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# CRIMINAL SENTENCING UNDER THE ADVISORY GUIDELINES AND THE *EX* *POST FACTO* CLAUSE

MEGAN PREUSKER\*

## I. INTRODUCTION

A judge is faced with the following dilemma: Defendant committed a crime in 2000. By the time he has been tried, convicted, and faces sentencing, it is now 2005. In the interim, a new version of the United States Sentencing Guidelines Manual (“Guidelines”) has come into effect, changing the range of the sentence for the crime from eighteen to twenty-four months in 2000 to twenty-seven to thirty-three months in 2005. The judge is now faced with a decision whether to apply the lesser sentence under the older version of the Guidelines, or whether to apply the increased sentence under the version of the Guidelines now in effect.<sup>1</sup>

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1. Prior to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), the answer to this question was fairly straightforward. The Circuit Courts uniformly held that it violated the *Ex Post Facto* Clause to apply a later version of the Guidelines if they applied retroactively and subjected the defendant to an increased quantum of punishment. See *United States v. Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases from all of the other Circuit Courts of Appeals and joining them in holding that federal sentencing Guidelines, if applied retroactively to increase the amount of punishment attached to a crime, violate the *Ex Post Facto* Clause). This hypothetical scenario is based upon the facts in *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), which was decided shortly after *Booker*. The defendant in *Demaree* pleaded guilty to wire fraud and tax offenses. *Id.* at 792. The 2000 version of the Sentencing Guidelines was in effect at the time she committed the crimes, subjecting her to a sentencing range of eighteen to twenty-four months imprisonment. *Id.* The version of the guidelines in effect at the time the defendant was sentenced resulted in a higher range of twenty-seven to thirty-three months. *Id.* Rather than sentence her under the Guidelines in effect at the time she committed her crime, as the courts had done prior to the *Booker* decision, the judge sentenced her to a term of thirty months under the revised guidelines. *Id.* The Seventh Circuit upheld this sentence on appeal. *Id.* at 795. This marked a divergence from the *Miller* line of cases and was really the emergence of the current debate over the implication and application of the *Ex Post Facto* Clause to sentencing guidelines.

### A. *The Ex Post Facto Dilemma*

The Guidelines direct a sentencing judge to apply the version in effect at the time the defendant is sentenced, unless doing so would violate the *Ex Post Facto* Clause.<sup>2</sup> Yet a direction such as this begs the question of what, exactly, is an *ex post facto* law and whether the *Ex Post Facto* Clause is violated by the application of upwardly revised sentencing guidelines, even though the Guidelines are only advisory. A question as serious as this goes to the heart of the constitutional guarantee that there will be no *ex post facto* laws.<sup>3</sup> The answer is not an easy one, and in fact has caused a split among the Circuit Courts of Appeals.<sup>4</sup>

### B. *A Guide to this Comment*

This Comment will focus on the application of the *Ex Post Facto* Clause to the United States Sentencing Guidelines. Part II will discuss the roots of the *Ex Post Facto* Clause in the Constitution and the interpretation of the Clause in early case law.<sup>5</sup> That section will also focus on the application of the *Ex Post Facto* Clause to sentencing guidelines for criminal defendants and the issues that have emerged after the Supreme Court declared in *United States v. Booker* that the Guidelines are advisory only and not binding on the courts.<sup>6</sup> Part III will introduce the circuit split

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2. U.S. Sentencing Guidelines Manual § 1B1.11 (1992) (amended 1993). The relevant portion of the statute states as follows:

§ 1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

18 U.S.C. § 1B1.11.

3. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

4. See *United States v. Ortiz*, 621 F.3d 82, 86 (2d Cir. 2010) (noting that the question of whether the “application of a guideline amended after the date of an offense violates the *Ex Post Facto* Clause under the advisory Guidelines regime, as it did when the Sentencing Guidelines were mandatory, has *divided the courts of appeals*”) (emphasis added) (internal citations omitted). See also *Demaree*, 459 F.3d at 795 (holding that the retroactive application of enhanced sentencing guidelines does not implicate the *Ex Post Facto* Clause, since the sentencing guidelines are merely advisory and have no legal or binding effect on the courts). *But see* *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) (rejecting the holding in *Demaree* and concluding that “the proper approach is . . . to conduct an ‘as applied’ constitutional analysis, not the sort of facial analysis conducted in *Demaree*”) (internal citation omitted).

5. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1; *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (opinion of Chase, J.).

6. *Miller v. Florida*, 482 U.S. 423 (1987); *Booker*, 543 U.S. at 245.

that has emerged in the wake of this decision.<sup>7</sup> It will discuss, analyze, and evaluate the arguments on both sides.<sup>8</sup> Part IV will reiterate the concerns inherent in the *Ex Post Facto* Clause analysis and note that more recent cases have followed the D.C. Circuit in adopting a “substantial risk” standard.<sup>9</sup> In light of these factors, this Comment will propose that the Seventh Circuit reconsider its holding in *United States v. Demaree* and reject a simple facial analysis.<sup>10</sup> It will also propose the idea of adopting a presumption that the retroactive application of increased sentencing guidelines does not violate the *Ex Post Facto* Clause, but still allowing the courts to go through an “as applied” analysis in each individual case. Finally, Part V will offer a summary of the issues and conclude that, in light of the constitutional protections at stake, the Supreme Court should either address the issue or the Seventh Circuit should reconsider its stance.

## II. BACKGROUND

### A. Evolution of the *Ex Post Facto* Clause

The Constitution of the United States prohibits Congress and the states from passing *ex post facto* laws.<sup>11</sup> Literally translated, the phrase means “after the fact.”<sup>12</sup> Yet like many constitutional provisions, the precise meaning of the Clause is unclear.<sup>13</sup> In *Calder v. Bull*, the Supreme Court was called upon to interpret the *Ex Post Facto* Clause and identified four categories of laws that fall within its prohibition.<sup>14</sup> Among them are laws that

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7. *Ortiz*, 621 F.3d at 86.

8. *Id.*

9. *Id.*

10. *Demaree*, 459 F.3d at 795.

11. U.S. CONST. art. I, § 9, cl. 3. Article I, Section 9 contains a list of limitations on Congress’s powers. *Id.* Clause 3 reads: “No Bill of Attainder or *ex post facto* Law shall be passed.” *Id.* See also U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from passing *ex post facto* laws).

12. *Calder*, 3 U.S. (3 Dall.) at 390. See also BLACK’S LAW DICTIONARY 661 (9th ed. 2009) (defining *ex post facto* as Latin meaning “from a thing done afterward,” or “[a]fter the fact; retroactively”).

13. See *Calder*, 3 U.S. (3 Dall.) at 390 (explaining that the meaning of the Constitutional prohibition on *ex post facto* laws is unclear standing by itself, and therefore requires interpretation in order to be a meaningful protection).

