When Judicial Deference Erodes Liberty: The Shortcomings of *Stinson v. United States* and its Implications on Judicial Ethics

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> "[T]he eternal struggle in the law between constancy and change is largely a struggle between history and reason, that is, between past reason and present needs."[1]
>
> —Justice Felix Frankfurter

Introduction

In 2017, Jeffrey Havis pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[2] Judge Travis McDonough sentenced Havis to 46 months after enhancing his base level from 14 to 20 to account for a 17-year-old conviction for a "controlled substance offense."[3] The career offender definition in the *Sentencing Guidelines* explains "controlled substance offense" as an offense under state law that prohibits the "distribution, or dispensing of a controlled substance."[4] The commentary further provides: "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[5]

Havis objected in the District Court, arguing that because the previous Tennessee conviction under the state statute encompassed the attempt to sell cocaine, under the "categorical approach,"[6] it could not be used to increase his base

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1. Felix Frankfurter & Learned Hand, The Lawyer and the Public 7–8 (The Council on Legal Education and Admissions to the Bar of the American Bar Association eds.) (1933).

2. United States v. Havis, 927 F.3d 382, 383 (6th Cir. 2019).

3. *Id.* at 384; *see also* U.S. Sent'g Guidelines Manual §§ 2K2.1(a)(4), (a)(6) (U.S. Sent'g Comm'n 2018) [hereinafter U.S.S.G].

4. U.S.S.G § 4B1.2(b); *see also* U.S.S.G § 4B1.1(a) ("A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a *controlled substance offense*.") (emphasis added).

5. *Id.* § 4B1.2 cmt. n.1.

6. The Sixth Circuit applies the categorical approach in sentencing, *see* United States v. Woodruff, 735 F.3d 445, 449 (6th Cir. 2013), which compares the elements of the Tennessee statute with the "controlled substance offense" under the Guidelines. *See* Taylor v. United States, 495 U.S. 575, 600–02 (1990). If the Tennessee

level offense from 14 to 20 for purposes of the career offender enhancement.[7] The District Court rejected his argument based on the Sixth Circuit's precedent in *United States v. Evans*,[8] which already interpreted the *Guidelines*' definition of "controlled substance offense" to *include* attempt crimes.[9] Therefore, under the categorical approach, the Tennessee statute criminalized the same conduct as the *Guidelines*, and the District Court was compelled to conclude that the enhancement properly applied to Havis.[10] On appeal to the Sixth Circuit, his argument failed again for one reason: the three judge panel could not "grant Havis relief without overruling *Evans*'s reliance on the very same commentary."[11]

Finally, in 2019, the Sixth Circuit sitting *en banc* reheard his case and abrogated *Evans* on the grounds that Havis raised a narrow objection that the parties did not raise in *Evans*[12]: that the Sentencing Commission *impermissibly added* attempt crimes to the list of "controlled substance offenses" through Application Note 1 when the career offender Guideline text does not include attempt.[13] The *en banc* Court held: "the text of [the guideline] controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses," and remanded to the district court for appropriate resentencing.[14]

Havis's three-year-long fight for a proportionate sentence results from the federal courts' strained attempts to apply the Supreme Court's 1993 decision in *Stinson v. United States*.[15] *Stinson* holds that Guideline Commentary ("Commentary") binds judges unless it violates the Constitution, a federal statute, or embraces a plainly erroneous reading of the guideline.[16] Nevertheless, the Court has never clarified *Stinson*'s scope nor explained how it operates in situations like Havis's when deference to the Commentary enhances a defendant's sanctions. Further, federal judges

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statute criminalizes the same, or a narrower, range of conduct than the Guidelines, the District Court did not err in sentencing Havis.

7. *See* United States v. Havis, 927 F.3d 382, 384 (6th Cir. 2019).

8. 699 F.3d 858 (6th Cir. 2012).

9. *Id.* at 868; Evans was convicted for cocaine trafficking conviction under Ohio Revised Code § 2925.03 (A)(1), but "[b]ecause the Ohio court documents do not indicate whether Evans was convicted for selling cocaine or offering to sell cocaine, the [court] should look to the lesser of the two offenses, an offer to sell cocaine, to determine whether this offense categorically qualifies as a controlled substance offense." *Id.* at 866.

10. United States v. Havis, 907 F.3d 439, 441–42 (6th Cir. 2018).

11. *Id.* at 442 ("But save an *en banc* decision of this court or an intervening decision of the Supreme Court, we must follow Evans nonetheless.").

12. Regarding Application Note 1, Evans solely raised that his cocaine trafficking conviction did not categorically qualify as a controlled substance offense. *See* United States v. Evans, 699 F.3d 858, 861 (6th Cir. 2012). Nevertheless, the court held that because his conviction under the Ohio Statute "require[d] an intent to sell a controlled substance, such a conviction under the statute for an offer to sell is properly considered an attempt to transfer a controlled substance, which is a 'controlled substance offense' under the Guidelines." *Id.* at 867 (citing U.S.S.G. § 4B1.2, Application Note 1).

13. United States v. Havis, 927 F.3d 382, 384 (6th Cir. 2019).

14. *Id.* at 387.

15. 508 U.S. 38 (1993).

16. *Id.* at 47.

are left to decide how, if at all, the doctrine of lenity applies if they find the Commentary ambiguous.[17]

Stinson has created inconsistent outcomes in the circuits as many defendants have received severe penalties under the *Guidelines* as a result of judicial deference to the Commentary, while others have received the benefit of judges who, following the rule of lenity, find the Commentary ambiguous or rule in their favor when they believe the Commentary disproportionately increases the defendants' sanctions. This Note uses Havis's case as a starting point to examine *Stinson* in various circuits and explores the Catch-22 judges are in when Commentary deference contravenes the rule of lenity and their conception of a just sentence. While Havis finally received his proportionate sentence when the *en banc* Court emphatically held: "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference,"[18] many defendants suffer as a result of judges' deference to Commentary.[19]

Part I briefly summarizes the background to *Stinson*, including the Sentencing Commission, the *Guidelines*, and their role in the greater constitutional scheme. Part II explores the doctrine of lenity and its role in sentencing. Part III examines *Stinson* in federal courts by comparing and contrasting various Circuit judges' rationales for adhering to, or ignoring, the Commentary when it increases defendants' penalties. Part IV discusses the tension between *Stinson* and judicial ethics and argues that codes of judicial conduct on judicial impartiality and independence expose two major flaws of *Stinson*. Particularly, *Stinson*'s broad deference regime unfairly closes judges' minds and ties their hands to the Commentary when the *Guidelines* themselves are not mandatory. Further, *Stinson*'s language that the Commentary is authoritative obfuscates judges' greater ethical obligations to other doctrines and rules of law, thereby stymieing their sentencing discretion. Finally, Part V argues that *Stinson* is ripe for reconsideration because of the recent growing Circuit split, the Court's decision in *Kisor v. Wilkie*, and judicial ethical cannons represent compelling reasons to overrule the doctrine, or at minimum, cabin its scope so federal judges do not use it to penalize defendants.

