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NOTES

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INTRODUCTION

In a bar called Andrea's Attic, David and Victor were having a drink when they got into an argument. The argument escalated until Victor said something that infuriated David. David looked at Victor, and, wanting to hurt Victor, grabbed the nearest object, a chair, and then threw it at Victor. The chair hit Victor and he fell to the ground, but was not hurt.[1]

In a bar called Barb's Barn down the street, Valerie was having a drink. Dorothy walked into the bar, grabbed Valerie by the arm and dragged her outside onto the street. As Valerie was dragged, she saw that Dorothy gripped a gun in her hand. On the street, Dorothy pointed the gun at Valerie and yelled, "You are going to die." Then Dorothy waved the gun in the air, threatening to fire it at the bar, at the sky, at Valerie, but never fired. Then, after holding Valerie at gunpoint for five minutes, Dorothy hit Valerie on the back of the head, pistol whipping her, so that she fell to the ground. Valerie was not injured.

Currently, in most federal circuits, despite the fact that Dorothy threatened Valerie with a brandished gun that she carried into the bar with her while David picked up the nearest chair and threw it without brandishing or threatening, David and Dorothy will receive the same sentence for their crimes. Courts hold that each committed an aggravated assault while "otherwise using"[2] a dangerous weapon under the United States Federal Sentencing Guidelines ("Guidelines" or "USSG"), but because neither committed another felony during the

1. The example of an aggravated assault with a chair is based on the facts of United States v. Williams, 954 F.2d 204 (4th Cir. 1992), in which the defendant struck a fellow inmate at a reformatory with a metal chair.

2. The term "otherwise used" means "conduct [that] did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.1(g) (1998) [hereinafter "USSG"]. This Note discusses in detail the meaning and application of the term.

assault, and neither victim was seriously injured, courts will treat each the same under the Guidelines.[3]

Courts should sentence David and Dorothy differently because David did not "otherwise use" the chair to commit the aggravated assault, and, in fact, it was only his "use" of the chair that qualified him for aggravated assault as opposed to simple assault.[4] On the other hand, Dorothy qualified for the aggravated assault Guideline because she possessed a gun, and then, when she pistol whipped Valerie, she "otherwise used" the gun.[5] This Note addresses the sentencing issues presented by these contrasting examples and argues that courts should sentence defendants like David, who used a chair, more leniently than defendants like Dorothy, who used a gun.

In the 1980s Congress passed the Sentencing Reform Act of 1984 ("Act")[6] to improve the federal system for sentencing federal defendants. Through the Act, Congress created the United States Sentencing Commission ("Commission").[7] The Act directed the Commission to establish specific guidelines for federal sentencing.[8] The Commission thereby drafted the Guidelines to eliminate unwarranted sentencing disparities between similarly situated defendants. The Commission's articulated goals were to produce uniformity and proportionality in sentencing.[9] As of November 1, 1987,[10] the

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3. The relevant portions of the USSG provisions discussed in this Note are reproduced as follows:

> § 2A2.2. Aggravated Assault
> a) Base Offense Level: 15
> b) Specific Offense Characteristics
> . . .
> (2)(A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.

USSG § 2A2.2. Application Note 1 defines "aggravated assault" as "a felonious assault that involved (A) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (B) serious bodily injury, or (C) an intent to commit another felony." USSG § 2A2.2, cmt. n.1.

4. *See infra* Sections I.B.1 and I.B.2.

5. *See infra* Sections I.B.1 and I.B.2.

6. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86; 28 U.S.C. §§ 991-98 (1994)).

7. *See* 28 U.S.C. § 991 (a).

8. *See* 28 U.S.C. §§ 991 (a), (b)(1).

9. *See* USSG ch. 1, pt. A(3); *see also* Tung Yin, Comment, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement In Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 429 (1995).

10. *See* USSG ch. 1, pt. A(2); Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 394 (1991).

Guidelines bound federal courts to follow them when sentencing persons convicted of federal crimes.[11]

Courts determine a sentence under the Guidelines by applying factors on a matrix. Each factor corresponds to a number called a "level," and courts add or subtract levels according to the facts of the case and the defendant's criminal history. A sentencing court calculates a sentence by finding the intersection on the matrix of the "base offense level"[12] of the conviction and the defendant's "criminal history category."[13] Once the court identifies this intersection it fine tunes the sentence by applying any applicable "specific offense characteristics,"[14] each with a different level.[15] The court can then further fine tune the result by applying upward or downward adjustments.[16] In the end, the court arrives at a level that corresponds to a certain number of months in prison.

For example, consider the aggravated assault Guideline for a defendant with no criminal history.[17] The base offense level for aggravated assault[18] is a level 15.[19] A court may add levels for applicable specific offense characteristics. For example: If a firearm was dis-

11. *See* USSG ch. 1, pt. A(2). For a helpful description of how a judge calculates a federal sentence under the Guidelines, see Daniel I. Smulow, Comment, *When Fair Is Foul: Federal Drug Sentencing in the Wake of* United States v. LaBonte, 48 CASE W. RES. L. REV. 437, 437 n.3 (1998).

12. "Base offense level" is the conduct accounted for in the elements of a charged offense of which a defendant is convicted, or to which he pled guilty. The Guidelines do not track the purely statutory language of the elements in the base offense levels, rather they are descriptions of generic conduct. *See* USSG ch. 1, pt. A(4)(a). A court locates the appropriate "base offense levels" in Chapter 2 of the Guidelines. *See* Erich D. Andersen, *Enhancement for "Abuse of a Position of Trust" Under the Federal Sentencing Guidelines*, 70 OR. L. REV. 181, 186 n.23 (1991).

13. The defendant's "criminal history" is based on factors relating to the defendant's prior sentences. A defendant will receive a longer sentence depending on the number and types of prior sentences he has served. *See* USSG § 4A1.1.

14. "Specific offense characteristics" are those characteristics specific to the defendant's conduct or harm that Congress has determined to be aggravating or mitigating factors of a crime. An example of a specific offense characteristic is the possession of a gun during the commission of an offense. *See* Andersen, *supra* note 12, at 186 n.24. This Note will use the terms "specific offense characteristic" and "enhancement" interchangeably.

15. *See* Smulow, *supra* note 11, at 437 n.3.

16. "Upward and downward adjustments" are those characteristics of the defendant's conduct or harm that are not specific to the crime, but yet are aggravating or mitigating factors. These adjustments take account of, among other things, the defendant's role in the offense and status of the victim. *See* USSG §§ 3A1.1-B1.4.

17. This Note does not discuss criminal history because it would add unnecessary complications in the context of this discussion.

18. The base offense level "aggravated assault" is defined in the Guidelines as "a felonious assault that involved (A) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (B) serious bodily injury, or (C) an intent to commit another felony." USSG § 2A2.2, cmt. n.1.

19. *See* USSG § 2A2.2(a).

charged – increase by 5 levels; if a dangerous weapon (including a firearm) was otherwise used[20] – increase by 4 levels; if a dangerous weapon (including a firearm) was brandished or threatened – increase by 3 levels.[21] If a defendant otherwise used a dangerous weapon to commit aggravated assault, a court would properly find that he is subject to a sentence corresponding to 19 levels.

A defendant might challenge the resulting sentence if a court were to count any aspect of his conduct twice when applying the factors on the matrix. "Double counting" occurs when a court applies the Guidelines in a way that accounts for the same aspects of a defendant's conduct more than once to increase the severity of a sentence.[22] A court might double count, for instance, if it applied a base offense level with a specific offense characteristic under one provision of the Guidelines, and subsequently enhanced that sentence by applying another provision or enhancement based on the same conduct accounted for in the first specific offense characteristic.[23]

For example, consider a defendant who commits a robbery by removing the cashier from behind the counter and tying him up in the bathroom. The court sentences the robber for the base offense level "robbery" and the specific offense characteristic "robbery involving restraint of the victim."[24] If the court also sentences the defendant for abducting the cashier under the enhancement providing: "If any person was abducted to facilitate commission of the offense . . . increase by 4 levels,"[25] the defendant might claim that the court impermissibly counted the same conduct (tying up the cashier in the bathroom) twice: once for the restraint and once for the abduction.

The success of a defendant's claim that a court double counted is not uniform throughout the federal circuits. The circuits uniformly consider double counting impermissible where the Guideline provision

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20. *See supra* note 2 (defining "otherwise used").

21. *See* USSG §§ 2A2.2(b)(2)(A)-(C).

22. *See* United States v. Parker, 136 F.3d 653, 654 (9th Cir. 1998) (" 'Double counting' occurs when the Guidelines use the same conduct more than once to increase the severity of a sentence."); *see also* Gary Swearingen, Comment, *Proportionality and Punishment: Double Counting Under the Federal Sentencing Guidelines*, 68 WASH. L. REV. 715, 718-20 (1993).

23. *See supra* note 22; *see also* Hideaki Sano, Note, *Judicial Abuse of "Process": Examining the Applicability of Section 2F1.1(b)(4)(B) of the Federal Sentencing Guidelines to Bankruptcy Fraud*, 98 MICH. L. REV. 1038, 1058 (2000) (citing United States v. Campbell, 967 F.2d 20, 23-24 (2d Cir. 1992) for the proposition that double counting occurs when courts consider the same factor in setting the initial Guidelines range and in choosing to depart from that range; and United States v. Lincoln, 956 F.2d 1465, 1471 (8th Cir. 1992) for finding double counting "when one instance . . . of a defendant's conduct forms the basis for a conviction . . . and is also employed to adjust one or more other sentences").

24. The base offense level is "Robbery." USSG § 2B3.1. The specific offense characteristic states: "if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels." USSG § 2.B3.1(b)(4)(B).

25. *See* USSG § 2B3.1(b)(4)(A).

at issue specifically prohibits it.[26] If the Guideline provision does not specifically prohibit double counting, however, a defendant's successful appeal depends on the circuit where the appeal is heard. Some circuits hold that double counting is only impermissible when the Guideline provision at issue specifically prohibits it.[27] Other circuits hold that double counting is always impermissible, whether or not the Guideline provision specifically prohibits it.[28] Finally, some circuits have not formulated a rule for the permissibility of double counting.[29] Whether David, who committed aggravated assault with a chair (a weapon this Note considers "inherently nondangerous"),[30] receives the same sentence as Dorothy, who committed aggravated assault with a gun (a weapon this Note considers "inherently dangerous"), depends, not on the different type of weapon used,[31] but on the court's view of

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26. *See* Smulow, *supra* note 11, at 455.