14. *Id.* at 390–91. In his opinion, Justice Chase wrote:

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in

aggravate a crime after it has been committed and laws that increase the punishment attached to an offense after it has been committed.<sup>15</sup> Central to the Court's opinion in *Calder* was the notion that the *Ex Post Facto* Clause was intended to serve the dual purpose of preventing legislatures from enacting arbitrary or vindictive legislation, as well as providing individuals with fair notice of the effects of legislative enactments.<sup>16</sup>

The Supreme Court further elaborated on the *Ex Post Facto* Clause in *Dobbert v. Florida* and *Weaver v. Graham*.<sup>17</sup> In *Dobbert*, the Court noted that for a law to implicate the *Ex Post Facto* Clause, it must alter "substantial personal rights," not merely affect procedure.<sup>18</sup> The statute at issue in that case involved a

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order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

*Id.*

15. *Id.* at 390. Of particular importance to this Comment are the second and third types of laws that Justice Chase identified as violating the *Ex Post Facto* Clause, "every law that aggravates a crime, or makes it greater than it was, when committed," and "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.*

16. *Id.* at 388–89, 396 (opinion of Paterson, J.), 399–400 (opinion of Iredell, J.). *Accord Miller*, 482 U.S. at 429–30 (discussing *Calder v. Bull* and the dual purpose of the *Ex Post Facto* Clause to prevent "legislative abuses" and to provide notice and permit individuals to rely on the effect of legislative enactments unless they are explicitly changed).

17. *Dobbert v. Florida*, 432 U.S. 282 (1977); *Weaver v. Graham*, 450 U.S. 24 (1981). The statute at issue in *Weaver* related to reduced sentences or "gain-time" for convicted prisoners who exhibit good conduct while they are imprisoned. *Id.* at 26. When the petitioner was sentenced in 1976, Florida Statute § 944.27(1) (1975) was in effect and provided a formula for calculating deductions from a prisoner's sentence as "gain-time" for good behavior. *Id.* In 1978, that statute was repealed and replaced with Florida Statute § 944.275(1) (1979), which reformulated the "gain-time" deductions. *Id.* The newer version of the statute applied to all prisoners, even those sentenced before its enactment. *Id.* at 27. The effect was a decrease in the amount of days of "gain-time" reduction a prisoner could receive, resulting in a longer sentence for prisoners with good behavior than under the previous statute. *Id.* For the petitioner this amounted to a difference of over two years. *Id.*

18. *Dobbert*, 432 U.S. at 293. The statute in effect at the time *Dobbert* committed his crimes provided that a person convicted of a capital crime would automatically receive the death penalty unless a majority of the jury recommended mercy. *Id.* at 288 n.3. This statute was struck down as unconstitutional before *Dobbert's* trial commenced. *Id.* at 288. At the time of his trial, the statute in effect provided that a defendant found guilty of a capital felony would then proceed to a sentencing hearing. *Id.* at 290–92. The jury at the hearing would then consider the relevant information and render an advisory decision, which the judge could either accept or alter on the basis of other considerations. *Id.* at 291. This change in the law was deemed procedural, as it affected merely the manner in which the death penalty would be imposed and did not change the amount of punishment attached to the crime. *Id.* at 293–94. *Accord Beazell v. Ohio*, 269 U.S. 167, 171 (1925) (stating that "the constitutional provision [forbidding the states from passing *ex post*

change to the way the death penalty was handed down for capital offenses.<sup>19</sup> The previous statute left the question of whether to impose the death penalty solely up to the jury, while the revised statute allowed the jury to recommend the death penalty, but gave the judge leeway to deviate from that recommendation.<sup>20</sup> In finding that the *Ex Post Facto* Clause was not implicated, the Court focused on the fact that the new law did not alter the amount of punishment attached to the crime but merely changed the method for determining whether that punishment would be imposed.<sup>21</sup>

In *Weaver*, the Court discussed two additional elements that must be present for a law to be an *ex post facto* law.<sup>22</sup> The Court stated that the law must be retrospective, applying to events that occurred prior to its enactment, and it must also work to the disadvantage of the defendant.<sup>23</sup> The *Weaver* Court was careful to point out that although *Dobbert* indicated that laws that are merely procedural do not implicate the *Ex Post Facto* Clause, a law that appears to be procedural on its face may still violate the *Ex Post Facto* Clause if it alters a substantial personal right.<sup>24</sup> Both cases also reiterated the dual purpose of the *Ex Post Facto* Clause as a restraint on legislatures as well as a measure for ensuring that individuals have fair warning as to the effect of legislative enactments.<sup>25</sup>

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*facto* laws] was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina*, 237 U.S. 180, 183 [(1915)], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.”). See generally *Hopt v. Utah*, 110 U.S. 574, 589 (1884); *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896); *Thompson v. Missouri*, 171 U.S. 380, 386 (1898); *Mallett v. North Carolina*, 181 U.S. 589, 597 (1901). All of the above cases rejected *ex post facto* challenges to laws that were procedural and did not impact or alter substantial rights.

19. *Dobbert*, 432 U.S. at 288–93.

20. *Id.*

21. *Id.* at 293–94. “The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.” *Id.* This oft-cited quote from *Dobbert* reveals the importance the Court placed on distinguishing between laws that affect rights, which implicate the *Ex Post Facto* Clause, and laws that affect only procedure, which do not.

22. *Weaver*, 450 U.S. at 29.

23. *Id.*

24. *Id.* at 29 n.12.

25. *Dobbert*, 432 U.S. at 293, 297–98; *Weaver*, 450 U.S. at 28–29, reaffirming *Calder*, 3 U.S. (3 Dall.) at 388–89 (opinion of Chase, J.), 396 (opinion of Paterson, J.), 399–400 (opinion of Iredell, J.).

### B. *The Ex Post Facto Clause Applied to Sentencing Guidelines*

In *Miller v. Florida*, the Supreme Court addressed the question of whether Florida's sentencing guidelines statute, which directed sentencing judges to apply the version of the state Guidelines in effect at the time of sentencing, violated the *Ex Post Facto* Clause.<sup>26</sup> The defendant in *Miller* had committed sexual battery and other crimes that, at the time he committed them, resulted in a sentencing range between three and one-half to four and one-half years in prison.<sup>27</sup> Under the revised version of the Guidelines, the sentence range for the crime was increased to between five and one-half to seven years imprisonment.<sup>28</sup> The Court applied a three-part test derived from prior case law and found that the statute violated the *Ex Post Facto* Clause.<sup>29</sup>

The Court considered: (1) whether the statute was retrospective; (2) whether it disadvantaged the criminal defendant; and (3) whether it altered "substantial personal rights" or only "modes of procedure which do not affect matters of substance."<sup>30</sup> In striking down the statute, the Court noted that it was retrospective in nature because it altered the legal consequences for a crime committed before the statute's enactment.<sup>31</sup> The statute was also disadvantageous to the defendant because it resulted in a longer sentence than the sentence imposed under the previous Guidelines, and also because this sentence was presumed reasonable since it fell within the

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26. *Miller*, 482 U.S. at 424–26. The statute at issue in *Miller* permitted the sentencing judge to apply the version of the Guidelines in effect at the time of sentencing, as opposed to the Guidelines in effect at the time the crime was committed. *Id.* Points were assigned to the offender on the basis of his crime and other factors, for example his prior record, legal status at the time of the offense, and the injuries sustained by the victim. *Id.* at 426. The statute then provided a sentencing range corresponding to the total points score. *Id.* A sentence within the range was presumed reasonable; the judge did not have to provide a written explanation for sentencing within the range and his decision was not reviewable on appeal. *Id.* Further, if the sentencing judge departed from the recommended sentencing range, he was required to provide clear and convincing reasons for doing so. *Id.* The defendant in *Miller* committed sexual battery and other crimes that, at the time he committed them, subjected him to a range of between three and one-half to four and one-half years imprisonment. *Id.* at 424. Yet, at the time of his sentencing, a revised version of the state Guidelines had gone into effect, which increased the points for his sexual battery offense and resulted in a sentencing range of five and one-half to seven years imprisonment. *Id.* The sentencing judge applied the upwardly revised Guidelines and the defendant was sentenced to a term of seven years imprisonment. *Id.* at 428.