I. BACKGROUND

A. THE SENTENCING COMMISSION, GUIDELINES, AND COMMENTARY

Congress enacted the Sentencing Reform Act in 1984 ("SRA"),[20] which created the Sentencing Commission (the "Commission") for the chief purpose of increasing sentencing uniformity for similarly situated defendants who committed similar

17. *See, e.g.*, United States v. Winstead, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) ("[I]t is not obvious how the rule of lenity is squared with Stinson's description of the commentary's authority to interpret guidelines. We are inclined to believe that the rule of lenity still has some force.").

18. *Havis*, 927 F.3d at 387.

19. *See infra* Part III(A).

20. Mistretta v. United States, 488 U.S. 361, 361 (1989).

crimes.[21] Before the SRA, judges sentenced defendants only through the broad penalty ranges included in the statute, and once they determined that a given sentence was within the statutory limits, appellate review was virtually impossible.[22] To secure nationwide consistency in sentencing, Congress made the *Guidelines* mandatory[23] until *United States v. Booker* in 2005 consigned them to advisory status.[24] After first calculating the sentence range and then considering commentary and other statements in the *Guidelines* about departures from the range, *Booker* requires judges to take a third step in their sentencing analysis by considering all of the 18 U.S. § 3553(a) factors (e.g., the deterrence value of punishment, the defendant's history, the seriousness of the offense) to decide whether to sentence within or outside the applicable range.[25]

Although Congress established the Commission in the judicial branch, the Commission represents "an unusual hybrid in structure and authority," entailing elements of both quasi-legislative and quasi-judicial power.[26] The Commission is fully accountable to Congress, which reviews the guideline for a six-month period before approving, modifying, or disproving the text.[27] Further, the rulemaking of the Commission "is subject to the notice and comment requirements of the Administrative Procedure Act" like other administrative agencies.[28] The Court has made clear that the *Guidelines* are a "starting point and the initial benchmark" in judges' sentencing analysis.[29] A judge may depart from the *Guidelines* if he or she believes the sentencing range does not adequately capture a defendant's culpability.[30] In 2019, 51.4% of all federal sentences were within the applicable *Guidelines* range[31] while 23.6% of offenders received sentences above or below the applicable range, but the court cited to the *Guidelines* to justify the

21. *See id*; *see also* U.S.S.G. ch 1, pt. A, subpt. 1 ("The Sentencing Reform Act of 1984 . . . provides for the development of guidelines that will further the basic purposes of criminal punishment: Deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.").

22. *See, e.g.*, Dorszynski v. United States, 418 U.S. 424, 431 (1974).

23. *Mistretta*, 488 U.S. at 367.

24. 543 U.S. 220 (2005).

25. U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 11 (2018).

26. *Mistretta*, 488 U.S. at 412.

27. *Id.* at 393–94; *see also* 28 U.S.C. § 994(p).

28. *Mistretta*, 488 U.S. at 394; *see also* 28 U.S.C. § 994(x).

29. Gall v. United States, 552 U.S. 38, 49 (2007).

30. *See id.* at 46 ("[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 justification."). However, a Judge may not depart from the Guidelines range on certain prohibited grounds like the offenders' race, sex or national origin, for instance. *See* U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 13 (2014).

31. U.S. SENT'G COMM'N: 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 8 (2019).

departure.[32] The Commentary by itself may be grounds for an upward or downward departure.[33]

The Commission promulgates three varieties of text in the *Guidelines*: (1) the *Guideline* itself, (2) policy statements, and (3) Commentary.[34] The Commentary serves one of three functions: (1) to "interpret [a] guideline or explain how it is to be applied;" (2) to "suggest circumstances which . . . may warrant departure from the guidelines;" or (3) to "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline."[35] Unlike the *Guidelines*, however, Commentary *does not* go through Congressional review or notice and comment rulemaking.[36]

Administrative law doctrines inform how courts construe the Commentary.[37] Because courts equate the *Guidelines* to agency legislative rules, the Commentary is "treated as an agency's interpretation of its own legislative rule."[38] Therefore, under the *Seminole Rock* deference doctrine which prevailed until recently, if an "agency's interpretation of its own [ambiguous] regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[39] Four years after *Stinson*, the Court reinforced *Seminole Rock* deference in *Auer v. Robbins*.[40]

Nevertheless, *Seminole Rock* and *Auer* no longer control. In 2019, the Court in *Kisor v. Wilkie*[41] instructed judges to defer only to "genuinely ambiguous" agency regulations after a court has "exhaust[ed] *all* the 'traditional tools of construction.'"[42] Traditional tools of construction include the doctrine that courts should prefer interpretations of ambiguous statutes that avoid constitutional

32. *Id.* I subtracted the 51.4% of offenders sentenced within the Guideline range from the 75% of offenders who received sentences under the Guidelines or outside the guidelines range and the court cited a departure reason from the Guidelines to find the percentage of offenders whose sentence departure was justified by the Guidelines.

33. *Id.* at 201, 215; *see also* 18 U.S.C. § 3553(b)(1) ("In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.").

34. Stinson v. United States, 508 U.S. 38, 41 (1993).

35. U.S.S.G. § 1B1.7.

36. *Stinson*, 508 U.S at 40; 28 U.S.C. § 994(p).

37. *See Stinson, 508 U.S* at 44 ("Although the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule.").

38. *Id.*

39. *Id.* at 45 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

40. 519 U.S. 452, 461 (1997) (holding that the Labor Secretary's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent with the regulation") (citations omitted).

41. 139 S. Ct. 2400 (2019).

42. *Id.* at 2415 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, n. 9 (1984)) (emphasis added).

questions[43] and the rule of lenity, for instance. Legislative history may also constitute a judge's tool of construction, but using it as a source of guidance is often arbitrary[44] and a last resort.[45] Therefore, *Kisor* requires that a court "carefully consider the text, structure, history, and purpose of a regulation . . . [as] if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."[46] Further, *Kisor* clarified that if a regulation remains genuinely ambiguous after a court exhausts its legal interpretive toolkit, deference to the agency's interpretation is not automatically due; the agency's interpretation must still be reasonable.[47] Even if a court decides that the agency's interpretation is reasonable, it nevertheless must inquire into the substantive expertise of the agency, among other factors, to determine whether the agency's interpretation reflects "fair and considered judgment"[48] before deferring to it. Therefore, because *Stinson* rests on the now-eroded *Seminole Rock* deference doctrine, its deference regime may very well rest on precarious ground.

B. *STINSON V. UNITED STATES*' DEFERENCE REGIME

In an effort to resolve the circuits' conflicting positions on the authoritative weight of the Commentary,[49] *Stinson* held the Commentary authoritative "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."[50] The Court specified that Commentary is binding only when it explains the Guideline's application.[51] Despite *Booker*'s discretionary *Guidelines* regime, because *Booker* did not expressly overrule *Stinson*, judges assume the precedents do not conflict.[52]

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43. *See Constitutional avoidance rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.").

44. *See e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2140 (2016) ("A judge may find that the answer provided by the legislative history accords better with the judge's sense of reason, justice, or policy. In that situation, the judge is subtly incentivized to categorize the statute as ambiguous in order to create more room to reach a result in line with what the judge thinks is a better, more reasonable policy outcome.").

