guidelines, the Sentencing Commission "shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities"); *see also* *Burns v. United States*, 501 U.S. 129, 133 (1991) (citing S. REP. NO. 98-225, at 49 (1983)).

279. *Pepper v. United States*, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring).

280. *Id.*

congressional intent is followed, district courts outside of the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits should adopt the reasoning of this Article and utilize the no-authority option. Even the circuit courts which have rejected the no-authority option can revisit the issue through en banc review. All of these courts should declare that the Sentencing Commission's promulgation of the expanded use-of-minor enhancement defied Congress's intent and should not be enforced against defendants under the age of twenty-one.

The adoption of the no-authority option may simply exacerbate the split of authority on the issue, however. This split may force the Supreme Court to adopt or reject the no-authority option. Until the issue is finally resolved (in favor of the no-authority option perhaps), the Guidelines' purpose in uniform and fair sentences will not be achieved. The unfortunate result is that defendants in different jurisdictions will continue to receive markedly disparate sentencing treatment for the same conduct.

No matter the ultimate outcome on the no-authority option, however, this Article explains that district courts have alternative options on how to deal with the Sentencing Commission's expansive use-of-minor enhancement. District courts have the discretionary authority to overcome sentencing disparities by rejecting section 3B1.4's application to defendants under the age of twenty-one. District courts have this authority regardless of the circuit split or whether the Supreme Court resolves the split. Under an advisory guidelines system, district courts now have tremendous discretionary authority to escape the strictures of the no-authority option to consider two other options to ensure that defendants under the age of twenty-one do not receive use-of-minor enhancements. As explained in Part VI, federal courts can adopt the policy-disagreement option or the individualized-assessment option to carry out Congress's intent to apply a use-of-minor enhancement only to adult defendants at least twenty-one years of age.

VI. ALL ROADS MIGHT STILL LEAD TO ROME: DISTRICT COURTS
HAVE THE AUTHORITY TO APPLY THE USE-OF-MINOR
ENHANCEMENT AS CONGRESS ORIGINALLY INTENDED BY
UTILIZING THE POLICY-DISAGREEMENT OPTION OR THE
INDIVIDUALIZED-ASSESSMENT OPTION IN AN ADVISORY
GUIDELINES SYSTEM

Although this Article concludes that the Sentencing Commission exceeded congressional authority by promulgating section 3B1.4

without an age restriction such that courts should adopt the no-authority option, that legal position is not the end of the road as far as the issue is concerned. The issue of the Sentencing Commission's authority could become less relevant if district courts use their significant sentencing discretion in applying section 3B1.4 of the now-advisory guidelines only to defendants who are at least twenty-one years of age. A brief introduction now to district courts' discretion on how to deal with section 3B1.4 might aid in digesting the extended discussion below.

In a watershed sentencing case, the Supreme Court in *United States v. Booker* struck down the mandatory nature of the Guidelines as unconstitutional.²⁸¹ The old mandatory sentencing regime fell to an advisory sentencing system. In place of the mandatory regime that existed at the time each of the circuit courts confronted the issue of whether the Sentencing Commission exceeded its authority in promulgating section 3B1.4, an advisory Guidelines system now exists. Under this system, district courts must still consult the Guidelines to calculate an advisory sentencing range. If the no-authority option is adopted, the range will never include the use-of-minor enhancement for defendants under the age of twenty-one. If the no-authority option is rejected, then the range will include a two-level use-of-minor enhancement for defendants under twenty-one. Once the advisory sentencing range is calculated, however, district courts must then consider all sentencing factors set forth in 18 U.S.C. § 3553(a) to impose an appropriate sentence.²⁸² The Guidelines' range is simply one factor among many that the district court must consider in imposing an appropriate sentence,²⁸³ one that is not greater than necessary to serve the purposes of federal sentencing. District courts are thus freed from the constraints of the mandatory guidelines regime, which in four circuits includes the mandatory application of section 3B1.4 to defendants younger than twenty-one years of age. District courts in every circuit are now free to look upon the Guidelines' range, which could include the application of section 3B1.4's use-of-minor enhancement if the no-authority option is rejected, as merely advisory.

How will an advisory system impact the issue of whether district courts must apply section 3B1.4's use-of-minor enhancement to defendants who are not twenty-one years old? Under an advisory

281. 543 U.S. 220, 244–45 (2005).

282. See 18 U.S.C. § 3553(a) (2006).

283. See *id.* § 3553(a)(4)(A).

system, district courts have two options to comply with Congress's intent of rejecting sentence enhancements for defendants under twenty-one years of age who use minors to commit federal offenses. First, district courts can now make an on-the-record policy disagreement with the Sentencing Commission's use-of-minor enhancement that does not have an age restriction. I call this first option the policy-disagreement option.²⁸⁴ In essence, the rationale for the policy-disagreement option is that the Sentencing Commission exceeded congressional authority by removing the relevance of a defendant's age in applying a use-of-minor enhancement. Another basis for the policy disagreement is that the Sentencing Commission has not demonstrated that it used its sentencing expertise to decide that defendants under twenty-one years of age should receive the same enhancement as defendants over twenty-one. Because the Sentencing Commission did not expand the congressionally directed use-of-minor enhancement based on its institutional strengths, little deference is due the Sentencing Commission.

Second, district courts can make an individualized, case-by-case assessment on whether applying section 3B1.4's use-of-minor enhancement to a defendant under the age of twenty-one would produce a sentence in a particular case that is greater than necessary to meet the purposes of federal sentencing. I call this second option the individualized-assessment option.²⁸⁵ If a district court decides that the use-of-minor enhancement will result in an excessive sentence, then the court has the discretion to sentence the defendant to a below-Guidelines sentence.

Ultimately, the Supreme Court's decision in *Booker* may moot—or at least tamp down—the importance of the original debate over the Sentencing Commission's authority to promulgate section 3B1.4's use-of-minor enhancement devoid of age restrictions. In jurisdictions that adopt the no-authority option and conclude that the Sentencing Commission exceeded its authority in promulgating section 3B1.4 without an age restriction, the advisory Guidelines range for defendants under twenty-one years of age will never include a two-level use-of-minor enhancement. In jurisdictions that reject the no-authority option and hold that the Sentencing Commission did not exceed its authority in promulgating section 3B1.4's use-of-minor enhancement (currently the Fourth, Seventh, Eighth, and Tenth Circuits), district courts must still apply the two-level use-of-minor

284. See discussion *infra* Part VI.B–C.

285. See discussion *infra* Part VI.D.

enhancement to defendants under twenty-one years of age to determine the appropriate Guidelines range. Under the now-advisory sentencing system, however, those district courts are then free to undo the effects of the misplaced application of section 3B1.4's use-of-minor enhancement to younger defendants under the policy-disagreement option or the individualized-assessment option.

A. *A Brief Tour of the Road from a Mandatory Guidelines Regime to an Advisory Guidelines System: Welcome to the Land of Booker, Kimbrough, and Spears*

For nearly twenty years, district courts labored under a mandatory Guidelines regime. That regime began to crumble in 2004. In *Blakely v. Washington*, a case involving the State of Washington's version of sentencing guidelines, the Supreme Court held that a district court violates the Sixth Amendment by imposing a sentence on a defendant that exceeds the statutory maximum of the offenses committed based on the court's, and not a jury's, factual findings in applying sentence enhancements under the Guidelines.²⁸⁶ As a base matter, the Supreme Court observed, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority."²⁸⁷ Thus, the Court held that parts of Washington's sentencing guidelines were unconstitutional to the extent that they deprived a defendant of his Sixth Amendment right to "insist that the prosecutor prove to a jury all facts legally essential to the punishment."²⁸⁸ The Court tried to make clear that its decision was "not about whether determinate sentencing is constitutional, [but] only about how it can be implemented in a way that respects the Sixth Amendment."²⁸⁹ The Court's decision in *Blakely*—applicable only to a single state's sentencing scheme—was the first blow that would ultimately take down the mandatory nature of the federal sentencing system.

286. 542 U.S. 296, 298, 303–04 (2004).

287. *Id.* at 304 (quoting 1 J. BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADINGS, EVIDENCE, AND PRACTICE IN CRIMINAL CASES § 87 (2d ed. 1872)).

288. *Id.* at 313–14.

289. *Id.* at 308.