27. *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, '[t]he 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))).

28. *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."); 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, 166-67 (6th Cir. 1992) (superceded by statute) ("[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.").

29. *Compare* United States v. Hudson, 972 F.2d 504, 507 (2d Cir. 1992) (impermissible double counting to use one factor to calculate both the base offense level and a specific offense characteristic), *with* United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995) (holding that a district court does not engage in impermissible doublecounting when it considers a single act that is relevant to two dimensions of the Guidelines analysis, but not clarifying whether such consideration constitutes permissible double counting, or does not constitute double counting at all). *See* United States v. Zapata, 1 F.3d 46, 47 (1st Cir. 1993) (Double counting in the sentencing context "is a phenomenon that is less sinister than the name implies."); United States v. Lilly, 13 F.3d 15, 19 (1st Cir. 1994) ("the Commission's ready resort to explicitly stated prohibitions against double counting signals that courts should go quite slowly in implying further such prohibitions where none are written.").

30. *See Hudson*, 972 F.2d at 506-07 (creating the distinction between "not an inherently dangerous weapon" and an "inherently dangerous weapon"); *see also* United States v. Farrow, 198 F.3d 179, 189-90 (6th Cir. 1999).

31. While some courts recognize the distinction between inherently dangerous and non-inherently dangerous weapons, *see supra* note 30, the Guidelines do not distinguish between the types of weapons in the definition of "dangerous weapon." The Guidelines define "dan-

"double counting" under the Guideline's provision for aggravated assault.

The double counting that occurs under the aggravated assault provision when an inherently nondangerous weapon was used, however, is somewhat unique. The aggravated assault provision, by its language and structure, appears to rule out double counting. When courts apply facts involving inherently nondangerous weapons to the aggravated assault provision, however, they inevitably face the opportunity to double count.[32] Although yet to be named by courts or commentators, this Note refers to this phenomenon as "applied double counting." Stated another way, a court engages in "applied double counting" when it applies facts to a Guideline provision that does not appear on its face to support double counting, yet the resulting sentence inevitably double counts aspects of the defendant's conduct.

The federal circuits are split on the permissibility of applied double counting under the aggravated assault provision when a defendant used an inherently nondangerous weapon to assault a victim.[33] The Second and Sixth Circuits conclude that such applied double counting is impermissible double counting.[34] Most other circuits, however, find application of the second enhancement to be permissible double

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gerous weapon" as "an instrument capable of inflicting death or serious bodily injury. Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon." USSG § 1B1.1, cmt. n.1(d). *See* United States v. Dayea, 32 F.3d 1377, 1379 (9th Cir. 1994) ("[I]n the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs."(citations omitted)). Further, the aggravated assault guideline applies to the use of any and all types of dangerous weapons. *See* USSG § 2A2.2(a) and cmt. n.1. Arguably, it may be difficult for some courts to distinguish between inherently dangerous weapons and inherently nondangerous weapons. *See, e.g.*, United States v. Duran, 127 F.3d 911, 919 (10th Cir. 1997). Courts might define an inherently dangerous weapon to be a weapon designed to harm, for example a bomb, a grenade, or a machine gun. Alternatively, courts might choose to consider any weapon that is generally used with premeditated intent to be inherently dangerous. This issue, however, is beyond the scope of this Note.

32. Part I *infra* provides a detailed explanation of why double counting under these circumstances is inevitable.

33. In Texas, the Fifth Circuit determined the sentence of a defendant, Mr. Morris, who had driven a car at an officer of the law. *See* United States v. Morris, 131 F.3d 1136 (5th Cir. 1997). The court found that to apply the enhancement because Mr. Morris "otherwise used" the car was not double counting. *See id.* at 1139. In Rhode Island, the First Circuit determined the sentence of a defendant, Mr. Garcia, who also had driven a car at an officer of the law. *See* United States v. Garcia, 34 F.3d 6 (1st Cir. 1994). The court there found that to apply the enhancement because Mr. Garcia "otherwise used" the car was permissible double counting. *See id.* at 11-12. In New York, the Second Circuit determined the sentence of a defendant, Mr. Hudson, who had also driven a car at an officer of the law. *See Hudson*, 972 F.2d at 507. The court there found that to apply the enhancement because Mr. Hudson "otherwise used" the car was impermissible double counting. *See id.*

34. *See Hudson*, 972 F.2d at 507; *Farrow*, 198 F.3d at 195.

counting.[35] The few remaining circuits do not consider application of the second enhancement to be double counting at all.[36]

This Note uses the example of applied double counting under the aggravated assault Guideline to urge courts to limit permissible double counting to those circumstances where the Guidelines unequivocally permit it. Part I compares the resulting sentences when the aggravated assault provision is applied to the specific facts of a defendant who committed aggravated assault with an inherently nondangerous weapon and a defendant who committed aggravated assault with an inherently dangerous weapon. Part I then argues that the statute's structure and plain language show the Commission's intent to prohibit the applied double counting, yet demonstrates that courts will inevitably face the opportunity to double count when sentencing a defendant who used an inherently nondangerous weapon. Part II challenges some courts' reliance on a canon of statutory construction, *expressio unius est exclusio alterius*,[37] in their reasoning that the Commission intended applied double counting under the aggravated assault provision. Part II argues that the invocation of this canon is inappropriate in the context of applied double counting. Part III urges courts to refrain from applied double counting to avoid violating the rule of lenity: courts are to construe ambiguous statues in favor of the accused.[38] Part III further urges courts to resist applied double counting because it violates the Commission's goal of proportionality in sentencing.[39] This Note concludes that courts should adopt a rule whereby all double counting is impermissible unless the Guidelines expressly permit it. This way, courts will avoid applied double counting that the Commission did not anticipate or intend.

I. THE PROVISION'S STRUCTURE DEMONSTRATES THAT THE COMMISSION DID NOT INTEND TO PERMIT APPLIED DOUBLE COUNTING

Under the aggravated assault provision, applied double counting inevitably occurs in cases where a defendant committed aggravated as-

35. *See* United States v. Valdez-Torres, 108 F.3d 385 (D.C. Cir. 1997); United States v. Williams, 954 F.2d 204 (4th Cir. 1992); United States v. Sorensen, 58 F.3d 1154 (7th Cir. 1995); United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996); *Reese*, 2 F.3d at 870; *Duran*, 127 F.3d at 916-19.

36. *See Morris*, 131 F.3d at 1138-40; United States v. Johnstone, 107 F.3d 200 (3rd Cir. 1997); *Garcia*, 34 F.3d at 11.

37. The canon holds that "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 581 (7th ed. 1999).

38. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998).

39. *See* 28 U.S.C. § 991(b)(1)(B) (1998); USSG ch. 1, pt. A(3). For an analysis of whether these goals are being met, see Karle & Sager, *supra* note 10.

sault with an inherently nondangerous weapon such as a chair or a tennis racket. It is apparent from the structure and language of the statutory provision, however, that the Commission intended the opposite result: that courts count each aspect of the defendant's conduct only once. Section I.A demonstrates that by designing the aggravated assault Guideline in a structure known as a "graduated enhancement schedule," the Commission intended to prohibit courts from double counting. Section I.B shows that applied double counting inevitably results when courts apply the second specific offense characteristic ("when a dangerous weapon was otherwise used"), to the sentence of a defendant who used an inherently nondangerous weapon when committing aggravated assault. Section I.B then argues that courts that apply this second specific offense characteristic under these circumstances contradict the Commission's intentions.

A. *The Commission Designed the Statute to Avoid Double Counting*

This section argues that the Commission explicitly designed the aggravated assault Guideline so that when courts apply the provided specific offense characteristics, they do not double count any of the defendant's actions. When a court applies specific offense characteristics to increase the sentencing level of a defendant who committed aggravated assault with an inherently dangerous weapon such as a gun,[40] because of the statute's structure, that court cannot double count any factor of the defendant's conduct or harm caused.

First, the Guidelines provide that a defendant qualifies for the base offense level "aggravated assault" by "involving" a dangerous weapon.[41] The Guidelines define aggravated assault as "a felonious assault that involved (A) a dangerous weapon with the intent to do bodily harm, (i.e., not merely to frighten), or (B) serious bodily injury, or (C) an intent to commit another felony."[42]

Then, the Commission provides a means by which courts can enhance the sentence of a defendant who committed aggravated assault according to the egregiousness of the use of the weapon involved. The enhancements, based on three special offense characteristics, are structured as what one court has termed a "graduated enhancement

40. This Note uses a gun throughout as an example of a clear-cut "inherently dangerous" weapon.

41. *See* USSG § 2A2.2, cmt. n.1. Commentators understand the base offense level to mean "mere possession." *See* THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 2A2.2 (2000 ed.). Recall that the Guidelines define a dangerous weapon as "an instrument capable of inflicting death or serious bodily injury." *See supra* note 31. Recall also that both a chair and a gun fall into the category of "dangerous weapon."

42. USSG § 2A2.2, cmt. n.1. *See supra* note 3.

schedule."[43] The term is appropriate because the statute or "schedule" is graduated: the special offense characteristics progress in gradation order from least harmful to most harmful and the length of sentence corresponds to each level's relative harm. That is, each gradation accounts for more egregious harm than the last and accordingly provides for a longer sentence.

The following table illustrates the graduated enhancement schedule and the conduct for which the base offense level and each specific offense characteristic accounts when a defendant committed an aggravated assault using a gun.

