Buffalo Law Review

Volume 66 | Number 5 Article 2

12-1-2018

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Buffalo Law Review

VOLUME 66 DECEMBER 2018 NUMBER 5

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"Who controls the past controls the future.
Who controls the present controls the past."
– George Orwell, 1984

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ABSTRACT

In recent years, federal criminal defendants have enjoyed great success in challenging "residual clauses" within the United States Code as unconstitutional. This began in 2015 when the United States Supreme Court, in *Johnson v. United States*,[1] struck a portion of the Armed Career Criminal Act[2] as void for vagueness. *Johnson's* holding at first appeared monumental because it invalidated a provision commonly used to enhance the prison sentences of offenders with certain qualifying prior convictions. Subsequent developments, however, significantly dulled the impact of *Johnson*, thwarting the dramatic reduction in sentences it once foreshadowed.

This Article is about how *Johnson* came to be and the mechanisms through which the Supreme Court has subsequently weakened *Johnson's* effect. It will describe two specific mechanisms:

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1. 135 S. Ct. 2551 (2015).

2. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat 1837, 2185 (1984) (codified at 18 U.S.C. § 924(e)).

(1) the Supreme Court's recasting of the history of federal sentencing in an attempt to contextualize the holding of *Booker v. United States*[3] as a return to the bygone days of indeterminate sentencing; and (2) the Supreme Court's evolving view of the role of the United States Sentencing Guidelines (Guidelines) in the federal criminal system that minimizes the Guidelines' actual influence over a district court's sentencing decisions. It will then explain why these mechanisms—one that exerts control over the past and one that exerts control over the present—are both unfounded. Finally, this Article will suggest ways in which those involved in federal criminal law—the United States Sentencing Commission (Sentencing Commission), Congress, the courts, and the criminal bar—can address the problems that the Court's recent decisions have caused in our criminal justice system.

INTRODUCTION

In 2009 and 2012, respectively, Oscar Rash and Laneer Everett found themselves in parallel legal circumstances. Both were convicted of felonies in the Eastern District of Wisconsin: Rash of a federal firearms offense[4] and Everett of a federal drug trafficking offense.[5] Both saw their sentences increased under a federal recidivism provision based, in part, on their prior state convictions for "vehicular flight": Rash under the residual clause of the Armed Career Criminal Act[6] and Everett under an identically worded residual clause in the Guidelines.[7] Finally, both were sentenced to fifteen years

3. 543 U.S. 220 (2005).

4. Rash v. United States, No. 15-C-1485, 2015 U.S. Dist. LEXIS 171320, at *1 (E.D. Wis. Dec. 23, 2015).

5. Everett v. United States, No. 17-CV-523-JPS, 2017 U.S. Dist. LEXIS 73642, at *2 (E.D. Wis. May 15, 2017).

6. *Rash*, 2015 U.S. Dist. LEXIS 171320, at *2. The Armed Career Criminal Act (ACCA) residual clause defines "violent felony" as a prior felony conviction that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (2018).

7. *Everett*, 2017 U.S. Dist. LEXIS 73642, at *2. The U.S. Sentencing Guidelines Manual's career-offender residual clause was identical to the ACCA residual clause, defining "crime of violence" as a prior felony conviction that "involves conduct that presents a serious potential risk of physical injury to another." U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.2(a)(2) (U.S. SENTENCING COMM'N 2011).

imprisonment: Rash as an "armed career criminal"[8] and Everett as a "career offender."[9]

As of 2011, neither Rash nor Everett had a path to appellate relief because the United States Supreme Court held, in *Sykes v. United States*, that vehicular flight was a qualifying residual clause offense.[10] Accordingly, they were left with no choice but to serve their time. But in 2015, Rash and Everett received a ray of hope. The Supreme Court decided *Johnson v. United States*, which overruled *Sykes* and struck the Armed Career Criminal Act residual clause as void for vagueness.[11] A year later, in *Welch v. United States*, the Court made *Johnson* retroactive in cases on collateral review.[12] Both Rash and Everett filed motions, in the district court, to vacate their sentences in light of *Johnson* because, without a valid residual clause, their convictions for vehicular flight no longer supported an enhanced sentence.[13]

Even though the Government conceded that armed career criminals and career offenders were both entitled to relief under *Johnson*,[14] Rash and Everett experienced different results. In the same jurisdiction, the district court

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8. *Rash*, 2015 U.S. Dist. LEXIS 171320, at *1–2. An armed career criminal is a federal firearms offender who has three qualifying prior convictions for either a violent felony or a "serious drug offense." *See* 18 U.S.C § 924(e)(1).

9. *Everett*, 2017 U.S. Dist. LEXIS 73642, at *2. A career offender is an offender whose instant offense is either a "crime of violence" or "controlled substance offense" and who has two qualifying prior conviction for either a crime of violence or controlled substance offense. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.

10. Sykes v. United States, 564 U.S. 1, 27–28 (2011).

11. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

12. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

13. Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody, 28 U.S.C. 2255 at 6, *Everett*, 2017 U.S. Dist. LEXIS 73642 (No. 17-CV-523-JPS); Unopposed Petition to Vacate Sentence Under 28 U.S.C. § 2255 at 1–3, *Rash*, 2015 U.S. Dist. LEXIS 171320 (No. 15-C-1485).

14. *See* Brief for the United States at 40, Beckles v. United States, 137 S. Ct. 886 (2017) (No. 15-8544) ("In light of those basic purposes of the vagueness doctrine, a district court's use of a vague guideline to calculate an advisory Guidelines range violates the Due Process Clause.").

vacated Rash's sentence while denying Everett relief.[15] The reason for this disparate treatment was an intervening decision from the Supreme Court, *United States v. Beckles*, in which the Court held that the Guidelines are immune from constitutional challenges for vagueness.[16] Accordingly, the same language, extrapolated from the Armed Career Criminal Act to the Guidelines,[17] led to divergent outcomes for armed career criminals and career offenders. As a result, Rash is now a free man while Everett continues to languish in a federal penitentiary.[18]

This Article attempts to look beneath *Johnson*, *Beckles*, and other decisions to identify the mechanisms through which the Supreme Court determined the fates of defendants like Rash and Everett. Part II explains how "armed career criminals" and "career offenders" received disparate treatment, even with the same prior convictions that triggered an increased sentence through identically worded provisions. Part III explains why this result was wrong both from a historical perspective and with a full present appreciation of the role of the Guidelines in the federal sentencing scheme. Part IV suggests ways in which those involved in federal criminal law—the Sentencing Commission, Congress, the courts, and the criminal bar—

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15. *Compare Rash* 2015 U.S. Dist. LEXIS 171320, at *2–3 (granting motion and vacating sentence), *with Everett*, 2017 U.S. Dist. LEXIS 73642, at *18–19 (denying motion).

16. *Beckles*, 137 S. Ct. at 897 ("Because the advisory Sentencing Guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness.").

17. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, vol. I, amend. 268 (U.S. SENTENCING COMM'N 2018) ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).").

18. According to the Bureau of Prisons' online "inmate locator," Rash was released from federal custody on September 9, 2016. Bureau of Prisons Inmate Locator, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmateloc (use the "Find by Name" tab; then input "Oscar" in the first name field and "Rash" in the last name field; then select "Search"). Everett is not due for release until September 25, 2020. *Id.* (use the "Find by Name" tab; then input "Laneer" in the first name field and "Everett" in the last name field; then select "Search").

can mitigate the harms that unconstitutional and constitutionally questionable provisions cause to our criminal justice system.

I. THE MINISTRY OF JUST RESULTS: *JOHNSON*, *WELCH*, *BECKLES*, AND THE ARMED CAREER CRIMINAL ACT RESIDUAL CLAUSE

A. *The Armed Career Criminal Act*

On September 11, 1982, President Ronald Reagan gave a radio address to the nation on crime and criminal justice reform. He began his address with these remarks:

> Today I want to talk with you about a subject that's been very much on my mind, even as we've been busy with budgets, interest rates, and legislation. It's a subject I know you've been thinking about too—crime in our society.
>
> Many of you have written to me how afraid you are to walk the streets alone at night. We must make America safe again, especially for women and elderly who face so many moments of fear. You have every right to be concerned. We live in the midst of a crime epidemic that took the lives of more than 22,000 people last year and has touched nearly one-third of American households, costing them about $8.8 billion per year in financial losses.
>
> During the past decade alone, violent crime rose by nearly 60 percent. Study after study shows that most serious crimes are the work of a relatively small group of hardened criminals. Let me give you an example—subway crime in New York City. Transit police there estimate that only 500 habitual criminal offenders are responsible for nearly half the crimes in New York's subways last year.
>
> It's time to get these hardened criminals off the street and into jail. The primary responsibility for dealing with these career criminals must, of course, rest with local and State authorities. But I want you to know that this administration, even as it has been battling our economic problems, is taking important action on the Federal level to fight crime.[19]

In the same address, President Reagan proceeded to express his intention to eliminate the parole system, limit the application of the exclusionary rule, narrow the insanity

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19. Radio Address to the Nation on Crime and Criminal Justice Reform, 2 PUB. PAPERS 1136 (Sept. 11, 1982).

defense, increase forfeiture, revise the bail system, and push other aggressive law-and-order reforms.[20] This address was one of many that foreshadowed the Comprehensive Crime Control Act of 1984,[21] one of the most significant criminal law reforms in this country's history. An integral component of the Crime Control Act was the Armed Career Criminal Act (ACCA), a three-strikes recidivism law that imposes harsh mandatory minimums on repeat violent and drug offenders who are caught illegally possessing a firearm.[22] The ACCA is the starting point for many discussions within federal criminal law, and the effect of residual clauses on the federal sentencing scheme is no exception.

1. Background and Purpose

The ACCA, like other aspects of Reagan-era reform, was a product of its time. In the early 1980s, murder was at an all-time high.[23] There was heightened awareness, discussion, and fear of "street violence."[24] The War on Drugs and the War on Crime were at full ideological tilt.[25] Congress and the

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20. *Id.*

21. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984).

22. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat 1837, 2185 (1984) (codified at 18 U.S.C. § 924(e)).

23. According to the FBI's Uniform Crime Reporting statistics, there were 23,040 intentional or reckless homicides in the United States in 1980, which was the highest annual total to date. FED. BUREAU INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS: ESTIMATED CRIME IN 1980, https://www.bjs.gov/ucrdata/Search/Crime/State/OneYearofData.cfm (select "United States-Total" in box "a;" then select "Number of violent crimes" in box "b;" then select "1980" in box "c;" then select "Get Table").

24. *See, e.g.*, Leonard Buder, *1980 Called Worst Year of Crime in City History*, N.Y. TIMES (Feb. 25, 1981), https://www.nytimes.com/1981/02/25/nyregion/1980-called-worst-year-of-crime-in-city-history.html.

25. As Professor Susan Stuart explains:

> Reagan's direct references to the War on Drugs in official statements and speeches surpassed President Ford's by a factor of seven. Although Reagan couched his War in terms of saving American lives, especially children's lives, his rhetoric nevertheless focused on taking the war to the suppliers. Reagan's allusions to war tactics were often less than

American people were willing to tolerate aggressive anti-crime reforms, even those that exacerbated mass incarceration and disproportionately affected minorities.[26] Yet passage of the ACCA was complicated because, at the same time, politicians were wary of giving the federal government jurisdiction over traditionally local activities, even activities such as prosecuting violent criminals.[27]

The ACCA was the brainchild of Senator Arlen Specter, who first introduced it in 1981 to criminalize the state crimes of armed burglary and armed robbery at the federal level.[28] The punishment would be a mandatory minimum sentence of fifteen years, up to life in prison, for offenders who had two qualifying prior convictions.[29] Senator Specter was the

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> subtle, using terms like "battlefield," "military intelligence," "the deployment of the armed forces," "battle," and "crusade." Perhaps Reagan was no more warrior-like than in his tribute to law enforcement officers slain during the War on Drugs . . . .

Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 9 (2011) (footnotes omitted). While President Johnson first declared the War on Crime, it evolved through President Nixon, President Carter, and finally President Reagan to symbolize a more prominent death penalty as well as the abandonment of the exclusionary rule and *Miranda* protections. Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL OF RTS. J. 335, 340–51 (2004) (discussing the War on Crime).

26. *See generally* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 381–82 (2002).

27. For a great description of the federalism concerns about granting co-jurisdiction over violent crime to the federal government, see Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 393 (2006).

28. Career Criminal Life Sentence Act of 1981, S. 1688, 97th Cong. (1981); *Career Criminal Life Sentence Act of 1981: Hearings on S. 1688, S. 1689, and S. 1690 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 97th Cong. 3–4 (1981). For a discussion of the ACCA's early legislative history, see United States v. Balascsak, 873 F.2d 673, 679 (3d Cir. 1989) (en banc).

29. Senator Spector's bill originally punished "armed career criminals" with a mandatory sentence of life in prison. But in light of data demonstrating that recidivism rates decrease after an offender turns thirty, Senator Specter revised his bill, lowering the mandatory minimum to fifteen years imprisonment. James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing*

former elected District Attorney of Philadelphia and had come to believe that the federal government should play a larger role in the prosecution of traditionally state crimes.[30] Many disagreed, including President Reagan, who pocket-vetoed the bill in 1983.[31] Senator Specter, along with then-Congressman Ron Wyden, reintroduced the bill, which Congressman William Hughes then amended to allay federalism concerns by limiting the triggering instant offense to a pre-existing federal gun crime.[32] Meanwhile, the threshold number of qualifying prior convictions was increased from two to three.[33]

The original purpose of the ACCA was not to dramatically increase federal prosecutions of repeat offenders but to create the *possibility* of a harsh federal sentence in order to pressure offenders to promptly plead guilty to state charges, known as the principle of "leveraging."[34] With the ACCA in place, the theory went, less than one-percent of eligible offenders would actually need to be prosecuted to send the appropriate signal to the rest of the criminal element. The ACCA's champion, Senator Specter, explained it before Congress as follows:

> If the career criminal bill were in place, it would be possible for a district attorney, like the district attorney of Philadelphia, to refer a few cases—3, 4, or 5, out of 500—where there would be the individual judge's calendar, a trial within 90 days, strong cases,

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Guidelines: Moving Toward Consistency, 46 HARV. J. ON LEGIS. 537, 545–46 (2009).

30. For a description of Senator Specter's views, see Arlen Specter & Paul R. Michel, *The Need for a New Federalism in Criminal Justice*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 59–71 (1982).

31. *Balascsak*, 873 F.2d at 680. ("S.1688 was passed by both Houses of Congress as part of a larger package, but President Reagan pocket-vetoed it. The President's objection to this aspect of the package concerned the relationship between federal and local prosecutors.").

32. Levine, *supra* note 29, at 546–47.

33. *See id.* at 547.

34. For a more developed discussion of "leveraging" and the ACCA, see James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1959–61 (1991).

> virtually certain convictions, and minimum mandatory sentences of 15 years to life.
>
> I can tell you, Mr. Chairman, that if that happened to a few of Philadelphia's career criminals, there would be a mass rush for guilty pleas in the State courts, and that it is not optimistic to predict that 300 or 400 of the balance of those 500 cases would result in guilty pleas, and not with sentences of 15 years to life but with sentences of 10 years, or 12 years, much more than is being obtained at the present time. It is that leveraging which we really seek to accomplish through the career criminal bill.[35]

Whether Senator Spector's stated intent of leveraging was sincere or merely to assuage President Reagan's (and others') federalism concerns, it worked: President Reagan signed the ACCA into law, as part of the Comprehensive Crime Control Act, on October 12, 1984.[36]

2. Text and Application

In its present form,[37] the ACCA imposes a mandatory minimum sentence of fifteen years imprisonment on offenders who commit a federal gun crime and have three or more prior convictions that qualify as a "violent felony" or "serious drug offense":

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than

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35. *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 13 (1984) (statement of Sen. Arlen Specter).

36. *See* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat 1837, 2185 (1984).

37. The last major revision to the ACCA was the requirement that the prior convictions must have been "committed on occasions different from one another." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988). This clarifying language was Congress's reaction to the Eighth Circuit's decision in *United States v. Petty*, 798 F.2d 1157, 1159–60 (8th Cir. 1986), which affirmed the ACCA enhancement for a man who had been previously convicted, under a single indictment, of six counts of robbery, which were committed against six different people at a restaurant simultaneously. *See* Hooper, *supra* note 34, at 1965–66.

> fifteen years[.][38]

The ACCA, in turn, defines violent felony as follows:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[39]

Textually, the ACCA's definition of violent felony comprises two subsections; courts, however, have analyzed it as three separate clauses: the elements clause; the enumerated offenses; and the residual clause:

Elements clause	has as an element the use, attempted use, or threatened use of physical force against the person of another; or
Enumerated offenses	is burglary, arson, or extortion, involves use of explosives, or
Residual clause	otherwise involves conduct that presents a serious potential risk of physical injury to another.

A prior conviction need only satisfy one clause to qualify as a violent felony.[40] And while each clause harbors its own set of legal considerations, the most nettlesome portion of the definition, and the focus of this discussion, has been the ACCA residual clause.

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38. 18 U.S.C. § 924(e)(1) (2018).

39. *Id.* § 924(e)(2)(B).

40. *See* United States v. Schmidt, 623 F.3d 257, 265 (5th Cir. 2010) ("The ACCA has three disjunctive prongs, under any one of which an offense may be deemed a crime of violence.").

B. *How the ACCA Residual Clause Met Its Fate*

Since its enactment, the fourteen-word ACCA residual clause has been a *bête noire* of both defendants and the judiciary. From 2007 to 2015, the United States Supreme Court heard six arguments on its application, expressing an increasing degree of frustration with each decision. As Justice Scalia sarcastically remarked in 2011, "[w]e try to include an ACCA residual-clause case in about every second or third volume of the United States Reports."[41]

1. Ex-Ante *Johnson*

The Court's decisions during this period were ad hoc and scattershot. In 2007, the Court held in *James* that Florida's attempted burglary statute satisfied the ACCA residual clause.[42] In 2008, the Court held in *Begay* that New Mexico's felony "DUI statute" did not satisfy the ACCA residual clause.[43] In 2009, the Court held in *Chambers* that Illinois's "failure to report for imprisonment" statute did not satisfy the ACCA residual clause.[44] In 2011, the Court held in *Sykes* that Indiana's vehicular flight statute satisfied the ACCA residual clause.[45] Finally, in 2015, after hearing argument twice in *Johnson v. United States*, the Court threw up its hands and held that the ACCA residual clause is void for vagueness.[46] In doing so, however, the Court was careful to preserve the remaining portions of the ACCA definition of violent felony.[47] But the impact of *Johnson*'s holding cannot be overstated: the Court definitively excised one of the most

41. Sykes v. United States, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting).

42. James v. United States, 550 U.S. 192, 195 (2007).

43. Begay v. United States, 553 U.S. 137, 148 (2008).

44. Chambers v. United States, 555 U.S. 122, 125, 130 (2009).

45. *Sykes*, 564 U.S. at 27–28.

46. Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

47. *Id.* at 2563. ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.").

commonly applied prior-conviction-enhancement provisions and laid the groundwork for challenging the constitutionality of other remaining residual clauses, both in the United States Code and the Guidelines. *Johnson*'s reasoning is, however, more subtle and complex than its holding suggests, and requires close examination to evaluate its application across the federal criminal landscape.

2. *Johnson v. United States*

It would be a mistake to ascribe *Johnson*'s holding—that the ACCA's residual clause is void for vagueness—to Congress's poor choice of words that presented uncertainties in application.[48] To be certain, courts apply vague—in the non-technical sense—provisions all the time: our own Constitution, for example, is full of them.[49] Moreover, courts impose a strong presumption against facial unconstitutionality when construing statutes.[50] In truth, the holding of *Johnson* would not have been reached had it not been for the analytical framework, known as the "categorical approach," through which courts interpret the ACCA and other similar statutes. In this regard, the real story of *Johnson* begins twenty-five years earlier with *Taylor v. United States*, a case in which the Supreme Court was struggling to interpret not the ACCA residual clause but its enumerated offense of "burglary."[51]

48. *See* Beckles v. United States, 137 S. Ct. 886, 897 (2017) (Kennedy, J., concurring) ("[That something is] vague in a general sense—that is to say, imprecise or unclear . . . does not necessarily mean that it is vague within the well-established legal meaning of that term.").

49. Reasonable minds differ, for example, on the precise breadth of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Compare* Glossip v. Gross, 135 S. Ct. 2726, 2746–50 (2015) (Scalia, J., concurring), *with id.* at 2755–77 (Breyer, J., dissenting).

50. *See* United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953) ("This Court does and should accord a strong presumption of constitutionality to Acts of Congress.").

51. Taylor v. United States, 495 U.S. 575 (1990).

a. Taylor's Categorical Approach

When Arthur Lejuane Taylor pleaded guilty to being a convicted felon in possession of a firearm in January of 1988, he had four prior convictions, all under Missouri law: (1) robbery; (2) assault; and (3–4) two convictions for second-degree burglary.[52] When prosecutors sought to enhance Taylor's sentencing exposure to a fifteen year mandatory minimum under the ACCA, Taylor conceded that his robbery and assault convictions qualified as violent felonies under the ACCA residual clause but disputed whether his two burglary convictions qualified under any clause.[53] The district court overruled Taylor's objections and sentenced him to fifteen years imprisonment.[54] The Eighth Circuit affirmed, joining two other circuits in holding that burglary in the ACCA enumerated offenses meant burglary "however a state chooses to define it."[55] Others circuits, however, were taking a different approach: some treated burglary as common law burglary,[56] while others continued to apply the ACCA's absent definition of burglary[57] that Congress inexplicably removed in 1986.[58]

The Court ultimately settled on a meaning for burglary closest to the ACCA's 1984 definition, which the Court called "generic" burglary, meaning burglary in its contemporary

52. *Id.* at 578.

53. *Id.* at 579.

54. *Id.*

55. *Id.* at 579–80, 580 n.2. *See, e.g.*, United States v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989), *vacated*, 495 U.S. 575 (1990); United States v. Leonard, 868 F.2d 1393, 1399 (5th Cir. 1989); United States v. Portwood, 857 F.2d 1221, 1223–24 (8th Cir. 1988).

56. *E.g.*, United States v. Chatman, 869 F.2d 525, 527 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753, 757–58 (4th Cir. 1988).

57. *E.g.*, United States v. Taylor, 882 F.2d 1018, 1023 (6th Cir. 1989); United States v. Dombrowski, 877 F.2d 520, 530 (7th Cir. 1989); United States v. Palmer, 871 F.2d 1202, 1205–09 (3d Cir. 1989); United States v. Hill, 863 F.2d 1575, 1581–83 (11th Cir. 1989).