Later, in *Booker*, the Supreme Court confronted the mandatory nature of the Guidelines in federal sentencing.²⁹⁰ Reaffirming that the Sixth Amendment requires “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt,” the Court extended its decision in *Blakely* to the federal Guidelines system.²⁹¹ In crafting the appropriate remedy to the unconstitutional nature of the mandatory Guidelines system, the Court severed the parts of the legislation that created the Guidelines and those that made it unconstitutional.²⁹² Once those unconstitutional provisions were removed from the statute, the Court reasoned, then the remaining sentencing system is constitutional, but it no longer retains its status as a mandatory regime.²⁹³ Instead, the Court’s decision to sever the unconstitutional parts of the statute rendered “the Guidelines effectively advisory.”²⁹⁴ Under this system, district courts must consider “Guidelines ranges,” but they are permitted “to tailor the sentence in light of other statutory concerns.”²⁹⁵ The Court declared, “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”²⁹⁶ Although district courts are no longer constrained by the mandatory application of the Guidelines, they still must consult the Guidelines along with other sentencing factors to determine the appropriate sentence.²⁹⁷

Under the federal sentencing system, district courts must consider the following seven factors under § 3553(a)—only one of which is the now-advisory sentencing range established by the application of the

290. 543 U.S. 220, 233–34 (2005) (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases.”).

291. *Id.* at 244.

292. *See id.* at 245. Specifically, the Court excised 18 U.S.C. §§ 3553(b)(1) and 3742(e), which collectively had the effect of making the Guidelines mandatory. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 264 (citing 18 U.S.C. §§ 3553(a)(4)–(5) (2006)).

297. *See id.*

Guidelines—to determine the appropriate sentence for a federal defendant.²⁹⁸

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [G]uidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

298. See *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (“This Court’s remedial opinion in *United States v. Booker* instructed district courts to read the United States Sentencing Guidelines as ‘effectively advisory[.]’ In accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”) (citations omitted); see also *Gall v. United States*, 552 U.S. 38, 59 (2007) (“[T]he Guidelines are only one of the factors to consider when imposing sentence . . .”).

- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.²⁹⁹

When considering the § 3553(a) factors, district courts are instructed to only “impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes” of the sentencing system as reflected in § 3553(a)(2).³⁰⁰

This sea change from a mandatory regime to an advisory system has sent ripples to every corner of federal sentencing. To this point, only one district court has utilized the advisory nature of the Guidelines to reject the Sentencing Commission’s expanded use-of-minor enhancement as it applies to defendants under the age of twenty-one.³⁰¹ Now, fertile fields exist to harvest such a result in every jurisdiction. To this end, district courts would then apply use-of-minor enhancements only to defendants at least twenty-one years of age, a result consistent with Congress’s intent in the first place. District courts would accomplish this result by adopting the no-authority option, policy-disagreement option, or individualized-assessment option.

B. The Post-Booker Advisory Guidelines System Authorizes District Courts to Adopt the Policy-Disagreement Option or the Individualized-Assessment Option to Sentence Defendants Without Applying the Sentencing Commission’s Guidelines

It is uncontroverted that *Booker*’s drastic change to the federal sentencing system is still being digested by the federal courts, with

299. 18 U.S.C. § 3553(a) (2006).

300. *Id.* (emphasis added).

301. See *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *5 (S.D.N.Y. Apr. 27, 2006).

many challenging and nuanced issues being debated. One challenging issue is how best to determine the extent of a district court's authority to reject a guideline based on the district court's policy disagreement with the Sentencing Commission over the wisdom of the guideline. This part of the Article presses the issue on whether a district court has the discretionary authority to reject the application of section 3B1.4's use-of-minor enhancement to defendants under twenty-one years of age based solely on the court's policy disagreement with the Sentencing Commission, i.e., the policy-disagreement option. This issue will take time to work its way through the federal sentencing system. That is precisely what is required in our constitutional republic. Hopefully, this Article will help light the path to the options available to sentencing courts to reject the Sentencing Commission's expanded use-of-minor enhancement so that courts can impose appropriate sentences on defendants under the age of twenty-one who use minors to commit federal offenses.

In a recent dissenting opinion to the Supreme Court's summary reversal of a circuit court's decision, Chief Justice Roberts acknowledged that it will take some time and effort before courts fully comprehend how much authority district courts have in rejecting guidelines based on policy disagreements:

[Our recent sentencing cases of] *Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.³⁰²

This Article cannot guarantee that the roots will be healthy if a district court adopts the policy-disagreement option by explicitly acknowledging a policy disagreement with the Sentencing Commission over section 3B1.4's application to defendants under twenty-one years of age. Nevertheless, this Article provides a reasonable analytical framework based on Supreme Court precedent that authorizes district courts to do just that.

After the Supreme Court decided *Booker*, one controversial issue launched itself to the front of the debate. That issue was the extent of a district court's discretion under an advisory Guidelines system to issue below-Guidelines sentences dealing with the disparity in the

302. *Spears v. United States*, 555 U.S. 261, 268, 270 (2009) (Roberts, C.J., dissenting) (per curiam).

federal treatment of crack cocaine and powder cocaine. In *Kimbrough*, the Supreme Court demonstrated that district courts have the authority to grant downward variances from Guidelines' ranges based *solely* on a policy disagreement with the Sentencing Commission on the wisdom of an actual guideline.³⁰³ The Court reached this decision in the context of the decades-long debate over the 100:1 disparity between crack cocaine and powder cocaine, which results in the same sentences for defendants convicted of crimes involving 1/100 of the amount of crack cocaine than defendants who are convicted of crimes involving powder cocaine.³⁰⁴ As the Court described, “[u]nder the statute criminalizing the manufacture and distribution of crack cocaine, 21 U.S.C. § 841, and the relevant Guidelines prescription, [section] 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.”³⁰⁵ As applied, if two defendants are convicted of crimes involving the same amount of cocaine, the defendant convicted of the crack crime would receive a sentence “three to six times longer” than the defendant convicted of the powder crime.³⁰⁶

The defendant in *Kimbrough* pleaded guilty to crimes involving crack and powder cocaine.³⁰⁷ Applying the advisory Guidelines, which contained the 100:1 disparity for sentencing purposes, the district court came up with a sentencing range of 228 to 270 months' imprisonment.³⁰⁸ The district court concluded that the sentencing range was excessive, such that any sentence within this range “would have been ‘greater than necessary’ to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a).”³⁰⁹ The district court blamed this excessive sentencing range on the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing.”³¹⁰ Contrasting the crack–powder dichotomy, the district court explained that had the defendant been convicted of crimes involving the same amount of powder cocaine, the applicable guidelines range would have been only 97 to 106 months, drastically lower than the range for

303. See *Kimbrough*, 552 U.S. at 91, 109–11.

304. See *id.* at 94–111.

305. *Id.* at 91.

306. *Id.* at 94.

307. See *id.* at 91.

308. See *id.* at 92.

309. *Id.* at 92–93.

310. *Id.* at 93.

crack cocaine.³¹¹ Deciding that the statutory minimum sentence, which itself still reflected Congress's bias against crack cocaine, was "clearly long enough" to satisfy § 3553(a)'s purposes, the district court sentenced the defendant to 180 months' imprisonment.³¹² On appeal, the Fourth Circuit reversed, concluding that any sentence "outside the [G]uidelines['] range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."³¹³

Disagreeing with the Fourth Circuit, the Supreme Court held "that, under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only, and that the [Fourth Circuit] erred in holding the crack–powder disparity effectively mandatory."³¹⁴ Although the district court must consider the Guidelines' range as one sentencing factor, the district court may also conclude that a sentence within the Guidelines' range exceeds what is necessary under § 3553(a). Thus, the Court held that when determining the appropriate sentence, a district court has the authority to "consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses."³¹⁵

Even though the Supreme Court in *Kimrough* held that the district court's rejection of a Guidelines sentence *based solely on policy disagreements with the Sentencing Commission* did not result in an unreasonable sentence, the Court nonetheless cautioned that such policy disagreements should not result in a panacea to reject all guidelines.³¹⁶ The Court tried to tamp down any notion that the Guidelines can be effectively discarded in a sentencing free-for-all.³¹⁷ The Court cautioned that although the Guidelines are only advisory, the Sentencing Commission nevertheless plays a key role in sentencing because of its capacity (which courts lack) to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."³¹⁸ Furthermore, because the Sentencing Commission serves Congress's goals in formulating and refining national sentencing standards, district courts are still required to "treat the Guidelines as the 'starting point and the initial

311. *See id.*

312. *Id.*

313. *Id.* (quoting *United States v. Kimrough*, 174 F. App'x 798, 799 (4th Cir. 2006)).

314. *Id.* at 91 (emphasis added).

315. *Id.*

316. *See id.* at 108–09.

