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WHEN FAIR IS FOUL: FEDERAL DRUG SENTENCING IN THE WAKE OF UNITED STATES V. LABONTE

INTRODUCTION

Imagine that you have just been tried and convicted for distribution of cocaine.\(^1\) Several days later, you meet with your attorney to discuss the pending sentencing hearing. Your attorney explains that because you have two prior convictions for such acts, the judge is obligated to impose a longer sentence than a first time offender would receive. Then comes the bad news. Because the prosecutor elected to file a sentence enhancement,\(^2\) your criminal history is counted against you twice under the United States Sentencing Guidelines (the “Guidelines”).\(^3\) Had the prosecutor decided

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\(^2\) In drug cases, the prosecutor has unfettered discretion when deciding whether to enhance the criminal’s sentence because of his recidivist status. This is made clear by the express language of 21 U.S.C. § 851(b), which states: “If the United States attorney files an information under this section, the court shall . . . inquire of the [defendant] . . . whether he affirms or denies that he has previously been convicted as alleged in the information.” 21 U.S.C. §851(b) (1994) (emphasis added).


The heart of the Guidelines is the “Sentencing Table,” a 258 cell matrix that is centered around a horizontal and vertical axis. The horizontal axis is divided into six levels that pertain to the defendant’s “criminal history category.” The longer the defendant’s record, the higher the corresponding criminal history category and the longer the term of imprisonment. The vertical axis is divided into 43 “offense levels.” Each federal crime is assigned a “base offense level.” As with the criminal history category, the higher the base offense level, the longer the term of imprisonment. A sentence is calculated by finding the intersection of the offense level of conviction and the defendant’s criminal history category.

The Guidelines were created to ensure certainty and fairness in sentencing. See 28 U.S.C. § 991(b)(1) (1994). “Fairness” is defined as “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar
against filing the enhancement, your criminal record would have only been increased once, resulting in a substantially shorter term of incarceration.

In *United States v. LaBonte*, the Supreme Court guaranteed that the scenario described above will be repeated *ad infinitum*. The issue in *LaBonte* was whether a federal statute, 28 U.S.C. § 994(h), conflicted with Amendment 506 (the "Amendment") to the Guidelines. The statute provides, in pertinent part:

The [United States Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized for categories of defendants* in which the defendant is eighteen years old or older and [has been convicted of a crime of violence or a felony drug offense and has at least two such prior convictions].

The United States Sentencing Commission (the "Commission") responded to this direction by enacting the Career Offender Guideline. Through the use of a two-step process, the Career Offender Guideline requires career offenders to be sentenced differently from first time offenders. First, career offenders are automatically assigned to the highest criminal history level. Second, the offense level is determined by taking the statute's maximum penalty and inserting it into a "Table of Offenses" found in this section. Prior criminal conduct while maintaining sufficient flexibility to permit individualized sentences."

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The Commission is an independent division of the judicial branch. See 28 U.S.C. § 991(a) (1994). It consists of seven voting members, all of whom are appointed by the President with the advice and consent of the Senate. See id.

6. See GUIDELINES, supra note 3, § 4B1.1. At that section, the Guidelines state:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id.

7. See supra note 3 for an explanation of how the Guidelines operate.
8. See supra note 3.
to Amendment 506, the commentary\(^9\) to the Career Offender Guideline stated: “‘Offense Statutory Maximum’ refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense.”\(^10\)

In 1994, the Amendment revised this commentary. It stated:

Offense statutory maximum . . . refers to the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record.\(^11\)

Amendment 506 was written in response to the enhanced maximum sentences provided for recidivist drug offenders. Prior to the Amendment, when defendants were convicted of narcotics felonies, an “unenhanced statutory maximum” was used for first time offenders while an “enhanced statutory maximum” was used for recidivists.\(^12\) The Amendment required judges to use the unenhanced maximum penalty regardless of the defendant’s status as a recidivist.

The Commission’s rationale for Amendment 506 was to “avoid[] unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion.”\(^13\) Before the Amendment’s enactment, all courts used the enhanced statutory maximum.\(^14\) As amended, the interpretive

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\(^9\) The Commission often includes “commentary” to help explain the various provisions:

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied . . . . Second, the commentary may suggest circumstances which . . . may warrant departure from the guidelines . . . . Finally, the commentary may provide background information, including . . . reasons underlying promulgation of the guideline.

\(^10\) GUIDELINES, supra note 3, § 1B1.7.


\(^12\) UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL app. C., at 804-05 (1994) (emphasis added).

\(^13\) 21 U.S.C. § 841(b)(1)(C) is the sentencing statute for drug offenses. It states that anyone convicted under it “shall be sentenced to a term of imprisonment of not more than 20 years [but] . . . [i]f any person commits such a violation after a prior conviction for a felony drug offense . . . such person shall be sentenced to a term of imprisonment of not more than 30 years.” 21 U.S.C. § 841(b)(1)(C) (1994). Thus, the potential discrepancy in sentences for the same offense could be as great as ten years.

\(^14\) UNITED STATES SENTENCING COMMISSION, supra note 11, at 804-05.

\(^{14}\) See, e.g., United States v. Sanchez, 988 F.2d 1384, 1395 (5th Cir. 1993); United
commentary conflicted with this case law. Since the Commission’s interpretive commentary of its own work-product is authoritative unless it conflicts with the Constitution, a federal statute, or is a plainly erroneous reading of the guideline section, the LaBonte Court granted certiorari to determine whether it was possible to reconcile the Amendment with 28 U.S.C. § 994(h).