27. *Id.* at 424.

28. *Id.*

29. *Id.* at 430.

30. *Dobbert*, 432 U.S. at 293; *Weaver*, 450 U.S. at 29.

31. *Miller*, 482 U.S. at 430–31; *Weaver*, 450 U.S. at 31.

new, albeit longer, Guidelines range.<sup>32</sup>

Finally, in addressing whether the sentencing guidelines statute altered personal rights or merely procedure, the Court took into account some additional factors.<sup>33</sup> The Court noted that the sentencing law was an enactment by the legislature carrying the full “force and effect of law.”<sup>34</sup> Thus, the Court held that the Guidelines were not “flexible guideposts” to assist the sentencing judge, but instead were “high hurdle[s] that must be cleared before discretion can be exercised.”<sup>35</sup> The resulting direct, adverse effect on the defendant’s sentence affected his personal rights and, therefore, caused an *Ex Post Facto* violation.<sup>36</sup>

The Circuit Courts of Appeals then extended the *Miller* holding to apply to federal sentencing Guidelines, noting the similarity between the federal Guidelines and the state Guidelines at issue in *Miller*.<sup>37</sup> Oftentimes, this resulted in the application of an older version of the Guidelines to avoid *ex post facto*

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32. *Miller*, 482 U.S. at 431–33; *Weaver*, 450 U.S. at 29.

33. *Miller*, 482 U.S. at 435.

34. *Id.*

35. *Id.*

36. *Id.* The Court distinguished the current statute from the statute at issue in *Dobbert*, noting that “this is not a case where we can conclude, as we did in *Dobbert*, that ‘the crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.’” *Id.* (quoting *Dobbert*, 432 U.S. at 294). The characteristics noted by the Court in *Dobbert* are indicative of a statute that merely affects procedure and therefore does not implicate the *Ex Post Facto* Clause. *Id.* at 433.

37. Christine M. Zeivel, Comment, *Ex-Post-Booker: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395, 405 (2008). See *United States v. Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuit Courts of Appeals, which have held that the *Ex Post Facto* Clause prohibits the retroactive application of federal sentencing guidelines that disadvantage a criminal defendant and noting that the Seventh Circuit had yet to adopt that holding). See also *United States v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990) (holding that the application of revised Guidelines violates the *Ex Post Facto* Clause when the defendant is subjected to a more severe sentence under the Guidelines in effect at the time he is sentenced than he would have been subject to at the time he committed the crime); *United States v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991) (same); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991) (same); *United States v. Morrow*, 925 F.2d 779, 782–83 (4th Cir. 1991) (same); *United States v. Suarez*, 911 F.2d 1016, 1021–22 (5th Cir. 1990) (same); *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992) (same); *United States v. Seacott*, 15 F.3d 1380, 1384–86 (7th Cir. 1994) (same); *United States v. Swanger*, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam) (same); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991) (same); *United States v. Smith*, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991), cert. denied, 112 S. Ct. 225 (1991) (same); *United States v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990) (same); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304–05 (D.C. Cir. 1991) (same).



problems.<sup>38</sup> The issue seemed to be settled until the Supreme Court ruled in *United States v. Booker* that the Guidelines were no longer mandatory but instead served an advisory purpose.<sup>39</sup>

### C. *United States v. Booker Upsets an Established System*

In *Booker*, the Supreme Court ruled on the application of the Sixth Amendment to the Guidelines.<sup>40</sup> The issue in *Booker* was whether the Sixth Amendment right to trial by jury was violated when an enhanced sentence was imposed under the Guidelines based solely upon the judge's own findings of fact (as opposed to findings by the jury or admissions of the defendant).<sup>41</sup> The

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38. See, e.g., *Seacott*, 15 F.3d at 1386 (explaining that the holding in *Miller* applies to the federal Guidelines and joining "all of our sister circuits" in holding that the *Ex Post Facto* Clause prohibits the application of upwardly revised Guidelines).

39. *Booker*, 543 U.S. at 245. The issue in *Booker* was whether the Sixth Amendment right to trial by jury prevented a sentencing judge from making independent factual findings that resulted in an increased sentencing range. *Id.* The Supreme Court held that this constituted a violation of the Sixth Amendment right to trial by jury. *Id.*

*Booker* was a consolidated case involving two respondents. *Id.* at 226. The first respondent was found guilty of violating a federal statute that prohibited possession of cocaine with the intent to distribute. *Id.* at 227. The Guidelines prescribed a range of between two hundred and ten and two hundred and sixty-two months. *Id.* The judge actually imposed a sentence of three hundred and sixty months, which was almost ten years longer than the Guidelines range. *Id.* This sentence was based upon the judge's independent factual finding that the defendant had possessed more cocaine than the jury found that he had. *Id.* On appeal, the Seventh Circuit struck down the increased sentence as inconsistent with the Sixth Amendment and prior Supreme Court precedent. *Id.*

The Court addressed a similar question in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in the context of a state statute. The *Apprendi* Court held that the Sixth Amendment requires that "[a]ny fact (other than a prior conviction), which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244 (quoting *Apprendi*, 530 U.S. at 490). In *Blakely v. Washington*, 542 U.S. 296 (2004), a case following *Apprendi*, the Supreme Court again addressed the issue of the Sixth Amendment in relation to a state criminal statute, and reaffirmed its previous holding. *Id.* at 303-04. The Court held once again that the right to trial by jury means that any fact that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 490). Each of these cases involved state Guidelines, so *Booker* was the first opportunity for the Supreme Court to extend its holdings to the federal Guidelines. The Court in *Booker* noted that there was no significant difference between the procedures at issue in these cases and the federal Guidelines. *Booker*, 543 U.S. at 233.

40. *Booker*, 543 U.S. at 226.

41. *Id.* at 229 n.1.

Supreme Court held that the mandatory Guidelines violated the Sixth Amendment because they *required* judges to impose sentences within the Guidelines range unless “the court” made additional findings of fact to justify a different sentence.<sup>42</sup>

In light of this holding, the Court was then faced with the question of how to reconcile it with the Guidelines.<sup>43</sup> The Court noted that the Sixth Amendment would not be implicated if the Guidelines were not binding on the courts.<sup>44</sup> The Court then looked to congressional intent and decided that, rather than strike the Guidelines in their entirety, the proper remedy was to sever and excise those portions of the Sentencing Reform Act that made the Guidelines mandatory.<sup>45</sup> The effect of the Court’s decision in

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42. *Id.* at 233–34 (emphasis added).