317. *See id.*

318. *Id.* at 108–09 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

benchmark” at sentencing.³¹⁹ Thus, “in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.’”³²⁰

The Court tried to boil down the analytical options when a district court seeks to impose a sentence outside the Guidelines’ range:

In light of [a district court’s] discrete institutional strengths [to judge a particular case and facts in light of the § 3553(a) factors], a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case “outside the ‘heartland’ to which the Commission intends individual Guidelines to apply.” On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range “fails properly to reflect § 3553(a) considerations” even in a mine-run case.³²¹

Thus, district courts have two options when sentencing outside the Guidelines’ range based on the court’s conclusion that a Guidelines sentence is not warranted under § 3553(a). First, a district court can utilize the individualized-assessment option by using its institutional strength to make an individualized assessment of what sentence is reasonable for an individual defendant based on the unique facts and circumstances of a single case. Second, a district court can utilize the policy-disagreement option and infringe on the Sentencing Commission’s institutional strength to make national sentencing policy by disagreeing with the Sentencing Commission on policy grounds, regardless of the facts and circumstances of a single case.

The Supreme Court in *Kimbrough* blessed the district court’s use of the policy-disagreement option. In doing so, the Court explained that the district court’s downward variance from the Guidelines’ range

319. *Id.* at 108 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

320. *Id.* at 109 (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)); *see also Gall*, 552 U.S. at 46 (“It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).

321. *Id.* (citation omitted).

based on a policy disagreement with the Guidelines' crack–powder disparity was warranted because even if the Sentencing Commission had not changed the Guidelines, it had expressed its distaste for the congressionally induced disparity.³²² The Court applauded the district court for explaining that it “accorded weight to the Sentencing Commission’s consistent and emphatic position that the crack–powder disparity is at odds with § 3553(a).”³²³ The Court indicated that the district court had merely disagreed with the Sentencing Commission in a case where even the Sentencing Commission itself disagreed with the Guidelines, as seen by its subsequent act of reducing the crack–powder disparity to between 25:1 and 80:1.³²⁴

Given *Kimbrough* and the Sentencing Commission’s adoption of guidelines with less than a 100:1 crack–powder disparity, what is the authority of a district court under the advisory sentencing system to issue a below-Guidelines sentence if the court adopts the policy-disagreement option and disagrees with even a 25:1 or 80:1 disparity? In *Spears v. United States*, the Court again addressed a district court’s policy disagreement with the 100:1 crack–powder disparity and its impact on sentencing.³²⁵ The district court first calculated the advisory Guidelines range—324 to 405 months’ imprisonment—for the defendant convicted of distributing crack and powder cocaine.³²⁶ Based on its consideration of the § 3553(a) factors, the district court concluded that the Guidelines’ 100:1 crack–powder ratio “yielded an excessive sentence.”³²⁷ Concluding that the 100:1 ratio was unjust, the district court recalculated the defendant’s sentencing range to reflect a 20:1 ratio—a ratio the district court favored for policy reasons—resulting in a sentencing range of 210 to 262 months.³²⁸ The district court then sentenced the defendant to 240 months in prison, the statutory minimum.³²⁹ The Eighth Circuit reversed the district court, concluding that district courts are not

322. *See id.* at 109–11.

323. *Id.* at 111.

324. *See id.* at 106, 111.

325. 555 U.S. 261, 262 (2009) (per curiam).

326. *See id.*

327. *Id.*

328. *See id.*

329. *Id.* (citing *United States v. Spears*, 469 F.3d 1166, 1173–74 (8th Cir. 2006) [hereinafter *Spears I*] (en banc), *vacated*, *Spears v. United States*, 552 U.S. 1090, 1090 (2008)).

authorized to simply substitute a new ratio for the Guidelines' 100:1 ratio.³³⁰

The Supreme Court disagreed with the Eighth Circuit, making clear that the Court had held in *Kimbrough* “that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a *policy disagreement* with those Guidelines.”³³¹ The Court specifically adopted the following language from the dissenting opinion from the Eighth Circuit’s decision as a correct interpretation of *Kimbrough*:

The Court thus established that even when a particular defendant in a crack cocaine case presents no special mitigating circumstances—no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation—a sentencing court may nonetheless vary downward from the advisory guideline range. The court may do so based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates “an unwarranted disparity within the meaning of § 3553(a),” and is “at odds with § 3553(a).” The only fact necessary to justify such a variance is the sentencing court’s disagreement with the [G]uidelines—its *policy view* that the 100-to-1 ratio creates an unwarranted disparity.³³²

The Supreme Court reiterated that district courts have two options when imposing sentences outside the Guidelines’ range. First, the Supreme Court explained that a district court’s decision to vary from the Guidelines’ range is entitled to great respect when the facts of a particular case are “outside the heartland” to which the Sentencing Commission intended the Guidelines to apply.³³³ In other words, when a variance is based on the district court’s institutional strength to make individualized assessments based on the unique facts and circumstances in a given case, the level of deferential respect is greatest. Again, this Article refers to this as the individualized-assessment option. Second, the Supreme Court made clear that an “‘inside the heartland’ departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily

330. See *id.* at 263 (citing *United States v. Spears*, 533 F.3d 715, 716–17 (8th Cir. 2008) [hereinafter *Spears II*] (en banc), *vacated*, *Spears v. United States*, 552 U.S. 1090, 1090 (2008)); *Spears I*, 469 F.3d at 1174, 1176).

331. *Id.* at 265–66 (emphasis added).

332. *Id.* at 263–64 (emphasis added) (citations omitted) (quoting *Spears II*, 533 F.3d at 719 (Colloton, J., dissenting)).

333. See *id.* at 264 (quoting *Kimbrough v. United States*, 552 U.S. 85, 89 (2007)).

disagrees on a ‘categorical basis’),” rather than an individualized assessment, “may be entitled to less respect.”³³⁴ Stated differently, when a district court finds itself farther away from its institutional strengths to sentence a particular defendant in a given case, and invades the institutional strengths of the Sentencing Commission to set national sentencing policy through the issuance of guidelines to apply to all defendants, the district court’s national policy determinations are entitled to less respect and some deference is owed to the Sentencing Commission’s judgment. This is what I term the policy-disagreement option.

The Supreme Court then addressed the level of respect afforded a district court based on a specific policy disagreement with the Sentencing Commission over the crack–powder disparity. The Court explained that although a district court’s policy disagreement over a guideline is generally not entitled to great respect, a policy disagreement specifically on the 100:1 crack–powder disparity is entitled to respect.³³⁵ The Court explained that because the disparity emanated generally from Congress, and not the Sentencing Commission’s institutional expertise, and, partly, because even the Sentencing Commission itself had criticized that ratio, district courts are actually not locked in a policy battle with the Sentencing Commission.³³⁶ Thus, the Supreme Court recognized “district courts’ authority to vary from the crack[-]cocaine Guidelines based on [a] *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”³³⁷ The Court made clear “that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines [100:1 crack–powder ratio] based on a *policy disagreement* with those Guidelines,” which “necessarily permits adoption of a replacement ratio.”³³⁸

After the Supreme Court’s approval of district courts’ authority to categorically reject the crack–powder disparity based on policy disagreements with the Sentencing Commission, it is now possible to eliminate the crack–powder disparity altogether under the advisory Guidelines system. District courts have begun to do just that. By rejecting any crack–powder disparity on policy grounds, it needs to be

334. *Id.*

335. *See id.*

336. *See id.*

337. *Id.* at 264 (emphasis in original).

338. *Id.* at 265–66 (emphasis added).

stressed that district courts are not using the individualized-assessment option. Instead, district courts are using the policy-disagreement option, which authorizes the courts to act as policymakers in disagreeing with the Sentencing Commission on what sentences best serve the sentencing policies in § 3553(a). In *United States v. Greer*, for example, a federal district court in Texas determined that the advisory Guidelines range for a defendant convicted of distributing crack cocaine was between seventy and eighty-seven months' imprisonment.³³⁹ Based *solely* on a policy disagreement over the disparity, the district court used the policy-disagreement option to "adopt[] a 1-to-1 ratio for this and all future crack cocaine cases in determining the base offense level."³⁴⁰ When the district court applied a 1:1 ratio to the facts of the case, the sentencing range decreased substantially to twenty-one to twenty-seven months' imprisonment.³⁴¹ After considering the remaining § 3553(a) factors, the district court settled on a sentence of twenty-four months' imprisonment, nearly two-thirds less than the lowest end of the Guidelines' range.³⁴² Given the Supreme Court's decisions in *Kimbrough* and *Spears*, appellate courts would have little authority to reject a district court's adoption of the policy-disagreement option to replace a 100:1, 80:1, or 25:1 sentencing disparity with a 1:1 ratio, at least until the Sentencing Commission utilizes its institutional strength to explain why the disparity should be given weight in mine-run cases. To the extent that district courts and the Sentencing Commission have a policy disagreement over an issue not within the Sentencing Commission's institutional areas of expertise, the Supreme Court will not force district courts in an advisory sentencing system to defer to the Sentencing Commission's belief as to the appropriate sentences under § 3553(a).