This Comment will examine the Supreme Court’s decision in LaBonte and argue that the case was incorrectly decided. Part I will discuss the status of the case law and the Guidelines prior to LaBonte. Part II will analyze more deeply the Court’s decision in LaBonte and examine the rationales that the majority and dissent used to reach their conclusions. An analysis of these rationales will follow in Part III. Special attention will be paid to the inconsistencies within the majority’s opinion and the majority’s divergence from the principles of punishment. The Comment will conclude in Part IV with a call to return to the original language of Amendment 506.

I. THE ROAD TO LABONTE

A. The Sentencing Guidelines

One of the primary dissatisfactions with criminal sentencing in the United States has been the “historical disagreement over the primary purpose of punishment.” The disagreement relates to which of the four main theories of punishment, i.e. retribution, deterrence, incapacitation, or rehabilitation, is the most effi-

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17. “The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts.” HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968).
18. There are two subsets of the “deterrence” theory. “General deterrence justifies sentences in the name of discouraging the general public from recourse to crime,” while “[s]pecial deterrence defends criminal penalties as a way to disincline individual offenders from repeating the same or other criminal acts.” ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:2 (2d ed. 1991).
19. “The rationale of incapacitation declares society need not fear offenders who are rendered physically incapable of committing crime.” Id. § 2:3.
20. Rehabilitation’s “justification for punishment is the claim that it may be used to
cacious. During the 1950s, rehabilitation was favored, but beginning in the 1970s, "[r]ehabilitation as a sound penological theory came to be questioned and ... was regarded by some as an unattainable goal for most cases." Although Congress has always had the power to set the sentence for federal crimes, it has traditionally delegated enormous sentencing discretion to federal judges.

The problem with this delegation is that it led to unconscionable disparities in the sentences of otherwise similarly situated defendants.

In light of the failure to subscribe to any one particular theory of punishment and the disparities resulting from judicial discretion, Congress determined that federal sentencing was in need of reform.

The solution to the problem was the Sentencing Reform Act of 1984 (the "SRA"). This legislation resulted in the establishment of the United States Sentencing Commission and the subsequent creation of the Guidelines. When first drafting the Guidelines, the

prevent crime by so changing the personality of the offender that he will conform to the dictates of law." PACKER, supra note 17, at 53.

21 See Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); see also Ogletree, supra note 16, at 1941 ("During the 1950's, the predominant judicial philosophy of punishment, as well as the prevailing view of penologists, favored the concepts of deterrence and rehabilitation.").

22 Mistretta v. United States, 488 U.S. 361, 365 (1989); see also NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 26 (1974) ("[T]he rehabilitative ideal is not acceptable as a purpose of punishment.").

23 See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature ... which is to define a crime, and ordain its punishment.").


25 When debating whether to create the Commission, Congress heard a considerable amount of testimony on sentencing disparities. One of the most compelling statements was given by one of the Sentencing Commissioners:

[T]he region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California ... . [B]lack [bank robbery] defendants convicted ... in the South are likely to serve approximately thirteen months longer than similarly situated bank robbers convicted ... in other regions.


Commission’s Chair, Judge William M. Wilkins, stated that “[u]nwarrented [sentencing] disparity I believe is the single major problem in our system, which resulted in the creation of the Sentencing Commission.” Aside from the elimination of unwarranted sentencing disparities, Congress instructed the courts to consider all four of the traditional goals of sentencing when imposing a sentence and expressed its concern that the sentences historically imposed “[did] not accurately reflect the seriousness of the offense[s].” The creation of the Guidelines required the balancing of many competing interests, yet the Commission created a constitutionally valid sentencing system that has been in place for a decade.

B. The Circuit Decisions

Prior to the Supreme Court’s LaBonte decision, there was a five-to-two split among the circuits as to whether Amendment 506 was valid.

27 United States Sentencing Commission: Unpublished Public Hearings 3 (1986) (United States Sentencing Commission, Public Hearings on Offense Seriousness, Apr. 15, 1986); see also William W. Wilkins & John R. Steer, The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity, 50 Wash. & Lee L. Rev. 63, 87 (1993) (“No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted sentencing disparity and resulting unfairness in the sentencing of similarly situated defendants.”). The elimination of unwarranted sentencing disparities was not the Commission’s only goal. Chairman Wilkins also stated that “[t]hese policies and guidelines will be designed . . . to create a determinant sentencing system which may appropriately be entitled Truth in Sentencing, with the aims of certainty, [and] fairness.” United States Sentencing Commission: Unpublished Public Hearings, supra, at 2.

28 Courts are directed to consider the need for the sentence (1) to reflect the seriousness of the offense and to provide just punishment for the offense, (2) to afford adequate deterrence to criminal conduct, (3) to protect the public from further crimes of the defendant, and (4) to provide the defendant with needed educational or vocational training. See 18 U.S.C. § 3553(a)(2) (1994).