58. *Taylor*, 495 U.S. at 582 ("The legislative history is silent as to Congress' reason for deleting the definition of burglary.").

sense.[59] For absolute clarity, the Court expressly defined generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[60] This formulation, henceforth, is what the ACCA and other prior-conviction-enhancement provisions mean by burglary.[61] Now that the Court had solved the problem of defining burglary, it faced a new quandary: how to evaluate whether a prior conviction meets or satisfies that definition. The Court addressed this problem by creating the formal categorical approach.[62]

The formal categorical approach, in its most straightforward application, holds that if the elements of a statute of prior conviction are the same as the elements of the generic offense—in *Taylor*, generic burglary—then the prior conviction counts toward the enhancement.[63] In more concrete terms, if a defendant is charged with a firearms offense and has a prior conviction for burglary, the court must examine the elements of the particular burglary statute for which the defendant was previously convicted, at the time of his conviction.[64] If that statute has, as its basic elements, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime," then the prior conviction matches generic burglary and would therefore qualify as a violent felony toward the ACCA enhancement. If two more prior convictions qualify as either a violent felony or serious drug offense, then the defendant would be enhanced under the

59. *Id.* at 598 ("Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States.").

60. *Id.*

61. The Supreme Court most recently applied the *Taylor* definition of generic burglary in *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

62. *Taylor*, 495 U.S. at 599–602.

63. Descamps v. United States, 570 U.S. 254, 261 (2013).

64. McNeill v. United States, 563 U.S. 816, 820 (2011) ("The only way to answer [the ACCA's] backward-looking question is to consult the law that applied at the time of that conviction.").

ACCA to a fifteen year mandatory minimum sentence.[65] This would be true even if the state did not call the crime burglary.[66]

Moreover, if the statute of prior conviction is narrower than the generic offense—meaning it criminalizes less conduct than its generic counterpart—then the conviction likewise counts toward the enhancement.[67] But if the statute of prior conviction is broader—meaning it criminalizes a broader swath of conduct, in any way—then the statute can *never* support an enhancement.[68] As Justice Kagan so evocatively explained in *Descamps v. United States*, "Congress . . . meant [the] ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none."[69] That is because, under the categorical approach, courts are only to consider the *elements* of the offense of prior conviction, never the *actual conduct* of the offender that led to the conviction.[70]

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65. 18 U.S.C. § 924(e)(1) (2018).

66. *Taylor*, 495 U.S. at 599–602 ("[T]here may be offenses under some States' laws that, while not called 'burglary,' correspond in substantial part to generic burglary.").

67. *Id.* at 599. *See also Descamps*, 570 U.S. at 257 ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.").

68. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). *See also Descamps*, 570 U.S. at 268 ("Congress . . . meant [the] ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.").

69. 570 U.S. at 268.

70. *Mathis*, 136 S. Ct. at 2248. The Court explained:

> Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a whit about them.

Id. (alterations and in original) (citations omitted).

b. The Problem of Imagining the Ordinary Case

While *Taylor* created the categorical approach to deal directly with the ACCA enumerated offenses, the approach applies equally to all clauses within the ACCA's definition of violent felony,[71] including the prohibition on peeking into an offender's actual prior conduct.[72] Accordingly, if a defendant has a prior conviction for, say, driving while intoxicated, courts cannot examine the specific nature of the conduct surrounding that conviction when deciding whether it satisfies the residual clause.[73] Instead, before *Johnson*, courts were left with the difficult task of examining the elements of the statute of prior conviction and then *estimating the degree of risk* involved in that crime's *imagined "ordinary case."*[74] It is this process of imagination—a direct result of the categorical approach—that proved ultimately unworkable. In *Johnson*, the defendant's prior conviction in question was for possession of a short-barreled shotgun.[75] Justice Scalia, writing for the majority, highlighted the difficulties of imagination:

> The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful

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71. *See* Johnson v. United States, 135 S. Ct. 2551, 2562 (2015) ("*Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes.").

72. *See id.* ("[*Taylor*'s] emphasis on convictions indicates that 'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'") (quoting *Taylor*, 495 U.S. at 600).

73. *E.g.*, Begay v. United States, 553 U.S. 137, 141 (2008) (applying the categorical approach to look only at the elements of the prior offense when evaluating whether driving while intoxicated satisfies the ACCA residual clause).

74. *Johnson*, 135 S. Ct. at 2557. The Court worried:

> [T]he residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?

Id.

75. *Id.* at 2556.

> possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.[76]

Of all the talk of legal imagination, one fact required no imagination: without the ability to examine specific conduct, not only the United States Supreme Court but also lower courts were hopelessly divided on how to classify common crimes through the ACCA residual clause.[77] Even worse, courts below could not even agree on "the nature of the inquiry" and "the kinds of factors one is supposed to consider."[78] Circuit splits abounded and consistency among the district courts was likely even more lacking.[79] In the eyes of the majority, if any semblance of uniformity were to be reinstated, there was but one choice: the ACCA residual clause had to go.[80] Thus, on June 26, 2015, the Court held in *Johnson* that the ACCA residual clause violates the Constitution's guarantee of due process, specifically its

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76. *Id.* at 2559.

77. *Id.* at 2559–60.

78. *Id.* at 2560.

79. *See id.* at 2559–60 ("This Court is not the only one that has had trouble making sense of the residual clause. The clause has 'created numerous splits among the lower federal courts,' where it has proved 'nearly impossible to apply consistently.'") (quoting Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring)).

80. *See id.* at 2562–63. The Court reasoned:

> Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

Id. at 2563 (citation omitted).

prohibition of vague criminal laws.[81] Almost exactly one year later, in *Welch v. United States*, the Court held that *Johnson* was retroactive in cases on collateral review.[82]

C. *How the ACCA Residual Clause Lives on by a Different Name*

The holdings of *Johnson* and *Welch* opened the door for relief to an enormous number of inmates sentenced under the ACCA, many of whom had already served more time than their current convictions allowed by law.[83] This returns us to the Introduction's real-world scenario: how did Rash enjoy the benefit of *Johnson* and *Welch* while Everett was left to serve his full, enhanced sentence when both of their sentencing enhancements were triggered by the same prior conviction (vehicular flight) under an identically worded residual clause? The answer to this question has to do with the Supreme Court's view of the nature of the Guidelines and the role they play in federal sentencing. But first, the Guidelines provision at issue: the career-offender definition of "crime of violence."[84]

1. The Career Offender Guideline

The Sentencing Commission created the career offender enhancement at Congress's direction. As part of the

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81. *Id.* at 2560, 2563 ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.").

82. Welch v. United States, 136 S. Ct. 1257, 1268 (2016) ("*Johnson*, however, struck down part of a criminal statute that regulates conduct and prescribes punishment. It thereby altered 'the range of conduct or the class of persons that the law punishes.' It follows that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review.") (citation omitted).

83. The instant offense that triggers the ACCA, 18 U.S.C. § 922(g) (2018), has a statutory maximum of ten years imprisonment if the ACCA does not apply. *Id.* § 924(a)(2). Because the ACCA carries a fifteen-year mandatory minimum, all improperly enhanced offenders would necessarily be serving an "illegal sentence." *See* United States v. Titties, 852 F.3d 1257, 1275 (10th Cir. 2017).

84. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2015).

Sentencing Reform Act of 1984, Congress enacted 28 U.S.C. § 994(h), which directed the newly formed Sentencing Commission to create a Guidelines provision that punishes certain repeat offenders "to a term of imprisonment at or near the maximum term authorized."[85] The Sentencing Commission thus drafted Guidelines Section 4B1.1, the career offender Guideline, and Section 4B1.2, its definitions provision.[86]

In its original incarnation, effective 1987, the career offender Guideline did not have its own, independent definition of crime of violence but simply cross-referenced the statutory definition found in 18 U.S.C. § 16.[87] It likewise did not provide a formal definition of "controlled substance offense" but rather listed several statutes that satisfied the term along with other "similar offenses."[88] A major change came in 1989 when the Sentencing Commission adopted the Armed Career Criminal Act's definition of violent felony, including its residual clause, as the career offender definition of crime of violence.[89] Meanwhile, the Sentencing Commission used the Guidelines commentary to identify specific generic offenses that did or did not qualify as a crime of violence.[90] This was the form of the career offender

85. 28 U.S.C. § 994(h) (2018).

86. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1–.2 (U.S. SENTENCING COMM'N 1987).

87. *Id.* § 4B1.2(1) ("The term 'crime of violence' as used in this provision is defined under 18 U.S.C. § 16.").

88. *Id.* § 4B1.2(2) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.").

89. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 268 (U.S. SENTENCING COMM'N 1989) ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).").

90. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015) ("'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling."); *see also id.* ("'Crime of violence' does not include the offense of unlawful possession of a firearm by a

Guideline when the Supreme Court decided *Johnson*.[91]

2. Beckles v. United States

Although Rash was sentenced as an armed career criminal, enhanced under the United States Code, and Everett was sentenced as a career offender, enhanced under the Guidelines,[92] these differences would not have seemed significant at the time of *Johnson* because the career offender residual clause was textually identical to the ACCA residual clause: "or otherwise involves conduct that presents a serious potential risk of physical injury to another."[93] In fact, the Sentencing Commission expressly modeled the career offender Guideline after the ACCA.[94] As such, both the Government and criminal defendants agreed, at the time, that the ACCA and career offender residual clauses shared the same fate under *Johnson*.[95]

Johnson's effect on the career offender Guideline was anticipated to benefit a larger number of offenders because, although it defined its terms almost identically to the ACCA, the career offender Guideline has a broader application than the ACCA: the career offender enhancement requires only two qualifying predicate offenses and the triggering instant

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felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a).").

91. A subsequent major change to Section 4B1.2 came in 2016 when the Sentencing Commission removed the Section 4B1.2(a)(2) residual clause in light of *Johnson* and, at the same time, elevated a lengthy enumerated list of qualifying generic offenses from the commentary to the actual text of the Guideline. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, Supp., amend. 798 (U.S. SENTENCING COMM'N 2016).

92. *See supra* Introduction.

93. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U. S. SENTENCING COMM'N 2011), *with* 18 U.S.C. § 924(e)(2)(b) (2012).

94. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 268 (U.S. SENTENCING COMM'N 1989) ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).").

95. *See* Brief for the United States at 38–40, Beckles v. United States, 137 S. Ct. 886 (2017) (No. 15-8544) ("In light of those basic purposes of the vagueness doctrine, a district court's use of a vague guideline to calculate an advisory Guidelines range violates the Due Process Clause.").

offense can be any crime of violence or controlled substance offense rather than the narrower range of offenses under 18 U.S.C. § 922(g).[96] Moreover, depending on how events unfolded, even more offenders were potentially affected because a slew of other Guidelines provisions cross-referenced the career-offender definition of crime of violence, including its residual clause.[97] Because the Government and Beckles both agreed that Section 4B1.2's residual clause did not survive *Johnson*, the Court appointed an *amicus curiae* to argue for keeping the Guidelines provision intact.[98]

The general issue in *Beckles* was *Johnson*'s application to the career offender residual clause.[99] The specific, constitutional issue was whether the Guidelines, by their advisory nature, are ever subject to a vagueness challenge under the Due Process Clause.[100] Justice Thomas, writing for the majority, began by explaining that, under precedent, two types of laws are vulnerable to a constitutional vagueness challenge: (1) laws that *define* criminal offenses; and (2) laws that *fix the permissible sentences* for defendants.[101] In

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96. The Guideline states:

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

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2018).