Why did this Article spend so much time explaining the policy-disagreement option in the context of the crack-powder-disparity debate? It is critical that district courts—as well as criminal

339. 699 F. Supp. 2d 876, 877 (E.D. Tex. 2010).

340. *See id.* at 879–80.

341. *See id.* at 880.

342. *See id.*; *see also* *United States v. Gully*, 619 F. Supp. 2d 633, 644 (N.D. Iowa 2009) (“[T]he appropriate method is to calculate the guideline range under existing law (i.e., using the 100:1 ratio and any appropriate guideline adjustments or departures), but then to calculate an alternative guideline range using a 1:1 ratio, and to use or vary from that alternative guideline range depending upon the court’s consideration of the 18 U.S.C. § 3553(a) factors to account, for example, for the defendant’s history of violence, the presence of firearms, or the defendant’s recidivism.”).

defendants and prosecutors—fully comprehend the sentencing options under an advisory-Guidelines system based on policy disagreements with the Sentencing Commission’s promulgation of guidelines. The extent to which a district court may exercise its discretionary authority to impose an outside-Guidelines sentence based on policy disagreements with the Sentencing Commission will take time to sort out. But one thing is crystal clear: the Supreme Court has concluded that a district court can choose to disregard the Guidelines based solely on an ideological policy disagreement with the Sentencing Commission.³⁴³ When district courts disagree with the Sentencing Commission’s Guidelines based on policy grounds, however, the Supreme Court has stated that the courts are not entitled to great respect when they drift from their institutional strengths and tread on the Sentencing Commission’s institutional strengths.³⁴⁴

As the *Booker* and *Kimbrough* line of cases show, the federal sentencing landscape has undergone a dramatic pruning in the last few years. Now that the Guidelines are merely advisory and district courts have the discretion to impose outside-Guidelines sentences based on a policy disagreement with the Sentencing Commission or an individualized assessment of a defendant’s unique circumstances, district courts have significantly more discretion in deciding whether to apply section 3B1.4’s use-of-minor enhancement to defendants who are not twenty-one years of age. As explained in Parts II to V, a district court’s first option is to conclude that the Sentencing Commission exceeded its congressional authority to promulgate section 3B1.4 without an age restriction. Under this no-authority option, the advisory Guidelines range will not include a two-level use-of-minor enhancement. District courts in the Fourth, Seventh, Eighth, and Tenth Circuits are foreclosed from choosing the no-authority option, while district courts in the Sixth Circuit already operate under such a framework. District courts in the remaining circuits that have not addressed the issue are free to adopt the no-authority option, which would mean that the Guidelines’ range for defendants under the age of twenty-one would not include a two-level use-of-minor enhancement.

C. *The Post-Booker Advisory Guidelines System Authorizes District Courts to Utilize the Policy-Disagreement Option—Based Solely*

343. See *Kimrough v. United States*, 552 U.S. 85, 91 (2007).

344. See *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam).

*on Policy Disagreements with the Sentencing Commission—to
Retract the Sentencing Commission’s Inappropriate Expansion of
Congressional Authority and Sentence Defendants Younger than
Twenty-One Years of Age Without Applying the Use-of-Minor
Enhancement*

Every district court in every circuit has the authority to adopt the policy-disagreement option, which decides as a matter of policy that section 3B1.4’s use-of-minor enhancement should not apply to defendants under the age of twenty-one. In March 2011, the Supreme Court decided *Pepper v. United States*, making crystal clear that district courts have the authority to adopt the policy-disagreement option:

To be sure, we have recognized that the [Sentencing] Commission post-*Booker* continues to “fil[l] an important institutional role” because “[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” Accordingly, we have instructed that district courts must still give “respectful consideration” to the now-advisory Guidelines (and their accompanying policy statements). As *amicus* acknowledges, however, our post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a [policy] disagreement with the [Sentencing] Commission’s views. That is particularly true where . . . the [Sentencing] Commission’s views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.³⁴⁵

What is the propriety of utilizing the policy-disagreement option in section 3B1.4 cases involving defendants under the age of twenty-one? As an initial matter, consider the Eighth Circuit’s pre-*Booker* case of *United States v. Wingate*, which rejected the no-authority option and held that the district court did not erroneously apply a two-level use-of-minor enhancement for an eighteen-year-old defendant.³⁴⁶ After the Eighth Circuit decided *Wingate*, the Supreme Court changed the sentencing landscape by determining that a mandatory Guidelines scheme was unconstitutional.³⁴⁷ As a result of its decision in *Booker*, the Supreme Court vacated the Eighth Circuit’s

345. 131 S. Ct. 1229, 1247 (2011) (alterations in original) (citations omitted).

346. 369 F.3d 1028, 1032 (8th Cir. 2004), *opinion reinstated*, 415 F.3d 885, 889 (8th Cir. 2005).

347. See *United States v. Booker*, 543 U.S. 220, 244–45 (2005).

judgment in *Wingate* and remanded the case so that the Eighth Circuit could consider *Booker's* impact on the decision.³⁴⁸ On remand, the Eighth Circuit reinstated its prior opinion and again affirmed the district court's application of section 3B1.4's use-of-minor enhancement to *Wingate*, even though the district court applied the enhancement while the Guidelines were still mandatory.³⁴⁹

In essence, the Eighth Circuit concluded that a sea change to an advisory Guidelines system from a mandatory regime would not have prodded the district court to issue a shorter sentence.³⁵⁰ Stated another way, based on a plain error standard of review, the Eighth Circuit required that *Wingate* establish that there was a reasonable probability that the district court would have imposed a more lenient sentence under an advisory Guidelines system than it did under the mandatory regime.³⁵¹ The Eighth Circuit concluded, "The record does not indicate the district court would have given *Wingate* a more lenient sentence absent *Booker* error."³⁵²

The Eighth Circuit reached this conclusion even though the district court (1) ultimately sentenced *Wingate* at the bottom of the Guidelines' range, (2) complained that the court "wasn't looking forward to" sentencing *Wingate*, and (3) exasperated that "there is not any good reason why" the court had to send a nineteen-year-old person to prison for seventy-eight months.³⁵³ Notwithstanding the district court's equivocal statements about *Wingate's* age and the appropriateness of the sentence, the Eighth Circuit found solace in its decision not to remand for resentencing by focusing on the district court's apparent fidelity to apply the mandatory use-of-minor enhancement.³⁵⁴ In that light, the Eighth Circuit focused on the district court's (1) finding that it was "crystal clear" that *Wingate* had used minors to commit a federal offense; (2) decision not to grant a downward departure from the mandatory sentencing range based "on the proximity in the ages between *Wingate* and the minors he used;" (3) confounding statement—at least when used as support for the notion that the district court would not have granted a shorter

348. See *Wingate v. United States*, 543 U.S. 1107, 1007 (2005).

349. See *United States v. Wingate*, 415 F.3d 885, 889 (8th Cir. 2005).

350. See *id.* at 888–89 (finding no plain error in *Wingate's* sentence that resulted from the district court's application of mandatory Guidelines because the district court would not have imposed a more lenient sentence if given the opportunity).

351. See *id.*

352. *Id.* at 889.

353. See *id.*

354. See *id.*

sentence if the Guidelines were merely advisory—that “the law is what it is and the [G]uidelines, at least in [the district court’s] mind, were clear as to what the penalty in this case is;” and (4) conclusion that “both the Congress and the Sentencing Commission” treat Wingate’s offense as serious.³⁵⁵

Unfortunately, there is no way of knowing whether the district court would have used either the policy-disagreement option or the individualized-assessment option (given Eighth Circuit precedent as outlined above in Part IV.B., the district court would have been foreclosed from considering the no-authority option) to impose a below-Guidelines sentence for Wingate under an advisory Guidelines system. Going forward, however, every district court (including the district court that sentenced Wingate) has the discretionary authority to reject section 3B1.4’s use-of-minor enhancement for defendants under the age of twenty-one by utilizing the policy-disagreement option or the individualized-assessment option.