30. See United States v. LaBonte, 117 S. Ct. 1673, 1680 (1997) (Breyer, J., dissenting) (“The upshot is a Guidelines system that balances various, sometimes conflicting, general goals.”). For a full discussion of the compromises that were made in the creation of the Guidelines, see Steven Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

31. See United States v. Mistretta, 488 U.S. 361, 412 (1989) (“We conclude that in creating the Sentencing Commission . . . Congress neither delegated excessive power nor upset the constitutionally mandated balance of power among the coordinate Branches . . . . Accordingly, we hold that the Act is constitutional.”).
1. The Circuits Holding Amendment 506 Valid

Both the First Circuit and the Ninth Circuit upheld the validity of Amendment 506; however, the First Circuit's LaBonte opinion is more useful for the analytical purposes of this Comment. In LaBonte, the First Circuit considered the Commission's status as a federal agency and applied Chevron v. United States, "the traditional process of reviewing agency rules." A Chevron analysis involves the determination of two issues: First, it must be determined "whether Congress has directly spoken to the issue. If the intent of Congress is clear, that is the end of the matter." In the event that "the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court is whether the agency's answer is based on a permissible construction of the statute." In order to determine whether Amendment 506 conflicted with 28 U.S.C. § 994(h), the First Circuit applied the Chevron test twice; first to determine the appropriate definitions of the words "categories" and "maximum" and again to determine the meaning of the phrase "at or near."

When defining the term "categories," the LaBonte court determined that "[c]onveniently, LaBonte was not divided on this issue. See United States v. LaBonte, 70 F.3d 1396 (1st Cir. 1995). It should be noted that the First Circuit was divided on this issue. In Dunn, the court observed:

Virtually everything that could be said in analysis of this case has been said by Judge Selya writing for the majority and Judge Stahl dissenting in United States v. LaBonte. We find Judge Selya's analysis more persuasive and refer to the history of the statute and the comprehensive treatment therein as confirmatory of our conclusion.

Dunn, 80 F.3d at 404 (citation omitted).

31. See United States v. Dunn, 80 F.3d 402 (9th Cir. 1996).

32. See United States v. LaBonte, 70 F.3d 1396 (1st Cir. 1995).

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Dunn, 80 F.3d at 404 (citation omitted).

36. LaBonte, 70 F.3d at 1403.

37. Chevron, 467 U.S. at 842.

38. Id. at 843.

39. The LaBonte court combined the interpretation of "categories" and "maximum" into one application of Chevron. See LaBonte, 70 F.3d at 1404 ("The first application combines two issues; it concerns the explication of the word 'maximum' as that word is used in section 994(h) and, concomitantly, the meaning of the word 'categories' as used therein.").
seek sentence enhancements. If this were the correct interpretation, then the appropriate sentencing decision would be to use the enhanced statutory maximum. However, "this reading is not linguistically compelled. The word 'categories' plausibly can be defined more broadly to include all offenders ... charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant." By opting for the latter view, the First Circuit took the first step toward upholding the validity of Amendment 506.

The First Circuit used Chevron a second time to define the word “maximum.” After determining that “it is simply unclear from the bare language of the law which maximum and what categories Congress had in mind when it contrived § 994(h),” the court turned to Chevron’s second step. Here, the court found reason to “believe that the Commission’s act in defining ‘maximum’ to refer to the unenhanced statutory maximum term of imprisonment . . . furnishes a reasonable interpretation of § 994(h),” and accepted its validity.

When defining “at or near,” the court observed that “[s]ection 994(h) is silent as to how ‘near’ sentences must be to the maximum, and the legislative history is singularly unhelpful on this point.” Thus, the court turned to step two, noting that “near” is an inherently vague term, and that “[i]n this setting, deference to the Commission is especially appropriate.” As a result, the court found that the Commission’s interpretation of the phrase “at or near” was an acceptable one and upheld the validity of Amendment 506.

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40 Id. at 1404-05.
41 Id. at 1405.
42 See id. at 1407.
43 Id. at 1405.
44 Id. at 1407.
45 Id. at 1409.
46 The LaBonte majority illustrated the inherent ambiguity of the word “near”: “In speaking with a Texan, one might say that Providence is ‘near’ Boston, but it is doubtful if that description would (or could) be employed in speaking with a resident of, say, Cambridge [MA] or Cranston [RI].” Id. at 1409.
47 Id. at 1409.
48 Id. at 1409; see also United States v. Fountain, 885 F. Supp. 185, 188 (N.D. Iowa 1995) (“Based on the generality of the phrase ‘at or near’ . . . I cannot find that the Commission’s definition of near . . . is not a permissible one.”).
2. The Circuits Invalidating Amendment 506

The five circuits\(^49\) that invalidated Amendment 506 defined "categories," "maximum," and "at or near" differently from the First and Ninth Circuits. In doing so, none of the circuits chose to use *Chevron*; rather, they looked for the meaning of these terms within the language of the statute.\(^50\) Despite the fact that this approach led these courts to disagree among themselves on issues such as the importance of the word "categories,"\(^51\) they nevertheless agreed that the statute calls for the use of the enhanced maximum. These courts also interpreted the legislative intent of § 994(h) differently from the First and Ninth Circuits when defining "statutory maximum." The Sixth Circuit, for example, found that "the plain language of § 994(h) dictates that the 'maximum term authorized' refers to the enhanced statutory maximum."\(^52\)

\(^49\) See, e.g., United States v. Branham, 97 F.3d 835, 845-46 (6th Cir. 1996); United States v. McQuilkin, 97 F.3d 723, 731-33 (3d Cir. 1996); United States v. Fountain, 83 F.3d 946, 950-53 (8th Cir. 1996); United States v. Hernandez, 79 F.3d 584, 595-601 (7th Cir. 1996); United States v. Novey, 78 F.3d 1483, 1486-88 (10th Cir. 1996).