43. *Id.* at 245. The Court addressed two options in light of its initial holding. *Id.* at 246. The Court could either interpret the Sentencing Reform Act as it stood to require that a jury find beyond a reasonable doubt any fact that would increase a defendant’s sentence beyond the recommended range, or it could eliminate those portions of the Act that made the Guidelines mandatory. *Id.* The Court sought to be consistent with Congress’s intent in enacting the Sentencing Reform Act and creating the Guidelines. *Id.* at 246–47. It noted that Congress’s main goal was to ensure uniformity in sentencing, and that Congress would not have intended to make it easier for judges to adjust sentences downward rather than upward. *Id.* at 255–57. In light of these concerns, the Court found that Congress intended to create a sentencing system that would enable judges to consider additional facts, not found by the jury, which would impact the defendant’s sentence. *Id.* at 257–58.

44. *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.” *Id.*

45. *Id.* at 245–46. Of great importance to this Comment is the Court’s holding that, “the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), [is] incompatible with [the Court’s] constitutional holding” that “the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing.” *Id.* at 245. The Court decided to sever and excise this section, as well as 18 U.S.C.S. § 3742(e), which was dependent on the Guidelines being mandatory. *Id.*

The excised portion of the statute, 18 U.S.C. § 3553 (b)(1) read as follows:

(b) Application of guidelines in imposing a sentence.

(1) In general.

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 sentencing guideline in the case of

*Booker* was to render the Guidelines advisory only.<sup>46</sup> As a result of the *Booker* ruling, a sentencing judge now is only required to consider the Guidelines range, yet has leeway to take into account other factors and alter the sentence on that basis.<sup>47</sup>

#### D. The Current Debate

In the wake of *Booker*, the *ex post facto* issue surrounding sentencing guidelines has reemerged.<sup>48</sup> Now that the Guidelines are no longer binding law, courts must consider whether they implicate the *Ex Post Facto* Clause and whether the Clause is violated when sentencing judges apply upwardly revised versions of the Guidelines.<sup>49</sup> The Supreme Court has yet to address this question, and the Circuit Courts of Appeals are divided on the issue.<sup>50</sup>

### III. ANALYSIS

Prior to the *Booker* decision, the Circuit Courts of Appeals uniformly held that the application of increased sentencing Guidelines violated the *Ex Post Facto* Clause, yet the holding in *Booker* raised the issue anew.<sup>51</sup> The Seventh Circuit was the first

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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) (1984) (emphasis added).

18 U.S.C. § 3742(e), which called for a *de novo* standard of review for sentences deviating from the mandatory Guidelines, was also stricken. *Booker*, 543 U.S. at 259. The Court determined that without the mandatory provisions, the statute was still capable of functioning independently, was constitutional, and was in line with Congress's intent. *Id.* at 258-59.

46. *Id.* at 245-46. 18 U.S.C. § 3553(a)(4) requires a court to consider the Guidelines range, yet allows the court to tailor the sentence in light of other statutory concerns. *Id.*

47. *Id.* at 233. The Sixth Amendment problem was thus eliminated because a defendant does not have a right to a jury determination of a sentence within the judge's discretion. *Id.*

48. See *Demaree*, 459 F.3d at 795 (holding that the advisory Guidelines no longer implicate the *Ex Post Facto* Clause). But see *Turner*, 548 F.3d at 1100 (rejecting *Demaree* and arguing that the *Ex Post Facto* Clause is still implicated, even in light of *Booker*, and proceeding with an "as applied" analysis).

49. *Demaree*, 459 F.3d at 795; *Turner*, 548 F.3d at 1100.

50. See *Ortiz*, 621 F.3d at 86-87 (noting the circuit split).

51. See *Schnell*, 982 F.2d at 218 (noting agreement among all the Circuit Courts of Appeals that the holding in *Miller* (that increased Guidelines could not be applied to defendants who committed their crimes when a less severe version of those Guidelines was in effect) also applied to the federal Guidelines). But see *Demaree*, 459 F.3d at 794 (indicating that, since *Booker* made the Guidelines advisory, the *Miller* line of reasoning is no longer applicable).

to address the application of the *Ex Post Facto* Clause in light of the advisory Guidelines in *Demaree*, which represented a shift from its pre-*Booker* holdings.<sup>52</sup> However, no other circuit has endorsed this approach. In *Turner*, the D.C. Circuit explicitly rejected the holding in *Demaree* and held that the *Ex Post Facto* Clause was implicated, even under the advisory Guidelines.<sup>53</sup> Since then, three other circuits have followed suit.<sup>54</sup> Although the Seventh Circuit's holding in *Demaree* has been criticized and has yet to be followed by any other Circuit Court of Appeals, the Seventh Circuit continues to stand by its decision.<sup>55</sup>

*A. The Seventh Circuit in United States v. Demaree Adopts a Facial Approach and Holds That, as a Matter of Law, the Ex Post Facto Clause Is Not Implicated Under the Advisory Guidelines*

The Seventh Circuit was the first to address the question of whether, in light of the now-advisory Guidelines, a change in the Guidelines that increased the punishment for a crime after it had been committed violated the *Ex Post Facto* Clause.<sup>56</sup> This time, the court distinguished *Miller* as applicable only to mandatory Guidelines.<sup>57</sup> The court held that since the *Ex Post Facto* Clause applies only to binding regulations, the Clause is not implicated under the advisory Guidelines.<sup>58</sup>

The court rejected a literal interpretation of an *ex post facto* law as any regulation that disadvantages the defendant or poses a

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52. See generally *Demaree*, 459 F.3d 791.

53. See generally *Turner*, 548 F.3d 1094.

54. *United States v. Lewis*, 606 F.3d 193 (4th Cir. 2010); *Ortiz*, 621 F.3d at 87.

55. See *United States v. Favara*, 615 F.3d 824, 829 (7th Cir. 2010) (addressing an *ex post facto* challenge to a sentence under the advisory Guidelines and following the holding in *Demaree* that the use of the advisory Guidelines does not violate the *Ex Post Facto* Clause); *United States v. Robertson*, 662 F.3d 871, 876 (7th Cir. 2011) (same); *United States v. Sandoval*, 668 F.3d 865, 870 (7th Cir. 2011) (same).

56. *Demaree*, 459 F.3d at 792.

57. *Id.* at 794. The Seventh Circuit in *Demaree* described both the state statute at issue in *Miller* and the mandatory federal Guidelines as “constraining,” arguing that they afforded judges only limited opportunities to depart from the prescribed sentencing range. *Id.* The court went on to describe and distinguish the advisory Guidelines. See also Daniel M. Levy, Comment, *Defending Demaree: The Ex Post Facto Clause’s Lack of Control Over the Federal Sentencing Guidelines After Booker*, 77 *FORDHAM L. REV.* 2623, 2650–51 (2009) (stating “[t]he Seventh Circuit distinguished the post-*Booker* Sentencing Guidelines from those at issue in *Miller* by pointing out that, in *Miller*, the sentencing judge had to set forth clear and convincing evidence to depart from the presumptive guideline range.”).