How should a district court record its adoption of the policy-disagreement option to reject the application of the Sentencing Commission’s use-of-minor enhancement to defendants under the age of twenty-one? What explanation should a district court electing to use the policy-disagreement option place on the record as the rationale for imposing a below-Guidelines sentence for a defendant under age twenty-one who uses a minor to commit a federal offense? The district court should explicitly recognize that it has a policy disagreement with the Sentencing Commission over the application of section 3B1.4 to defendants who are not twenty-one years of age such that applying the use-of-minor enhancement would not serve the purposes of § 3553(a)(2). In other words, a district court should not mask its policy disagreement as if it were using the individualized-assessment option on what would be a reasonable sentence for this particular defendant.³⁵⁶ In exercising its authority under the policy-

355. *See id.*

356. In *United States v. Pena-Hermosillo*, the district court refused to apply section 3B1.4 to enhance the sentence of a defendant who used his minor girlfriend because the defendant was a minor when he began using his girlfriend to commit federal offenses:

The spirit of the enhancement is to punish adults who exploit minors, and I don’t feel that [the defendant] fits this mold, because his girlfriend was very close to him in age and he wasn’t really exploiting her so much as he was misleading his wife.

522 F.3d 1108, 1114 (10th Cir. 2008). When reviewing the district court’s sentencing decision on the applicability of section 3B1.4, the Tenth Circuit explained that “it is not clear whether the district judge concluded that, as a matter of law, the enhancement did not apply under the government’s proffered facts” or, on the other hand, “if the ruling was

disagreement option, a district court makes a policy determination that all defendants under the age of twenty-one should not receive the same two-level use-of-minor enhancement as defendants who are older than twenty-one.

If a district court utilizes the policy-disagreement option to reject section 3B1.4's application to defendants under the age of twenty-one, the court must explain why the Sentencing Commission's promulgation of the guideline will not carry out the purposes behind federal sentencing. To do this, the district court must explain that the Sentencing Commission's expression of national sentencing policy directly contradicts Congress's expression of national sentencing policy. Using the arguments in Parts II to V above, district courts should explain why federal sentencing policy, as reflected in the consideration of the § 3553(a) factors, does not justify the same two-level use-of-minor enhancement for every defendant, regardless of age, and no matter the proximity in age between the defendant and minor.

The district court should discuss the policy judgment of Congress when it enacted the Crime Bill and included the use-of-minor directive to the Sentencing Commission. Although the arguments on Congress's intent and the policy behind the use-of-minor enhancement for adult defendants will be the same as those detailed in Parts II to V, the effect of those arguments under the policy-disagreement option is not that the Sentencing Commission exceeded its authority (that is the no-authority option). The import of these policy arguments is to illustrate that the district court is carrying out congressional intent on the sentencing of defendants under the age of twenty-one rather than the Sentencing Commission's unjustified approach. A district court utilizing the policy-disagreement option will

based on a factual finding." *Id.* at 1115. Based on Tenth Circuit precedent holding that section 3B1.4 can be applied to defendants under the age of twenty-one, district courts in that circuit do not have the authority to adopt the no-authority option. *Id.* (citing *U.S. v. Kravchuk*, 335 F.3d 1147, 1158 (10th Cir. 2003)). In *Pena-Hermosillo*, the Tenth Circuit also reversed the district court's attempt to use the policy-disagreement option (or perhaps the individualized-assessment option) to not use section 3B1.4's use-of-minor enhancement, concluding that "the district court's alternative rationale [was] procedurally unreasonable, because [it was] inadequately explained." *Id.* at 1117. This holding underscores how important it is for a district court to make a rational and detailed explanation as to why the court is not applying section 3B1.4 to enhance sentences for defendants under the age of twenty-one, whether based on the no-authority option, policy-disagreement option, or individualized-assessment option. This Article strives to supply that rational and detailed explanation to district courts for their use in sentencing defendants who are not twenty-one yet.

conclude that Congress's approach to enhancing sentences only for adult defendants over the age of twenty-one who use minors to commit federal offenses better serves the sentencing purposes in § 3553(a) than the Sentencing Commission's one-size-fits-all approach to sentence every defendant—no matter how old or how young—by using the same two-level use-of-minor enhancement.

A district court's rejection of the Sentencing Commission's expertise on uniform national sentencing policy will not be entitled to great respect if the Sentencing Commission utilized its institutional expertise in determining that § 3553(a) requires that *all* defendants—regardless of age—receive a two-level enhancement for using any minor, even if the minor is much younger, barely younger, or even older than the defendant. As seen in *Kimbrough* and *Spears*, the Sentencing Commission loses its vaulted status as a body entitled to great deference when it cannot show that its institutional expertise produced a sentencing policy. In the context of sentencing defendants under the age of twenty-one for using minors to commit federal offenses, the Sentencing Commission has not demonstrated institutional expertise as to why the factors listed in § 3553(a) would be satisfied only through an application of the same use-of-minor enhancement for every defendant, regardless of age. Instead of utilizing its institutional strengths, the Sentencing Commission simply promulgated a congressional directive in a “slightly broader form.” In promulgating an enhancement pursuant to the congressional directive, the Sentencing Commission wholly abrogated the relevance of the defendant's age in sentencing. Additionally, the Sentencing Commission apparently concluded, without explanation, that the proximity in age between the defendant and the minor used is also irrelevant in meting out punishment consistent with § 3553(a). Because there are no policy reasons or empirical data explaining these unsupported conclusions, the Sentencing Commission's decision to promulgate a use-of-minor enhancement without age restrictions is not entitled to deference. This is particularly true when the Sentencing Commission defies Congress's intent. District courts are thus free to disregard the Sentencing Commission's policy decision and fully embrace Congress's expression of policy.³⁵⁷

357. Interestingly, one federal circuit judge has indicated that defendants may be able to argue that certain guidelines—such as section 3B1.4—may even “be irrelevant to whether the sentence a party proposes is sufficient, but not greater than necessary to satisfy” some of the purposes of sentencing in § 3553(a)(2). See *United States v. Irey*, 612 F.3d 1160, 1241–42 (11th Cir. 2010) (en banc) (Tjoflat, J., concurring in part and dissenting in part). If a district court decided to reject an advisory Guidelines sentence under the

After utilizing the policy-disagreement option to categorically reject section 3B1.4's application to defendants under the age of twenty-one, a district court would then calculate a Guidelines range without a use-of-minor enhancement. If the district court determined that an upward variance is required for a defendant's use of a minor, then the court is free to apply its own use-of-minor enhancement to reach an appropriate sentence in the case. The import of a district court's discretion in an advisory Guidelines system is not to freely disregard the Sentencing Commission's justification for sentencing; rather, it is to apply sound sentencing policy consistent with § 3553(a). Even if a district court utilizes the policy-disagreement option, it must still utilize the individualized-assessment option to determine the appropriate sentence for a particular defendant. All district courts are required to use the individualized-assessment option in every case.

One district court has apparently utilized the policy-disagreement option in a post-*Booker* case to reject the application of section 3B1.4's use-of-minor enhancement to a defendant under the age of twenty-one. The district court in *Delarosa* surveyed the federal circuit decisions on whether the Sentencing Commission exceeded congressional authority in promulgating section 3B1.4 without age restrictions for defendants.³⁵⁸ Even though the Second Circuit had not decided the issue, leaving the district court free to do so, the district court nonetheless refused to take sides on the circuit split.³⁵⁹ In essence, it rejected the opportunity to adopt the no-authority option. The court nevertheless still refused to apply the Sentencing Commission's use-of-minor enhancement to a defendant who was a minor and who used other minors who were older than the defendant to commit a federal offense.³⁶⁰ In deciding not to apply a clearly applicable guideline—section 3B1.4 applies to all defendants regardless of age—the district court concluded that Congress never intended the use-of-minor enhancement to apply to minors who are younger than the minors used to commit the federal offense.³⁶¹

In effect, the district court utilized the policy-disagreement option by issuing a policy disagreement with the Sentencing Commission

policy-disagreement option, the court would be entitled to no level of deference or respect if the court's wholesale rejection of a guideline included a guideline properly promulgated under a congressional directive.

358. See *United States v. Delarosa*, No. 04 CR. 424-1(RWS), 2006 WL 1148698, at *5 (S.D.N.Y. Apr. 27, 2006).

359. See *id.*

360. See *id.*

361. See *id.*

over the appropriate sentence under § 3553(a). The district court was not using the individualized-assessment option to determine the appropriate sentence only for this particular defendant. The court was declaring that its view of national sentencing policy—consistent with congressional intent—differed from the Sentencing Commission’s such that the court would never apply a use-of-minor enhancement to defendants under the age of eighteen who use minors older than the defendant to commit a federal offense. Under the advisory Guidelines system, the district court in *Delarosa* acted well within its discretion to ignore a guideline that results in a sentence that is greater than necessary to carry out the purposes of § 3553(a).