TABLE 1

GRADUATED ENHANCEMENT SCHEDULE FOR AGGRAVATED ASSAULT	CONDUCT WITH AN INHERENTLY DANGEROUS WEAPON
base offense level: "involving a dangerous weapon"	assaulting while carrying a gun in a holster
first enhancement: "brandishing or threatening with a dangerous weapon"	assaulting while pointing, waving or threatening with a gun
second enhancement: "a dangerous weapon was otherwise used"	pistol whipping with the butt of a gun
third enhancement: "firing a firearm"	assaulting while firing a gun in the air

A defendant who committed aggravated assault involving a dangerous weapon qualifies for the base offense level by "merely possessing"[44] a dangerous weapon. Consequently, when a defendant, with the intent to do bodily harm, assaults a victim while possessing an inherently dangerous weapon (for example, carries a gun in a holster), he commits an aggravated assault.[45] A defendant incurs three additional points under the first enhancement if he brandished or threatened to use the gun.[46] Brandishing or threatening is different and more

43. United States v. Duran, 127 F.3d 911, 916 (10th Cir. 1997); *see* United States v. Hudson, 972 F.2d at 507 ("incremental adjustment schedule"); *Farrow*, 198 F.3d at 190 ("incremental adjustment schedule").

44. Commentators and courts understand the nature of the base offense level, "involving" a dangerous weapon, to mean "mere possession." *See* HUTCHINSON ET AL., *supra* note 41, at § 2A2.2.

45. USSG § 2A2.2.

46. USSG § 2A2.2(b)(2)(C).

egregious than mere possession because the gun is waved about or its use is threatened.[47]

Under the second enhancement a court adds four points when "a dangerous weapon . . . was otherwise used."[48] The Commission defines such use as "conduct that did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon."[49] Although the Guidelines do not provide an example of conduct greater than brandishing but less than firing a firearm, commentators suggest that an applicable example might be striking a victim with the butt of a gun ("pistol whipping").[50] If the defendant "otherwise used" a gun, he receives a harsher sentence than he would for possession, brandishing, or threatening because otherwise using a gun is conduct different from and more egregious than brandishing, threatening, and mere possession.

Finally, the Guidelines provide that the defendant incurs five points if he discharged the gun.[51] By providing the harshest penalty for firing a gun, the Commission demonstrates its value judgment that discharging a firearm, even into the air, while committing an assault is different from and more egregious than possessing, brandishing, threatening, or pistol whipping. A defendant who does so is sentenced accordingly.

Because of the graduated enhancement structure of the aggravated assault provision, when a court applies that provision to a case involving a defendant who committed aggravated assault with an inherently dangerous weapon (such as a gun), the court cannot double count any aspect of the defendant's conduct.[52] When the schedule is utilized as

47. The Commission defines "brandished" with reference to a dangerous weapon (including a firearm) to mean "that the weapon was pointed or waved about, or displayed in a threatening manner." USSG § 1B1.1, cmt. n.1(c).

48. USSG § 2A2.2(b)(2)(B).

49. USSG § 1B1.1, cmt. n.1(g).

50. HUTCHINSON ET AL., *supra* note 41, at § 2A2.2 cmt. 3a(ii) (citing USSG § 1B1.1, cmt. n.4(d)). Case law provides further examples of conduct that courts have concluded constitutes "otherwise used": United States v. Johnson, 931 F.2d 238 (3d. Cir. 1991) (leveling a gun at the head of a victim at close range and verbalizing a threat to discharge the weapon); United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990) (both brandishing and threatening with a dangerous weapon).

51. USSG § 2A2.2(b)(2)(A).

52. The graduated enhancement schedule clearly works neatly with a gun as the example of an inherently dangerous weapon. Other potentially inherently dangerous weapons such as a switchblade would fit also into the graduated enhancement schedule. For example, the base offense level could be carrying a hidden switchblade while assaulting a victim. The first enhancement could be holding the switchblade and threatening to use it while assaulting a victim. The third enhancement could be throwing the closed switchblade at the victim, or knocking the victim on the head with the handle of the switchblade. Notably, because there is no fourth enhancement for an inherently dangerous weapon such as a switchblade, "otherwise use" might be any "use" of the weapon in the assault that is more egregious than brandishing or threatening. Such use might include cutting or slicing.

intended by its structure, it determines a defendant's sentence for aggravated assault with a gun without double counting any conduct. Each enhancement accounts for new and more egregious conduct; no conduct overlaps; and each enhancement corresponds to a greater punishment for a greater crime. The structure of the sentencing provision thus demonstrates the Commission's intent to avoid punishing defendants twice for the same conduct.

B. *The Commission did not Intend for Applied Double Counting when Inherently Nondangerous Weapons were Used*

The Commission designed the aggravated assault Guideline to include a graduated enhancement schedule that corresponds to the use of a weapon. When courts apply the second specific offense characteristic because a defendant "otherwise used a dangerous weapon" and the weapon was inherently nondangerous, courts inevitably double count the defendant's "use" of the weapon. The resulting double counting is impermissible because the graduated nature of the enhancement schedule falls apart. Section I.B illustrates this inevitable applied double counting and argues that the Commission did not intend for it to occur. Section I.B.1 demonstrates that when courts apply the second enhancement in the case of an aggravated assault with an inherently nondangerous weapon, the structure of the graduated enhancement schedule falls apart. Each level of the graduated enhancement schedule no longer accounts for different and more egregious conduct than the last. Instead, the base offense level and the second enhancement double count the same conduct. Section I.B.2 examines the statute's plain language and illustrates that the Commission defined the base offense level with the word "involving" a dangerous weapon, and defined the second enhancement with the phrase "otherwise used" a dangerous weapon. The Commission used different words to describe different conduct. This section argues that in the context of an assault with an inherently nondangerous weapon the difference between the conduct described by the words "involve" and "use" evaporates, resulting in the base offense level and a second enhancement that double count for identical conduct. As illustrated through the statute's structure and plain language, Section I.B.3 argues that the Commission intended each invocation of the defendant's conduct to serve a unique sentencing purpose, and thus did not intend to permit applied double counting.

1. *Statutory Structure*

Although the Commission designed the statute as a graduated enhancement schedule, a court that sentences a defendant who committed aggravated assault with a chair cannot enhance for "otherwise"

using the chair without double counting the "use" of the chair. When a court applies the second enhancement, the graduated nature of the enhancement schedule falls apart.

Although courts and commentators understand that the "mere possession" of an inherently dangerous weapon constitutes sufficient use of a weapon to qualify a defendant for the base offense level of aggravated assault,[53] the "mere possession" of an inherently nondangerous weapon such as a chair only constitutes simple assault.[54] A defendant may possess a chair while intending to do bodily harm to someone by sitting on the chair while punching someone with his fists. Or a defendant may possess a hammer while assaulting with the intent to do bodily harm, simply by wearing a tool belt while pulling someone's hair.[55] Unless the defendant uses, brandishes or threatens to use the inherently nondangerous weapon beyond mere possession, the defendant does not qualify for the base offense level of aggravated assault.[56] Instead, he commits the lesser offense of minor assault.[57]

Because it is the use or threatened use that transforms an inherently nondangerous object into a dangerous weapon, sentencing courts necessarily count the use or threatened use of the object when they apply the base offense level of aggravated assault. In determining when an inherently nondangerous object constitutes a dangerous weapon, courts have held that it is not only the object's capability of infliction of death or serious bodily injury, but also the instrument's

53. *See supra* note 41 and accompanying text.

54. *See* United States v. Hudson, 972 F.2d 504, 507 (2d Cir. 1992) ("[M]ere possession of a car during an assault will not convert an ordinary assault into an aggravated one."); United States v. Farrow, 198 F.3d 179, 194 (6th Cir. 1999); *see also* Diana Graettinger, *State Asks Judge if Man Out on Bail can Use Explosives: Suspect in Standoff Works with Dynamite*, BANGOR DAILY NEWS, Apr. 13, 1999 (noting that when a District Attorney in a case stated "[i]t is difficult for me to imagine a claim that dynamite and blasting caps . . . are not inherently dangerous," the defendant's attorney disagreed, noting that objects are only dangerous weapons if they are intended to be used in a manner that could cause death or serious bodily injury).

55. The Sixth Circuit in *Farrow* used the following example to illustrate this point: "If, for example, Farrow had been standing next to his car and had charged at Agent Ward but had done him little or no harm, we would not consider his offense an 'aggravated assault' simply because he possessed an object (his car) that, under different circumstances, could have been used as a dangerous weapon." 198 F.3d at 194.

56. Recall, however, that a defendant can qualify for aggravated assault by ways other than those involving a dangerous weapon. *See supra* note 3. If the defendant committed the felonious assault while attempting to commit another felony or by inflicting serious bodily harm, then the defendant who merely possessed a chair or a hammer could qualify for the base offense level of aggravated assault. This Note, however, as mentioned in the introduction, only considered a fact pattern where a defendant qualifies for aggravated assault *only* because he involved a dangerous weapon.

57. The Guidelines define "minor assault" as "a misdemeanor assault, or a felonious assault not covered by § 2A2.2." USSG § 2A2.3(a), cmt. n.1.

use or threatened use combined with that capability that makes it dangerous.[58]

For example, in *United States v. Hudson*, the court stated "it is the use or threatened use of the object which makes [an] assault aggravated."[59] The court similarly noted that a "defendant can not be guilty of assault with an non-inherently dangerous weapon . . . unless the object is used (or its use is threatened) in a dangerous way."[60] In *Hudson*, the defendant "used" a car by driving the car toward a federal marshal and thereby qualified for the aggravated assault Guideline.[61] Without having used the car in this manner, the defendant would not have transformed the car into a dangerous weapon.[62] Thus, if an assailant drives slowly by a victim, reaches out of the window and punches the victim with the intent to hurt him, he commits minor assault, but if he drives the car at the victim with the intent to hurt him with the impact of the car, he commits aggravated assault by his *use* of the car.[63] Further, his use of the car is also threatening, and could be characterized as brandishing.[64]

Because a defendant who commits aggravated assault with an inherently nondangerous weapon qualifies for the base offense level of aggravated assault due to his "use" or threatened use of the weapon, a court double counts if it applies the specific offense characteristic "a dangerous weapon was otherwise used" to the defendant's sentence. Recall that double counting occurs because in applying the specific offense characteristic of "otherwise used," the court is not taking account of any different or more egregious conduct than has already been accounted for.[65] If "use" is not accounted for in the base offense level for aggravated assault, for example when a gun is involved, the court does not double count when it applies the specific offense char-

58. *See, e.g.*, United States v. Matthews, 106 F.3d 1092, 1095 (2d Cir. 1997) (upholding jury instruction stating that "[a]lmost any object which, as used, or attempted to be used, may endanger life or inflict great bodily harm, can be a deadly or dangerous weapon"); United States v. Murphy, 35 F.3d 143, 147 (4th Cir. 1994) ("whether an object constitutes a dangerous weapon hinges . . . [in part] on the manner in which the object is used"); United States v. Schoenborn, 4 F.3d 1424, 1433 (7th Cir. 1993) (explaining that whether an object is a dangerous weapon depends on the circumstances of the case, as "the manner in which the object is used in the assault is determinative"); United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988) ("Almost any weapon, as used or attempted to be used, . . . may be a dangerous and deadly weapon.").