\(^50\) This is an entirely appropriate method of analysis. The Supreme Court has held that "'[i]n determining the scope of a statute, we look first to its language.'" Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)); see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (stating that "the starting point for interpreting a statute is the language of the statute itself").

\(^51\) See United States v. Hernandez, 79 F.3d 584, 596 (7th Cir. 1996) ("'Categories' is a rather generic term, and we are tempted to say that it has little or no particular meaning within the four corners of section 994(h)."). But see United States v. Fountain, 83 F.3d 946, 952 (8th Cir. 1996) ("It is clear to us that the crucial word in the statute is 'category' and that the meaning of the rest of the language cannot be discerned without knowing the 'category' of defendants to which the statute [§ 994(h)] refers.").

\(^52\) United States v. Branham, 97 F.3d 835, 846 (6th Cir. 1996). The Seventh Circuit has applied a similar rule:

> [W]e think it clear that Congress meant the higher of the two maximums provided for in statutes like 21 U.S.C. § 841 ... we believe that to construe the statute as referring to the unenhanced maximum departs from the common sense of the term 'maximum,' ... and relegates the enhanced penalties Congress provided for in section 841 to the dustbin.

Despite "agree[ing] with the First Circuit that some flexibility in the 'at or near' mandate is required,"\(^{53}\) the courts that invalidated Amendment 506 circumvented the vagueness problem by enunciating that "[t]he issue here is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close."\(^{54}\) These courts held that Congress intended the use of the enhanced maximum penalties, and concluded that, therefore, the Amendment was invalid.\(^{53}\)

II. THE SUPREME COURT AND LABONTE

A. The Majority

Writing for a six member majority, Justice Thomas "conclude[d] that the Commission's interpretation is inconsistent with § 994(h)'s plain language, and therefore . . . that the 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements."\(^{55}\) In arriving at this conclusion, the Court found "little merit" in the argument that 'maximum term authorized' refers to the unenhanced statutory maximum\(^{57}\) because it "would largely eviscerate the penalty enhancements Congress enacted in statutes such as [21 U.S.C.] § 841."\(^{58}\) The Court dismissed the First Circuit's definition of "categories" as "overinclusive\(^{59}\) under the theory that "[t]he statutory scheme obviously contemplates two distinct categories of repeat offenders."\(^{60}\)

When interpreting the "at or near" language of § 994(h), Jus-
tice Thomas cited the Eighth Circuit’s *Fountain* opinion for the proposition that “[t]he pertinent issue . . . ‘is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close.’” He concluded that “[w]hatever latitude § 994(h) affords the Commission in deciding how close a sentence must come to the maximum to be ‘near’ it, the statute does not license the Commission to select as the relevant ‘maximum term’ a sentence that is different from the congressionally authorized maximum term.”

Finally, the Court addressed the two rationales that the Commission used to enact Amendment 506 in the first place. The majority readily dismissed the double counting argument as “entirely beside the point,” holding that “[t]he number of steps the Commission employs to achieve [the statutory maximum] requirement is unimportant, provided the Commission’s mechanism results in sentences ‘at or near’ the ‘maximum term authorized.’” The Court then made equally short shrift of the Commission’s argument that prosecutorial discretion would result in unwarranted sentencing disparities among similarly situated defendants:

Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral part of the criminal justice system, and is appropriate, so long as it is not based upon improper factors. Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice is a foreseeable—but hardly improper—consequence of the statutory notice requirement.

Having rejected each of the Respondents’ arguments as to why Amendment 506 was valid, and having satisfied itself that the Amendment conflicted with federal law, the Court reversed the judgment of the First Circuit.

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61. *Id.* (quoting United States *v.* *Fountain*, 83 F.2d 946, 952 (8th Cir. 1996)).  
62. *Id.* at 1678.  
63. *Id.* at 1679.  
64. *Id.*  
65. *Id.* (citations omitted).
B. Justice Breyer's Dissent

In contrast to the majority, Justice Breyer found that the phrase “maximum term authorized” is fraught with ambiguity and that the crux of the issue is, “authorized by what?” Justice Breyer concluded that “once one understands the need to engage in rather complex exercises in statutory interpretation to separate out, from the set of all potentially applicable sentencing statutes, those to which the word ‘authorized’ refers, one understands that the referent of that word ‘authorized’ is not obvious.” After analyzing the background sentencing law as well as the legislative history of § 994(h), the dissent concluded that no one on the Court could find “a clear indication of what Congress must have meant by its open-ended term ‘authorized.”

Aside from Justice Breyer’s uncertainty as to what authority sanctioned use of the enhanced statutory maximum, he also found the majority’s opinion “regrettable” for its policy implications. He noted that Congress created the Commission to ensure a “fair and more rational sentencing system” and that “courts, when interpreting the authorizing Act, should recall Congress’ overriding objectives” when it passed the Sentencing Reform Act.

III. ANALYSIS—WHY FAIR IS FOUL

LaBonte’s most immediate impact will be the perpetuation of a Draconian drug sentencing system. Although there are obvious moral concerns when drug dealers are sentenced to thirty years while persons convicted of “ethnic cleansing” receive twenty years, there are other legal and policy reasons that suggest that the dissenting justices and the Sentencing Commission embraced the more just approach to this issue.