By exercising the policy-disagreement option, the district court in *Delarosa* imposed a sentence on the defendant drastically below the Guidelines’ sentence. If the court had applied a two-level use-of-minor enhancement under section 3B1.4, the defendant’s offense level would have been 41. Given the offense level and a criminal history category of II, the applicable sentencing range under the Guidelines would have been between 360 months’ and life imprisonment. By rejecting a use-of-minor enhancement for the seventeen-year-old defendant who used older seventeen-year-old minors to commit the federal offenses, the district court calculated a Guidelines’ range of between 292 and 365 months’ imprisonment based on an offense level of 39 and the same criminal history category.³⁶² Further using the discretion authorized by *Booker*, which inherently includes the individualized-assessment option, the district court sentenced *Delarosa* to 188 months’ imprisonment.³⁶³ The defendant’s resulting sentence was nearly half of the bottom of the Guidelines’ range that included a two-level use-of-minor enhancement. That is an outstanding illustration of the high stakes that surround the issue of national sentencing policy for use-of-minor enhancements for adult defendants over the age of twenty-one as opposed to younger defendants.

Once the district court properly utilizes the policy-disagreement option to reject section 3B1.4’s application to all defendants, appellate courts should defer to the district court. The Eleventh Circuit poetically described a reviewing court’s obligation to defer to a district court’s proper use of its sentencing discretion under the advisory Guidelines system: “Because of the substantial deference district

362. *See id.* at *5–6.

363. *See id.* at *6, *8.

courts are due in sentencing, we give their decisions about what is reasonable wide berth and almost always let them pass.”³⁶⁴

Another post-*Booker* case further illustrates how a district court can reasonably utilize the policy-disagreement option to reject a guideline. In *United States v. Handy*, a senior district judge in New York rejected, on policy grounds, a guideline that enhanced sentences for defendants who possess stolen firearms, regardless of the defendant’s knowledge that the firearm was stolen.³⁶⁵ In doing so, the district court disagreed with various circuit courts in concluding that section 2K2.1(b)(4) of the Guidelines should not apply unless a defendant knew or should have known that a firearm was stolen.³⁶⁶ The district court questioned the constitutionality of section 2K2.1(b)(4), which can be appropriately characterized as exercising the no-authority option. The court also made a passing reference that the § 3553(a) factors do not support the application of strict liability—as opposed to a knowledge requirement—for possessing a stolen gun.³⁶⁷ This wholesale, categorical rejection of a guidelines’ use in all similar cases constitutes the utilization of the policy-disagreement option, which effectively makes a policy decision on what the national sentencing policy should be on an issue. This analytical approach indicates that if a reviewing court disagrees with a guideline on legal grounds under the no-authority option—in this case, that section 2K2.1(b)(4)’s strict liability requirement is unconstitutional—then the district court should also seek safe harbor in employing the policy-disagreement option.³⁶⁸

364. *United States v. Irey*, 612 F.3d 1160, 1225 (11th Cir. 2010) (en banc); *but see id.* at 1169–80, 1199–1225 (holding that a district court’s downward variance from a Guideline’s sentence based on a *policy disagreement* with the Sentencing Commission’s choice to promulgate Guidelines to sentence pedophiles was unreasonable for a host of reasons).

365. 570 F. Supp. 2d 437, 440 (E.D.N.Y. 2008).

366. *See id.* at 439–40; *but see United States v. Black*, 386 F. App’x 238, 241–42 (3d Cir. 2010) (holding that section 2K2.1(b)(4)’s strict liability standard is valid); *United States v. Rolack*, 362 F. App’x 460, 464 (6th Cir. 2010) (same); *United States v. Perez*, 585 F.3d 880, 883 (5th Cir. 2009) (same); *United States v. Statham*, 581 F.3d 548, 553–54 (7th Cir. 2009) (same); *United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (same).

367. *See Handy*, 570 F. Supp. 2d at 440.

368. Consistent with the principles enunciated in *Kimbrough* and *Spears*, numerous federal courts have demonstrated that district courts have the discretionary authority to reject various guidelines *solely* for *policy disagreements* with the Sentencing Commission about the need to apply an enhancement across-the-board as a categorical matter (the policy-disagreement option), as opposed to simply making an individualized assessment that an enhancement should not apply to a particular defendant’s case (individualized-assessment option). *See, e.g., United States v. Merced*, 603 F.3d 203, 218–19 (3d Cir. 2010) (acknowledging both parties’ concession that a district court acts within its authority to reject a career-offender guideline based solely on a policy disagreement with the

Following the lead of these courts and adopting the policy-disagreement option, district courts can stand on firm ground in deciding to reject the Sentencing Commission's abrogation of Congress's intent to enhance sentences only for adult defendants at least twenty-one years old. As long as the district court expressly adopts the policy-disagreement option and supports its decision with the reasoning in this Article, the district court should not anticipate a reviewing court's reversal.

D. The Post-Booker Advisory Guidelines System Authorizes District Courts to Utilize the Individualized-Assessment Option—Based Solely on an Individualized Assessment of the Unique Facts and Circumstances of a Single Case—to Sentence Defendants Younger than Twenty-one Years of Age Without Applying the Use-of-Minor Enhancement

Even if a district court chooses not to utilize the no-authority option or the policy-disagreement option to reject wholesale section 3B1.4's application to defendants under the age of twenty-one, it can still utilize the individualized-assessment option by using its institutional strength to impose an outside-Guidelines sentence based on the unique facts and circumstances of a single case that demonstrate that the application of a use-of-minor enhancement to a particular defendant under the age of twenty-one does not serve the purposes of federal sentencing under § 3553(a)(2).³⁶⁹ This Article's focus is not to convince district courts to adopt the individualized-assessment option in sentencing defendants under the age of twenty-one who use minors to commit federal offenses. As fully explored already, this Article contends that the Sentencing Commission

Sentencing Commission); *United States v. Simmons*, 568 F.3d 564, 569 (5th Cir. 2009) (holding that the district court acted unreasonably in failing to understand that it could focus on the age of the defendant to impose a below-Guidelines sentence based solely on a policy disagreement with the Sentencing Commission); *United States v. Herrera-Zuniga*, 571 F.3d 568, 583–84 (6th Cir. 2009) (holding that the district court acted within its authority to reject an illegal-reentry guideline based solely on a policy disagreement with the Sentencing Commission); *United States v. Cavera*, 550 F.3d 180, 194–95, 197 (2d Cir. 2008) (holding that the district court acted within its authority to reject a firearms guideline based solely on a policy disagreement with the Sentencing Commission); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009) (rejecting a guideline in a child pornography case based solely on a policy disagreement with the Sentencing Commission).

369. Again, the key distinction between the policy-disagreement option and the individualized-assessment option is that the first option applies the district court's policy decision to all similar cases while the second option only reflects the district court's decision in a particular case involving a particular defendant.

exceeded its congressional authority and defied Congress's intent by setting national sentencing policy with a use-of-minor enhancement that makes the age of a defendant wholly irrelevant for sentencing purposes. The result of this national policy is that every defendant who uses a minor to commit a federal offense—no matter the age of the defendant or the proximity in ages between the defendant and minor used—will receive the same two-level enhancement. Notwithstanding this Article's focus on the Sentencing Commission's misuse of its authority in promulgating a use-of-minor enhancement without an age restriction, the Article ultimately seeks to ensure that sentencing courts faithfully carry out Congress's intent to make age a relevant factor in applying the use-of-minor enhancement. To that end, the Article has first discussed a district court's no-authority option and policy-disagreement option. The Article would be remiss if it then failed to also explain that the individualized-assessment option can provide support for a district court to grant a downward variance from a Guidelines sentence that includes a two-level use-of-minor enhancement for a defendant under the age of twenty-one.

On the same day the Supreme Court decided *Kimbrough*, the Court also decided *Gall v. United States*.³⁷⁰ In *Gall*, the Court expounded on the appropriate analytical framework that district courts employ when sentencing a defendant under a post-*Booker* advisory Guidelines system based on the institutionalized strengths of district courts in making individualized assessments:

[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an *individualized assessment* based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on

370. 552 U.S. 38 (2007).

the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.³⁷¹

District courts should clearly explain whether they are utilizing the no-authority option, the policy-disagreement option, or the individualized-assessment option. When a district court adopts the no-authority option or the policy-disagreement option, reviewing courts will engage in a purely legal analysis of the district court's conclusion to reject a guideline. Little deference is due a district court under the no-authority option—this is a decision that any court can make as a matter of law. Although little deference will be allotted a district court's decision to use the policy-disagreement option,³⁷² as long as the court is not infringing on either Congress's or the Sentencing Commission's authority to set national sentencing policy, then the court should be well within its authority to adopt the policy-disagreement option under an advisory Guidelines system.