97. Specifically, Guidelines Section 2K1.3 (offenses involving explosive materials), Section 2K2.1 (offenses involving firearms), Section 2S1.1 (money laundering), Section 4A1.1(e) (computation of criminal history category), Section 4B1.1 (career offender enhancement), and Section 4B1.4 (armed career criminal enhancement) all increase a defendant's base offense level if a prior conviction satisfies one or more of the Section 4B1.2 definitions. *Id.* §§ 2K1.3, 2K2.1, 2S1.1, 4A1.1(e), 4B1.1, 4B1.4.

98. *Beckles*, 137 S. Ct at 892.

99. *Id.* at 890–92.

100. *Id.*

101. *Id.* at 892.

Beckles, the Court explained that in *Johnson*, it struck the ACCA residual clause as the second type because it did not "specify the range of available sentences with sufficient clarity," increasing a defendant's term of imprisonment from a ten year maximum to a fifteen year minimum based on unascertainable language.[102] But as Justice Thomas explained, the Guidelines do not *fix* sentences; instead, after *Booker*, they merely "guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range."[103] Therefore, because the Guidelines cannot be challenged as vague under the Due Process Clause, the Court held that the career-offender residual clause cannot be void for vagueness.[104]

In light of *Johnson*, Rash was released from federal custody on September 9, 2016.[105] In light of *Beckles*, Everett is not set for release until September 25, 2020.[106] Although this seems patently unfair, fairness is rarely, if ever, a dispositive inquiry in federal sentencing law. The problem actually lurks much deeper, in the undercurrent of *Beckles*'s historical assumptions and its mischaracterization of the current role that the Guidelines play in federal sentencing practice. Part III will explore this terrain.

III. THE MINISTRY OF TRUTH: *BECKLES*, *BOOKER*, BAD HISTORY, AND MISCHARACTERIZING THE ROLE THAT THE SENTENCING GUIDELINES PLAY IN THE FEDERAL SENTENCING SCHEME

The holding of *Beckles* closed the door for relief to defendants whose base offense level was increased through

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102. *Id.*

103. *Id.*

104. *Id.*

105. Bureau of Prisons Inmate Locator, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmateloc (use the "Find by Name" tab; then input "Oscar" in the first name field and "Rash" in the last name field; then select "Search").

106. *Id.* (use the "Find by Name" tab; then input "Laneer" in the first name field and "Everett" in the last name field; then select "Search").

the residual clause of the career-offender Guideline. The sentences of career offenders remained while many armed career criminals were seeing their sentences vacated, even with the same criminal history. All the while, the Supreme Court made assurances that the disparate treatment of these categories of offenders was on sound constitutional footing. The Court, however, reached this conclusion based on two mischaracterizations: a historical mischaracterization of the impact of *United States v. Booker* on the federal sentencing scheme; and a present mischaracterization of the role of the Guidelines in federal sentencing today. This confluence of mischaracterizations formed a false narrative that the Guidelines offer "mere guidance" in our system, thus inoculating them from vagueness concerns and preserving the sentences of career offenders in light of *Johnson*.[107]

The reasoning of *Beckles* is rooted not in the text of the Guidelines' residual clause but in the Supreme Court's understanding of the impact of *Booker* on federal sentencing. *Beckles* depends upon one fundamental premise: that *Booker*'s twin holdings, in large part, returned the federal criminal sentencing scheme to one of indeterminate sentencing, as it was prior to the imposition of the Guidelines.[108] In doing so, the Court grossly understated the role that the advisory Guidelines continue to play in federal sentencing after *Booker*. Certain aspects of the role of

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107. *See Beckles*, 137 S. Ct. at 892. In *Beckles*, the Court promulgated:

> Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness.

Id. (emphasis added).

108. *See id.* at 893–94 ("The Guidelines were initially binding on district courts, but this Court in *Booker* rendered them 'effectively advisory.' . . . The Guidelines thus continue to guide district courts in exercising their discretion by serving as 'the framework for sentencing,' but they 'do not constrain that discretion.'") (alteration and citations omitted).

advisory Guidelines in federal sentencing were perhaps unforeseeable to the Court in *Booker*, but were certainly known by the time the Court decided *Beckles*. In short, the holding of *Beckles* is as good as its history, and *Beckles*'s evolved historical understanding of *Booker*'s impact and the current role of the Guidelines in federal sentencing led the Court down a misguided path with ongoing consequences.

A. *Contextualizing* United States v. Booker*: A Short History of Judicial Discretion in Federal Sentencing*

Because the federal court system covers such a wide range of territory, with diverse regional views of justice, it has been plagued, since inception, with the problem of sentencing disparity. Liberal and conservative critics alike have historically called for more sentencing uniformity—even if for different reasons.[109] As a result, the federal sentencing scheme has undergone a series of changes over time with an eye toward reducing disparity by limiting a district court's ability to decide how much time a defendant will actually serve in prison. These efforts have benefitted offenders, on the one hand, by vesting decision-making power with bodies other than Congress and the judiciary that can mitigate overly long sentences of imprisonment. They have been a detriment to offenders, on the other hand, when Congress has protected against overly lenient sentences by imposing mandatory minimum sentences, reducing good-time credit, and eliminating parole. Either way, whether fair or not, judicial discretion has been squarely blamed for sentencing disparity and has, in some form or another, been the target of these changes. These developments are important to consider because courts' understandings of the nature, history, and extent of judicial sentencing discretion have, in recent years, played a critical role in how those courts have evaluated the impact of a successful statutory

109. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–28 (1993).

void-for-vagueness challenge.

1. Sentencing Before the Guidelines (origin–1987)

a. A System of Indeterminate Sentencing

At the outset of our federal criminal system, the only two players in the sentencing game were Congress and the federal district courts. Congress would set the statutory sentencing range for each federal crime (a statutory maximum and sometimes a mandatory minimum), which was often very wide, and district courts were free to impose a sentence anywhere within that range.[110] This "system of indeterminate sentencing" included decisions regarding the length of incarceration and whether probation should substitute for a sentence of imprisonment or a fine.[111] And because sentencing decisions, at the time, enjoyed little or no appellate review,[112] this wide discretion brought equally wide sentencing disparity.[113]

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110. Mistretta v. United States, 488 U.S. 361, 363–64 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion . . . .").

111. *Id.* at 363.

112. *See* Freeman v. United States, 243 F. 353, 357 (9th Cir. 1917) ("[T]he question of the nature of the sentence was one which rested in the discretion of the court below, a discretion which will not be reviewed in this court in any case where the punishment assessed is within the statutory limits.").

113. In January 1960, *The Atlantic* published an article by United States District Court Judge Irving R. Kaufman in which the Judge illustrated the problem:

> [T]he average sentence for auto theft in the federal courts of eastern Oklahoma was thirty-six months, while in New Hampshire the average commitment for the same crime was less than a year. . . . [And], the average prison sentence meted out in the federal courts ranged from 9 months in Vermont to 58 months in southern Iowa. . . . [T]he disparity in different sentences for the same offense seems unfair.

Irving R. Kaufman, *Sentencing: The Judge's Problem*, ATLANTIC MONTHLY, Jan. 1960, at 40.

b. "Good Conduct Time"

The first significant effort to mitigate the harsh effects of wide judicial sentencing discretion came on March 3, 1875, when Congress passed legislation providing inmates with a credited reduction to their sentences for time with "no charge of misconduct" or "good conduct time."[114] The original version of this good-time statute gave inmates a five day reduction in their overall sentence for each month they did not receive a charge of misconduct.[115] These rules were changed from time to time, for most of their history, to increase an offender's good-time credit. For example, on June 25, 1948, Congress refined the good conduct time computation rules, crediting inmates with up to ten days per month on sentences of ten years or more.[116] For much of its history, up until 1984,[117] good conduct time remained at this level.[118]

c. The Federal Parole System

Congress's next significant step came on June 25, 1910,

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114. Act of March 3, 1875, ch. 145, 18 Stat. 479.

115. *Id.*

116. Act of June 25, 1948, Pub. L. No. 80-772, § 4161, 62 Stat. 683, 853. Specifically, an inmate would receive credit for: (1) five days per month on a sentence of six months to one year imprisonment; (2) six days per month on a sentence of more than one year and less than three years imprisonment; (3) seven days per month on a sentence of at least three years and less than five years imprisonment; (4) eight days per month on a sentence at least five years and less than ten years imprisonment; and (5) ten days per month on a sentence ten years imprisonment or more. *Id.* These credits, of course, assumed that the inmate had "faithfully observed all the rules and ha[d] not been subjected to punishment" that month. *Id.*

117. In the time after the Sentencing Reform Act of 1984, described more fully below, Congress has dramatically reduced the amount of good time available—to 54 days per year—while simultaneously making the credit more difficult to earn, requiring a full year of "exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b)(1) (2018). Any violation will generally result in no good conduct credit awarded for the year. *Id.* ("[I]f the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate.").

118. *See* Stith & Koh, *supra* note 109, at 226 n.10.

when it enacted legislation implementing a system of parole for federal prisoners.[119] This new system provided an opportunity for release, under the "guidance and control" of a corrections official,[120] to federal inmates who were sentenced to more than a year imprisonment and had served at least one-third of their total sentence.[121] Congress entrusted the decision of whether to release an inmate on parole to each prison's new parole board, which would review eligible inmates' behavior while incarcerated and evaluate whether there was a reasonable probability that the inmate "will live and remain at liberty without violating the laws."[122] This new system curbed a district court's ability to control the actual length of a defendant's time in prison, which could, at that time, be reduced by up to two-thirds. Congress then created a centralized United States Board of Parole (later the Parole Commission) in 1930, which provided oversight of the individual federal prison boards.[123] Still, disparities in the actual length of incarceration remained common.[124]

d. The United States Parole Commission

In 1976, Congress passed the Parole Commission and Reorganization Act, which sought to systemize how federal parole boards evaluated inmates.[125] This Act created a nine-member United States Parole Commission (Parole Commission), within the Department of Justice, tasked with crafting guidelines to govern whether an inmate's

119. Act of June 25, 1910, Pub. L. No. 61-269, 36 Stat. 819.

120. *See* Zerbst v. Kidwell, 304 U.S. 359, 363 (1938).

121. Act of June 25, 1910 § 1.

122. *Id.* §§ 2–3.

123. Act of May 13, 1930, Pub. L. No. 71-202, 46 Stat. 272. *See also* U.S.A. *ex rel.* Forman v. McCall, 776 F.2d 1156, 1167 (3d Cir. 1985) ("In 1930, Congress created the United States Board of Parole.").

124. Mistretta v. United States, 488 U.S. 361, 364–66 (1989).

125. Parole Commission and Reorganization Act, Pub. L. No. 94-233, sec. 2, §§ 4201–4218, 90 Stat. 219, 219–231(1976).

application for parole should be granted or denied.[126] The stated goal was threefold: (1) to establish a national paroling policy; (2) to increase consistency; and (3) to create a fairer decision-making process while still allowing for case-by-case consideration.[127] In short, Congress sought to decrease regional disparity in the actual amount of time similarly situated inmates served in federal prison.