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66. Justices Ginsburg and Stevens joined Justice Breyer in his dissent. See id. at 1679.
67. See id. at 1679.
68. Id. at 1682.
69. Id. at 1683.
70. Id. at 1686.
71. See id. at 1688.
72. Id.
73. LaBonte, 117 S.Ct. at 1688.
A. The Purposes of the Criminal Sentence are Satisfied by Use of the Unenhanced Statutory Maximum

Congress has stated four purposes to be served by the imposition of a criminal sentence. Sentences are to (1) reflect the seriousness of the offense and to provide just punishment; (2) afford adequate deterrence to criminal conduct; (3) protect the public from further crimes of the defendant; and (4) provide the defendant with the needed educational training or vocational training in the most effective manner. There are several reasons why the Court’s decision fails to implement these mandates.

1. The Unenhanced Statutory Maximum Reflects the Seriousness of the Offense and Does Not Undermine Other Goals of Sentencing

Sentences are to reflect the seriousness of the offense. In many instances, the sentences the Guidelines promulgate exceed this directive and require the sentencing judge to impose sentences that many consider too severe. Some of the most dramatic examples of excessive sentencing are found in narcotics offenses, where the punishments are routinely criticized by the federal judiciary. Judicial discontent is most clearly typified by the actions of Senior District Judge Jack B. Weinstein of the Eastern District of New York and Senior Judge Whitman Knapp of the Southern District of New York. In 1993 each took advantage of his senior status on the bench to announce that he would use his case-selection discretion to refuse assignment to any drug cases.

The philosophical reactions of these two judges can hardly be considered the exception. In 1993, the New York Times reported that “about 50 of the 680 Federal judges are refusing to take drug cases.” In addition, Chief Judge Mikva of the District Court for the District of Columbia publicly thanked that district’s United States Attorney for declining to prosecute drug cases that the U.S. Attorney concluded belonged in local courts. Judge Pettine of

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76 See 18 U.S.C. § 3553(a)(2)(A) (1994) (“The court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed to reflect the seriousness of the offense.”).
78 Id.
79 See Proceedings of the Fifty-Fifth Judicial Conference of the District of Columbia
the First Circuit has also expressed his difficulties with the Guidelines: "I find myself taking exception to the mechanical sentencing that the guidelines force upon judges, and I find it painful to adhere to this impersonal and cold-blooded process."80

The defense bar has also noted the judiciary's dislike of the Guidelines as have academics.81 Considering the dissatisfaction that exists among those who must deal with the Guidelines on a regular basis, it is important to ensure that the Guidelines, if they are indeed as Draconian as some suggest, are reworked to reflect more mainstream notions of justice. Although Amendment 506 was a step in this direction, the LaBonte Court effectively nullified this gain.

In addition to adequately reflecting the seriousness of the offense, one could argue that use of the unenhanced statutory maximum would have no negative implications toward the other goals of sentencing. There does not appear to be any reason why a maximum penalty of twenty years does not adequately reflect the seriousness of the offense and thereby satisfy the retributive theory. Such a lengthy term of imprisonment also satisfies the incapacitation theory by keeping the defendant away from the public for twice the duration of the typical criminal career.82 Twenty years also satisfies the deterrence theory by sending a message that society will not tolerate criminal behavior and will severely punish the criminal who transgresses the statute.

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80 United States v. Jackson, 30 F.3d 199, 204 (1st Cir. 1994) (Pettine, J., concurring) (describing the sentencing court's belief that a 27 year sentence was excessive and was not a proper basis for departure from the guidelines).

81 See Harry A. Silvergate, Boston Bar Journal Sentencing Guidelines, BOSTON B.J. Sept.-Oct. 1993, at 17 ("Among judges who have the luxury of following their consciences in matters of case selection, a disturbingly large number have chosen not to tread where federal sentencing guidelines result in particularly unconscionable miscarriages of justice.").

82 See Thomas E. Baker, A View to the Future of Judicial Federalism: “Neither out Far nor in Deep,” 45 CASE W. RES. L. REV. 705, 739 (1995) ("[T]he federal courts have been weeping and gnashing their teeth over the deluge of drug cases and the Draconian sentences being imposed under the federal sentencing guidelines.").

83 The typical criminal career lasts for approximately ten years. See Peter Greenwood, Sentencing, in THE PREDICTION OF CRIMINAL VIOLENCE 123, 124 (1987).
2. Use of the Unenhanced Statutory Maximum Permits Adequate Consideration of the Defendant’s Criminal History

Congress made it clear that when imposing a sentence, a court should consider the defendant’s history and characteristics. In response to this mandate, the Commission drafted chapter four of the Guidelines which considers the convicted criminal’s criminal history and criminal livelihood. In the introductory commentary to chapter four, the Commission notes that “[a] defendant’s record of past criminal conduct is directly relevant to” the four goals of sentencing. In addition, the Commission states that “[a] defendant with a record of prior criminal behavior is more culpable than a first offender,” and that “[g]eneral deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.