When a district court utilizes the individualized-assessment option, however, reviewing courts owe a great deal of deference under an advisory sentencing system to the district court's institutional strengths to impose appropriate sentences to a particular defendant in a given case.³⁷³ District courts should take great care to avoid unwittingly masking the use of the policy-disagreement option as the individualized-assessment option.

The Supreme Court has cautioned district courts against mischaracterizing the use of their discretion. In *Spears*, the Court instructed district courts to avoid varying from the Guidelines' range based on an apparent consideration of § 3553(a) factors in individual cases where the court simply has a policy disagreement with the Sentencing Commission over a guideline's application to all similar

371. *Id.* at 49–50 (emphasis added) (citations omitted). Because of the important role the Guidelines play in the consistent administration of justice nationally, the proper application of the use-of-minor enhancement is critical to ensure fair sentences for defendants who use minors to commit federal offenses. In that regard, it is plain to see how the no-authority option and the policy-disagreement option serve a vital national interest, because both options ensure that “the starting point and initial benchmark,” a Guidelines' range, is properly achieved for cases involving a defendant under the age of twenty-one who uses a minor to commit a federal offense.

372. *See* *Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring) (explaining that “appellate courts should review [district] decisions more closely when they rest upon disagreement with Guidelines policy.”).

373. *See id.* at 1254 (acknowledging that a “trial court typically better understands the individual circumstances of particular cases before it” such that appellate courts should provide a level of deference if the trial court adopts what this Article calls the individualized-assessment option).

cases.³⁷⁴ The Court stressed that district courts should openly state their policy disagreements rather than “masking their categorical policy disagreements as ‘individualized determinations.’”³⁷⁵ According to the Court, a district court’s failure to be transparent with the reason for the variance—policy disagreement or individualized assessment—would amount to “institutionalized subterfuge.”³⁷⁶

To avoid the sleight-of-hand characterization that could lead to “institutionalized subterfuge,” district courts must simply ask whether they intend to reject the application of the use-of-minor enhancement to all cases involving a defendant under the age of twenty-one (which would indicate adoption of the no-authority option or the policy-disagreement option) or whether they simply reject the use-of-minor enhancement’s application to a unique defendant in a particular case (which would indicate adoption of the individualized-assessment option).

Assume the following facts as an example of how a district court can issue a reasonable, below-Guidelines sentence based on its adoption of the no-authority option, policy-disagreement option, or individualized-assessment option to reject the Sentencing Commission’s expanded use-of-minor enhancement. Forty-year-old adult *A* recruits eighteen-year-old adult *B* and seventeen-year-old minor *C* to commit a federal offense. Recognizing opportunities for themselves, *B* and *C* then recruit their best friend and high-school classmate, minor *D*. At seventeen years old, *D* is only five days younger than *B* and five days older than *C*. Assuming that *A*, *B*, and *C* committed the same offenses and used minors to commit the offenses, the district court would then apply the Guidelines to determine the appropriate range. If *A*, *B*, and *C* had the same criminal history, then the Guidelines’ range could be the same for the defendants. Adopting the no-authority option or the policy-disagreement option, only *A* would receive a two-level use-of-minor enhancement under section 3B1.4. Thus, *A*’s Guidelines’ range, the initial starting point for sentencing, would be higher than the range for *B* and *C*.

Without use of the no-authority option or the policy-disagreement option, however, the Guidelines’ range would be the same for *A*, *B*, and *C*. Under an advisory sentencing system, the Guidelines’ range is only one factor to consider in meting out the appropriate punishment for each individual defendant. The district

374. See *Spears v. United States*, 555 U.S. 261, 265–66 (2009).

375. *Id.* at 266.

376. See *id.*

court must consider the remaining § 3553(a) factors to ensure that each defendant is given a sentence that is not greater than necessary to carry out the purposes of federal sentencing. This is the point at which the individualized-assessment option plays an important role. Utilizing the individualized-assessment option, the district court could conclude that *A*, *B*, and *C* should not all receive the same sentence regardless of the application of the two-level use-of-minor enhancement to set each defendant's Guidelines' range. Based on its analysis of the § 3553(a) factors, the district court could stand on solid ground in exercising its significant discretion to impose shorter sentences for *B* and *C* and a longer sentence for *A*. That is, the district court can determine what is an appropriate sentence for each of the defendants under the individualized-assessment option. This option allows the district court to consider anew the relevance of the defendant's age and the proximity in age between the defendants and the minors used. If the Seventh Circuit was correct in its speculation that the Sentencing Commission could have determined that some defendants under the age of twenty-one can exert as much influence over minors as do defendants over the age of twenty-one, then the individualized-assessment option is the perfect place in the analytical framework to reach this result. Otherwise, Congress's intent to focus enhanced sentences on adult defendants at least twenty-one years of age who corrupts minors becomes insignificant when every defendant, regardless of age, gets the same enhancement.

One might assume that the district court inherently reached the same conclusion it would have had it adopted the no-authority option or the policy-disagreement option. This is an unfair assumption. Because the district court has the discretion under an advisory Guidelines system, the district court can choose to vary from the Guidelines by applying a sentence the court deems appropriate for a certain case. For example, the court could reject the two-level use-of-minor enhancement in favor of a one-level use-of-minor enhancement for *B* based on *B*'s age and proximity in age to *D*. Similarly, the court could decide to impose a three-level use-of-minor enhancement for *A*, who is significantly older than the minors used to commit a federal offense. Finally, the court could choose not to apply a use-of-minor enhancement at all for *C*, the youngest of the defendants who used a minor older than *C* himself to commit a federal offense.

One district court has apparently utilized the individualized-assessment option to impose a sentence on a defendant under the age of twenty-one regardless of the validity of section 3B1.4's application.

In *United States v. Hawkins*, the district court hedged its bets by explicitly stating that regardless of whether it had erroneously applied section 3B1.4's use-of-minor enhancement such that the sentencing range was improperly inflated, the court would have sentenced the defendant to the same 121 months' imprisonment.³⁷⁷ The district court said it would have imposed an upward variance from the advisory sentencing range based on its consideration of the § 3553(a) factors.³⁷⁸ This decision does not demonstrate a court's policy objection to the application of the use-of-minor enhancement, but rather stands as an example of a district court's attempt to use the individualized-assessment option in a particular case to apply an enhancement that is required to mete out appropriate punishment for a particular defendant. It further demonstrates that as far as section 3B1.4 is concerned, district courts have as much authority as the Sentencing Commission to determine the appropriate sentence for a defendant under the age of twenty-one who uses a minor to commit a federal offense. In *Hawkins*, the district court simply utilized the individualized-assessment option to decide that a use-of-minor enhancement was appropriate for a defendant under the age of twenty-one even if it had generally decided that the no-authority option and policy-disagreement option were viable in the mine-run cases.

Admittedly, there has been much confusion about the amount of discretion that district courts enjoy under an advisory Guidelines system. Federal circuit courts have struggled with reviewing non-Guidelines sentences for reasonableness.³⁷⁹ As long as district courts display a clear understanding of the difference between their institutional strengths and the Sentencing Commission's institutional strengths, district courts should feel comfortable in imposing sentences that are "sufficient, but not greater than necessary" to carry out the sentencing purposes contained in § 3553(a).³⁸⁰

377. No. 08-CR-66-LRR, 2009 WL 2253188, at *13 (N.D. Iowa July 28, 2009), *aff'd sub nom.*, *United States v. Jones*, 612 F.3d 1040, 1048–49 (8th Cir. 2010).

378. *See id.*

379. *See, e.g.*, *United States v. Irely*, 612 F.3d 1160, 1260–61 (11th Cir. 2010) (en banc) (Tjoflat, J., concurring in part and dissenting in part); *United States v. Russell*, 537 F.3d 6, 13–14 (1st Cir. 2008); *United States v. Gunter*, 527 F.3d 282 (3d Cir. 2008), *vacated*, 129 S. Ct. 2051 (2009); *Spears I*, *supra* note 328; *Spears II*, *supra* note 329.