The parole guidelines evaluated inmates based on their offense of conviction as well as their past criminal conduct, which were then reduced to numerical values.[128] These two values formed the x- and y-axes of a grid, which ultimately recommended a range of imprisonment in months.[129] These parole guidelines are the clear predecessor to the Guidelines that have come to drive so many sentencing decisions thereafter.[130] The parole guidelines also demonstrated a desire for uniformity and fairness: uniformity by way of systematic guidance; fairness by way of an executive-branch agency that could mitigate harsh exercises of judicial discretion. Just as with good conduct time, Congress drastically changed course in 1984.

e. The Sentencing Reform Act of 1984

The Sentencing Reform Act,[131] part of the larger

126. *Id.* sec. 2, §§ 4202–03. It is speculated the Parole Commission was using informal "pilot" guidelines as early as 1972. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1171 n.27 (2017).

127. 28 C.F.R. § 2.20(a) (1986).

128. *See id.* § 2.20(b)–(e).

129. *See id.* § 2.20(j); Newton & Sidhu, *supra* note 126, at 172.

130. Although more simplistic, the parole guidelines bore the same structure as the future sentencing guidelines and were even drafted by Peter Hoffman, a future staffer for the Sentencing Commission. Newton & Sidhu, *supra* note 126, at 1171–73.

131. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.) (the Act was held in abeyance during the drafting of the Guidelines and therefore did not become applicable until 1987).

Comprehensive Crime Control Act of 1984,[132] was the first of two watershed events in the history of modern federal sentencing law, and arguably remains the most significant.[133] With one stroke of the President's pen, the Act abolished the federal parole system, dramatically reduced the availability of good conduct time, and created the Sentencing Commission, an independent agency within the judicial branch.[134] This new Sentencing Commission was tasked with promulgating mandatory guidelines for sentencing, which would bind judicial sentencing discretion. The intricacies of the legislative history and the political context in which the Act arose are complex and fascinating, but beyond the scope of this article.[135] Needless to say, it was a coup for critics from the right who viewed judicial discretion and the Parole Commission as unwanted instruments of leniency.[136] The effect of the Act, however, is central: the Act forced a federal district court's judicial discretion to its historical nadir.[137] It also began a prolonged battle between the Government and federal defendants over various aspects of the relationship between the Guidelines, the United States Code, and a district court's discretion—a battle which continues today.

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132. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

133. The other event is the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which is described below.

134. *See* Newton & Sidhu, *supra* note 126, at 1175–76.

135. For a thorough and impressive discussion of these matters, see Stith & Koh, *supra* note 109.

136. *See id.* at 223–24 (describing how the Act was initially conceived by liberal reformers but later morphed into conservative law-and-order legislation).

137. *See id.* at 270 (describing the Sentencing Reform Act's "extraordinary transfer" of discretion from the district court to the Sentencing Commission).

2. Sentencing under the Mandatory Guidelines (1987–2005)

a. The United States Sentencing Guidelines Manual

The first United States Sentencing Guidelines Manual (Guidelines Manual) went into effect on November 1, 1987. The new Guidelines, coupled with Congress's decision to make them mandatory,[138] marked the end of the system of indeterminate sentencing.[139] It was the product of approximately three years of study, meetings, and review by the newly formed Sentencing Commission. In many ways, the Guidelines were a refinement, albeit a good one, of the prior parole guidelines put into place in 1976. More importantly, the decisions were now being made by the Sentencing Commission, not a parole board. Still, even though discretion over how long a defendant would actually spend in prison was now back within the judicial branch of government, it was not given directly to the district courts. This is because, at their inception, the Guidelines were predominately binding upon courts.[140]

b. Judicial Discretion under the Guidelines

Judicial sentencing discretion under the mandatory Guidelines was limited. By statute, Congress instructed district courts to impose a sentence within the applicable Guidelines range "unless there exists an aggravating or mitigating circumstance" that the Sentencing Commission did not adequately consider when formulating the Guidelines.[141] Appellate review of sentencing was likewise limited, primarily serving the oversight function of ensuring

138. 18 U.S.C. § 3553 (1988).

139. *See* Joanna Shepherd, Blakely's *Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 Hastings L.J. 533, 539 (2007) ("Sentencing guidelines, a form of 'determinate sentencing,' emerged as a cure for these perceived failures of indeterminate sentencing.").

140. *See* 18 U.S.C. § 3553 (*abrogated by* United States v. Booker, 543 U.S. 220 (2005)).

141. *Id.* § 3553(b).

that the sentencing court properly calculated the Guidelines sentencing range.[142] But well before the Supreme Court struck the mandatory Guidelines in *Booker*, confidence in the constitutionality of the Guidelines, especially as it related to judicial discretion, was eroding. This is because the very process of calculating the Guidelines sentencing range required a district court to engage in judicial factfinding by a lower standard than beyond a reasonable doubt.[143]

3. Changing Winds: Growing Skepticism over the Role of Judicial Factfinding in Sentencing (2000–2005)

The second watershed moment in modern federal sentencing law was *United States v. Booker*, in which the Supreme Court rendered the Guidelines advisory only.[144] To understand *Booker*, however, one must understand a few preceding developments. The story of *Booker* actually begins five years earlier with *Apprendi v. New Jersey*.[145]

a. Apprendi v. New Jersey

In *Apprendi*, a defendant had pleaded guilty to two counts of "possession of a firearm for an unlawful purpose," which were each punishable in New Jersey by up to ten years imprisonment.[146] After the defendant pleaded, but before he was sentenced, the sentencing judge held a hearing inquiring into the defendant's motivation for his crime.[147] Based on the court's judicial factfinding, by a preponderance of the

142. *See* 18 U.S.C. § 3742(e) (1988) (*abrogated by* United States v. Booker, 543 U.S. 220 (2005)); Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1116 (2008).

143. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (U.S. SENTENCING COMM'N 2000) ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

144. *Booker*, 543 U.S. at 245–46.

145. *See generally* Apprendi v. New Jersey, 530 U.S. 466 (2000).

146. *Id.* at 469–70.

147. *Id.* at 470.

evidence, that the defendant was motivated by "racial bias," the court increased the defendant's sentencing exposure to twenty years per count.[148] After the court sentenced the defendant to twelve years imprisonment on one of the counts, the defendant appealed, under the Due Process Clause, the court's method of increasing his statutory maximum.[149]

The Supreme Court reversed, holding that any fact that increases a crime's statutory maximum, other than the fact of a prior conviction,[150] must be found by a jury beyond a reasonable doubt.[151] The Court rooted its holding in the Fifth and Fourteenth Amendment's guarantees of due process, in conjunction with the Sixth Amendment's right to trial by jury.[152] In doing so, the Court's holding was a marriage of earlier decisions in which it had held that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"[153] and that the right to a jury trial entitles a defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[154]

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148. *Id.* at 470–71.

149. *Id.* at 471.

150. The "prior conviction" exception refers to the Court's perennially controversial holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

151. *Apprendi*, 530 U.S. at 490.

152. *Id.* at 499–500. Relying on precedent, the Court explained:

> We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 476 (citation omitted).

153. *In re* Winship, 397 U.S. 358, 364 (1970).

154. United States v. Gaudin, 515 U.S. 506, 510 (1995).

b. Ring v. Arizona

Two years later, in *Ring v. Arizona*, the Supreme Court decided another state case in which a defendant's sentencing exposure was increased by post-conviction judicial factfinding.[155] In *Ring*, a defendant was convicted of felony murder in Arizona state court.[156] Under Arizona law, a felony murder conviction could only qualify for the death penalty if one or more aggravating factors accompanied the crime.[157] After the defendant's conviction, but before his sentencing, the trial court held an evidentiary hearing and made a finding of two aggravating factors.[158] As a result, the court entered a "special verdict" of death.[159] The defendant challenged his death sentence on Sixth Amendment grounds, arguing that aggravating factors, that increase sentencing exposure, must be found by a jury beyond a reasonable doubt.[160]

Although the Supreme Court had already approved of Arizona's death penalty sentencing scheme a decade earlier in *Walton v. Arizona*,[161] its approach to the Sixth Amendment had changed. The rule was now simpler: other than the fact of a prior conviction, if a factual finding increases sentencing exposure, it must be found by a jury

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155. Ring v. Arizona, 536 U.S. 584, 588–89 (2002).

156. *Id.* at 591.

157. *Id.* at 592.

158. *Id.* at 594–95.

159. *Id.* at 594.

160. *Id.* at 597.

161. Walton v. Arizona, 497 U.S. 639 (1990). There the Court said:

> If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances. We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

Id. at 649.

beyond a reasonable doubt. And Arizona's "aggravating circumstances" finding violated *Apprendi*'s rule.[162] As a result, the Supreme Court vacated the defendant's sentence and abrogated its prior holding in *Walton*.[163]

c. Blakely v. Washington

Two years after *Ring*, the Supreme Court once again took up the issue of a state district court's discretion to increase a sentence based on judicial factfinding.[164] This time, however, the district court's factfinding did not result in a sentence above the state legislature's maximum punishment for the crime; instead, the factfinding merely caused the court to sentence above the state's guideline range.[165] The result of *Blakely*, which considered the interplay between the legislature's statutory range and a guidelines-based sentencing system, would foreshadow how the Court would approach the Guidelines soon thereafter.

In *Blakely*, a defendant pleaded guilty to "second-degree kidnapping involving domestic violence and use of a firearm,"[166] which was punishable by up to ten years imprisonment.[167] As part of his plea agreement, the defendant admitted to the elements of the offense but no other relevant facts.[168] Under a system of indeterminate sentencing, the state district judge would have had discretion to sentence the defendant to any term of

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162. *Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.")

163. *Id.* at 603 ("[W]e are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.").

164. *See generally* Blakely v. Washington, 542 U.S. 296 (2004).

165. *Id.* at 298–99.

166. *Id.*

167. *Id.* at 299.

168. *Id.*

imprisonment up to, and including, ten years. Washington state, however, had put into place a guidelines system that limited judicial sentencing discretion to a "standard range" unless the court found "substantial and compelling reasons justifying an exceptional sentence."[169] Under Washington's guidelines, the standard range for the defendant's offense was a sentence of forty-nine to fifty-three months imprisonment.[170] After the defendant's plea, but before sentencing, the district court held a three day evidentiary hearing to gather facts about the defendant's crime.[171] Afterward, the court issued thirty-two findings of fact, including a determination of "deliberate cruelty."[172] Based on this determination, the court sentenced the defendant to ninety months imprisonment.[173]

Justice Scalia, writing for a narrow majority, expanded upon the rule of *Apprendi* by casting a wider definition of "statutory maximum." Now, a crime's statutory maximum was not just the hard ceiling set by the legislature, but could be case fact- and case-specific: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[174] And when the district court engaged in factfinding that increased the defendant's sentence above the standard range, it violated *Apprendi*.[175] Accordingly, the Court reversed and remanded for resentencing.[176] In her dissent, Justice O'Connor recognized *Blakely*'s threat to the Guidelines.[177] But just a

169. WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000).

170. *Blakely*, 542 U.S. at 300.

171. *Id.* at 300–01.

172. *Id.* at 298, 300–01.

173. *Id.* at 298–99.

174. *Id.* at 303.

175. *See id.* at 304–05.

176. *Id.* at 314.

177. *Id.* at 303. Justice O'Connor noted:

year later, the momentum of *Apprendi* would prove too much to resist.

d. United States v. Booker*'s Constitutional Holding*

In 2005, the Supreme Court decided *United States v. Booker*, which considered the cases of two defendants, Freddie Booker and Ducan Fanfan, whose sentencing ranges under the Guidelines were increased as a result of judicial factfinding.[178]

Booker was charged with possession of fifty grams or more of crack cocaine, which had a statutory sentencing range of ten years to life imprisonment.[179] The jury convicted Booker after considering evidence that he possessed ninety-two and one-half grams of crack in his duffel bag.[180] Combined with Booker's criminal history, this produced a Guideline sentencing range of 210 to 262 months imprisonment.[181] At his sentencing hearing, however, the district court concluded, by a preponderance of the evidence, that Booker possessed an additional 566 grams of crack and that he had obstructed justice.[182] These findings resulted in a new sentencing range of 360 months to life imprisonment.[183] The district court sentenced Booker, under the enhanced range, to 360 months imprisonment.[184]

> The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments.