59. 972 F.2d at 507.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.*

64. *See supra* note 47.

65. *See supra* notes 18-20 and accompanying text.

acteristic "otherwise used."[66] The converse, however, is also true: if "use" *is* accounted for in the base offense level, the court double counts when it applies the specific offense characteristic of "otherwise used."[67]

The demolition of the graduated nature of the sentencing schedule is apparent.[68] The following table compares conduct considered in the graduated enhancement schedule when a defendant committed aggravated assault using an inherently dangerous weapon with the conduct considered when a defendant committed aggravated assault using an inherently nondangerous weapon.

66. *See supra* Section I.A (noting that a court does not double count any conduct when it applies any of the three specific offense characteristics to the base offense level of a defendant who commits aggravated assault with a gun).

67. *Hudson*, 972 F.2d at 507; United States v. Hernandez-Fundora, 58 F.3d 802, 812-13 (2d Cir. 1995), *amending and superceding* 49 F.3d 848 (2d Cir. 1995). *But see* United States v. Reese, 2 F.3d 870, 896 n.32 (9th Cir. 1993) ("That we use a single sentencing factor 'twice' to trace the effects of this transformation (first to distinguish minor from aggravated assaults, then to distinguish more and less culpable aggravated assaults) is merely an accidental by-product of the mechanics of applying the Guidelines."). Whether or not using the factor "twice" is "merely an accidental by-product of the mechanics of applying the Guidelines," this Note argues that such use constitutes impermissible double counting.

68. The Fifth Circuit sought to avoid double counting by asserting that an inherently non-dangerous weapon can be "used" two different ways. *See* United States v. Morris, 131 F.3d 1136, 1139 (5th Cir. 1997). In *Morris*, "during the course of [the] criminal episode," the defendant rammed his Blazer into an FBI agent's vehicle and fled from the law enforcement authorities "recklessly and at a high rate of speed to escape capture." *Id.* The court found that the "ramming" rendered the vehicle a dangerous weapon, and qualified the defendant for the aggravated assault base offense level. *Id.* The court further found that the subsequent "fleeing" constituted the "otherwise" use of the weapon. *Id.* While it might be possible to use, and otherwise use an inherently non-dangerous weapon in two different ways, note that "the mere fact that a bad act can be described in two different ways does not justify making two separate upward adjustments" under the Guidelines. United States v. Campbell, 967 F.2d 20, 24 (2d Cir. 1992). To avoid double counting the two uses must occur during the course of the assault. The aggravated assault guideline does not apply to the conduct unless the defendant used the dangerous weapon in the assault and the defendant intended to inflict bodily harm or commit another felony or caused serious bodily harm. *See* United States v. Hood, 210 F.3d 660, 664 (6th Cir. 2000) (citing USSG § 2A2.2 (2)).

TABLE 2

GRADUATED ENHANCEMENT SCHEDULE	CONDUCT WITH AN INHERENTLY DANGEROUS WEAPON	CONDUCT WITH AN INHERENTLY NONDANGEROUS WEAPON
base offense level: "involving a dangerous weapon"	assaulting while carrying a gun in a holster[69]	assaulting by driving a car at a victim
first enhancement: "brandishing or threatening with a dangerous weapon"	assaulting while pointing, waving, or threatening with a gun	assaulting by driving a car at a victim
second enhancement: "a dangerous weapon was otherwise used"	pistol whipping with the butt of a gun	assaulting by driving a car at a victim
third enhancement: "firing a firearm"	assaulting while firing a firearm	no application

As discussed above in Section I.A, the Commission intended each enhancement of the graduated enhancement schedule to account for new and more egregious conduct.[70] Consequently, the Commission could not have intended the double counting that results when courts apply the second enhancement because "a dangerous weapon was otherwise used"[71] in situations where they have already accounted for the "use" of an inherently nondangerous weapon in the base offense level. Instead, the structure of the graduated enhancement schedule demonstrates that the Commission intended the enhancements to account for new and more egregious conduct.

2. *Plain Language*

The Commission defined the base offense level for aggravated assault as "involving a dangerous weapon" and the specific offense characteristic as "a dangerous weapon . . . was otherwise used."[72] Through its use of different wording, the Commission demonstrated that the base offense level and the second enhancement account for different

69. *See supra* note 41 and accompanying text (discussing "mere possession").

70. *See supra* notes 40-52 and accompanying text.

71. USSG § 2A2.2(b)(2)(B).

72. *See supra* note 2.

conduct.[73] In the context of aggravated assault with an inherently nondangerous weapon, however, the distinction carries no meaning.[74] The difference *does hold* meaning when "involving" means "mere possession," as in the case of aggravated assault with an inherently dangerous weapon such as a gun,[75] but in the case of an aggravated assault with an inherently nondangerous weapon, "involving" means "used"[76] and therefore "otherwise used" carries no additional meaning.

3. *Commission's Intent*

The fact that application of the second enhancement to the sentence of a defendant who committed aggravated assault with an inherently nondangerous weapon inevitably results in applied double counting does not end the inquiry because, as noted in the introduction, double counting is not always impermissible.[77] This section argues that the inevitable applied double counting discussed in this Note is impermissible because the Commission did not intend for courts to engage in applied double counting. As already examined, the Commission demonstrated its intent that the enhancement schedule be gradual,[78] thus, the Commission did not intend for the graduated nature of the schedule to fall apart. Also, the Commission used plain language to demonstrate its intent that the words "involve" and "otherwise use" carry different meanings.[79] Thus, the Commission did not intend a result where the difference between the words evaporates.

More specifically, this section argues that applied double counting is impermissible because each invocation of a particular behavior fails to serve a unique sentencing purpose. Recall that a court double counts a defendant's "use" of an inherently nondangerous weapon because each enhancement for the behavior accounts for the same conduct.[80] The defendant's "use" of the weapon refers to one action —

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73. *See* Gershon M. Ratner, *The Federal Circuit's Approach to Statutory and Regulatory Construction, With Emphasis on Veteran's Law*, 6 FED. CIR. B. J. 243, 249 (1996) ("Statutory language must be construed so as to give separate meaning to each word, so that no words are treated as mere surplusage, entirely without meaning.") (internal quotations omitted); *see also* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 52 (1997) (noting that the canon of statutory construction *noscitur a sociis* provides that "words are to be read in context with neighboring words in the same document").

74. *See generally* United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992). *But see* United States v. Williams, 954 F.2d 204, 206-207 (4th Cir. 1992).

75. *See supra* Section I.A.

76. *See supra* Section I.B.

77. *See supra* notes 26-29 and accompanying text.

78. *See supra* Section I.B.1.

79. *See supra* Section I.B.2.

80. *See supra* Section I.B.1.

one harm committed by the defendant.[81] This section examines the meaning of "unique sentencing purpose" and argues that when each invocation of a particular behavior does not serve a unique purpose, the Commission did not intend the resulting double counting.[82]

Consider a situation in the Guidelines where double counting is permissible because the two Guidelines applied to a single action refer to different conceptual harms. Under the robbery provision section 2B3.1, the base offense level can be enhanced for the specific offense characteristic of physical restraint.[83] If the robber necessarily restrained the victim in order to accomplish the robbery, a court that enhances the sentence for the restraint has double counted conduct necessary for the robbery to take place. In this case, however, the double counting is permissible because the robbery (the actual taking of property), and the physical restraint (the conduct necessary to commit the taking of the property), constitute different and distinct harms. Because "robbery does not necessarily entail physical restraint,"[84] it is possible to distinguish the physical restraint as a separate harm from the robbery.

Courts must determine whether conduct used to establish the base offense level serves a sentencing purpose unique from the way the same conduct is used to establish another part of the Guideline, here, "otherwise using" a weapon. The Ninth Circuit addressed this issue in *United States v. Reese*.[85] In *Reese*, the defendant housing authority police officer struck the victim on the head with a flashlight, an inherently nondangerous weapon. In doing so, the defendant seriously injured the victim. The defendant appealed his sentence, arguing that the district court double counted the use of the flashlight when it applied the enhancement for "otherwise using" the flashlight. In his analysis of the double counting issue presented in *Reese*, Judge O'Scannlain determined that it is impermissible double counting to "use a single aspect of conduct both to determine [the base offense

81. *See* United States v. Hernandez-Fundora, 58 F.3d 802, 813 (2d Cir. 1995); United States v. Hudson, 972 F.2d 504, 507 (2d Cir. 1992).

82. *See* United States v. Reese, 2 F.3d 870, 895 (9th Cir. 1993) ("[M]ultiple uses of a particular aspect of a defendant's past behavior are proper where each invocation of the particular behavior serves a unique purpose under the Guidelines.") (quoting United States v. Starr, 971 F.2d 357, 361 (9th Cir. 1992)); *see also* United States v. Adeleke, 968 F.2d 1159, 1161 (11th Cir. 1992) (noting that double counting is permissible if "each section concerns conceptually separate notions relating to sentencing") (quoting United States v. Aimufa, 935 F.2d 1199, 1201 (11th Cir. 1991)); United States v. Campbell, 967 F.2d 20, 25 (2d Cir. 1992) (noting that double counting is permissible "where a single act is relevant to two dimensions of the Guideline analysis").

83. *See supra* note 20.

84. *Reese*, 2 F.3d at 895 (quoting United States v. Doubet, 969 F.2d 341, 347 (7th Cir. 1992)) (cataloging examples of cases where double counting was permissible because two different harms were accounted for in the sentencing).