380. 18 U.S.C. § 3553(a) (2006). In his concurring opinion in *Pepper*, Justice Breyer provided a helpful, succinct framework on how best to conceptualize the sentencing roles played by Congress, the Sentencing Commission, and the judiciary:

[Congress] create[s] a Sentencing Commission with authority to develop sentencing policy embodied in the Guidelines. The Guidelines are to further

In summarizing Part VI, district courts accomplish the objective of the Guidelines—to impose appropriate sentences—by employing a three-step analytical framework. Under the no-authority option, district courts should determine whether the Sentencing Commission’s promulgation of a guideline complies with a congressional directive. As discussed in Parts II to V, this Article contends that the Sentencing Commission exceeded its congressional authority in promulgating section 3B1.4’s use-of-minor enhancement without an age restriction for defendants. Based on the legal conclusion that section 3B1.4 cannot be applied to defendants under the age of twenty-one, district courts should calculate the advisory Guidelines range without applying the two-level use-of-minor enhancement for defendants who were not yet twenty-one when they used a minor to commit a federal offense. Even if a district court utilizes the no-authority option, the court is still free to use the individualized-assessment option to impose the appropriate sentence under § 3553(a) to a particular defendant, which could increase or decrease the sentence from the Guidelines’ range.

If a district court rejects the no-authority option and decides that the Sentencing Commission acted within its congressional authority in promulgating section 3B1.4 without an age restriction for defendants (or if the district court resides in the Fourth, Seventh, Eighth, or Tenth Circuits, where that decision has already been reached), then the district court may nonetheless use the policy-disagreement option to reject the application of section 3B1.4 to defendants under the age of twenty-one. To do so, district courts must explain that the Sentencing Commission failed to utilize its institutional strengths and sentencing expertise in promulgating section 3B1.4 and that Congress’s approach to focus on adult defendants at least twenty-one years of age reflects better sentencing policy. In the case of the Sentencing Commission’s decision to promulgate a use-of-minor enhancement in a “slightly broader form” than the congressional

[Congress’s] basic objective, namely greater sentencing uniformity, while also taking account of special individual circumstances, primarily by permitting the sentencing court to depart in nontypical cases. By collecting trial courts’ reasons for departure (or variance), by examining appellate court reactions, by developing statistical and other empirical information, by considering the views of expert penologists and others, the Commission can revise the Guidelines accordingly. Trial courts, appellate courts, and the Commission all have a role to play in what is meant to be an iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system.

Pepper v. United States, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring) (citations omitted).

directive, the Sentencing Commission showed no policy expertise as to why defendants under the age of twenty-one who use a minor to commit a federal offense should receive the same two-level enhancement as any defendant regardless of age. Additionally, the Sentencing Commission did not display its expertise on why the proximity in age between a defendant and the minor used is irrelevant for sentencing purposes, such that a defendant who is younger than the minor used should receive the same enhancement as an adult defendant who is much older than the minor used.

Finally, the post-*Booker* analytical framework allows district courts to use the individualized-assessment option in a given case to decide that the application of a guideline like section 3B1.4's use-of-minor enhancement to a particular defendant results in an excessive sentence when all of the § 3553(a) factors are considered. This option should not be used as a policy disagreement with the Sentencing Commission over a categorical application of the use-of-minor enhancement to defendants under the age of twenty-one. Rather, it should be limited to the unique facts and circumstances in a particular defendant's case.

VII. CONCLUSION

This Article in no way takes a "get-weak-on-crime" position, where the ultimate goal is the reduction in the lengths of sentences for criminals who use minors to commit federal offenses. Moreover, this Article does not seek to enter the general policy debate on the appropriate sentences for defendants who are minors. Instead, this Article promotes a healthy level of judicial review of the Sentencing Commission's exercise of its significant authority. Whenever the Sentencing Commission complies with a congressional directive to promulgate a guideline or uses its significant discretion and institutional strengths to declare national sentencing policy to a broad class of behavior, then there can be little doubt that the Sentencing Commission's policy decision should be respected in most cases. When the Sentencing Commission defies Congress's intent, ignores a congressional directive, and exceeds its authority, courts must not allow that unauthorized expansion of power to go unchecked. This Article arms federal courts with three options to push back on the Sentencing Commission's unsubstantiated grab for excessive power in promulgating a use-of-minor enhancement without age restrictions for defendants.

When the Sentencing Commission promulgated section 3B1.4's enhancement without age restrictions for defendants, it made a national sentencing policy that *all* defendants—regardless of how old or how young or how close in age the defendant is to the minor used—should receive the *same* two-level enhancement for using minors to commit federal offenses. A review of the congressional directive's plain language to the Sentencing Commission to promulgate a use-of-minor enhancement, the legislative history behind the directive, and the context in which the directive was enacted reveals that Congress intended that only adult defendants at least twenty-one years old would receive a sentence enhancement for corrupting a minor by using him to commit a federal offense. Because the Sentencing Commission ignored a clear congressional directive and defied Congress's intent, the Sentencing Commission exceeded its authority in promulgating section 3B1.4 without an age restriction for defendants. As such, district courts should utilize the no-authority option to conclude that no defendant under the age of twenty-one should receive a two-level use-of-minor enhancement under section 3B1.4. Because federal circuit courts are split on the issue of the Sentencing Commission's authority to promulgate a use-of-minor enhancement that makes the age of a defendant entirely irrelevant, the Supreme Court must resolve the circuit split.³⁸¹

In addition to the legal conclusion that the Sentencing Commission lacked the authority to enhance sentences for defendants under the age of twenty-one who use minors to commit federal offenses (i.e., the no-authority option), district courts have two other options to push back on the Sentencing Commission's unlawful expansion of the congressional directive. District courts can use either the policy-disagreement option or the individualized-assessment option. A district court's adoption of either of these options would act as insulation from the circuit split on the no-authority option.

381. In the meantime, district courts in the Fourth, Seventh, Eighth, and Tenth Circuits do not have the authority to utilize the no-authority option, because these circuits have already decided that the Sentencing Commission acted within its authority in promulgating section 3B1.4. District courts in the Sixth Circuit also do not technically have the authority to utilize the no-authority option, but for a different reason—the Sixth Circuit has already utilized that option. District courts in all other circuits can adopt the no-authority option as explained in this Article. Of course, the Fourth, Seventh, Eighth, and Tenth Circuits, sitting en banc, could also adopt the no-authority option, which would resolve the circuit split and eliminate the need for the Supreme Court to address the viability of the no-authority option.

District courts have the authority to adopt what this Article coins the policy-disagreement option. When the Sentencing Commission seeks to establish national sentencing policy in an area in which it lacks institutional expertise by promulgating a guideline like section 3B1.4, courts have the discretionary authority to check that use of power by categorically rejecting the guideline based on a policy disagreement. In cases involving section 3B1.4's use-of-minor enhancement, this policy-disagreement option inherently rejects the application of the two-level use-of-minor enhancement to defendants under the age of twenty-one. In essence, district courts that exercise the policy-disagreement option are choosing to follow Congress's intent on how to treat adult defendants who use minors as opposed to the Sentencing Commission's unsupported decision to apply the same two-level enhancement to every defendant, regardless of the defendant's age or the proximity in age between the defendant and the minor. The policy-disagreement option inherently recognizes that under an advisory Guidelines system, the Sentencing Commission's authority to set national sentencing policy is only as strong as its compliance with a congressional directive or its use of its institutional strengths and sentencing expertise. In areas such as the appropriate punishment for defendants who use minors to commit federal offenses, the Sentencing Commission loses its vaulted status as a body with institutional strengths when it fails to explain why it is setting national sentencing policy and even more when it defies a congressional directive. Every district court in every circuit has the discretionary authority to utilize the policy-disagreement option to ensure that defendants under the age of twenty-one do not receive section 3B1.4's use-of-minor enhancement as part of the Guidelines' range.

District courts can also use their own institutional strengths in making individualized assessments in particular cases that fall outside the heartland of cases contemplated by the Sentencing Commission such that a variance from a Guideline's sentence is appropriate under § 3553(a). By utilizing the individualized-assessment option, district courts may determine that an advisory Guidelines' sentence would result in an excessive sentence, thus failing to achieve the purposes of federal sentencing under § 3553(a). When confronted with the unique facts of a particular case involving a defendant under the age of twenty-one who used a minor to commit a federal offense, district courts have the authority to determine—solely for purposes of that particular case—that section 3B1.4's two-level enhancement should

not be applied so that an appropriate sentence can be imposed on an individual defendant.

Given the Sentencing Commission's unlawful expansion of the congressionally directed use-of-minor enhancement, district courts have the authority to adopt the no-authority option, policy-disagreement option, or individualized-assessment option to ensure that Congress's intent is followed by applying section 3B1.4 only to defendants who are at least twenty-one years of age. As long as this three-option, analytical framework on how to approach the advisory Guidelines system is followed, district courts are well equipped to mete out punishment consistent with § 3553(a), while ensuring that the Sentencing Commission continues to play a vital role in national sentencing policy within its congressionally sanctioned power.