58. *Demaree*, 459 F.3d at 795. “We conclude that the [E]x [P]ost [F]acto [C]lause should apply only to laws and regulations that bind rather than advise . . . .” *Id.*

risk of increased punishment.<sup>59</sup> Emphasis was placed on the fact that under the advisory Guidelines, a judge is not required to sentence within the recommended range.<sup>60</sup> While a judge must consider the Guidelines range, she can also sentence according to other factors.<sup>61</sup>

The *Demaree* court also expressed concern that a rule prohibiting retroactive application of enhanced Guidelines would have only a “semantic effect.”<sup>62</sup> According to the court, this is because a sentencing judge could simply avoid the rule by stating that she started with the older version of the Guidelines but increased the sentence on the basis of other factors listed in 18 U.S.C. § 3553(a).<sup>63</sup>

*B. The D.C. Circuit in United States v. Turner Rejects the Facial Approach Applied in Demaree and Adopts a “Substantial Risk” Standard*

In *Turner*, the D.C. Circuit faced a similar *ex post facto* challenge to the application of revised Guidelines that increased

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59. *Id.* at 794. The court expressed the concern that, if these requirements were liberally applied to any form of regulation (as opposed to just binding laws), it would open the door to many potential *ex post facto* claims. *Id.* The court cited the examples of a Congressional joint resolution urging judges to hand down lengthier sentences, or a practice of appointing judges who pledged to be heavy handed in regards to criminal sentencing. *Id.* Although both of these instances would tend to make sentences longer, it cannot and should not be said that either one violates the *Ex Post Facto* Clause. *Id.*

60. *Id.* at 795. The court likened the Guidelines to a nudge, pushing the judge towards the sentencing range but allowing him “unfettered” freedom to impose a reasonable sentence outside the range. *Id.*

61. *Id.* The Sentencing Reform Act, as modified by the *Booker* decision, no longer requires sentencing judges to sentence within the range offered by the Guidelines. *Id.* A sentencing judge is still required to take into account the range, according to 18 U.S.C. § 3553(a). *Id.* However, the judge may sentence on the basis of a variety of other factors that are also enumerated in the statute. *Id.* See 18 U.S.C. § 3553(a) (2006) (listing seven considerations that courts are required to take into account in determining what sentence to impose).

62. *Demaree*, 459 F.3d at 795.

63. *Id.* The court stated that the Sentencing Commission is expert in criminal punishments and when the Commission changes a guideline, it does so on the basis of factors it has deemed important. *Id.* It is therefore reasonable to conclude that the same factors that were important to the Sentencing Commission in increasing the sentencing range for a crime would also be important for a sentencing judge to take into account in determining an individual sentence. *Id.* The effect on the sentence would be the same whether the judge started with the earlier Guidelines and took the additional factors into account, or sentenced under the latter Guidelines with the factors already accounted for. *Id.* However, the Seventh Circuit’s suggestion that a sentencing judge would purport to base his decision on an earlier version of the Guidelines while in fact sentencing under a later version has been highly criticized.

the sentencing range for the crime committed by the defendant.<sup>64</sup> The D.C. Circuit rejected the facial analysis conducted in *Demaree* and instead held that the proper approach to determine whether the *Ex Post Facto* Clause is violated is to conduct an “as applied” constitutional analysis.<sup>65</sup> As applied to the facts at hand, the court found that the newer Guidelines created a “substantial risk” that the defendant’s sentence would be more severe, and therefore the sentence violated the *Ex Post Facto* Clause.<sup>66</sup>

The court rejected the argument advanced in *Demaree* that judges will attempt to avoid a rule prohibiting retroactive application of enhanced Guidelines by “misrepresent[ing] the true basis for their actions.”<sup>67</sup> The court also noted that judges are highly likely to sentence within the Guidelines, especially since the Supreme Court’s decision in *Rita v. United States* held that sentences within the Guidelines range are presumed reasonable.<sup>68</sup> Finally, the *Turner* court emphasized the importance of the Guidelines as a “starting point or ‘anchor’ for judges,” and noted that they will be taken more seriously than *Demaree* suggests.<sup>69</sup>

In the case of *United States v. Lewis*, the Fourth Circuit adopted the D.C. Circuit’s approach in holding that the retroactive application of increased Guidelines implicates the *Ex Post Facto* Clause.<sup>70</sup> The court held that the Guidelines are a crucial “starting point” and “initial benchmark” for the sentencing process, and therefore “an increased advisory Guidelines range poses a *significant risk* that a defendant will be subject to increased punishment.”<sup>71</sup> This holding was reaffirmed in *United States v. Knight*, where the court once again followed the rule that the application of “post-offense” Guidelines that result in an increased

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64. *Turner*, 548 F.3d at 1096. The defendant in *Turner* was convicted of conspiracy to defraud the United States. *Id.* He committed the crime in 2001, when the base level for the offense was ten and the Guidelines range was twenty-one to twenty-seven months imprisonment. *Id.* However, the Guidelines were amended in 2004 to a base level of fourteen and a resulting Guidelines range of thirty-three to forty-one months imprisonment. *Id.* The defendant was sentenced to thirty-three months in 2006 under the revised Guidelines. *Id.*

65. *Id.* at 1100.

66. *Id.*

67. *Id.* at 1099.

68. *Id.*; *Rita v. United States*, 551 U.S. 338, 347 (2007).

69. *Turner*, 548 F.3d at 1099.

70. *Lewis*, 606 F.3d at 199. In *Lewis*, the applicable Guidelines range at the time the defendant was sentenced was nearly double that of the Guidelines range in effect at the time he committed the offense. *Id.* at 195. The lower court declined to sentence according to the increased Guidelines after finding that doing so would violate the *Ex Post Facto* Clause. *Id.* The Fourth Circuit agreed. *Id.*

71. *Id.* at 199 (emphasis added).

sentencing range violates the *Ex Post Facto* Clause.<sup>72</sup>

The Second Circuit in *United States v. Ortiz* also adopted the “substantial risk” approach to determining whether the *Ex Post Facto* Clause is violated by the application of increased Guidelines.<sup>73</sup> That court rejected the hard line test adopted in *Demaree*.<sup>74</sup> It noted that the “substantial risk” standard is more appropriate because, though it does not invalidate every increased sentence imposed under the Guidelines, it allows the court to consider the circumstances in each individual case to determine whether the *Ex Post Facto* Clause has been violated.<sup>75</sup>

Most recently, the Eleventh Circuit addressed the circuit split in *United States v. Wetherald*, and found the D.C. Circuit’s reasoning to be more compelling.<sup>76</sup> The court noted that as a practical matter, the Guidelines, though not mandatory, are the starting point for sentencing judges.<sup>77</sup> Once the judge has correctly calculated the Guidelines range, it is difficult for a defendant to show that a within-Guidelines sentence is unreasonable.<sup>78</sup> Because of the importance the Guidelines play in sentencing, the court stated, “it cannot be said that the *Ex Post Facto* Clause is never implicated when a more recent, harsher, set of Guidelines is employed.”<sup>79</sup> Following the D.C. Circuit, the Eleventh Circuit held that the proper way to approach *ex post facto* challenges is to conduct an “as applied” analysis to determine whether the change in Guidelines created a “sufficient risk” of increased punishment in each individual case.<sup>80</sup>

*C. Other Circuit Courts of Appeals Have Discussed the Split, but Have Not Explicitly Ruled on the Issue*

1. *Though not expressly adopting the approach taken by the D.C. Circuit in Turner, the First and Sixth Circuits have indicated a preference for the “as applied” approach.*

The First Circuit in *United States v. Gilman* stated that although the Seventh Circuit held that the *Ex Post Facto* Clause is

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72. *United States v. Knight*, 606 F.3d 171, 178 (4th Cir. 2010). “This court . . . has recently rejected the *Demaree* analysis and reaffirmed our pre-*Booker* view that application of a post-offense Guidelines Manual that increases the advisory sentencing range violates the *Ex Post Facto* clause.” *Id.* The court noted that the question was settled in the Fourth Circuit after *Lewis*. *Id.*

73. *Ortiz*, 621 F.3d at 87.