85. *Id.*

level] and to increase the base offense level mandated thereby . . . [where] absent such conduct, it is impossible to come within that guideline."[86]

Thus, at least in the Ninth Circuit, if a court uses the same conduct both to qualify the defendant for a base offense level and to increase that base level with a specific offense characteristic, the court impermissibly double counts unless the defendant could have qualified for the base offense level due to any other unique conduct. In *Reese*, the defendant housing authority police officer both "otherwise used" a flashlight to strike a suspect on the head, and "inflict[ed] serious bodily injury"[87] on the victim. As a result, the Ninth Circuit court noted that since the defendant could have come under the Guideline by conduct other than his "use" of the flashlight, the double counting was permissible.[88] The result in *Reese* makes sense: the defendant there engaged in at least two of the types of conduct for which one may qualify for the aggravated assault Guideline, so enhancing a sentence when the flashlight was "otherwise used" was not impermissible double counting. Accordingly, this Note urges courts to find double counting impermissible if a sentencing court uses a single aspect of conduct (the use of the dangerous weapon) both to determine the applicable base offense level (aggravated assault) and to apply an enhancement (otherwise using a dangerous weapon) where, absent the use of the dangerous weapon, it was impossible for the defendant to come within the base offense level Guideline.[89]

When the facts of an aggravated assault involving the use of an inherently nondangerous weapon are applied to the Ninth Circuit's test, the result is as follows: It would be permissible double counting for a defendant who seriously injured a victim with a chair to be sentenced for otherwise using the chair because he qualified for aggravated assault as a result of the inflicted injury. Similarly, it would be permissible double counting for a defendant who committed the aggravated assault with the chair in the midst of an attempted bank robbery to be sentenced for otherwise using the chair because he qualified for aggravated assault as a result of his attempt to commit another felony. In the factual scenario addressed in this Note, however, the defendant neither inflicts serious bodily harm on the victim nor attempts to

86. *Id.*

87. Recall that there are three ways to come within the aggravated assault guideline according to the definition of aggravated assault. "Aggravated assault" is "a felonious assault that involved (A) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (B) *serious bodily injury*, or (C) an intent to commit another felony." USSG § 2A2.2 cmt. n.1 (emphasis added).

88. *Reese*, 2 F.3d at 895.

89. *See id.*

commit another felony.[90] As a result, according to the Ninth Circuit's test, it is impossible for the defendant to qualify for the base offense level other than for the "use" of the chair. The Commission could not have intended courts to double count where each invocation of "use" does not serve a unique purpose.[91]

II. COURTS SHOULD NOT USE THE CANON *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*[92] TO PERMIT APPLIED DOUBLE COUNTING

This section challenges some courts' conclusions that the Commission intended applied double counting because it expressly prohibited double counting elsewhere in the Guidelines, but did not forbid it under the aggravated assault Guideline. These courts rely on the canon of statutory construction *expressio unius est exclusio alterius* (hereinafter "*expressio unius*"). This section argues that reliance on this canon is inappropriate in the context of applied double counting.

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90. *See supra* text accompanying note 3.

91. Unfortunately, subsequent courts have applied the test articulated in *Reese*, 2 F.3d 870, in a manner that does not appear to make sense. In *Reese* the defendant did in fact have the intent to commit another felony and used a non-inherently dangerous weapon to commit an aggravated assault. *Id.* at 895-96. In that case it was appropriate for the defendant to have points applied to his sentence for each harmful act. The court in *Duran*, however, interpreted the reasoning in *Reese* to mean that, unless there is no other way for *any* hypothetical defendant to qualify for the aggravated assault guideline other than his use of a dangerous weapon, only then can there be impermissible double counting of the "use" conduct. United States v. Duran, 127 F.3d 911, 917 (10th Cir. 1997).

According to these courts' interpretation of the Ninth Circuit's language, unless it is impossible to qualify for aggravated assault in any way other than involving a dangerous weapon, there can be no impermissible double counting of the "use of the dangerous weapon." *See, e.g.*, *Duran*, 127 F.3d at 917; United States v. Dunnaway, 88 F.3d 617, 619 (8th Cir. 1996).

In application, this means that because there are two additional ways a defendant *might* qualify for the aggravated assault guideline, because the defendant committed another felony or inflicted bodily injury, *see supra* note 82; *see also* United States v. Farrow, 198 F.3d 179, 193 (6th Cir. 1999) (refusing to follow the Ninth Circuit rule that "a guideline raises no double counting concerns so long as it is capable of being applied in some hypothetical case without counting the same conduct twice"), a court always will permissibly double count the "use" of an inherently non-dangerous weapon.

The error of this extrapolation is plain. A defendant who qualified for the base offense level by committing a felonious assault with the intent to commit another felony and also used an inherently non-dangerous weapon would receive 19 points (15 for the base offense level and 4 for the enhancement because a dangerous weapon was "otherwise used"). *See* USSG § 2A2.2(b)(2)(B). At the same time, a defendant who qualified for the base offense level by using a dangerous weapon but could theoretically have qualified for the base level by having the intent to commit another felony (even though he did not have the intent) would also receive 19 points (15 for committing aggravated assault involving a dangerous weapon and 4 because he otherwise used a dangerous weapon). *See id.*; *see also Duran*, 127 F.3d at 917. One defendant has committed two serious offenses, the other has committed only one. The Ninth Circuit's language as erroneously used by other courts, creates, rather than alleviates, disproportionality in sentencing. *See infra* Section III.B (discussing the Commission's goal of proportionality in sentencing).

92. *See supra* note 37 (defining the canon: "to express or include one thing implies the exclusion of the other, or of the alternative").

Throughout the Guidelines, the Commission recognized certain instances where double counting could occur and expressly prohibited the double counting. Section II.A asserts that these express prohibitions are overt whereas applied double counting is, by definition, a phenomenon that is not plain on the face of the statute because it only occurs through application.[93] Thus, courts that rely on the canon make an unrealistic assumption that the Commission recognized every potential instance of double counting in the Guidelines. Section II.B points out that the Guidelines both expressly permit and prohibit double counting, and thus argues that the canon, in this context, is meaningless.

A. Expressio Unius *is Inappropriate when Double Counting is As Applied*

Throughout the Guidelines, the Commission prohibited certain instances of potential double counting.[94] Using the canon of *expressio unius*, some courts have argued that by including provisions that expressly forbid double counting, the Commission demonstrated that it understood the potential for double counting.[95] This section argues that this reliance on *expressio unius* is inappropriate because applied double counting is distinguishable from the instances of double counting that the Guidelines expressly prohibit. As Section I.A demonstrated, the double counting involved in an enhancement for otherwise using, brandishing, or threatening with a dangerous weapon is not apparent from the face of the statute. In contrast, as this section will show, the instances of double counting that the Commission explicitly bars are overt and easily recognizable. Therefore, the omission of an express prohibition of double counting more readily signifies an oversight on the part of the Commission, rather than the intent to permit applied double counting.

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93. *See* Introduction (defining "applied double counting").

94. *See* Swearingen, *supra* note 22, at 720 (cataloging instances of explicitly prohibited double counting). For example, it is impermissible for courts to apply the adjustment enhancement for a vulnerable victim if the definition of the offense or the specific offence characteristic includes that vulnerability. USSG § 3A1.1 cmt. 2; USSG § 2A3.1(b)(2); *see also* United States v. Newman, 982 F.2d 665, 672 (1st Cir. 1992) (cataloging instances of express prohibition of double counting).

95. *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 212 (3d. Cir. 1997) ("[T]he principle of statutory construction, *expressio Unius Est Exclusio Alterius* applies. Following these principles, we conclude that the exclusion of a double counting provision in the [certain] sections . . . was by design. Accordingly, an adjustment that *clearly* applies to the conduct of an offense must be imposed unless the Guidelines exclude its applicability.") (second emphasis added) (quoting *Wong*, 3 F.3d at 670-71). For cases relying on the concept of the canon, but not the canon itself, see United States v. Williams, 954 F.2d 205, 208 (4th Cir. 1992); United States v. Curtis 934 F.2d 553 (4th Cir. 1991); United States v. Rocha, 916 F.2d 219, 243 (5th Cir. 1990); United States v. Goolsby, 908 F.2d 861, 863 (11th Cir. 1990).

An example of overt double counting that is easily recognizable because it could result from every factual application occurs in section 2X3.1 of the Guidelines.[96] That provision sets the base offense level for an offender who participates only as an accessory to a crime after the fact.[97] The base offense level for an accessory to a crime is set lower than the base offense level for a principal offender.[98] The application notes[99] to that provision provide that "an adjustment for reduced culpability is incorporated in the base offense level."[100] The Commission thereby made it clear that courts are prohibited from double counting the factor of reduced culpability of an accessory. Without this express provision, courts might count reduced culpability twice: once, as it is incorporated into the relatively low base offense level, and a second time to further reduce the sentence because factors involving reduced culpability in other crimes can mitigate the sentence.[101] This instance of potential double counting is overt. Most likely, the Commission easily recognized it because every defendant who is an accessory rather than a principal participant in a crime will have reduced culpability.[102]

Another overt example of expressly prohibited double counting that raises the offense level occurs in section 2C1.1 of the Guidelines,[103] where the Commission sets the base level for extortion under color of official right. The application notes to the section instruct the sentencing court not to apply the adjustment under section 3B1.3 for abuse of a position of trust.[104] Presumably courts are so instructed because the base level for extortion under color of official right necessarily contemplates such an abuse.[105] Again, this instance of potential double counting is obvious because extortion under color of official right will necessarily be committed by official persons in positions of trust. Consequently, such a crime will almost always be a direct result of an abuse of a position of trust.

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96. USSG § 2X3.1.

97. *Id.*

98. *Id.*

99. The Application Notes are designed to assist courts in interpreting Guideline provisions. *See* USSG § 1B1.7. Courts are required, however, to follow application notes. *See* Stinson v. United States, 508 U.S. 36, 38 (1993) ("commentary is a binding interpretation"); United States v. Knobloch, 131 F.3d 366, 372 (3rd Cir. 1997).