45. *See, e.g.*, Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J. concurring) ("Resort to legislative history is only justified where the face of the [statute] is inescapably ambiguous.").

46. Kisor, 139 S. Ct. at 2415.

47. *Id.* at 2416 ("[T]he agency's reading must fall 'within the bounds of reasonable interpretation.' . . . And let there be no mistake: That is a requirement an agency can fail.").

48. *Id.* at 2417 (2019) (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155, (2012)).

49. Stinson, 508 U.S at 40.

50. *Id.* at 38.

51. *Id.* at 43.

52. *See, e.g.*, United States v. Douglas, 634 F.3d 852, 862 n.1 (6th Cir. 2011) ("*Stinson* is still good law after *Booker*."); United States v. Katalinic, 510 F.3d 744, 746 (7th Cir. 2007) ("Even though the guidelines are no longer mandatory after United States v. Booker, 543 U.S. 220 (2005), courts must still begin the sentencing process by calculating the guideline sentence and must, therefore, use the commentary to interpret the guidelines."); United States v. Mooney, 425 F.3d 1093, 1101 (8th Cir. 2005) (same).

Fortunately for Terry Lynn Stinson, the Court's deference to Commentary did not lengthen his sentence nor did the Court have the occasion to consider lenity because the Commentary resolved the Guideline's ambiguity in his favor.[53] In 1990, the District Court for the Middle District of Florida sentenced Stinson to 365 months' imprisonment with an additional five-years for bank robbery (where he used a firearm during the crime).[54] The harsh sentence resulted from Stinson's classification as a career offender because possessing a firearm as a felon constituted a predicate "crime of violence" for the enhancement.[55] The Eleventh Circuit affirmed[56] and after its decision, the Commission amended the Commentary to *prohibit* a felon's possession of a firearm as a predicate offense for the enhancement.[57] Stinson thereafter sought a rehearing, arguing that the amendment should be given retroactive effect, but the Eleventh Circuit denied on the grounds that the Commentary is not binding because "Congress does not review [the] amendments."[58] In order to resolve a Circuit split on the Commentary's force, the Supreme Court granted certiorari, holding that failing to defer to the Commentary constitutes an erroneous application of the *Guidelines*.[59] The Court stated that they had no reason to consider the Government's retroactivity concerns because the Eleventh Circuit based its denial of Stinson's rehearing solely on the grounds that the Commentary was not binding.[60] The Court remanded to resentence Stinson without the career offender enhancement.[61]

II. LENITY IN THE CRIMINAL LAW

The rule of lenity has multiple rationales, though it is most commonly understood as a canon of statutory interpretation that strictly construes criminal statutes against the government.[62] Judges also describe lenity as follows: when two rational readings of a statute are possible, the one with the less harsh effect on the defendant must prevail unless "the text, structure, and history . . . establish that the [harsher] position is unambiguously correct."[63] The Court has provided

53. *See* Stinson, 508 U.S. at 47.

54. United States v. Stinson, 943 F.2d 1268, 1269 (11th Cir. 1991).

55. *See* Stinson, 508 U.S. at 38; *see also Stinson*, 943 F.2d at 1269 ("[Stinson] had been earlier convicted of three violent felonies.").

56. Stinson, 943 F.2d at 1273.

57. Stinson, 508 U.S. at 39; *see also* U.S.S.G. § 4B1.2, cmt. n.2.

58. Stinson, 508 U.S. at 40.

59. *Id.* at 42–43.

60. *Id.* at 47–48.

61. *Id.* at 48.

62. *See, e.g.*, McBoyle v. United States, 283 U.S. 25 (1931)*; see also* 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th ed. 1770). This version of lenity reflects the principle that Congress must state their intent clearly when criminalizing conduct. If Congress' language is ambiguous, it will be construed against them.

63. United States v. Granderson, 511 U.S. 39, 54 (1994). For an example of how lenity is applied to interpret an ambiguous firearms trafficking enhancement, *see* United States v. Henry 819 F.3d 856 (6th Cir. 2016). The Commentary defines trafficking as "transferr[ing] . . . two or more firearms to another individual" and the

numerous other instances when the doctrine applies, including when a judge can make "no more than a guess as to what Congress intended"[64] or when a "grievous ambiguity" exists in a criminal statute.[65] Importantly, lenity not only applies to interpretations of criminal statutes, but also their penalties.[66] Therefore, nearly every circuit applies the rule of lenity when necessary to interpret the *Guidelines*.[67] The Seventh Circuit stands alone in not applying lenity to interpret the *Guidelines*.[68] However, in the other circuits that use lenity to interpret the *Guidelines*, most adopt the grievous ambiguity standard.[69]

No matter what iteration of lenity a court employs, applying the doctrine results from a judge's threshold finding of statutory ambiguity. Determining whether ambiguity exists is difficult and often incoherent.[70] Justice Brett Kavanaugh describes "one judge's clarity is another judge's ambiguity"[71] based on his time on the bench. A judge may believe a statute's language is ambiguous but "say it is clear anyway in order to avoid triggering an interpretive doctrine that would lead to a result that she considers unjust in a particular case."[72] Given the absence of a clear test to guide judges on determining ambiguity, lenity is inconsistently employed.[73]

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parties debated whether "another individual" meant one or multiple people because the defendant did not transfer more than one firearm to a single person. *Id.* at 861–863. The Court determined the Commentary's language had more than one interpretation and accordingly followed the rule of lenity to reverse the district court's holding that applied the vague enhancement to the defendant. *Id.* at 87 1–7 2. The court reasoned: "[e]ven assuming Henry's conduct fell within a plausible reading of these provisions, the fact that another reasonable reading exists that would subject him to less punishment is grounds for applying the less severe interpretation." *Id.* at 872.

64. Ladner v. United States, 358 U.S. 169, 178 (1958).

65. Muscarello v. United States, 524 U.S. 125, 139 (1998).

66. Bifulco v. United States, 447 U.S. 381, 387 (1980).

67. *See, e.g.*, United States v. Pinkham, 896 F.3d 133, 138 (1st Cir. 2018); United States v. Carey, 268 F. Supp. 3d 29, 32 (D.D.C. 2017); United States v. Jeter, 329 F.3d 1229, 1230 (11th Cir. 2003); United States v. Simpson, 319 F.3d 81, 86 (2d Cir. 2002); United States v. Gonzalez–Mendez, 150 F.3d 1058, 1061 (9th Cir. 1998); United States v. Lazaro–Guadarrama, 71 F.3d 1419, 1421 (8th Cir. 1995).

68. United States v. Mrazek, 998 F.2d 453, 455 (7th Cir. 1993).

69. *See, e.g.*, United States v. Suárez-González, 760 F.3d 96, 101 (1st Cir. 2014); United States v. D.M., 869 F.3d 1133, 1144 (9th Cir. 2017); United States v. Brown, 740 F.3d 145, 150–51 (3d Cir. 2014); United States v. Galaviz, 645 F.3d 347, 361–62 (6th Cir. 2011); United States v. Rivera, 265 F.3d 310, 312 (5th Cir. 2001) (lenity applies "only if after a review of all applicable sources of legislative intent the statute remains truly ambiguous").

70. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2139 (2016) ("When we practice law, we look for the ambiguity when defending a criminal defendant, a corporate client, an agency, or even a President. What may look clear to everyone else, lawyers argue, is actually not so clear . . . And it can be pernicious when we bring that instinct onto the bench and employ it to make statutory interpretation much more difficult and unpredictable than it can and should be.").

71. *Id.* at 2137; *see also id.* at 2137–38 ("In practice, I probably apply something approaching a 65-35 rule. In other words, if the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons. . . . By contrast, I have other colleagues who appear to apply a 55-45 rule. If the statute is at least 55-45 clear, that's good enough to call it clear.").

72. *Id.* at 2140 n. 108.

73. *Id.* at 2138 ("The simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous. In a considerable understatement, the Supreme Court itself has

Certainly, such unpredictability does not inspire the utmost confidence in the judiciary. But, no matter the doctrine's unpredictable application, lenity is revered by criminal defendants, lawyers, and academics as it reflects principles of due process, separation of powers, and individual liberty. First, lenity ensures due process of law by providing fair warning of "what the law intends to do if a certain line is passed."[74] Further, the law must be "in language that the common world will understand" to constitute sufficient warning as people cannot be apprised of the law if it is cloaked in legalese.[75] Second, lenity ensures the separation of powers upon which the Founders built the nation because "the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[76] Thus, lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[77] Keeping the duties of our tripartite government separate also safeguards individual liberty[78] as it is the "duty of the judicial department to say what the law is"[79] and not the Executive nor Legislative.

Lastly, the Commission's prescriptions endanger liberty because the criminal sanction represents "ultimate governmental power, short of capital punishment."[80] Lenity critically protects defendants' lives and physical integrity from selective and arbitrary criminal enforcement by construing statutes and its penalties that are not sufficiently particularized in their favor.[81] Justice Marshall recognized early in our history that "[w]here rights are infringed, where fundamental principles are overthrown . . . the legislative intention must be expressed with *irresistible clearness* to induce a court of justice to suppose a design to effect such objects."[82] The doctrine therefore preserves the inherent liberal bias of the criminal law by reflecting the notion that "citizens can do [little] to protect themselves against abuse by state officials."[83]

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admitted that 'there is no errorless test for identifying or recognizing "plain" or "unambiguous" language.'") (citation omitted).

74. United States v. Bass, 404 U.S. 336, 348 (1971) (quoting McBoyle v. United States, 283 U.S. 25, 26 (1931)).

75. McBoyle v. United States, 283 U.S. 25, 27 (1931).

76. Bass, 404 U.S. at 348.

77. Liparota v. United States, 471 U.S. 419, 427 (1985).

78. *See* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

79. Marbury v. Madison, 1 Cranch 137, 177 (1803); *see also* Abramski v. United States, 573 U.S. 169, 191 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe.") (citation omitted).

80. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

81. *See e.g.*, United States v. Kozminski, 487 U.S. 931, 952 (1988).

82. United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805) (emphasis added).

83. John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS LAW JOURNAL 1, 55 (2002).

III. *STINSON* IN THE CIRCUITS

Since 2018, the circuit split on *Stinson*'s authoritative weight, when Commentary enhances a defendant's penalties, has been growing. As of January 2021, the Third, Sixth, and D.C. Circuits have reconsidered their precedents and refused to defer to Commentary that penalizes defendants if the Guideline text does not expressly warrant the penalty.[84] Seven circuits have ruled exactly opposite.[85] This Part will highlight influential cases on both sides of the circuit split and briefly summarize the judges' rationales for adhering to or ignoring *Stinson*.

A. CIRCUITS THAT ADHERE TO *STINSON* WHEN COMMENTARY ENHANCES DEFENDANTS' PENALTIES

In the past two years, many defendants have been in Havis's position when he first appealed to the Sixth Circuit on the grounds that the Commentary lacked legal force because it improperly expanded the text of the controlled substance offense Guideline.[86] For Marcus Crum last year in the Ninth Circuit[87] and Zimmian Tabb in February of this year in the Second Circuit,[88] both received the same disheartening answer Havis first received: despite their meritorious arguments that prevailed in other circuits, the three-judge panels could not overrule their precedent which deferred to the Commentary under *Stinson*.[89]

Crum argued that his prior conviction for delivery of methamphetamine in violation of an Oregon statute did not qualify as a "controlled substance offense" for the career offender enhancement because Application Note 1 includes, "aiding and abetting, conspiring, and attempting to commit such offenses."[90] He argued that because the Guideline text "does not encompass solicitation (or any of the inchoate offenses discussed in the commentary), the commentary may not expand the definition of 'controlled substance offense' to include those offenses."[91] The Ninth Circuit held that because its precedents in *United States v. Vea-Gonzales*[92]

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84. *See* United States v. Nasir, 982 F.3d 144 (3d Cir. 2020); United States v. Havis, 927 F.3d 382 (6th Cir 2019); United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018).

85. *See* United States v. Lewis, 963 F.3d 16, 24 (1st Cir. 2020); United States v. Cingari, 952 F.3d 1301, 1311 (11th Cir. 2020), *cert. denied*, No. 20-5937 (2020); United States v. Tabb, 949 F.3d 81,89 (2d Cir. 2020), *cert. pending*, No. 20-579 (2020); United States v. Lovato, 950 F.3d 1337, 1347 (10th Cir. 2020), *cert. pending*, No. 20-6436 (2020); United States v. Crum, 934 F.3d 963, 966–67 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020); United States v. Jefferson, 975 F.3d 700, 708 (8th Cir. 2020), *cert. pending*, No. 20-6745 (2020); United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020).

86. See United States v. Crum, 934 F.3d 963 (9th Cir. 2019); United States v. Tabb, 949 F.3d 81 (2d Cir. 2020).

87. *See* Crum, 934 F.3d 963.

88. *See* Tabb, 949 F.3d 81.

89. *See* Crum*, 934 F.3d* at 966; Tabb, 949 F.3d at 87 ("[W]e, acting as a three judge panel, are not at liberty to revisit Jackson . . . Accordingly, we find that Jackson precludes Tabb's argument that Application Note 1 is invalid.").

90. Crum, 934 F.3d at 964; U.S.S.G. § 4B1.2 cmt. n.1.

91. *Id*. at 966.