The Career Offender Guideline is found in section 4B1.1 of the Guidelines. A defendant qualifies as a “career offender” if (1) the defendant is at least eighteen years old at the time of the instant offense, (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. On its face, section 4B1.1 appears to adequately consider the defendant’s criminal record, and with statutes that do not have enhancement provisions, it does. However, consideration of the statutory maximum is not the only means by which section 4B1.1 accounts for the defendant’s prior record. This history is also considered by automatically placing a career offender in the highest criminal history category. Defendants who are convicted under a drug statute have their criminal history considered once by an increase in the offense level and a second time by automatic placement into cate-

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84 See 18 U.S.C. § 3553(a)(1) (1994) (“The court, in determining the particular sentence to be imposed, shall consider . . . the history and characteristics of the defendant.”).
85 GUIDELINES, supra note 3, at ch. 4 pt. A (Introductory Commentary).
86 See supra note 75 and accompanying text.
87 GUIDELINES, supra note 3, at ch. 4 pt. A (Introductory Commentary).
88 GUIDELINES, supra note 3, at ch. 4 pt. A (Introductory Commentary).
89 See GUIDELINES, supra note 3, § 4B1.1.
90 See GUIDELINES, supra note 3, § 4B1.1.
91 See GUIDELINES, supra note 3, § 4B1.1 (“A career offender’s criminal history category in every case shall be Category VI.”).
gory VI of the career offender axis. This necessarily exceeds the mandate of 18 U.S.C. § 3553(a), which only requires consideration of the defendant's criminal history.92

3. Use of the Unenhanced Statutory Maximum Would Help to Ameliorate the Overcrowded Prison Problem

28 U.S.C. § 994(g) states: "The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the federal prisons."93 However, the Guidelines have been routinely criticized for failing to abide by this statute.94 In 1992, federal prisons were operating at 148% of their capacity95 and "with tough new laws calling for even longer sentences for repeat offenders, experts worry that the numbers will rise even more sharply."96 In light of the fact that prisons have five times the population that they did thirteen years ago,97 the repeal of Amendment 506 and the resulting longer sentences are certain to exacerbate this problem. With the enactment of Amendment 506, the Guidelines had taken a step towards solving the overcrowding crisis. The Court's invalidation of the Amendment will do nothing more than ensure that this problem continues to persist.

92. See 18 U.S.C. § 3553(a) (1994) ("The court, in determining the particular sentence to be imposed, shall consider . . . the history and characteristics of the defendant.") (emphasis added).
94. See United States Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 53 (1987) ("Federal prison populations are likely to grow dramatically by the end of the century. However, the sentencing guidelines alone will contribute only marginally to such growth."); Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 936 (1991) ("[T]he legislature’s directives to match sentences to resources have not always proven effective."); Donald P. Lay, Rethinking the Guidelines: A Call for Cooperation, 101 Yale L.J. 1755, 1763 (1992) ("[T]he Commission’s policies have contributed in part to an increase in the federal prison population from 42,000 in 1987 to a projected 72,000 in 1992."); Dale G. Parent, What Did the United States Sentencing Commission Miss?, 101 Yale L.J. 1773, 1784 (1992) ("The commission ignored this congressional directive and developed its guidelines without concern for their effects on prison populations.").
96. Leslie Helm, Factories with Fences: Oregon’s ambitious prison work program is being closely scrutinized for ways to manage the rising cost of a growing prison population, L.A. Times, Jan. 5, 1997, at D1.
97. See id.
4. Use of the Enhanced Statutory Maximum Does Not Guarantee a Sentence “At or Near” the Statutory Maximum

One of the Court’s major justifications for invalidating Amendment 506 was that use of the unenhanced statutory maximum would not provide a sentence “at or near” the statutory maximum. However, the structure of the Guidelines exposes the weaknesses of this argument. Recall that the Career Offender Guideline provides a table of offense levels that correlates to the “offense statutory maximum.” Thus, the longer the maximum penalty, the higher the offense level. A drug dealer sentenced using the enhanced statutory maximum would be sentenced under an offense level of 34.

Now consider section 3El.1 of the Guidelines, which provides for a two level reduction in the “offense level” in the event that the defendant accepts responsibility for his criminal actions. It is entirely possible that a defendant could be sentenced to the enhanced statutory maximum and still be granted a section 3El.1 reduction. In this situation, a drug offender who faces an offense level of 34 under the enhanced maximum penalty will be subject to an offense level of 32. The disparity in the length of sentence between levels 34 and 32 can be greater than five years. Thus, when a defendant is sentenced to the enhanced maximum and is granted a reduction for “acceptance of responsibility,” the defendant would not be sentenced “at or near” the maximum term authorized. Reliance on the “at or near” argument requires acceptance of the principle that reductions such as the one provided in section 3El.1 are also invalid because they conflict with the “at or near” language of § 994(h).

B. Use of the Enhanced Statutory Maximum is Double Counting

“The notion that the use of the enhanced maximum amounts to double counting . . . stems from the fact that the defendant’s prior convictions trigger both the statutory enhancement and the Career Offender Guideline.” Avoidance of this injustice was one of the

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98. See United States v. LaBonte, 117 S.Ct. 1673, 1678 (1997).
99. See supra notes 6-9 and accompanying text.
100. See Guidelines, supra note 3, § 4B1.1.
101. See Guidelines, supra note 3, § 3El.1(a) (“If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.”).
Commission’s reasons for the enactment of Amendment 506. Currently, the federal circuits are divided into three groups as to whether and when the Guidelines authorize double counting. Five circuits hold that double counting is permissible except in those instances where the guidelines expressly prohibit it. Four others hold that double counting is never permissible, one of which has even gone so far as to suggest that it is prohibited by the Supreme Court. Finally, two circuits take an intermediate approach, holding that “[d]ouble counting in the sentencing context ‘is a phenomenon that is less sinister than the name implies,’” yet remaining leery that district courts may over-step their bounds. These courts take the view that double counting may be proper,