100. USSG § 2X3.1, cmt. n.2.

101. For example, under the aggravated assault guideline, a sentence is mitigated for the assailant's reduced culpability if the assailant did not inflict serious bodily injury.

102. *See supra* note 98 and accompanying text.

103. USSG § 2C1.1.

104. USSG § 2C1.1 cmt. n.3.

105. *See* United States v. Williams, 954 F.2d 204, 207 (4th Cir. 1992) (citing USSG §§ 2C1.1, cmt. n.3, 3A1.1 cmt. n.2, 3A1.2 cmt. n.3, 3A1.3 cmt. n.2, all expressly forbidding the sentencing court from applying the adjustment if the offense provision specifically incorporates that factor); *see also* Swearingen, *supra* note 22, at 719-20.

In such instances where the Commission expressly prohibited double counting, a court would likely read the plain language of the statute to require double counting even without an express prohibition. Unlike instances of applied double counting, these instances do not require the application of a number of different fact scenarios to expose the potential for double counting. In contrast, the case of a defendant who commits aggravated assault with an inherently nondangerous weapon who neither inflicts serious bodily injury nor intends to commit another felony is *not* an obvious fact pattern. Nor, when one views the aggravated assault Guideline and its graduated enhancement schedule, does one immediately become cognizant of the potential for double counting that the Guideline presents. Courts that rely on *expressio unius* argue that the Commission recognized this potential for double counting, and determined that it was permissible.[106] Because it would be difficult, if not impossible, for the Commission to contemplate every fact pattern with every type of weapon to determine whether certain facts applied to the Guidelines would result in double counting, it seems unrealistic to presume that if the Commission did not include an express prohibition of applied double counting, it intended the applied double counting.[107]

Contrary to the above examples of expressly forbidden double counting, the plain language and natural application of the aggravated assault Guideline do not display an overt instance of the potential for double counting, even though in application the statute does in fact lead to this result.[108] In fact, as noted in Section 1.A, a fact pattern that comes to mind when reading the plain language of the aggravated assault Guideline is the case of aggravated assault with a dangerous weapon such as a gun, particularly because the graduated enhancement schedule culminates with the firing of a firearm.[109] It is realistic to assume that the Commission overlooked the potential double counting that could result in the case of an aggravated assault with an inherently nondangerous weapon without serious bodily injury or intent to commit another felony. To have detected the potential for applied double counting, the Commission would have had to imagine assaults with a variety of dangerous and inherently nondangerous weapons.[110] The Commission would also have had to imagine fact scenarios under the

106. *See supra* note 95.

107. *See* Swearingen, *supra* note 22, at 733 ("Courts have recognized that they should use the canon with care because it is an uncertain guide to legislative intent and is often based on an unfounded assumption that the legislature considered and rejected all factors.") (citing McKenna v. Ortho Pharm., 622 F.2d 657, 667 (3d Cir. 1980); Tri-State Terminals, Inc., v. Jesse, 596 F.2d 752, 755 n.2 (7th Cir. 1979)).

108. *See supra* Section I.A; *see also* tbl.2.

109. *See* USSG § 2A2.2(b)(2)(A); *see also* tbl.1.

110. *See* Swearingen, *supra* note 22, at 731-33.

Guideline involving each weapon in a variety of situations, including where the defendant does not inflict serious bodily harm and does not attempt to commit another felony. Given the relative complexity of the facts addressed in this Note, and the seemingly straightforward nature of the aggravated assault Guidelines' graduated enhancement schedule, it is unlikely that the Commission contemplated the possibility of applied double counting.

Courts relying on *expressio unius* in the context of applied double counting overlook the fact that it is unlikely that the Commission was aware of the possibility for applied double counting under the aggravated assault Guideline pursuant to a particular fact pattern. Instead, this Note urges courts to adhere to the Supreme Court's rationale in *Standefer v. United States*, a case deciphering congressional intent from committee reports: The Commission should not be held responsible for an unintended result pursuant to *expressio unius*, because the Commission, like Congress in *Standefer*, should not have been expected to "identify all of the 'weeds' which are being excised from the garden."[111]

B. Expressio Unius *is Meaningless Because it Cuts Both Ways*

The second reason that *expressio unius* cannot be applied to argue that provisions lacking express prohibitions on double counting should be construed to permit double counting is that the canon cuts both ways. The Guidelines include both express provisions *prohibiting* double counting[112] and express provisions *permitting* double counting.[113] For example, in the provision for an illegal alien found in the country after deportation,[114] the Commission states "[a]n adjustment . . . for a prior felony conviction applies in addition to any criminal history points added for [the identical] conviction in [the Criminal History Chapter]."[115] When a defendant argues that a court double counted a

111. Standefer v. United States, 447 U.S. 10, 20 n.12 (1980) ("It is not necessary for Congress in its committee reports to identify all of the 'weeds' which are being excised from the garden.").

112. *See, e.g.*, USSG § 2K2.4, cmt. n.2 ("Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm. (e.g., §§ 2B3.1(b)(2)(A)-(F) (Robbery)) is not to be applied in respect to the guideline for the underlying offense.")).

113. *See, e.g.*, USSG § 2L1.2(b)(1)(A), cmt. n.4; *see also* USSG § 1B1.1 cmt. n.4 ("Absent an instruction to the contrary, the adjustments from the different guideline sections are to be applied cumulatively (added together). For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively."); United States v. Johnson, 22 F.3d 106, 108 (6th Cir. 1994) (finding that Congress intended to impose multiple punishments for the same conduct under 18 U.S.C. § 2119, which outlaws car jacking, and 18 U.S.C. § 924(e), which prohibits the use of a firearm in a crime of violence).

114. This conduct is illegal pursuant to 8 U.S.C. § 1326 (1988).

115. USSG § 2L1.2(b)(1)(A) cmt. n.4 (emphasis added).

prior felony conviction under this provision, courts uphold the conviction, concluding that the Guidelines expressly permit the double counting.[116]

Because some provisions of the Guidelines prohibit double counting and some provisions permit it, the canon can be used by proponents of either side of the argument. Courts can contend that because the Commission expressly prohibited double counting in certain provisions, silent provisions demonstrate the Commission's intent to *permit* double counting for those provisions. Courts can also contend that because the Commission included at least one express provision permitting double counting, the Commission intended silent provisions to *prohibit* double counting. As a result of this ambivalence, the canon in this context is meaningless.

III. EVEN IF PERMISSIBLE, COURTS SHOULD DECLINE TO CONDUCT APPLIED DOUBLE COUNTING BECAUSE IT IS CONTRARY TO LEGISLATIVE INTENT

The Commission designed the Guidelines to promote uniformity,[117] fairness,[118] and proportionality[119] in sentencing. This section argues that double counting the "use" of an inherently nondangerous weapon contradicts these goals, and courts should therefore refrain from enhancing the sentence of a defendant who "otherwise used" an inherently nondangerous weapon.

As discussed in Section I.B, when a court enhances the sentence of a defendant who "otherwise used" an inherently nondangerous weapon, the graduated nature of the Guideline's enhancement schedule falls apart. When courts encounter a situation where a sentencing provision's structure falls apart, the likely result is confusion among the courts and lack of uniformity in sentencing nationwide.[120] Section

116. *See, e.g.*, United States v. Torres-Echavarria, 129 F.3d 692, 698 n.2 (2d Cir. 1997) ("The plain language of the [note accompanying the guideline provision] suggests that such double counting is permissible."); United States v. Adeleke, 968 F.2d 1159, 1159 (11th Cir. 1992); United States v. Campbell, 967 F.2d 20, 24 (2d Cir. 1992); *see also* Swearingen, *supra* note 22, at 720.

117. "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offense committed by similar offenders." USSG ch. 1, pt. A(3); *see also* United States v. La Guardia, 902 F.2d 1010, 1014 (1st Cir. 1990) ("Uniformity in sentencing was undeniably a primary goal of Congress and the Sentencing Commission.").

118. *See* USSG ch. 1, pt. A(3) ("The [Sentencing Reform Act of 1984]'s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.").

119. "[C]ongress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." USSG ch. 1, pt. A(3).

120. *See supra* notes 33-36 and accompanying text.

III.A asserts that the confusion created when courts face facts resulting in applied double counting is sufficient grounds to sentence with lenity, and that if all courts sentenced with lenity, uniformity would be achieved.[121] Section III.B contends that because Congress deems crimes with inherently dangerous weapons, (e.g., guns), more dangerous than crimes with inherently nondangerous weapons, (e.g., chairs), to apply the same sentence for both crimes is contrary to the Commission's goals of fairness and proportionality in sentencing.

A. *Courts Should Apply the Rule of Lenity*

The rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused."[122] Criminal statutes are traditionally construed according to the rule of lenity, a name given to a common law principle that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed."[123] The purpose of the rule of lenity is to provide adequate notice to defendants and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not.[124] This section argues that the rule of lenity is appropriate in the context of applied double counting for two reasons. Section III.A.1 argues that applied double counting is an appropriate context for lenity because, by its nature, applied double counting involves statutory ambiguity. Section III.A.2 asserts that if courts apply the rule of lenity and refrain from double counting when facts, as applied to a statute, might lead to double counting, the goals of the rule would be satisfied: sentencing with fair-warning and allowing Congress, not courts, to determine when defendants should receive cumulative sentences.

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121. It is true that uniformity would be achieved by the uniform application of the higher of two possible sentences, (e.g., if all courts engaged in applied double counting). Such a result, however, is inconsistent with the rule of lenity which instructs courts to apply the more lenient of two possible sentences when the sentencing statute is ambiguous. The rule of lenity is discussed in detail below.

122. Staples v. United States, 511 U.S. 600, 619, n.17 (1994).

123. Solan, *supra* note 38, at 58 (quoting NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992)). Black's Law Dictionary defines "rule of lenity" as: "The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishment, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1332-33 (7th ed. 1999).

124. *See* Solan, *supra* note 38, at 58 (citing Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 704 n.18 (1995) (mentioning the rationales)).