Id. (citations omitted).

178. United States v. Booker, 543 U.S. 220, 226–30 (2005).

179. *Id.* at 227.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

Fanfan was charged with conspiracy to distribute and possession with intent to distribute 500 grams or more of cocaine,[185] which had a statutory sentencing range of five to forty years imprisonment.[186] In arriving at a conviction, the jury answered "yes" to the question, "Was the amount of cocaine 500 or more grams?"[187] Combined with Fanfan's criminal history, the jury's finding produced a Guideline sentencing range of sixty-three to seventy-eight months imprisonment.[188] At his sentencing hearing, however, the district court concluded, by a preponderance of the evidence, that Fanfan possessed two and one-half kilograms of cocaine, 261.6 grams of crack, and had been an organizer-leader of the criminal scheme.[189] These findings resulted in a new sentencing range of 188 to 235 months imprisonment.[190] The district court, however, heeded *Blakely* and declined to impose an increased sentence based on its judicial factfinding.[191]

The Court recognized that the cases before it presented two questions: (1) whether the *Apprendi* line of cases applied to the Guidelines; and (2) if so, what portions of the Guidelines remained in effect.[192] Because a different

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185. *Id.* at 228.

186. 21 U.S.C. § 841(b)(1)(B) (2012).

187. *Booker*, 543 U.S. at 228.

188. United States v. Fanfan, No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593, at *5 (D. Me. June 28, 2004).

189. *Booker*, 543 U.S. at 228.

190. *Id.*

191. *Fanfan*, 2004 U.S. Dist. LEXIS 18593, at *12–14. The District Judge stated:

> Accordingly, following *Blakely*, I conclude that it is unconstitutional for me to apply the federal guideline enhancements in the sentence of Duncan Fanfan, which is to say, an increase in the drug quantity beyond that found by the jury, or any role enhancement. To do so would unconstitutionally impinge upon Mr. Fanfan's Sixth Amendment right to a jury trial as explained by *Blakely*.

Id. at *12.

192. *Booker*, 543 U.S. at 229.

majority coalesced around the answer to each question, *Booker* actually produced two opinions: its constitutional holding, written by Justice Stevens, to answer the first question,[193] and its remedial holding,[194] written by Justice Breyer, to answer the second question.[195]

The Court answered the constitutional question in the affirmative, holding that the *Apprendi* rule, particularly as most recently articulated in *Blakely*, applied to the Guidelines.[196] The Court based its conclusion on the Guidelines' mandatory nature. According to the Court, if the Guidelines were not binding on judges, but advisory only, the Sixth Amendment implications so central to *Apprendi* would disappear.[197] As in *Blakely*, the problem was not resolved simply by the defendants' sentences being within the legislature's statutory maximum or by the judge having the authority to depart from the standard range.[198] This is because the mandatory nature of the Guidelines required the court to engage in judicial factfinding as a prerequisite to an enhanced sentencing range. Such a requirement impinged upon the jury's role of finding any fact (other than a prior conviction) that raised a sentence above the statutory range,

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193. *Id.* at 230–44.

194. *Id.* at 244–68 (2005).

195. *Id.* at 244–68.

196. *Id.* at 244. In the words of the Court:

> Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Id.

197. *Id.* at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.").

198. *See id.* at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.")

as defined in *Blakely*.[199] Therefore, the Guidelines, as they were being applied, violated defendants' Sixth Amendment rights.[200] The question then became what to do about it.

4. Sentencing Under the Advisory Guidelines (2005–present)

a. United States v. Booker*'s Remedial Holding*

In many ways, *Booker* was the inevitable consequence of *Blakely*. The dissenting judges in *Blakely* saw what was coming clear enough, which is why the dissents in *Blakely* were filled with constructive alternatives to the majority's scorched-earth approach.[201] Perhaps, the minority judges reasoned, a compromise could be reached. And the curious dual-coalition opinion in B*ooker* reflects just that sort of backroom bargaining,[202] which ultimately left the Guidelines almost fully intact. Much to the chagrin of the justices who fought to strike down the Guidelines' determinate sentencing scheme, the solution was not a bang but a whimper. The Court would simply excise two statutes that governed the application of the Guidelines: 18 U.S.C. § 3553(b)(1),[203]

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199. *See id.* at 244.

200. *See id.* at 244–45.

201. *See* Blakely v. Washington, 542 U.S. 296, 330–40 (2004) (Breyer, J., dissenting).

202. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 716–17 (2005).

203. The statute states:

> Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable

which made the Guidelines mandatory, and 18 U.S.C. § 3742(e),[204] which governed appellate review of sentencing.

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sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b)(1) (2018).

204. The statue states:

> Upon review of the record, the court of appeals shall determine whether the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and
>
> (A) the district court failed to provide the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)];
>
> (B) the sentence departs from the applicable guideline range based on a factor that—
>
> (i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or
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> (ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or
>
> (iii) is not justified by the facts of the case; or
>
> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title [18 USCS § 3553(a)] and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) [18 USCS § 3553(c)]; or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Id. § 3742(e).

Everything else remained the same, including judicial factfinding. But now judicial factfinding, even when it increased the Guidelines sentencing range, was authorized because, according to the Court, advisory Guidelines do not present Sixth Amendment concerns.[205]

b. The Three-Step Sentencing Process

After *Booker*, federal district courts follow a three-step process when sentencing a defendant. First, courts properly determine the applicable advisory sentencing range under the Guidelines.[206] Second, courts consider the applicability of any departure provisions within the Guidelines.[207] Third, courts consider the statutory sentencing factors codified in 18 U.S.C. § 3553(a),[208] which include the nature and circumstances of the offense and the history and characteristics of the defendant,[209] to impose a sentence "sufficient, but not greater than necessary" to comply with the statutory sentencing purposes.[210] As is clear on its surface, this process continues to give significant weight to the Guidelines. And over time, since *Booker*, the role of the Guidelines has continued to increase.

B. *More Than a Decade after* Booker*: The Present Role of the Guidelines in Federal Sentencing*

When the Supreme Court salvaged the Guidelines by

205. *Booker*, 543 U.S. at 233. ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.").

206. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (U.S. SENTENCING COMM'N 2016). *See also* Rita v. United States, 551 U.S. 338, 351 (2007) ("The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.").

207. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b).

208. *Id.* § 1B1.1(c).

209. 18 U.S.C. § 3553(a) (2018).

210. *Id.*

rendering them advisory, it failed to appreciate fully the role that the Guidelines would continue to play in federal sentencing. When the Supreme Court held years later, in *Beckles*, that the Guidelines are not subject to vagueness challenges, it grossly understated what was then known about the Guidelines' continued influence after *Booker*. These shortcomings led the Court to render a holding that was fundamentally dissonant with the realities of federal sentencing.

Booker did not return the federal sentencing scheme to indeterminacy, as *Beckles* at times suggests.[211] It was instead a compromise opinion[212] that left the Guidelines intact. It also allowed the Guidelines to continue to guide district court's sentencing practices just as before. As one recent commentator has observed, after *Booker* "there is good reason to believe that the Federal Sentencing Guidelines are, at best, extremely influential on sentencing and, at worst, effectively binding."[213]

According to Sentencing Commission data and analysis, federal sentencing practices changed very little as a result of *Booker*. For example, according to the Sentencing Commission's 2012 "*Booker* Report," the average sentence—for all federal offenders across all jurisdictions—from 1996 to 2003 was forty-nine months; the average sentence from 2007 to 2011 was also forty-nine months.[214] Comparing these same two periods, the percentage of federal sentences that were within-Guidelines or below-Guidelines based on a

211. *See* Beckles v. United States, 137 S. Ct. 886, 894 (2017) (explaining that the Guidelines "merely guide the district courts' discretion" but "do not constrain that discretion").

212. It is widely believed that Justice Ginsburg "defected" from the dissent in *Booker*'s remedial opinion to the majority in order to salvage the Guidelines. *See, e.g.*, Klein, *supra* note 202, at 716–17.

213. Veronica Saltzman, Note, *Redefining Violence in the Federal Sentencing Guidelines*, 55 HARV. J. ON LEGIS. 525, 532 (2018).

214. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 58 (2012).

Government-sponsored motion was 83.9% before *Booker* and 80.7% after *Booker*.[215] Since the *Booker* Report, the Sentencing Commission has reported a slight decrease in these numbers, with 78.6% of sentences from fiscal years 2011 to 2015 either within-Guidelines or below-Guidelines based on a Government motion.[216] This data demonstrates that *Booker*'s practical effect has proved marginal.

This practical reality was also by the Supreme Court's design. In *Booker*, the Court held that sentencing courts must continue to "consider" the properly calculated Guidelines sentencing range.[217] Later, in *Pepper v. United States*, the Court clarified that sentencing courts owe the Guidelines "respectful consideration."[218] Still later, in *Molina-Martinez v. United States*, the Court explained, "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."[219]

After *Booker*, sentencing courts are not only still charged with consideration of the Guidelines, but it is reversible error if they misinterpret or misapply a Guidelines provision, or miscalculate the proper Guidelines sentencing range.[220]

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215. *Id.*

216. U.S. SENTENCING COMM'N, FIGURE G: COMPARISON OF SENTENCE IMPOSED AND POSITION OF SENTENCE RELATIVE TO THE GUIDELINE RANGE BY YEAR (2015) (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf) (last visited Nov. 17, 2018).

217. United States v. Booker, 543 U.S. 220, 245–46 (2005) (requiring sentencing courts to consider Guidelines ranges).

218. Pepper v. United States, 562 U.S 475, 476 (2011).

219. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016).

220. *See* United States v. Olarte-Rojas, 820 F.3d 798, 805 (5th Cir. 2016) The Fifth Circuit explained:

> While the Guidelines are advisory in light of *United States v. Booker*, district courts still must properly calculate the applicable guidelines range before imposing a sentence. The incorrect application of the Guidelines that results in an erroneous calculation of the total offense level and the guidelines sentencing range is an obvious error or mistake that almost certainly would result in a remand.

Additionally, if a court's sentencing varies outside the properly calculated Guidelines range, it is reversible error to not state a good reason for doing so.[221] Moreover, after *Booker*, courts of appeals are charged with reviewing all sentences, whether within the Guidelines range or not, for substantive reasonableness.[222] But only sentences outside the properly calculated Guidelines range are reviewed without a presumption of reasonableness.[223] Additionally, an appellate court will review for substantive reasonableness the degree to which a sentencing court upwardly varies above the advisory Guidelines range.[224]

All of these observations rebut the Court's erroneous claim in *Beckles* that the post-*Booker* Guidelines "merely guide the district courts' discretion" but "do not constrain that discretion."[225] In fact, as illustrated above, the Guidelines, both before and after *Booker*, dramatically constrain a district court's sentencing discretion. And because the holding in *Beckles* rested squarely on the Court's misplaced view of post-*Booker* sentencing discretion, the holding that the Guidelines are not vulnerable to vagueness challenges is equally misplaced.

Id. See also 18 U.S.C. § 3553(a)(4) (2018) (requiring sentencing courts to properly calculate the applicable Guidelines range).