74. *Id.*

75. *Id.*

76. *United States v. Wetherald*, 636 F.3d 1315, 1321 (11th Cir. 2011).

77. *Id.* at 1321.

78. *Id.* at 1322.

79. *Id.*

80. *Id.*

no longer implicated by increased Guidelines in light of *Booker* and the change from mandatory to advisory Guidelines, “the issue is doubtful in this circuit.”<sup>81</sup> Although not explicitly taking a stance, the court went on to conduct an “as applied” analysis and upheld the defendant’s sentence under the revised Guidelines.<sup>82</sup> The court found that the policy considerations underlying the increased Guidelines justified the higher sentence, and therefore there was no *ex post facto* violation.<sup>83</sup>

The Sixth Circuit in *United States v. Barton* initially seemed to indicate that a change to the Guidelines would not raise *ex post facto* concerns.<sup>84</sup> However, in *United States v. Duane* the court went back on this implication, declining “to read *Barton* as announcing such a broad rule.”<sup>85</sup> Though the court in *Duane* did not expressly adopt a position on the *ex post facto* question, it went on to conduct an “as applied” analysis.<sup>86</sup> The court focused on the fact that the defendant was on notice that he could be sentenced according to a more stringent version of the Guidelines and therefore his sentence under the revised Guidelines did not violate the *Ex Post Facto* Clause.<sup>87</sup>

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81. *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007).

82. *Id.*

83. *Id.*

84. *United States v. Barton*, 455 F.3d 649 (6th Cir. 2006). The court in *Barton* discussed the distinction between retroactive application of advisory Guidelines as opposed to mandatory Guidelines. *Id.* at 655 n.4. The court noted that, whereas increased mandatory Guidelines operate as laws and therefore directly implicate the *Ex Post Facto* Clause, advisory Guidelines do not. *Id.* The court stated that the advisory Guidelines “are no longer akin to statutes in their authoritativeness” and “[a]s such, the *Ex Post Facto* Clause is not implicated.” *Id.*

85. *United States v. Duane*, 533 F.3d 441, 446 (6th Cir. 2008). The court in *Duane* distinguished *Barton* as dealing with the retroactive application of the *Booker* decision itself, rather than the retroactive application of the Guidelines. *Id.* In *Barton*, the defendant pleaded guilty before the *Booker* decision came down, but was sentenced after *Booker*. *Barton*, 455 F.3d at 652. He argued that the application of the negative aspects of the *Booker* decision, which allowed his sentencing range to be increased, violated the Due Process Clause. *Id.* The discussion of the application of the *Ex Post Facto* Clause in *Barton* can therefore be categorized as dicta.

86. *Duane*, 533 F.3d at 447. The court first noted that the question of whether the *Ex Post Facto* Clause is implicated by a change to the Guidelines that increases the sentencing range for an offense had not been addressed in the Sixth Circuit in light of *Booker*. *Id.* at 445. It went on to discuss the split of authority between the Seventh Circuit and other circuits weighing in on the issue, noting that despite the Seventh Circuit holding that the *Ex Post Facto* Clause is not implicated, many courts continue to go through an “as applied” analysis. *Id.* at 446 n.1. The court then assumed “*arguendo* that a retroactive change to the Guidelines could implicate the *Ex Post Facto* Clause,” and went on to conduct an “as applied” analysis. *Id.* at 447.

87. *Id.* at 449.



2. *The Fifth Circuit, on the other hand, has indicated a preference for the facial approach taken by the Seventh Circuit in Demaree.*

Although the Fifth Circuit has not determined whether the *Ex Post Facto* Clause is implicated after the *Booker* decision rendered the Guidelines advisory, that court seems to be leaning towards the Seventh Circuit's interpretation.<sup>88</sup> In a concurring opinion in *United States v. Rodarte-Vasquez*, Chief Judge Edith Jones stated that she found the reasoning in *Demaree* persuasive on the issue.<sup>89</sup> She argued that the *Ex Post Facto* Clause would not be offended by the application of revised Guidelines for two reasons.<sup>90</sup> First was the fact that advisory regulations do not pose the same *ex post facto* problems that mandatory regulations do because they are merely informative, not binding laws.<sup>91</sup> Second was the consideration that a sentence imposed even after considering revised advisory Guidelines may not be any harsher than it would have been under previous Guidelines.<sup>92</sup> Although the defendants' sentences were found to violate the *Ex Post Facto* Clause in that case, the court based this finding on the fact that the sentences were handed down prior to *Booker*.<sup>93</sup>

In *United States v. Castillo-Estevez*, the Fifth Circuit again

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88. See Levy, *supra* note 57, at 2651 ("In *United States v. Rodarte-Vasquez*, the Fifth Circuit indicated that it might agree with the Seventh Circuit in future cases where the defendant committed the offense after *Booker*.").

89. *United States v. Rodarte-Vasquez*, 488 F.3d 316, 325 (5th Cir. 2007) (Jones, C.J., concurring). This case indicated another way in which the *Ex Post Facto* Clause may come into play when a sentencing judge applies a revised version of the Guidelines. Many of the other cases discussed in this Comment have dealt with *ex post facto* challenges to Guidelines that have been revised to increase the base level of the offense and therefore increase the sentencing range for the offense. In *Rodarte-Vasquez*, however, the *ex post facto* challenge dealt with the wording of the Guidelines revision. *Id.* at 323. The defendants both plead guilty to illegal reentry after deportation. *Id.* at 318. In determining their sentences, the judge considered past convictions for transporting and harboring illegal aliens. *Id.* Under the version of the Guidelines in effect when they committed the crime of illegal reentry, a sentencing enhancement applied only if the prior offenses were committed for profit. *Id.* at 319. Under the revised Guidelines in effect at the time they were sentenced, the sentencing enhancement applied regardless of whether the prior offenses were committed for profit or not. *Id.* Therefore, the defendants alleged an *ex post facto* violation based on the language of the Guidelines, arguing that they did not commit their prior crimes for profit and so would not be subject to the enhancement under the prior version of the Guidelines. *Id.* at 323.