92. 999 F.2d 1326, 1330 (9th Cir. 1993).

and *United States v. Shumate*[93] declared the Commentary consistent with the Guideline, they were powerless to accept his argument.[94] The *Crum* court, nevertheless, powerfully stated their dislike of Circuit precedent acknowledging: "[i]f we were free to do so, we would [accept Crum's argument]" like the Sixth Circuit did with Havis's.[95] The Court continued: "the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline [and that is] especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1.[96] However, absent a Supreme Court decision "clearly irreconcilable" with Circuit precedent, it controlled.[97] The Court had the opportunity to resolve the Circuit split in *Crum* but denied certiorari in March 2020.[98]

Zimmian Tabb faced the same fate as Crum.[99] In the Southern District of New York, the government advocated his sentencing range between 151 to 188 months' imprisonment based on the career offender enhancement for a previous narcotics conspiracy conviction.[100] Without the enhancement, his *Guidelines* range would have been 33 to 41 months.[101] The *Tabb* court recognized "the career offender enhancement often dwarfs all other Guidelines calculations and recommends the imposition of severe, even draconian, penalties."[102] But, Tabb's enhanced sentence is final unless the Court grants his petition for certiorari.[103]

Like the *Crum* and *Tabb* courts, the First Circuit similarly refused to grant Vaughn Lewis relief on the very same issue in the Commentary, reasoning that it would disrupt the "'stability and predictability' essential to the rule of law"[104] if they departed from their precedent.[105] Nevertheless, Judges Torruella and Thompson expressed their dismay with *Stinson* and their "discomfort with the practical effect of the deference to Application Note 1"[106] as applied to inchoate

93. 329 F.3d 1026, 1029 (9th Cir. 2003).
94. Crum, 934 F.3d at 966.
95. *Id*. at 966.
96. *Id*.
97. *Id*. at 967.
98. Crum v. United States, 140 S. Ct. 2629 (2020).
99. United States v. Tabb, 949 F.3d 81, 89 (2d Cir. 2020) ("To us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy. Tabb's conviction under this statute thus properly served as a predicate for his sentencing enhancement.").
100. Tabb, 949 F.3d at 83.
101. *Id*.
102. *Id*. at 83 n.2.
103. United States v. Tabb, 949 F.3d 81 (2d Cir. 2020), cert. pending, No. 20-579 (Nov. 2, 2020).
104. United States v. Lewis, 963 F.3d 16, 23 (1st Cir. 2020).
105. *See* United States v. Piper, 35 F.3d 611, 617–618 (1st Cir. 1994) (holding that Application Note 1 is consistent with the career offender guideline and it applies to conspiracy crimes); *see also* Unites States v. Fiore, 983 F.2d 1, 4 (1992) (counting conspiracy as a predicate offense for the career offender provision).
106. Lewis, 963 F.3d at 27 (Torruella & Thompson JJ., concurring).

offenses. They admitted that circuit precedent "raises troubling implications for due process, checks and balances, and the rule of law."[107] The judges further admonished the Commission, stating that *Stinson* should not empower the Commission to use its Commentary as a "Trojan horse for rulemaking" or a "shortcut around the due process guaranteed to criminal defendants."[108]

Beyond the legality of Application Note 1 in *Crum*, the Ninth Circuit has deferred to Commentary on another occasion which severely enhanced defendants' sentences. In *United States v. Yepez*,[109] David Yepez and Audenago Acosta were convicted of importing methamphetamine, which carries a mandatory minimum ten-year sentence.[110] For first-time nonviolent drug offenders, "safety valve relief" exists for defendants to be convicted beneath the mandatory minimum if five conditions are satisfied, one of them being that the defendant cannot have more than one criminal history point.[111] The issue before the Ninth Circuit was whether defendants' probation for minor state crimes when they were arrested for the drug offense precluded their abilities to obtain more lenient sentences under the relief provision.[112] The *Guidelines* assign two criminal history points if a person "committed [a federal] offense while under any criminal justice sentence, including probation."[113] The Commentary provides that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score."[114]

The issue for Yepez and Acosta was that prior to being sentenced for their drug offenses, they each received "nunc pro tunc" orders from a state court that terminated their probations as of the day before they committed their federal offenses.[115] The Ninth Circuit reasoned that because the Commentary does not expressly create "an exception for probationary sentences that are terminated nunc pro tunc by a state court order," they must infer that defendants' probationary sentences are to be counted for their criminal history scores.[116] The majority further reasoned that it would undermine principles of federalism to allow a state court order to determine a federal defendant's eligible sentencing relief.[117] Unfortunately for Yepez, deferring to the Commentary to count sentences not otherwise excluded for his criminal history score resulted in a mandatory minimum ten-year sentence as opposed to 57 months if he obtained valve relief.[118]

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107. *Id*. at 28 (Torruella & Thompson JJ., concurring).
108. *Id*. at 28–29 (Torruella & Thompson JJ., concurring).
109. 704 F.3d 1087 (9th Cir. 2012).
110. *Id*. at 1089.
111. *Id*.
112. *Id*.
113. U.S.S.G. § 4A1.1(d).
114. U.S.S.G. § 4A1.2 cmt. background.
115. Yepez, 704 F.3d at 1089–90.
116. *Id*. at 10 90–91.
117. *Id*. at 1091.
118. *Id*. at 1093 (Wardlaw, J., dissenting).

Judge Wardlaw, joined by four others, vehemently dissented, stating that the Commentary's *silence* regarding how a court should count probation terminated by a state court order should not be inferred to preclude valve relief given its grave sentencing consequences.[119] She stated "principles of justice, federalism . . . [and] the rule of lenity" counsel against the majority's interpretation and allow judges "to exercise their broad sentencing discretion when calculating criminal history scores . . . and then to exercise that same discretion in determining the appropriate sentence length."[120] Given Congress' and the Commission's "deafening silence"[121] on nunc pro tunc orders, the "text, structure, and history fail to establish that the Government's position is unambiguously correct," therefore, lenity must be invoked to "resolve [such] doubt in the defendant's favor."[122] Further, she claims lenity is appropriate as evidenced by the District Court judge's discomfort sentencing Yepez to the mandatory minimum.[123] The District Court judge held:

> I wouldn't give Mr. Yepez a 10–year sentence if it was up to me, if I had discretion. Wouldn't do it. I think that's disproportionate given his background . . . I really don't like it . . .. I have imposed [this sentence] because I felt like I had to. That's the only reason.[124]

Yepez illustrates the Ninth Circuit's strained attempt to divine the Commission's intent from its silence on retroactively terminated probation terms in the Commentary. Sadly for the defendants, strictly adhering to the Commentary led to a sentence more than twice as long for defendants than they would have received if the Commentary did not apply to them.[125]

B. CIRCUITS THAT DO NOT ADHERE TO *STINSON* WHEN COMMENTARY ENHANCES DEFENDANTS' PENALTIES

Luckily, circuits are increasingly reconsidering their *Stinson* precedents when Commentary deference increases defendants' penalties. The D.C. Circuit in *United States v. Winstead*[126] in 2018 changed the landscape on *Stinson* by holding the inclusion of inchoate offenses in Application Note 1 was inconsistent with the

119. *Id.* at 1099 (Wardlaw, J., dissenting).
120. *Id.* at 1092 (Wardlaw, J., dissenting).
121. *Id.* at 1101 (Wardlaw, J., dissenting).
122. *Id.* at 1101 (Wardlaw, J., dissenting).
123. *Id. at* 1103 (Wardlaw, J., dissenting) ("*Applying the rule of lenity is particularly appropriate here, where the predicate state offenses were so minor that each of the four trial judges involved . . . found the mandatory minimum sentence unjust under the circumstances.*").
124. *Id.* at 1093 (Wardlaw, J., dissenting).
125. *Id.* ("The Probation Office . . . recommended the ten-year mandatory minimum sentence. While the government agreed with the recommendation, it noted that it would have recommended a sentence of 57 months had Yepez qualified for safety valve relief.").
126. 890 F.3d 1082 (D.C. Cir. 2018).