221. *See* Rita v. United States, 551 U.S. 338, 356–58 (2007) ("Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so."). *See also* 18 U.S.C. § 3553(c)(2) (requiring a sentencing court to state a "specific reason" for a sentence outside the Guidelines range).

222. *See* Kimbrough v. United States, 552 U.S. 85, 90–91 (2007) (explaining that even a within-Guidelines sentence is subject to reasonableness review).

223. Gall v. United States, 552 U.S. 38, 51 (2007) ("If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness.").

224. *Id.* at 46–47 ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of deviation from the Guidelines.").

225. Beckles v. United States, 137 S. Ct. 886, 894 (2017).

C. *An Evolving View of the Role of the Guidelines in Sentencing: The Uneasy Relationship between* Beckles *and* United States v. Peugh

Not only is *Beckles* misguided in its understanding of the role of the Guidelines after *Booker*, its reasoning is also at odds with a recent predecessor opinion, *United States v. Peugh*.[226] In *Peugh*, decided in 2013, the Court analyzed whether the advisory Guidelines were subject to a different constitutional concern: the *Ex Post Facto* Clause.[227]

The United States Constitution prohibits Congress, as well as the states, from passing *ex post facto* laws.[228] The Supreme Court has defined "*ex post facto* laws" as including "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."[229] As the Sentencing Commission promulgates new Guidelines, which it does nearly every year, the advisory sentencing range for the same offender sometimes increases between the time he committed the crime and the time he is sentenced. Such was the case for Marvin Peugh.

Peugh was in the agriculture business, holding a stake in two companies: one bought, stored, and sold grain; the other provided farming services to landowners and tenants.[230] When Peugh and his business partner fell behind financially, they attempted to stay afloat by engaging in a scheme of bank fraud and "check kiting."[231] The scheme eventually came to light and, around ten years after the commission of the offense, a jury convicted Peugh of five

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226. Peugh v. United States, 569 U.S. 530 (2013).

227. *Id.* at 532–33.

228. U.S. Const. art. I, § 9 ("No . . . ex post facto Law shall be passed [by Congress]."); U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law.").

229. Calder v. Bull, 3 U.S. 386, 390 (1798).

230. *Peugh*, 569 U.S. at 533.

231. *Id.*

counts of bank fraud.[232] The district court calculated Peugh's advisory sentencing range at seventy to eighty-seven months imprisonment under the version of the Guidelines in effect at the time of sentencing.[233] Peugh objected, arguing that his advisory sentencing range should be thirty-seven to forty-six months imprisonment, which it would have been under the version of the Guidelines in effect at the time he committed the offense.[234] The district court overruled Peugh's objection and sentenced him to seventy months imprisonment.[235] The Seventh Circuit affirmed, following its own precedent that the *Ex Post Facto* Clause did not apply to the advisory Guidelines.[236]

On review, the Supreme Court began its analysis by establishing that the *ex post facto* inquiry depends on "whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'"[237] While the Court had previously held in *Miller v. Florida* that the *Ex Post Facto* Clause applied to the Florida guidelines' scheme,[238] some federal courts of appeals, such as the Seventh Circuit, later interpreted *Booker* to undercut *Miller*'s application to the federal Guidelines on the basis "that '*Booker* demoted the Guidelines from rules to advice.'"[239] In response to this sentiment, the Court outlined

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232. Peugh committed the offenses in 1999 and 2000; he was sentenced in May 2010. *Id.* at 533–34.

233. *Id.* at 534.

234. *Id.* at 533–34.

235. *Id.* at 534–35.

236. United States v. Peugh, 675 F.3d 736, 741 (7th Cir. 2012) ("We, however, stand by [our prior precedent's] reasoning—the advisory nature of the guidelines vitiates any ex post facto problem—and again decline the invitation to overrule it."), *rev'd*, 569 U.S. 530 (2013).

237. *Peugh*, 569 U.S. at 539 (2013) (quoting Garner v. Jones, 529 U.S. 244, 250 (2000)).

238. *See* Miller v. Florida, 482 U.S. 423, 430–36 (1987).

239. United States v. Demaree, 459 F.3d 791, 793–94 (7th Cir. 2006) (quoting United States v. Roche, 415 F.3d 614, 619 (7th Cir. 2005)).

the central role that even the post-*Booker*, advisory Guidelines continue to play in federal sentencing.[240] Based on this role, the Court reversed, concluding that "altering the substantive 'formula' used to calculate the applicable sentencing range" poses a "significant risk"[241] of inflicting a greater punishment—even when the range is technically advisory only.[242]

In reaching its holding in *Peugh*, the Court soundly rejected the notion that the Guidelines offer mere guidance, or "advice," to the district court. Justice Sotomayor, writing for the majority, took particular issue with the Government analogizing the Guidelines to a policy paper:

> While the Government accurately describes several attributes of federal sentencing after *Booker*, the conclusion it draws by isolating these features of the system is ultimately not supportable. On the Government's account, the Guidelines are just one among many persuasive sources a sentencing court can consult, no different from a "policy paper." The Government's argument fails to acknowledge, however, that district courts are not required to consult any policy paper in order to avoid reversible procedural error; nor must they "consider the extent of [their] deviation" from a given policy paper and "ensure that the justification is sufficiently compelling to support the degree of the variance." Courts of appeals, in turn, are not permitted to presume that a sentence that comports with a particular policy paper is reasonable; nor do courts of appeals, in considering whether the district court's sentence was reasonable, weigh the extent of any departure from a given policy paper in determining whether the district court abused its discretion. It is simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing.[243]

This passage reflects an appreciation for post-*Booker* precedent and sentencing practices that informs a holistic view of the Guidelines' role in sentencing. But *Peugh* was a

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240. *See Peugh*, 569 U.S. at 541–42 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.").

241. *Id.* at 550–51 (citations omitted).

242. *See id.* at 546–50.

243. *Id.* at 548–49 (citations omitted).

close decision and the dissenting Justices had a different perspective.

In the *Peugh* dissent, Justice Thomas, Justice Roberts, Justice Scalia, and Justice Alito took a narrower, less-holistic view of the role of the Guidelines in federal sentencing.[244] To the dissenting Justices, the answer was simple: the advisory nature of the post-*Booker* Guidelines renders the Guidelines impotent, in and of themselves, to "alter the punishment affixed" to an offender's crime.[245] This is so, for two reasons: (1) because the Guidelines "do not constrain the discretion of district courts," they "have no legal effect on a defendant's sentence;" and (2) even if the Guidelines do create a risk of a harsher punishment, "that risk results from the Guidelines' persuasive force, not any legal effect."[246] The dissenting Justices subscribed to the Seventh Circuit's characterization of *Booker* as transforming the Guidelines "from law to advice," stating that, after *Booker*, the Guidelines "merely influence[] the exercise of the sentencing judge's discretion."[247] The dissent concluded by treating *Booker* as a return to indeterminate sentencing: because the statutory sentencing range remained the same from the time of the offense to the time of sentencing, and because the advisory Guidelines sentencing range does not "affix" a punishment, Peugh's sentencing under the newer Guidelines did not offend the *Ex Post Facto* Clause.[248]

By comparison, *Peugh*'s majority and dissenting opinions fundamentally differ in their view of a district court's discretion under the advisory Guidelines. The difference can be summed up in a single question: Is discretion a matter of degree or is it black-and-white? Put differently: Is the discretionary nature of the advisory Guidelines a return to

244. *See id.* at 551–57, 563 (Thomas, J., dissenting).

245. *See id.* at 551.

246. *Id.* at 551–52.

247. *Id.* at 552–55.

248. *See id.*

indeterminate sentencing? The answer to these questions appears to determine the outcome of all constitutionality questions with respect to the Guidelines. Just as with *Peugh*, this view determined the outcome in *Beckles*. But this time, the majority and minority views of the role of the Guidelines in post-*Booker* sentencing had reversed.

In terms of counting noses, the radical change in the view of the Guidelines from *Peugh* to *Beckles* was due to two circumstances: Justice Kennedy and Justice Breyer moved camps and joined the majority, and Justice Kagan did not participate in the consideration or decision in *Beckles*.[249] This resulted in effectively a 5-2 split in *Beckles* over what role the Guidelines play in federal sentencing. This also resulted in a radically different answer to the question. Gone was the holistic view and weight of statistical data; in was a black and white view of judicial discretion. In this sense, which is fundamental, *Peugh* and *Beckles* are irreconcilable.

Perhaps aware of this criticism, Justice Thomas, writing for the majority in *Beckles*, strained to comport *Beckles* with *Peugh*. He asserted that *Peugh* was still good law but narrow in its holding.[250] He argued that vagueness in the Eighth Amendment context is different from vagueness under the Due Process Clause.[251] Finally, he explained that the Guidelines are not "entirely immune" from scrutiny under the Due Process Clause.[252] But it is difficult to see how the

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249. *See* Beckles v. United States, 137 S. Ct. 886, 889 (2017).

250. *See id.* at 894–96 ("Our holding today does not render the advisory Guidelines immune from constitutional scrutiny. . . . But the void-for-vagueness and *ex post facto* inquiries are 'analytically distinct.'") (citations omitted).

251. *Id.* Justice Thomas explained:

> The Court has also recognized 'in the Eighth Amendment context' that a district court's reliance on a vague sentencing factor in a capital case, even indirectly, 'can taint the sentence.' But our approach to vagueness under the Due Process Clause is not interchangeable with 'the rationale of our cases construing and applying the Eighth Amendment.'

Id. at 895–96. (citations omitted).

252. *Id.* at 896 ("Finally, our holding today also does not render 'sentencing

past cases cited in *Beckles* could be decided the same given the Court's evolved view of the role of the Guidelines. For example, Justice Thomas already stated in his dissent in *Peugh* that he believed *Peugh* was decided wrongly.[253] There's no reason to see why any other cases dealing with constitutionality and the Guidelines, from *Beckles* forward, would elicit a different response.

IV. ESCAPING ROOM 101: RECOMMENDATIONS TO MITIGATE THE HARMS CREATED BY *BECKLES* AND OTHER RELATED DECISIONS

Circuit courts, inspired by *Beckles*, have begun to take constitutional questions surrounding federal sentencing law in previously unforeseeable directions. In *United States v. Sanchez-Rojas*, for example, the Eighth Circuit has held that when the Guidelines merely cross-reference an unconstitutional statute, the statute is no longer unconstitutional for Guidelines purposes.[254] The Fifth Circuit reached the same conclusion in *United States v. Godoy*.[255] The rationale for *Sanchez-Rojas* and *Godoy* lies beyond the holding of *Beckles* but is perhaps not inconsistent with *Beckles*'s underlying reasoning, specifically its view of the role of the Guidelines in federal sentencing. This is now the landscape that the courts have created, one in which the

procedure[s]' entirely 'immune from scrutiny under the due process clause.' We hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.") (citations omitted).

253. *See Peugh*, 569 U.S. at 560–63 (Thomas, J., dissenting).

254. United States v. Sanchez-Rojas, 889 F.3d 950, 952 (8th Cir. 2018) ("Applying the *Beckles/Johnson* reasoning here, Sanchez-Rojas cannot maintain his vagueness challenge against U.S.S.G. § 2L1.2(b)(1)(C). We see no meaningful difference between a Guidelines section that uses the same language as a statute (like § 4B1.2(a)(2)) and a section that incorporates the statutory language by reference (like § 2L1.2(b)(1)(C)).").