103. See supra note 13 and accompanying text.
104. See United States v. Wimbush, 103 F.3d 968, 970 (11th Cir. 1997) (“[D]ouble counting a factor under different guidelines is permitted if the Commission intended that result.”); United States v. Box, 50 F.3d 345, 359 (5th Cir. 1995) (“Double counting is prohibited only if the particular guidelines at issue forbid it.”); United States v. Wong, 3 F.3d 667, 670 (3d Cir. 1993) (“[T]he Sentencing Guidelines are explicit when double counting is forbidden.”); United States v. Reese, 2 F.3d 870, 895 (9th Cir. 1993) (“[T]here is nothing wrong with ‘double counting’ when it is necessary to make the defendant’s sentence reflect the full extent of the wrongfulness of his conduct.”); United States v. Ellen, 961 F.2d 462, 468 (4th Cir. 1992) (“As we recently noted, ‘the Sentencing Commission plainly understands the concept of double counting, and expressly forbids it where it is not intended.’” (quoting United States v. Williams, 954 F.2d 204, 207 (4th Cir. 1992))); United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991) (“[T]he sentencing guidelines are explicit when double counting is prohibited.”); see also Thomas R. Ascik, Annual Fourth Circuit Review for the Criminal Practitioner, 53 WASH. & LEE L. REV. 465, 544 (1996) (reviewing the Fourth Circuit’s 1995 decisions on criminal issues).
105. See United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994) (“Impermissible double counting occurs when a district court imposes two or more upward adjustments within the guidelines range, when both are premised on the same conduct.” (emphasis added)); United States v. Flinn, 18 F.3d 826, 829 (10th Cir. 1994) (“Impermissible double counting . . . occurs when the same conduct on the part of the defendant is used to support separate increases under separate enhancement provisions which necessarily overlap . . . and serve identical purposes.”); United States v. Romano, 970 F.2d 164, 166, 167 (6th Cir. 1992) (“[T]he Commission did not intend for the same conduct to be punished cumulatively under separate Guidelines provisions.”); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) (“[T]he Sentencing Commission did not intend for multiple Guidelines sections to be construed so as to impose cumulative punishment for the same conduct.”).
106. See Romano, 970 F.2d at 167 (“A rule against double counting is consistent with Supreme Court decisions that have required a clear expression of legislative intent to apply sentence enhancement provisions cumulatively.”) (citing Werlinger, 894 F.2d at 1015; Busic v. United States, 446 U.S. 398, 404-04 (1980); and Simpson v. United States, 435 U.S. 6, 12-13 (1978)).
107. United States v. Lilly, 13 F.3d 15, 19 (1st Cir. 1994) (quoting United States v. Zapata, 1 F.3d 46, 47 (1st Cir. 1993)).
but that "courts should go quite slowly in implying further such prohibitions [against double counting] where none are written."\(^{108}\)

Despite the lack of agreement as to whether and when double counting is permissible, all of the federal circuits defer to the Commission when it explicitly states that a particular action is impermissible double counting. However, deference to the Commission is not automatic. Recall that commentary enacted by the Commission is authoritative so long as it does not conflict with the Constitution or a federal statute and is not an erroneous reading of the guideline.\(^ {109}\) Several federal appellate and district courts concluded that use of the enhanced statutory maximum is not double counting and that the Commission's commentary to Amendment 506 conflicts with 28 U.S.C. § 994(h).

The Supreme Court answered the double counting issue in this context by holding that "[t]he number of steps the Commission employs to achieve [sentencing at the maximum penalty] is unimportant."\(^ {110}\) Even before the Court's decision, several federal circuits rejected the double counting argument, opining that since the Guidelines are not separate statutory provisions of penalties, there can be no double counting.\(^ {111}\) While it is certainly true that the additional penalty that is provided by section 4B1.1 is not "statutory," it nevertheless significantly enhances the defendant's term of imprisonment. This argument, stating that because the Guidelines are not statutory, there can be no double counting, plays on semantics and denies reality. Regardless of whether or not the provision is statutory, the fact remains that the use of the statutory maximum, along with section 4B1.1, penalizes the defendant twice for the same prior criminal history. It is of no concern to a prisoner whether an additional ten years in prison results from the Guidelines or from a sentencing statute.

\(^{108}\) Id. at 19; see also, United States v. Hudson, 972 F.2d 504, 507 (2d Cir. 1992) (stating that the Fourth Circuit's conclusion that double counting is always acceptable except where explicitly prohibited is not the law in the Second Circuit). This suggests that while some circumstances may warrant double counting, see, e.g., United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995) (consideration of an act that is relevant to two dimensions of the guidelines is permissible), other forms are not. See Campbell, 967 F.2d 20, 24 (2d Cir. 1992) (holding that the use of one factor to calculate both the base offense level and an upward departure violates the basic sentencing statute, 18 U.S.C. § 3553(b) (1994)).

\(^{109}\) See supra note 15 and accompanying text.

\(^{110}\) United States v. LaBonte, 117 S.Ct. 1673, 1679 (1997).