controlled substance offense Guideline.[127] Relying partly on the canon of *expressio unius est exclusio alterius*,[128] Judge Silberman held that because the *Guidelines*' "detailed 'definition' of controlled substance offense . . . clearly excludes inchoate offenses," Aumbrey Winstead could not be punished for an offense not listed in the Guideline.[129] Further, Judge Silberman reasoned that because the Commission expressly lists attempt crimes in other sections of the Guideline, it "knows how to include attempted offenses when it intends to do so."[130] Moreover, given the "enormous difference in Appellant's potential term of imprisonment if sentenced as a career criminal (over ten years),"[131] the court admonished the government stating "surely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary . . . to impose such a *massive impact* on a defendant with *no grounding* in the guidelines themselves."[132] Judge Silberman warned the government that if the Commission intends to include attempt crimes as a controlled substance offense, it must not flout the Congressional review process.[133]

Following the lead of the *Winstead* and *Havis* courts, the Third Circuit in December 2020 sitting *en banc* unanimously held the very same Commentary deserves no deference because inchoate crimes are not included in the "controlled substance offenses" definition in the *Guidelines*.[134] The Court admitted that in previously ruling that the "commentary to [the controlled substance offense definition] was explanatory and therefore binding," they "may have gone too far in affording deference to the guidelines' commentary."[135] The Court continued: "[i]n light of *Kisor's* limitations on deference to administrative agencies" it is accordingly "clear that such an interpretation is not warranted."[136] Judge Bibas concurring expanded on the Court's reasoning stating that, as a tool of construction, "lenity takes precedence as a shield against excessive punishment and stigma" when "defer[ring] to a Guidelines comment that is harsher than the text."[137] Judge Bibas also stated that judicial role in sentencing supports the Third Circuit's conclusion because "[j]udges interpret the law" and "[t]he judge's lodestar must remain the law's text, not what the Commission says about that text."[138] He further stated that given that *Kisor* changed the landscape on agency

127. *Id*. at 1091.

128. *See Expressio unius est exclusio alterius,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]o express or include one thing implies the exclusion of the other.").

129. *Winstead*, 890 F.3d at 1091.

130. *Id.*

131. *Id*. at 1089.

132. *Id*. at 1092 (emphasis added).

133. *Id.*

134. United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020). Accordingly, the Third Circuit overruled its precedent in United States v. Hightower, 25 F.3d 182 (1994).

135. *Id*. at 158.

136. *Id*. at 158–160.

137. *Id*. at 179 (Bibas, J., concurring).

138. *Id*. at 177 (Bibas, J., concurring).

deference, "we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role."[139]

IV. *STINSON* AND JUDICIAL ETHICS CONSIDERATIONS

The tension between *Stinson* deference and the judicial role in sentencing has been articulated by judges mainly as an intrusion into the judicial department's constitutional duty to declare what the law is[140] or an encroachment on judicial discretion during sentencing.[141] This Part will introduce a novel idea into the debate and make the case that principles of judicial ethics further expose the flaws of *Stinson*. This Part examines how the *Code of Conduct for United States Judges* ("Code of Conduct") and the American Bar Association's ("ABA's") *Model Code of Judicial Conduct* ("*Model Code*"), as rules of reason, impliedly include the rule of lenity and *Kisor's* prescriptions and allow a judge to not apply *Stinson* when the commentary penalizes the defendant. The rule of lenity and *Kisor* are therefore embedded in judges' ethical obligations, but *Stinson*'s mandatory deference language for decades[142] has obfuscated judges' greater ethical obligations of independence and justice and ultimately stymied their sentencing discretion until the D.C. Circuit reconsidered its precedent in 2018.

A. AN ETHICAL OBLIGATION OF IMPARTIALITY AND INDEPENDENCE

While *Stinson* does not expressly contravene federal judicial ethics, the law is in tension with the values that underpin judicial ethics canons.[143] These canons broadly reflect judges' commitments to integrity, impartiality, and independence.[144] Judicial impartiality and independence, while conceptually distinct, are invariably related because "[a] judge who lacks independence will typically lack

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139. *Id.* (Bibas, J., concurring).

140. Judge Amul Thapar, who comprised part of the first panel that heard *Havis*, acknowledged Stinson's constitutional concerns, declaring that deference to the Commission that promulgates the Guidelines, and interprets them via Commentary "trespass[es] upon the court's province to 'say what the law is.'" *See* United States v. Havis, 907 F.3d 439, 450 (2018) (Thapar, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

141. *See* United States v. Nasir, 982 F.3d 144, 177 (3d Cir. 2020) (Bibas J., concurring) ("In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous. Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role."); *see also* United States v. Yepez, 704 F.3d 1087, 1093 (9th Cir. 2012) (Wardlaw J., dissenting) (reiterating the district court judge's frustration, "'I have imposed [this mandatory minimum sentence] because I felt like I had to. That's the only reason.'").

142. *See* United States v. Nasir, 982 F.3d 144, 177 (3d Cir. 2020) ("For decades, we and every other circuit have followed the Supreme Court's guidance in Stinson. That meant we gave nearly dispositive weight to the Sentencing Commission's commentary, not the Guidelines' plain text . . . . Now the winds have changed.").

143. *See*, *e.g.,* MODEL CODE OF JUDICIAL CONDUCT pmbl. [1] [hereinafter MODEL CODE] ("[T]he judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.").

144. MODEL CODE Canons 1, 2, 3.

impartiality . . . the dependent judge is likely to be partial to parties and causes favored by the individual or institution upon whom the judge is dependent."[145] It remains especially important in the criminal context given defendants' potential liberty deprivation that judges be detached from the "competitive enterprise of ferreting out crime."[146]

While federal judges are appointed for life tenure and enjoy salary protection subject to "good behavior" under the Constitution,[147] they must still abide by ethical guidelines.[148] The *Model Code* serves as an ethical guide for both state and federal judges.[149] In the federal system, the *Model Code* does not serve as a basis for all disciplinary proceedings but instead, "subjects judges to limited forms of discipline for conduct 'prejudicial to the effective and expeditious administration of the business of the courts.'"[150] Federal judges, not including Supreme Court Justices, are governed by additional ethical prescriptions in the *Code of Conduct* designed after the *Model Code*.[151]

First, Part IV (A)(1) explains how the *Model Code* and *Code of Conduct* conceptualize federal judges' obligations of impartiality and independence. Next, Part IV(A)(2) explains how such prescriptions expose two major flaws of *Stinson*.