90. *Id.* at 325. "A logical corollary to *Booker* would seem to be that the [E]x [P]ost [F]acto Clause does not apply . . ." *Id.*

91. *Id.*

92. *Id.*

93. *Id.* "[A]s this case arises from a pre-*Booker* sentencing, we do not reach the issue whether the [E]x [P]ost [F]acto Clause can apply to a post-*Booker* sentence." *Id.*

addressed an *ex post facto* challenge to the application of revised Guidelines.<sup>94</sup> The court stated that the defendant's *ex post facto* argument overlooked *Booker*, and discussed the concurring opinion in *Rodarte-Vasquez* with seeming approval.<sup>95</sup> However, since the court was reviewing the defendant's sentence under a plain error standard of review, it was not required to and did not adopt a rule for determining whether the *Ex Post Facto* Clause applies to the advisory Guidelines.<sup>96</sup>

3. *Other Circuit Courts of Appeals have discussed the split of authority, but have not indicated which line of reasoning, if any, they would follow.*

The Eighth Circuit in *United States v. Deegan* addressed the application of the *Ex Post Facto* Clause to the advisory Guidelines after the defendant claimed the lower court erred by discussing the higher Guidelines range.<sup>97</sup> Although the lower court ultimately followed the rule that the application of upwardly revised Guidelines violates the *Ex Post Facto* Clause, the Court of Appeals noted that, in light of *Booker*, "the endurance of that rule is an open question in this circuit."<sup>98</sup>

In *United States v. Jones*, the Tenth Circuit only briefly touched on the *Ex Post Facto* question.<sup>99</sup> That court stated that, although the defendant was sentenced according to the Guidelines in effect when he committed the crime, "we offer no opinion as to whether the now-advisory guidelines require an *ex post facto* analysis."<sup>100</sup> In *United States v. Yip*, the Ninth Circuit also recognized the split of authority over whether the *Ex Post Facto*

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94. *United States v. Castillo-Estevez*, 597 F.3d 238, 240–41 (5th Cir. 2010).

95. *Id.* at 241. After discussing the main points from the concurring opinion in *Rodarte-Vasquez*, the court stated that this was consistent with the approach taken by the Seventh Circuit in *Demaree* that the *Ex Post Facto* Clause applies "only to laws and regulations that bind rather than advise." *Id.* (quoting *Demaree*, 459 F.3d at 794). The court mentioned contrary decisions from the D.C. Circuit and the Eighth Circuit, but did not discuss these holdings to the same degree. *Id.*

96. *Castillo-Estevez*, 597 F.3d at 241.

97. *United States v. Deegan*, 605 F.3d 625 (8th Cir. 2010). Although the court ended up applying the version of the Guidelines in effect when the defendant committed her crime, in its decision the court discussed and considered the version in effect at the time of sentencing. *Id.* at 632. The defendant did not make a timely objection, so the standard of review on appeal was for plain error. *Id.* For these reasons, the court was not forced to definitively decide the issue. *Id.*

98. *Id.*

99. *United States v. Jones*, 254 F. App'x 711 (10th Cir. 2007). In a footnote the court cited cases demonstrating the conflicting holdings on the application of the *Ex Post Facto* Clause to the advisory Guidelines. *Id.* at 730 n.10.

100. *Id.* at 730.

Clause is implicated under the advisory Guidelines.<sup>101</sup> However, in that case, the court was not called upon to decide the issue and declined to further address it.<sup>102</sup> As of the date of publication of this Comment, the Third Circuit is the only circuit that has not discussed or addressed the issue.

#### IV. PROPOSAL

The precise meaning and application of the *Ex Post Facto* Clause has challenged courts since the Constitution was enacted,<sup>103</sup> and the current circuit split is but another example of the challenges inherent in applying constitutional guarantees to novel and ever changing scenarios. This section will discuss the application of prior Supreme Court precedent to the current issue.<sup>104</sup> It will analyze the strengths and weaknesses of the arguments that the Courts of Appeals have adopted both for and against the application of the *Ex Post Facto* Clause to sentences under the advisory Guidelines.<sup>105</sup> Finally, it will conclude that, in light of these considerations, the solution is to conduct an “as applied” analysis.<sup>106</sup>

While past precedent helps to put the issues in context, it does little to resolve the split because there are strong arguments for both sides. In *Calder*, an early Supreme Court case defining the meaning of the *Ex Post Facto* Clause, the Court identified laws that make the punishment for a crime more severe than when it was committed as violating the Clause.<sup>107</sup> On one hand, the advisory Guidelines are not laws in a literal sense, and do not

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101. *United States v. Yip*, 362 F. App'x 659, 662 n.2 (9th Cir. 2010). In a footnote, the court noted the disagreement and cited *Demaree* and *Turner* as authorities coming down on opposite sides of the issue. *Id.*

102. *Id.* The Ninth Circuit in *Yip* held that the lower court erred by sentencing the defendant under a revised version of the Guidelines as opposed to the ones in effect at the time the crimes were committed. *Id.* at 662. Although this appears to be in keeping with the *Turner* line of reasoning, the court was really just following its own pre-*Booker* precedent. *Id.* The court noted that it was not called upon by either party to decide whether *Booker* was irreconcilable with prior holdings, but seemed to indicate that it would have considered the issue anew if asked to do so. *Id.* at 662 n.2.

103. *Calder*, 3 U.S. (3 Dall.) at 388–89 (opinion of Chase, J.); *Dobbert*, 432 U.S. at 293, 297–98; *Weaver*, 450 U.S. at 28–29.

104. In particular, it will incorporate the cases discussed in the “Background” section of this Comment and their application to the issue at hand.

105. The focus will be on the arguments advanced in *Demaree*, 459 F.3d 791, and *Turner*, 548 F.3d 1094, as those courts were the first to take a stand on the application of the *Ex Post Facto* Clause to the Guidelines post-*Booker*, and came down on opposite sides of the issue.

106. Similar to the analysis adopted by the D.C. Circuit Court of Appeals in *Turner*, 548 F.3d at 1094.

107. *Calder*, 3 U.S. (3 Dall.) at 390.

necessarily lead to increased punishment.<sup>108</sup> On the other hand, the Guidelines are still a starting point for sentencing judges and oftentimes proscribe a higher sentencing range than the one in effect at the time the crime was committed.<sup>109</sup>

In *Dobbert*, the Court noted that whether the *Ex Post Facto* Clause was implicated also depended on whether the change in law affected substantive personal rights or merely procedure.<sup>110</sup> In fact, the Court in that case distinguished between a law that affects the amount of punishment and one that affects only the method for determining punishment.<sup>111</sup> The Court held that the former implicates the *Ex Post Facto* Clause, whereas the latter does not.<sup>112</sup> While a sentence under an increased Guidelines range clearly affects the amount of punishment a criminal receives, rendering the Guidelines advisory but not striking them in their entirety arguably impacts only the method for determining punishment.

The Court added to *Ex Post Facto* Clause precedent in *Weaver*, where it held that a law violates the *Ex Post Facto* Clause if it is both retrospective in nature and disadvantageous to the offender.<sup>113</sup> Although changes to the Guidelines apply to some extent to events occurring before the changes were enacted, the ability of a judge to depart from the Guidelines muddles the analysis.<sup>114</sup> Furthermore, application of revised Guidelines may be

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108. The *Demaree* court expressed concern with extending the *Ex Post Facto* Clause to anything other than “laws and regulations that bind rather than advise.” *Demaree*, 459 F.3d at 795. The court noted that, if the Clause was not so limited, it could be extended to apply to “any regulation traceable to Congress that disadvantages a criminal defendant.” *Id.* at 794.