\(^{111}\) See United States v. Moralez, 964 F.2d 677, 683 (7th Cir. 1992); United States v. Sanchez-Lopez, 879 F.2d 541, 559 (9th Cir. 1989).
C. A Case of Congressional Oversight

When the Commission originally drafted Amendment 506, it observed “that when the instruction to the Commission that underlies section 4B1.1 [i.e. 28 U.S.C. § 994(h)] was enacted . . . the enhanced statutory maximum sentences provided for recidivist drug offenders did not exist.” The enhanced statutory maximum provision was incorporated as part of the Narcotics Penalties and Enforcement Act of 1986 (the “NPEA”). However, the requirement that recidivists be sentenced “at or near” the statutory maximum first appeared in the SRA. This Act was passed two years prior to the NPEA. The fact that the enhanced statutory maximum sentence did not exist when Congress enacted the SRA raises the question of whether Congress was aware of the quagmire that it was creating when it passed the enhancement provision. Notwithstanding the construction that Congress is “generally presumed [to be] knowledgeable about existing law pertinent to the legislation it enacts,” it appears that this issue may have escaped Congress’ attention. Both 28 U.S.C. § 994(h) and 21 U.S.C. § 841 were part of omnibus legislation. Had they been enacted as individual statutes, or as part of the same Act, one might have been able to argue that Congress was aware of what was happening. Since this is not the case, it seems entirely reasonable that given the small fraction of each Act that these statutes represent, even the most scrupulous legislator would not have foreseen the sentencing discrepancies that have resulted.

D. Prosecutorial Discretion is Undesirable in this Situation

One of the greatest problems with the use of the enhanced statutory maximum is that it does not automatically apply to all similarly situated defendants. If the prosecuting attorney wishes to impose the increased penalty, the prosecutor simply files an enhancement that states the defendant’s previous convictions. One

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112. UNITED STATES SENTENCING COMMISSION, supra note 11, at 804-05.
115. Indeed, in his dissenting opinion, Justice Breyer recognized that the ambiguity of § 994(h) “indicates that Congress simply has not ‘addressed the question’” of which maximum term to use. See LaBonte, 117 S. Ct. at 1682 (Breyer, J., dissenting) (quoting Chevron v. United States, 467 U.S. 837, 843 (1984)).
116. This decision is left entirely to the prosecutor. See supra note 2.
117. See 21 U.S.C. § 851(a)(1) (1994) (“No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior
of the Commission's reasons for enacting Amendment 506 was to avoid disparate sentences based upon "the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." Although "[t]he notion that the prosecuting attorney is vested with a broad range of discretion . . . is firmly entrenched in American law," this discretion is not unfettered. By enacting Amendment 506, the Commission attempted to remedy a situation where prosecutorial discretion resulted in disparate sentences becoming the norm.

The sentencing disparities that resulted from prosecutorial discretion came as no surprise. In 1979, the Federal Judicial Center predicted that the proposed sentencing reform would "actually aggravate the problems of discretion and sentencing disparities, because the enormous discretion exercised by prosecutors would not be brought under direct control." The report criticized the transfer of discretion from the judiciary to prosecutors not only because there was uncertainty as to whether the shift would reduce disparities, but also because judges generally tend to be older and more experienced than prosecutors. Many practicing attorneys and academics have found that the Federal Judicial Center's prediction has come to fruition. Yet another reason to avoid the shift is that judges are intended to be neutral parties while prosecutors are inherently partisan. Transferring sentencing discretion from

convictions, unless . . . the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon.

118. UNITED STATES SENTENCING COMMISSION, supra note 11, at 804, 805.
120. 1 STEPHEN J. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM 1-2 (1979).
121. See id. at 1 ("It is by no means clear, however, that narrowing the discretion of judges . . . would reduce disparities or control the total amount of discretion exercised in the criminal justice system.").
122. See id. at 2-3 ("[T]he quality of the discretion exercised might be adversely affected because, in effect, discretion would be transferred from federal district judges to assistant United States attorneys . . . who are almost uniformly far younger and less experienced than district judges.").
123. See William J. Powell & Michael T. Cimino, Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?, 97 W. VA. L. REV. 373, 398 (1995) ("[T]he unbridled discretion of the judiciary that caused Congress to overhaul the federal sentencing system has merely been transferred . . . to the prosecutors who are just as likely to exercise it differently from one to another. Disparity remains, creating fertile ground for unfair sentencing.").
a neutral party to a biased one is senseless if justice is indeed the ultimate goal.

IV. CONCLUSION

The United States Sentencing Guidelines were created to eliminate unwarranted sentencing disparities between similarly situated defendants. Unfortunately, one way that the Guidelines approach this problem is by meting out excessively harsh sentences to all. In many cases, sentences go beyond reflecting the seriousness of the defendant's offense and more than adequately account for the defendant's criminal history. This phenomenon is particularly visible in drug cases. In light of the criticism that has been voiced in this area, the Commission has been taking measures to correct the situation. One of these measures was the enactment of Amendment 506.

Amendment 506 furthered the four traditional goals of sentencing. In addition, disparities were reduced by eliminating an area of prosecutorial discretion which resulted in the disparate application of enhanced statutory maximum provisions. Moreover, use of the unenhanced statutory maximum to calculate the defendant's offense level adequately reflected the seriousness of the offense. Despite Amendment 506's positive attributes, the Supreme Court invalidated the Amendment. In its brief opinion in United States v. LaBonte, the Supreme Court ensured that, in the area of drug sentencing, unwarranted sentencing disparities will remain the norm and justice will remain an elusive goal.

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