1. THE RULES GOVERNING FEDERAL JUDICIAL ETHICS

The *Code of Conduct* consists of five canons and accompanying commentary.[152] Canon 1 of the *Code of Conduct* emphasizes the integrity and independence of the Judiciary and states "[a]n independent and honorable judiciary is indispensable to justice in our society."[153] The Commentary to Canon 1 reads, "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor."[154] Thus, the Commentary explains that "violation of this Code diminishes public confidence in the judiciary and injures our system of government under law."[155] The

145. Charles Gardner Geyh et al, JUDICIAL CONDUCT AND ETHICS 6th ed. § 1.02 (2020).

146. Johnson v. United States, 333 U.S. 10, 14 (1948).

147. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

148. *See e.g.*, MODEL CODE pmbl. [2] ("The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules.").

149. Charles Gardner Geyh et al, JUDICIAL CONDUCT AND ETHICS 6th ed. § 1.06 (2020).

150. *Id.* (citing 28 U.S.C. § 351 (2002)).

151. *Id.*

152. CODE OF CONDUCT FOR UNITED STATES JUDGES [hereinafter CODE OF CONDUCT] (Mar. 2019).

153. *Id.*; *see also* Shimon Shetreet, THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 28 (Shimon Shetreet et al eds., 2012) (arguing that the Founding Fathers strove for judicial independence through the doctrine of checks and balances).

154. CODE OF CONDUCT Canon 1. cmt.

155. CODE OF CONDUCT Canon 1 cmt.

Commentary to Canon 1 also states: "The Canons are *rules of reason*. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and *in the context of all relevant circumstances*."[156] This Commentary is especially relevant in the context of *Stinson* as Part IV(A)(2) explains.[157]

The *Model Code* is similar in spirit to the *Code of Conduct*, but contains more Commentary. Like the *Code of Conduct,* the *Model Rules* also contain a rule that judges must maintain public confidence in the judiciary.[158] Rule 2.2 expands upon this provision stating "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[159] The Commentary to Rule 2.2 states "[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded"[160] and "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."[161] Rule 2.11(a) thus mandates disqualification where "the judge's impartiality might reasonably be questioned."[162] The *Model Code* defines impartiality as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an *open mind* in considering issues that may come before a judge."[163] Importantly, the *Model Code* also contains a provision that "The Rules of the Model Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances."[164]

2. HOW THE RULES EXPOSE *STINSON'S* FLAWS

Judicial ethical canons expose two major flaws of *Stinson*. First, *Stinson*'s broad deference regime unfairly closes judges' minds and ties their hands to the Commentary when the *Guidelines* themselves are not mandatory. Second, *Stinson*'s language that the Commentary is authoritative obfuscates judges'

156. CODE OF CONDUCT Canon 1 cmt. (emphasis added).

157. *See infra Part IV(A)(2)*.

158. *See* MODEL CODE Canon 1, R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

159. MODEL CODE Canon 2, R. 2.2.

160. MODEL CODE Canon 2, R. 2.2 cmt. 1.

161. MODEL CODE Canon 2, R. 2.2 cmt. 2.

162. MODEL CODE Canon 2, R. 2.11(a); Judicial impartiality in the United States has historically involved judges who have financial interests in matters before their courts or biases related to the parties due to personal or familial ties. However, given the constantly evolving landscape of judicial ethics, there are inconsistencies relating to why judges are disqualified today based on their lack of impartiality so much so that "the applicable precedents suggest the *absence* of a sound theoretical base." *See* Richard Flamm, *The History of Judicial Disqualification in America*, 52 A.B.A. THE JUDGES' JOURNAL 1, 16 (2013).

163. MODEL CODE Terminology (emphasis added).

164. MODEL CODE pmbl. [5].

greater ethical obligations to other doctrines and rules of law and thereby stymies their sentencing discretion.

As the *Model Code* acknowledges, "each judge comes to the bench with a unique background,"[165] and in the most literal sense, complete open-mindedness is unattainable as judges cannot be blank slates nor erase their legal and personal experiences before the bench. But, impartiality under the judicial ethical codes does not require this contrived understanding of open-mindedness. In fact, life experience enriches a judge's time on the bench.[166] The *Model Code* simply requires that judges maintain "an *open mind* in considering issues that may come before [them]."[167] This notion of judicial impartiality exposes a flaw in *Stinson*'s doctrine in that it constrains judges to apply a certain sentence or enhancement in the Commentary when the judge believes the facts themselves do not warrant it. The duty of a judge is inherently a "question of degree."[168] Thus, *Stinson* takes away a judge's balancing act in declaring the law by prohibiting him to consult "his philosophy, his logic . . . his sense of right"[169] which he brings to bear in sentencing.[170] Further, the Supreme Court has said the criminal law is "for courts, not for the Government, to construe,"[171] yet *Stinson* precludes judges from applying their knowledge and experience because the Commentary must be construed as authoritative.

Additionally, the *Code of Conduct* and *Model Code* make clear that judges must adhere to the canons "consistently with constitutional requirements, statutes, other court rules and decisional law, and *in the context of all relevant circumstances*."[172] Despite *Stinson*'s mandate, it is reasonable, and arguably necessary, to construe the rule of lenity as a part of judges' ethical obligations to uphold the law. Further, *Kisor* and *Booker* are impliedly included in the judicial canons as ethical obligations as well.

First, when there is more than one interpretation regarding whether Commentary is consistent with a Guideline (e.g., the current controversy concerning Application Note 1 and the career offender enhancement) lenity must control. When a defendant's livelihood and integrity is at stake, deference "has no role to play."[173] Additionally, the Commentary's interpretation of the

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165. MODEL CODE Canon 2, R. 2.2 cmt. 2.

166. *See* Mary Kreiner Ramirez, Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing, 57 Drake L. Rev. 591, 594–595 (2009) ("[A] judge must exercise discretion free from bias. Yet, federal district judges are political appointees who bring a variety of personal and legal experiences to the bench.").

167. MODEL CODE Terminology.

168. BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 161 (1921).

169. *Id*. at 162.

170. This restriction was surely felt by the California district court judge who wrote that he felt forced to give Yepez the mandatory minimum under the commentary despite his view that it was disproportionate to the defendant's offense. *See* United States v. Yepez 704 F.3d 1087, 1093 (9th Cir. 2012) (Wardlaw J., dissenting).

171. Abramski v. United States, 573 U.S. 169, 191 (2014).

172. CODE OF CONDUCT Canon 1 cmt.; *see also* MODEL CODE pmbl. [5] (emphasis added).

173. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari).