255. *See* United States v. Godoy, 890 F.3d 531, 537–38 (5th Cir. 2018) ("The Guidelines are not subject to vagueness challenges. So it does not necessarily follow from *Dimaya* that § 16(b) is unconstitutionally vague in the Guidelines context.").

decisions of the Sentencing Commission will be incrementally inoculated from constitutional concerns. To be sure, it only gets more Orwellian from here. But it does not have to be. In fact, there are concrete steps that those involved in criminal law—the Sentencing Commission, Congress, the courts, and the criminal bar—can take to begin to right the ship and mitigate some of the harms and injustices created by the Court in *Beckles*.

A. *The United States Sentencing Commission*

As explained above, the Sentencing Commission, as the promulgator of the Guidelines, plays an extraordinarily large role in federal sentencing. Larger, in fact, than a majority on the Supreme Court is currently willing to recognize. As a district court's interpretation and application of the Guidelines has become more insulated from review (especially as it relates to constitutional concerns) than a court's treatment of statutory authority, it is incumbent upon the Sentencing Commission to work diligently to avoid constitutional problems even in the absence of congressional or judicial direction. The Sentencing Commission should do so in three ways, each of which would serve to promote the Sentencing Commission's policy objective of "just punishment" as well as to ameliorate its concerns over judicial economy.[256]

First, the Sentencing Commission should remove any language from the Guidelines that is similar to (or the same as) statutory language struck as unconstitutional. Thus far, the Commission has been extremely effective and proactive in doing so. Most notably, in Amendment 798, the Sentencing Commission deleted the career offender residual clause "as a

256. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018) ("The Sentencing Reform Act of 1984 . . . provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, *just punishment*, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.") (emphasis added).

matter of policy," citing *Johnson* and judicial economy.[257] This was the correct decision, on both grounds, and the Sentencing Commission should remain vigilant in identifying any future opportunities to make similar amendments as expeditiously as possible.

Second, the Sentencing Commission should remove any cross-reference to a statute that has been held unconstitutional, or expressly excuse from the cross-reference the unconstitutional portion. Because some circuits are using *Beckles* to hold that unconstitutional statutes remain in effect for Guidelines purposes when incorporated by cross-reference,[258] it is solely up to the Sentencing Commission to decide whether problematic language remains.

Third, the Sentencing Commission should expressly declare retroactive any amendments removing potentially unconstitutional language. By its own terms, Amendment 798 only applied to offenders who were sentenced after August 1, 2016, foreclosing relief for many offenders on collateral review.[259] While the retroactive application of the Guidelines is eventually a decision for the judiciary, one factor courts consider is whether the Sentencing Commission expressly intended the Amendment to apply retroactively.[260]

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257. *Id.* app. C, Supp., amend. 798. The Guidelines Manual states:

> The Commission determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*, and, as a matter of policy, amends § 4B1.2(a)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the *Johnson* decision.

Id.

258. *E.g.*, *Godoy*, 890 F.3d at 537–38; *Sanchez-Rojas*, 889 F.3d at 952.

259. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, Supp., amend. 798 (the Amendment became effective on August 1, 2016).

260. United States v. Huff, 370 F.3d 454, 465–67 (5th Cir. 2004) (explaining that courts look to the Commission's express statements on retroactivity but do

An affirmative statement of retroactivity, even if ultimately uneventful, would at least lend some credence to the arguments of a defendant whose offense level was increased as a result of constitutionally questionable language.

B. *Congress*

Baked into the concept of a mandatory minimum is a one-size-fits-all approach to sentencing. This can be a problem that is further intensified when Congress includes catch-all provisions, such as a residual clause, in mandatory minimum statutes. The solution to the problems posed by residual clauses specifically, and a one-size-fits-all approach generally, is to abandon such approaches altogether and allow district judges to make sentencing decisions—in consultation with the Guidelines—on a case by case basis. This was the case for much of the history of federal sentencing, before Congress began passing mandatory minimum recidivism statutes in the mid-1980s. And these statutes have created problems ever since, dramatically increasing our prison population and giving the courts enormous difficulties in weighing their application.[261] This is part of the reason the Sentencing Commission has drifted away from residual clauses, and to an extent, prior-conviction-enhancement provisions.[262] In this respect, Congress should follow the Sentencing Commission's lead.

Short of abandoning mandatory minimum recidivism statutes altogether, Congress should take additional steps to inject clarity into its prior-conviction enhancement

not treat them as binding).

261. *See* Matthew C. Lamb, Note, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 NOTRE DAME J. LEGIS. 126, 132–34 (2015).

262. U.S. SENTENCING GUIDELINES MANUAL app. C, Supp., amend. 798 ("Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the *Johnson* decision.").

provisions in order to reduce unnecessary litigation. Congress should do so in three ways. First, it should include a definition for each enumerated offense, even if simply copied from courts' generic definitions. Although the courts have done most of this work by now, a statutory definition would prevent new definitional questions from arising. Second, Congress should revise all "elements" clauses to clearly state the *mens rea* and degree of force required to satisfy the clause. This would settle many ongoing disputes among the circuits.[263] And third, Congress should remove all residual clauses from the United States Code, whether courts have deemed them unconstitutional or not.[264] While Congress would not ordinarily need to remove a residual clause once a court has declared it unconstitutional, some circuits are now actually using Congress's inaction to infer an intent to revive an unconstitutional statute for some applications.[265]

C. *The Courts*

Although no federal judge would admit to a results oriented approach to sentencing law, many decisions betray this species of judicial activism. Such decisions can come in obvious forms, such as unusually narrow or counterintuitive interpretations of statutes, Guidelines, and binding

263. The circuits remain entrenched in extrapolating the full implications of two Supreme Court decisions. *E.g.*, Voisine v. United States, 136 S. Ct. 2272 (2016) (dealing with the *mens rea* required under the same type of clause); Johnson v. United States, 559 U.S. 133 (2010) (dealing with the degree of physical force required to satisfy an "elements" clause).

264. The obvious current example is 18 U.S.C. § 924(c)(3)(B) (2018), which is nearly identical in wording to the residual clause the Court struck in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

265. *See, e.g.*, United States v. Godoy, 890 F.3d 531, 540 (5th Cir. 2018) ("Section 16(b) remains on the books, not purged from existence—at least for confined uses. And until Congress acts or we are presented with binding authority to the contrary, § 16(b) remains incorporated into the advisory-only Guidelines for definitional purposes.").

precedent.[266] They can also come in subtler forms, such as a systematic refusal to engage in substantive reasonableness review of terms of imprisonment.[267] Three adaptations would improve the current system. First, judges must take a consistent, principled approach to sentencing law that is outcome blind. Second, judges must reconsider sentencing decisions not as administrative problems but as justice solutions. Third, courts must begin to engage in meaningful substantive reasonableness review. This third recommendation warrants some additional elaboration.

As part of *Booker*'s remedial holding, the Supreme Court elevated reasonableness review, which may or may not have previously existed in any meaningful way,[268] to a primary appellate concern about sentencing.[269] At the time, the role that reasonableness review would actually play was in dispute. The remedial majority was optimistic, predicting that circuit courts would "prove capable" of "applying the standard."[270] The dissent, on the other hand, was alarmist, predicting that reasonableness review would "produce a discordant symphony" and "wreak havoc" on courts.[271] Both were wrong: substantive reasonableness review entered with

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266. *See id.*

267. *See* Note, *More than a Formality: the Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 959–61 (2014) [hereinafter *More than a Formality*].

268. The majority believed it did exist, *United States v. Booker*, 534 U.S. 220, 262 (2005) ("'Reasonableness' standards are not foreign to sentencing law."), while the dissent believed it did not exist, *id.* at 310 (Scalia, J., dissenting) ("[S]entences within the Guidelines range have not previously been reviewed for reasonableness. Indeed, the very concept . . . finds no support in statutory language or established practice of the last two decades.").

269. *Id.* at 262–64 (majority opinion).

270. *Id.* (explaining that contrary to Justice Scalia's dissenting opinion, "appellate judges will prove capable" of applying the reasonableness standard).

271. *Id.* at 312–13 (Scalia, J., dissenting) (predicting that "'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority's sanguine claim that 'no feature' of its avant-garde Guidelines system will 'ten[d] to hinder' the avoidance of 'excessive sentencing disparities'") (citations omitted).

a whisper. In fact, it is rarely used in any meaningful sense.[272] Several circuit judges, for example, have publicly stated that substantive reasonableness review "defies appellate explanation," is unprincipled, a "waste of time," and "has essentially become no appellate review."[273] But this does not have to be so.

The Supreme Court can, in one or two cases, dramatically advance substantive reasonableness review. First, it should provide clear principles that appellate courts should consider when evaluating substantive reasonableness. Second, it should reverse *Rita v. United States*, in which the Court held that an appellate court may impose a presumption of reasonableness on within-Guidelines sentences but may not impose a presumption of *unreasonableness* on sentences outside the advisory Guidelines range.[274] This undercuts reasonableness review by failing to energize the principle that district courts should only vary outside the advisory Guidelines range when they have a good reason for doing so.[275] Even after *Booker*, that principle is sound but lacks reinforcement. This would build on the three substantive reasonableness recommendations by the Sentencing Commission in its 2012 *Booker* Report to "[d]evelop more robust substantive appellate review": (1) require a presumption of reasonableness for within-Guidelines sentences; (2) require more justification for sentences outside the advisory Guidelines range; and (3)

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272. The Fifth Circuit, for example, has only ever vacated one sentence on substantive reasonableness grounds, in *United States v. Chandler*, 732 F.3d 434 (5th Cir. 2013).

273. *See More than a Formality*, *supra* note 267, at 959–60.

274. Rita v. United States, 551 U.S. 338, 355–56 (2007) ("The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness.").

275. *See* Gall v. United States, 552 U.S. 38, 46 (2007) ("It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.").

require heightened review of sentences that are based on policy disagreements with the Guidelines.[276]

D. *The Criminal Bar*

Nearly every case that reaches the United States Supreme Court—whether *Peugh*, *Johnson*, *Welch*, or *Beckles*—began with an objection before the district court. The case then proceeded with a well-reasoned and well-argued appeal. Finally, an attorney introduced the case to the Supreme Court, likely in a terse but thoughtful petition for writ of certiorari. These are the ingredients for good lawyering and for moving the law in a beneficial direction. And while no single ingredient is sufficient, all are necessary. As the arc of the moral universe slowly bends, criminal attorneys (defense attorneys and prosecutors alike) can help point it toward justice. It is needed now as much as ever.

V. CONCLUSION

The story of *Booker*, *Peugh*, *Johnson*, and *Beckles* is multilayered. On the surface, it tells of the Supreme Court working both to identify the constitutional vulnerabilities of the Guidelines and to explore how the analysis changed when the Guidelines transitioned from mandatory to advisory. On a deeper level, however, it tells of two competing narratives about the impact of *Booker* and the present role of the advisory Guidelines. As the dissenting narrative overtook the majority narrative, most notably in *Beckles*, both the past and the present were, in a real way, rewritten. As a result, similarly situated defendants suffered divergent outcomes. And it does not end there. Now, in light of the new narrative, circuit courts are blazing more puzzling trails, eroding the ideals of consistency, uniformity, and, at the end of the day, fairness. But there is hope: the Sentencing Commission, Congress, the courts, and the criminal bar can

276. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 111–12 (2012).

respond to guide federal sentencing practice back toward a more principled place where things are what they seem. This is a worthwhile pursuit that is necessary to restore a semblance of justice to the often vexing world of federal sentencing law.