1. *Applied Double Counting Results in Statutory Ambiguity*

When faced with the ambiguity of double counting as applied when a defendant "otherwise used" an inherently nondangerous weapon to commit aggravated assault, courts should apply the rule of lenity. The rule of lenity applies if a Guideline is ambiguous as to the appropriate sentence, and courts give the defendant the benefit of the lower sentence.[125] In the context of applied double counting discussed in this Note, courts would apply only the base offense and refrain from enhancing under the second specific offense characteristic.

While courts are not to invoke the rule of lenity haphazardly,[126] lenity is appropriate in cases of applied double counting because the structure and plain language of the applicable statutes lead to grievous ambiguity.[127] On its face, the structure and language of the aggravated assault Guideline establishes a clear graduated enhancement schedule.[128] When applied to the situation of a defendant who used an inherently nondangerous weapon to commit aggravated assault, however, the structure of the Guideline disintegrates[129] and the language of the Guideline seems to call for double counting.[130] If applying a Guideline to a fact pattern garners a result different from the outcome plainly called for on the face of the statute, the Guideline is ambiguous because it will likely be understood in different ways.[131]

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125. *See* United States v. Luna-Diaz, 222 F.3d 1, 3 n.2 (1st Cir. 2000) (noting that where a Guideline provision is ambiguous, the rule of lenity should be invoked to resolve the ambiguity in favor of the criminal defendant); *see also* Ladner v. United States, 358 U.S. 169, 177 (1958); United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993) (adopting the rule of lenity for interpretation of Guidelines).

126. The rule of lenity is not applicable unless "there is a grievous ambiguity or uncertainty in the language and structure of the Act." United States v. Blake, 59 F.3d 138, 140 (10th Cir. 1995) (quoting United States v. Wilson, 10 F.3d 734, 736 (10th Cir. 1993) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)). It is a rule of last resort. *See Wilson*, 10 F.3d at 736. Thus, the mere assertion of an alternative interpretation is not sufficient to bring the rule into play. *See* Moskal v. United States, 498 U.S. 103, 108 (1990).

127. *See* United States v. Smith, 196 F.3d 676, 681 (6th Cir. 1999) ("A rule against double counting is also consistent with the general rule of lenity in criminal cases."). This Note argues that there is uncertainty in the meaning of the language "otherwise used" in the context of an inherently non-dangerous weapon. This Note also argues that there is grievous ambiguity in the structure of the statute as applied to the facts, thus, use of the rule of lenity is appropriate.

128. *See* USSG § 2A2.2(b) and *supra* Section I.A, tbl.1.

129. *See supra* Section I.B.1, tbl.2.

130. *See supra* Section I.B; *see also* United States v. Reese, 2 F.3d 870, 894 (9th Cir. 1993) ("[O]n its face this Guidelines section clearly requires the 'double counting' of which appellants complain here.").

131. Black's Law Dictionary defines "ambiguity" as "[a]n uncertainty of meaning or intention, as in a contractual term or statutory provision." BLACK'S LAW DICTIONARY 79 (7th ed. 1999). Black's Law Dictionary also quotes RUPERT CROSS, STATUTORY INTERPRETATION 76-77 (1976) as follows:

2. *In the Context of Applied Double Counting, Application of Lenity Satisfies the Rule's Goals*

The goals of the rule of lenity are satisfied if courts apply the rule in the context of applied double counting: providing fair-warning in sentencing and allowing legislators, not courts, to determine when defendants should receive cumulative sentences.[132] The first goal, fair-warning in sentencing, would be satisfied by the application of the rule of lenity to this case.[133] As it stands now, a person in David's position may not know that he is subject to sentencing for aggravated assault with a three level enhancement because he "otherwise used" a chair in a bar fight, while a person like Dorothy, who pistol whipped with a gun, might have a good idea that serious punishment will ensue. Fairness exists when the community knows "what the law intends to do if a certain line is passed."[134] Without the rule of lenity, David has no idea, when he is in the bar with the chair raised, that the consequences of his actions could be to receive a sentence as harsh as the sentence received by one who pistol whips a victim with a gun. If courts apply the rule of lenity here, the resulting sentence will appropriately correspond to David's understanding of the punishment he deserves for the crime he committed.

The second goal of the rule of lenity would also be satisfied were courts to apply the rule when faced with the opportunity to double

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> In the context of statutory interpretation the word most frequently used to indicate the doubt which a judge must entertain before he can search for and, if possible, apply a secondary meaning is "ambiguity". In ordinary language this term is often confined to situations in which the same word is capable of meaning two different things, but, in relation to statutory interpretation, judicial usage sanctions the application of the word "ambiguity" to describe any kind of doubtful meaning of words, phrases or longer statutory provisions. *Hinchy's* case prompted the suggestion that if, in a particular context, words convey to different judges a different range of meanings "derived from, not fanciful speculations or mistakes about linguistic usage, but from true knowledge about the use of words, they are ambiguous.

BLACK'S LAW DICTIONARY 79 (7th ed. 1999).

132. *See* United States v. Bass, 404 U.S. 336 (1971):

> This principle [of lenity] is founded on two policies that have long been part of our tradition. First, '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 fair as possible the line should be clear.' Second, because of 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.

Id. at 348 (citations omitted); *see also* David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 931 (1996); Swearingen, *supra* note 22, at 728.

133. *See* United States v. Werlinger, 894 F.2d 1015, 1017 (8th Cir. 1990) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (citing Ladner v. United States, 358 U.S. 169, 179 (1958)).

134. *See Bass*, 404 U.S. at 348.

count. The rule of lenity is based in part on the notion that courts presume that legislators do not intend to impose multiple punishments for one offense unless the legislators clearly express an intent to do so.[135] This presumption comes from the fact that society does not want people to be punished unless lawmakers have clearly delineated the law.[136] Lenity allows the legislature, not the courts, to determine when sentences should be applied cumulatively.[137]

In the case of a defendant who "otherwise used" an inherently nondangerous weapon, legislative intent for cumulative sentencing is unknown. Perhaps the Commission intended to prohibit double counting, given that the structure of the aggravated assault provision implies graduated enhancement without double counting. Or maybe the Commission intended the double counting that inevitably results when certain facts are applied to the statute. When legislative intent clearly appears to lead to two different results, lenity is appropriate.[138] Courts should assume that the Commission intended not to impose cumulative sentences like double counting, and thus give defendants the lower sentence. If the legislators object, they can clarify the law to call specifically for applied double counting.

B. *Proportionality in Sentencing Demands that Courts Refrain from Double Counting as Applied: Gun Crimes are Worse than Chair Crimes*

Courts that engage in applied double counting to sentence chair-wielding attackers identically to gun-wielding attackers for less serious conduct frustrate the Commission's goal of proportionality in sentencing.[139] This section argues that a more lenient sentence for chair-

135. *See Werlinger*, 894 F.2d at 1017 (citing Whalen v. United States, 445 U.S. 684, 689 (1980); Bell v. United States, 349 U.S. 81, 84 (1955)).

136. *See Bass*, 404 U.S. at 348 (noting that the policy of allowing Congress, not the courts, to determine criminal sentences, and forcing Congress to write laws clearly, embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should") (quoting HENRY J. FRIENDLY, BENCHMARKS 209 (1967)).

137. *See Romano*, 970 F.2d 164, 167 (6th Cir. 1992) ("[I]mposing 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 Busic v. United States, 446 U.S. 398, 403-04 (1980); Simpson v. United States, 435 U.S. 6, 12-13 (1978))).

138. *See Werlinger*, 894 F.2d at 1017 ("Congress does not intend to impose multiple punishments for one offense unless it clearly expresses an intent to do so.") (citing, inter alia, *Whalen*, 445 U.S. at 689; *Bell*, 349 U.S. at 84); *see also Romano*, 970 F.2d at 167.

139. Double counting "frustrate[s] the structure of the Guidelines and their goal of ensuring the proportionality of federal sentences." United States v. Johnstone, 107 F.3d 200, 213 (3rd Cir. 1997). *See* United States v. Reese, 2 F.3d 870, 895 (9th Cir. 1993) ("When more than one kind of harm is attributable to a given aspect of a defendant's conduct, failure to enhance his punishment for each harm caused thereby would defeat the Commission's goal of proportionality of sentencing.").

wielding attackers is appropriate because a contrary result is disproportionate to the crime, and thus contrary to legislative intent.

The Commission developed the Guidelines in part to promote proportionality in sentencing,[140] so that the punishment imposed would fit the crime committed.[141] The Commission sought to address proportionality because of the variable nature of sentencing prior to the creation of the Guidelines. Criminals convicted of lesser crimes were subject to the real possibility that they might receive a longer sentence than would a criminal convicted of a more egregious crime.[142] The Commission, in drafting the Guidelines, intended to end this injustice by creating a system where the length or type of punishment corresponded to the seriousness of the crime committed.[143] Further, the Commission hoped to heighten the legitimacy of the criminal justice system in the eyes of the public by curtailing prison sentences that appeared vastly disproportionate to the offense committed.[144] Thus, the Guidelines seek to punish a defendant for "all harm that resulted from the acts and omissions" for which he is responsible.[145]

Applied double counting frustrates the legislative goal of proportionality in sentencing, and thus courts should avoid it.[146] Each defendant who commits a felonious assault involving a dangerous weapon, a gun or a chair, with the intent to commit bodily harm, should receive 15 points for aggravated assault.[147] If, however, a court double counts the "use" of a chair (once to qualify for the base offense level "involve" and again for the second enhancement "otherwise using"), and only single counts the "use" of the gun (counts "possession" of the gun, and then counts pistol whipping),[148] but gives both defendants the same enhancement for "otherwise using" the weapon, the resulting sentences are disproportionate. The defendant who "used" the chair to qualify for the base offense level (but did nothing else with it) and the defendant who possessed the gun to qualify (and pistol whipped his victim) would both receive 19 points.[149]

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140. *See* 28 U.S.C. § 991(b)(1)(B) (1988); USSG ch. 1, pt. A(3); *see also supra* note 139; United States v. Duran, 127 F.3d 911, 918 (10th Cir. 1997).

141. Swearingen, *supra* note 22, at 715.

142. Karle & Sager, *supra* note 10, at 395-96.

143. *See, e.g., id.*; Andersen, *supra* note 12, at 185.