Guidelines contravenes the notion of fair notice because citizens may not be apprised of the Commentary, and, if they are, they may not understand *Stinson*'s deference regime. Fair notice of the conduct that the criminal law forbids does not mandate citizens have expert legal knowledge, but, because the cost of overstepping the line between right and wrong is enormous, citizens should be apprised of the law.[174] Defendants simply would not know about *Stinson*'s interpretation and, therefore, a judge should invoke lenity to strictly construe the *Guidelines* and Commentary and resolve ambiguities in favor of the defendant.[175] Deferring to the Commission's interpretation of the *Guidelines* replaces "the doctrine of lenity with a doctrine of severity."[176]

In addition to lenity, *Kisor* and *Booker* can be interpreted as part of a judge's ethical obligation under the "rules of reason" provision. *Booker* importantly restored flexibility to judges in sentencing as "[j]udges regain[ed] more power to adjust sentences to fit their ex post perceptions of individual defendants' blameworthiness and need for specific deterrence."[177] Given *Booker*'s advisory *Guidelines* regime, it proves antithetical to mandate deference to Commentary, especially since Commentary "never passes through the gauntlets of congressional review or notice and comment."[178] The Supreme Court's prescriptions in *Kisor*—that judges must exhaust their legal toolkit before deferring to an agency's interpretation of its own regulation[179]—fortifies the role of a judge in carrying out their duties to independently administer the law without influence from the Legislative or Executive branches.[180] The aforementioned ethical considerations, when taken together, strongly counsel for judges to apply the *Guidelines* and Commentary holistically and construe the criminal law for themselves as is the duty of the Judiciary. Thus, if *Stinson* continues to exist in its

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174. McBoyle v. United States, 283 U.S. 25, 26 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

175. *See generally* Liparota v. United States, 471 U.S. 419, 427 (1985).

176. Crandon v. United States, 494 U.S. 152, 178, (1990) (Scalia, J., concurring).

177. Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing after* Booker, 47 WM. & MARY L. REV. 721, 731 (2005); *see also* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 422 (2006) ("[e]ncouraging judges to exercise reasoned judgment at sentencing is a step in the right direction as a matter of policy as well as a matter of constitutional jurisprudence").

178. United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019).

179. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

180. *See* Anton Cooray, *Standards of Judicial Behaviour and the Impact of Codes of Conduct*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 349, 351 (Shimon Shetreet & Christopher Forsyth eds., 2012) ("It is axiomatic that so must be administered impartially and according to law and reason. It is true that it is the responsibility of each judge to act fairly and impartially, but an institutional framework which ensures this has a very important part to play. Thus, to ensure judicial impartiality, rules and practices have evolved which deter outsiders from unduly influencing the judiciary with threats or inducements. If these rules and practices are well observed, the general public can rest assured that courts are no respecters of persons. This is what is mainly meant by 'public confidence in the administration of justice.'").

same form, without clarification or change from the Supreme Court, circuit judges and federal district court judges should feel free to not adhere to *Stinson* if ethical considerations and competing precedents, like *Kisor* or doctrines like the rule of lenity, so overwhelm it.

V. THE REMEDY

There is a strong "presumption of honesty and integrity in those serving as adjudicators,"[181] and the purpose of this Note is certainly not to doubt federal judges who defer to the Commentary under *Stinson* or imply that such deference amounts to actionable misconduct. Despite the increasing controversy over the past three years across the circuits concerning *Stinson*, the doctrine still remains binding law from a unanimous Court. It would be unsound to imply that judges who follow *Stinson*'s prescriptions violate judicial ethics canons. Nevertheless, the purpose of this Note is to make the case that because judicial ethical cannons must be construed in light of all relevant circumstances and doctrines, *Kisor*, *Booker*, and the rule of lenity overcome *Stinson*'s far-reaching deference regime in situations when Commentary penalizes the defendant more than the Guideline text itself permits.

Courts do not like to overrule themselves.[182] Nonetheless, the growing circuit split, judicial ethical considerations, and *Kisor* together reveal compelling reasons why *Stinson* is ripe for reconsideration. As then-Judge Cardozo, quoting Justice Holmes, wrote:

> It will not do to decide the same question one way between one set of litigants and the opposite way between another. 'If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles.'[183]

This gross injustice has manifested itself between the Third, Sixth, and D.C. Circuits and the remaining federal circuits that are irreconcilably split on *Stinson*'s authoritative weight as it relates to Commentary to the career offender Guideline.[184] The disparate views on what offenses qualify as predicate crimes for the career offender enhancement results from the Supreme Court's lack of guidance regarding *Stinson*'s application when Commentary deference increases defendants' sanctions.[185]

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181. Withrow v. Larkin, 421 U.S. 35, 47 (1975).

182. Felix Frankfurter & Learned Hand, THE LAWYER AND THE PUBLIC 8 (The Council on Legal Education and Admissions to the Bar of the American Bar Association eds.) (1933).

183. Cardozo, *supra* note 168, at 33.

184. *See supra* Part III(A) and Part III(B).

185. Judge Silberman noted the ambiguity surrounding *Stinson's* application in United States v. Winstead, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018), ("[I]t is not obvious how the rule of lenity is squared with Stinson's description of the commentary's authority to interpret guidelines. We are inclined to believe that the rule of lenity still has some force.").

The Supreme Court should accordingly grant certiorari on one of numerous cases pending before it to either clarify *Stinson*'s scope when deference to the Commentary further penalizes the defendant or overrule the doctrine given its practical sentencing challenges. The three recent denials of certiorari[186] may indicate the Court's unwillingness to intervene on the issue and its desire for the Commission to clarify its intent by amending the Commentary. Nevertheless, the Commission has yet to promulgate new Commentary. Even assuming the Court's reticence to determine whether the Commentary to the career offender enhancement oversteps its interpretive function, there will invariably be other Commentary which impermissibly expands the *Guidelines* and sanctions defendants too harshly. Given the severe implications of the career offender enhancement on defendants' terms of imprisonment, the Court should intervene to prevent others from such harsh and unwarranted sentences.

CONCLUSION

The Court's certiorari power exists to clarify the law[187] when there is a compelling public necessity to do so.[188] The circuit split on the authoritative weight of the Commentary constitutes such compelling need. Refusal of the Court to cabin the scope of *Stinson* or overturn it in light of modern administrative deference precedents would amount to a great injustice for offenders who continue to suffer under excessive penalties. Such refusal to clarify the law also places judges in a difficult position as they either continue to adhere to their post-*Stinson* precedents of the 1990s or join the growing number of circuits departing from such unquestioned attachment. Federal judges should not continue to be tied to a quarter-century old precedent for the sole purpose of maintaining the status quo.[189] The law is built upon gradual modification, "inch by inch . . . measured by decades and even centuries."[190] Judges are experts in the criminal law.[191] Therefore, their diametrically opposed views on Commentary deference, coupled with the rule of lenity and *Kisor*, reveal that the time for doctrinal modification is now.

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186. *See* United States v. Cingari, 952 F.3d 1301 (11th Cir. 2020), *cert. denied*, No. 20-5937 (2020); United States v. Adams, 934 F.3d 720 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020); United States v. Crum, 934 F.3d 963 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020).

187. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 902 (2009) (Scalia, J., dissenting).

188. *See* 14 Am. Jur. 2d Certiorari § 2 ("Certiorari is used only in those cases in which a compelling public necessity or other unusual circumstances make the ordinary modes of proceeding inadequate, and review is limited to keeping an inferior tribunal within the limits of its jurisdiction and ensuring that such jurisdiction is exercised with regularity.").

189. *See, e.g.*, Cardozo, *supra* note 168, at 152 ("If judges have wofully misinterpreted the *mores* of their day or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.").

190. Cardozo, *supra* note 168, at 25.

191. *See* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 97 (2017) ("Judges are experts only in criminal law, which occupies perhaps a third of our docket.").