144. Karle & Sager, *supra* note 10, at 396 (noting the view that "sentencing was more a product of a lottery than a rational punishment scheme undermined public confidence in, and respect for, the criminal justice system").

145. USSG § 1B1.3(a)(3).

146. *See, e.g.*, United States v. Farrow, 198 F.3d 179, 193-94 (6th Cir. 1999).

147. The court should apply the base offense level for aggravated assault. *See* USSG § 2A2.2.

148. *See supra* Section I.B.1 tbl.2.

149. *See id.*

The Guidelines provide a graduated enhancement schedule that makes sense when there is an aggravated assault with a gun.[150] Courts therefore know what sentence to give to a defendant who committed aggravated assault with a gun. If a court grants the identical sentence to a defendant who attacks with a chair or a car, the result is disproportionate sentencing. This is even clearer where an attacker who throws a chair or drives a car at a victim receives the same sentence as an attacker who pistol whips a victim.[151]

Sentencing criminals more leniently for attacking with chairs rather than guns satisfies the Commission's goal of proportionality in sentencing. This section argues that because legislators generally treat gun crimes more harshly in other contexts, treating gun crimes more harshly in the applied double counting context would be proportionate, and in accord with the legislative intent.

Legislators generally treat crimes with inherently dangerous weapons, such as guns,[152] more harshly than crimes with other, inherently nondangerous objects. The Commission views crimes involving guns to be worthy of harsher treatment in sentencing than crimes involving other weapons. First, the Commission often sets the highest weapon enhancement for "discharging a firearm."[153] Further, other graduated enhancement schedules in the Guidelines set harsher sentences for crimes involving firearms than for crimes involving other weapons.[154] The Commission devoted an entire section of the Guidelines exclu-

150. *See supra* Section I.A tbl.1.

151. That is, he receives the same sentence assuming the pistol-whipping does not seriously injure the victim. *See supra* Section I.B.1 tbl.2.

152. While this Note does not attempt to draw the line between "inherently dangerous" and "non-inherently dangerous" weapons, *see supra* note 31, weapons like bombs, grenades, and automatic weapons probably qualify as inherently dangerous. They serve no purpose other than violence. A chair, a hammer, a tennis racket, or even a kitchen knife have inherent uses other than violence, and may be used in the heat of the moment in a way that a gun or a bomb probably cannot be so used. This section discusses legislative intent with regard to guns as a clear example of an inherently dangerous weapon.

153. *See, e.g.*, USSG § 2A2.2(b)(2)(A); USSG § 2L1.1(b)(4)(A) (the Guideline provision for Smuggling, Transporting, or Harboring an Unlawful Alien sets the highest enhancement "if a firearm was discharged").

154. *See, e.g.*, USSG § 2B3.2(b)(3)(A), Extortion by Force or Threat of Injury or Serious Damage (setting up a graduated enhancement schedule whereby the harshest penalty, an increase of seven points, corresponds to firearm discharge, a six point increase when a firearm is "otherwise used," a five point increase when a firearm was brandished, displayed, or possessed, a four point increase when a dangerous weapon was otherwise used, and a three point increase when a dangerous weapon was brandished, displayed, or possessed); The Robbery graduated enhancement schedule makes it even clearer that the Commission views firearm use as a crime worthy of harsher punishment than the use of other weapons. *See* USSG § 2B3.1(b)(2)(A) (if a firearm was discharged, add 7 points; if a firearm was otherwise used, add 6 points; if a firearm was brandished, displayed or possessed, add 5 points; if a dangerous weapon was otherwise used, add 4 points; if a dangerous weapon was brandished, displayed, or possessed, add 3 points).

sively to firearms.[155] Also, the Commission sets enhancements for Armed Career Criminals based on a defendant's use or possession of firearms, not other weapons.[156]

Furthermore, the use of a gun suggests premeditation, unlike the use of a chair,[157] and the Commission makes crimes involving premeditation worthy of harsher sentences than crimes lacking premeditation.[158] Presumably, an attacker who used a gun planned to carry a gun. He intended to pull the gun out with the intent to involve that gun in the assault to do bodily harm. Dorothy, wielding a gun, should not receive the same sentence as David, who did not carry a gun into the fray, who did not pull out a gun in order to involve it in the assault, and who did not use a gun with the intent to inflict bodily harm. David grabbed the first object available to him, a chair.

Apart from the Guidelines, as demonstrated by the many bills in Congress seeking to promote gun control and safety,[159] legislators view gun violence, and the potential for gun violence, as a major concern[160]

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155. *See* USSG § 2K2, Offenses Involving Public Safety. For an example of the way the Commission views firearm involvement in crime, see USSG § 2K2.1. Under this section, the Commission sets base offense levels for unlawful receipt, possession, or transportation of firearms or ammunition and prohibited transactions involving firearms or ammunition when the crimes involve certain specific types of firearms. *See* USSG § 2K2.1(a). The Commission further sets increases in points based on the number of firearms that were involved in the crime. *See* USSG § 2K2.1(b)(1). Further, under the guideline for Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone, USSG § 2K2.5, the Commission includes a specific offense characteristic where a "defendant unlawfully possessed or caused any firearm to be present in a school zone." USSG § 2K2.5(b)(1)(B). There is no similar enhancement for possessing other dangerous weapons in a school zone.

156. *See* USSG §§ 4B1.4(b)(3)(A), 4B1.4(c)(2).

157. *See supra* note 31 (discussing the role of premeditation).

158. *See, e.g.*, USSG § 2A1.1, cmt. n.1. The Commission concludes in the application notes to the first degree murder guideline that "in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing."

159. *See, e.g.*, S. 1190, 106th Cong. (1999) (bill to apply the Consumer Product Safety Act to firearms and ammunition) (introduced in Senate June 9, 1999); American Handgun Standards Act of 1999, H.R. 2009, 106th Cong. (1999); S. 193, 106th Cong. (1999); Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999, S. 254, 106th Cong. (1999); The Youth Gun Crime Enforcement Act of 1999, H.R. 1768, 106th Cong. (1999); S. 995, 106th Cong. (1999); The Firearm Heritage Protection Act of 1999, H.R. 1032, 106th Cong. (1999); New Millennium Law Enforcement Assistance Act, S. 899, 106th Cong. (1999); The Children Gun Violence Prevention Act of 1999, H.R. 1342, 106th Cong. (1999).

160. There are no comparable bills in Congress relating to the use of inherently non-dangerous weapons such as chairs or hammers. There are many laws regarding the use of motorized vehicles which are often the weapons that defendants use to commit aggravated assault with an inherently non-dangerous weapon, and for which these same defendants receive double counted sentences for "otherwise using" the vehicle. *See, e.g.*, United States v. Morris, 131 F.3d 1136 (5th Cir. 1997); United States v. Garcia, 34 F.3d 6 (1st Cir. 1994); United States v. Hudson, 972 F.2d 504 (2d Cir. 1992). These laws, however, are not aimed at the vehicles potentially used to commit intentional acts of violence such as aggravated assault, rather they are laws aimed at curtailing the danger that comes from accidents and misuse. For some examples of bills currently being debated in Congress relating to automobiles, see Auto Safety Assurance Act of 1999, H.R. 3153, 106th Cong. (1999); Motor Carrier Safety

and view crimes involving guns to be particularly harmful to society. For instance, Congress has spent much energy debating gun control bills. In less than a year, Congress has debated at least eight bills directly pertaining to gun control and safety.[161]

Federal legislators, the Commission, and others have demonstrated that a goal of sentencing is proportionality. One way for courts to meet the goal of proportionality in sentencing is to refrain from double counting as applied in the context of defendants who commit aggravated assault with inherently nondangerous weapons.

CONCLUSION

As evidenced in Littleton, Colorado,[162] gone are the days when kids merely throw fists or sticks and stones in the schoolyard. The law should punish less severely those who choose to stay away from inherently dangerous weapons like guns and punish those who use guns to commit aggravated assaults. Legislators advocate a harsher punishment for offenders who use violent weapons than those who throw sticks or stones, or even those who use baseball bats. Consequently, courts should sentence offenders who attack with chairs to shorter prison terms than offenders who attack with guns.

The aggravated assault Guideline has a graduated structure on its face and metes out graduated sentences when applied to aggravated assaults with inherently dangerous weapons. When the base offense level is enhanced under any of the special offense characteristics in section 2A2.2(b)(2), the court does not double count a single factor. The graduated enhancement schedule, however, falls apart in structure and purpose when a defendant who commits an aggravated assault with an inherently nondangerous weapon such as a chair is given an enhancement for otherwise using a dangerous weapon. The enhancement double counts the defendant's use or threatened use of the weapon.

Applied double counting is impermissible because the Commission did not intend its graduated enhancement schedule to fall apart upon application, therefore, the Commission did not intend the double counting as applied. Further, just because the Commission prohibited double counting elsewhere in the Guidelines does not lead to the conclusion that double counting in this instance is permissible. Finally,

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Act of 1999, H.R. 2679, 106th Cong. (1999); Motor Carrier Safety Improvement Act of 1999, S. 1501, 106th Cong. (1999).

161. *See supra* note 159.

162. On April 20, 1999, Dylan Klebold and Eric Harris, two students at Columbine High School in Littleton, Colorado opened fire on their classmates killing 12 students, one teacher, and themselves. Tom Kenworthy, *Big Bomb Found in School, Police Think 2 Gunmen May Have Been Helped*, CHI. SUN-TIMES, Apr. 23, 1999, at 3.

even if courts find that double counting is permissible they should resist it. To resist it promotes the Commission's goals of uniformity and fairness. Further, due to the ambiguity created by applied double counting, courts should err on the side of lenity in sentencing. Finally, courts should resist double counting because Congress deems crimes involving inherently dangerous weapons such as guns more dangerous than crimes with chairs. If courts hold that attacking with a gun and attacking with a chair garner the same punishment, they undermine Congress' goal of proportionality in sentencing and the public's sense of justice.

Instead of engaging in applied double counting, courts faced with an offender who qualified for the aggravated assault provision of the Guidelines through the use of an inherently nondangerous weapon should refuse to apply the second enhancement "when a dangerous weapon was otherwise used." Instead, courts should sentence such offenders only for the base offense level.