The ability of sentencing judges to depart from the Guidelines range is the main reason why, even when Guidelines have been upwardly revised, they may not actually result in an increased sentence. However, as has been noted, most sentences do in fact fall within the advisory Guidelines range. *Id.*; *Turner*, 548 F.3d at 1099.

109. *Turner*, 548 F.3d at 1099. As the court in *Turner* noted, sentencing judges are required to begin by calculating the Guidelines range in effect at the time of sentencing and will often sentence within that calculated range. *Id.* For the defendant in *Turner*, the Guidelines in effect at the time he was sentenced proscribed a higher sentence than the ones in effect at the time he committed his crimes, and he was in fact sentenced according to the higher range.

110. *Dobbert*, 432 U.S. at 293.

111. *Id.* at 293–94.

112. *Id.*

113. *Weaver*, 450 U.S. at 29.

114. As *Miller* held, the application of increased Guidelines clearly was retrospective in that the revised Guidelines applied to crimes committed before they were enacted. *Miller*, 482 U.S. at 430–31. Now that the Guidelines are no longer mandatory and judges have the ability to deviate on the basis of other factors and policy considerations, it is less clear whether they are retrospective in nature.

disadvantageous in some cases, but is not necessarily so.<sup>115</sup>

Another important consideration throughout the case law has been the purpose of the *Ex Post Facto* Clause as a mechanism for ensuring that people are on notice as to potential penalties for their actions.<sup>116</sup> Courts have held that notice that a sentence may be changed is not sufficient.<sup>117</sup> Yet at the same time, notice does not require that a defendant be able to determine to a degree of certainty the punishment that he may be subject to.<sup>118</sup> As the court in *Demaree* noted, even under the mandatory Guidelines this would have been extremely difficult.<sup>119</sup> Since prior case law can be read to support both positions, it does relatively little to resolve the current dispute.

As for the cases specifically addressing the *Ex Post Facto* Clause in relation to the advisory Guidelines, much emphasis has been placed on the fact that by their plain wording, the Guidelines are not binding laws.<sup>120</sup> After the Guidelines were rendered advisory in *Booker*, some courts have argued that the *Ex Post Facto* Clause is simply not implicated by anything other than “laws.”<sup>121</sup> However, this argument ignores Supreme Court cases that have rejected such a simple analysis as to when the *Ex Post Facto* Clause is implicated.<sup>122</sup>

In practical effect, describing the Guidelines as merely advisory is an understatement. Sentencing judges are required to calculate the Guidelines range—they at least represent a starting

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115. Once again, because the Guidelines are a starting point and sentencing judges have the ability to depart from the recommended range, there is no guarantee that defendants will be subject to increased sentences. However, this is not to say that they are not, in some cases, subject to a “substantial risk” of increased punishment. *Turner*, 548 F.3d at 1100.

116. *Calder*, 3 U.S. (3 Dall.) at 388–89 (opinion of Chase, J.), 396 (opinion of Paterson, J.), 399–400 (opinion of Iredell, J.); *Dobbert*, 432 U.S. at 297–98; *Weaver*, 450 U.S. at 28–29.

117. *Miller*, 482 U.S. at 431. “The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed.” *Id.*

118. *Dobbert*, 432 U.S. at 293–94; *Demaree*, 459 F.3d at 793.

119. *Demaree*, 459 F.3d at 793.

120. This was the force of the reasoning underlying the holding in *Demaree*. *Demaree*, 459 F.3d at 795. Similarly, the concurring opinion in *Rodarte-Vasquez* noted that “purely advisory regulation[s]” do not implicate the *Ex Post Facto* Clause. *Rodarte-Vasquez*, 488 F.3d at 325 (Jones, E., concurring).

121. *Demaree*, 459 F.3d at 795; *Rodarte-Vasquez*, 488 F.3d at 325 (Jones, E., concurring).

122. See James R. Dillon, Comment, *Doubting Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker*, 110 W. VA. L. REV. 1033, 1036 (2008) (arguing that the Court has “rejected bright-line classifications of ‘law’ or ‘not law’ for evaluating the *Ex Post Facto* Clause’s applicability to a given legislative enactment . . .”).

point in the sentencing process.<sup>123</sup> Although judges are no longer required to sentence within the range, they must justify significant departures from it.<sup>124</sup> The fact that sentences within the range are presumed reasonable further encourages judges to sentence within the range.<sup>125</sup> Therefore, when sentences are reviewed on appeal they are much more likely to be affirmed if they are within the Guidelines range.<sup>126</sup>

Although the *Demaree* court likened the advisory Guidelines to a “nudge” towards the appropriate sentence, the court itself acknowledged that, even after *Booker*, the majority of federal sentences continue to be within the Guidelines range.<sup>127</sup> This fact in itself indicates that the Guidelines are much more than a “nudge” and are more akin to an “anchor” for sentencing judges.<sup>128</sup> Further, the statements in *Demaree* that a judge’s choice of sentence is only subject to “light appellate review” and that a judge has “unfettered” freedom to sentence outside the Guidelines range are noticeable understatements.<sup>129</sup> As the court in *Turner* emphasized, the presumption of reasonableness given to within-Guidelines sentences on appeal means that more judges are likely to sentence within the Guidelines.<sup>130</sup>

Finally, like the *Turner* court pointed out, *Demaree*’s argument that a rule requiring judges to sentence under the older Guidelines would have only a semantic effect is unpersuasive.<sup>131</sup> It seems that the *Demaree* court was trying to emphasize that a judge, in imposing a higher sentence, would probably take into account the same policy considerations that the sentencing commission took into account in ratcheting up the Guidelines, yet the *Demaree* court actually implied that sentencing judges would misrepresent the basis for their decisions.<sup>132</sup> This is an argument

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123. *Gall v. United States*, 552 U.S. 38, 49 (2007); *Turner*, 548 F.3d at 1099.

124. *Lewis*, 606 F.3d at 201; *Gall*, 552 U.S. at 50. As the Court in *Gall* noted, although a sentencing judge has the ability to sentence outside the Guidelines, he must have a “significant justification” for “major departures.” *Id.*

125. *Turner*, 548 F.3d at 1099; *Rita*, 551 U.S. at 347.

126. *Turner*, 548 F.3d at 1099; *Rita*, 551 U.S. at 347.

127. *Demaree*, 459 F.3d at 794. *See also Turner*, 548 F.3d at 1099 (noting that the impact of *Booker* on sentencing has been minor, since most sentences continue to fall within the Guidelines range).

128. *Demaree*, 459 F.3d at 794. *See also Turner*, 548 F.3d at 1099 (referring to the Guidelines as an “anchor” for judges—an important starting point that is likely to influence the sentence they impose).

129. *Demaree*, 459 F.3d at 795.

130. *Turner*, 548 F.3d at 1099.

131. *Id.* at 1099; *Demaree*, 459 F.3d at 795.

132. *Demaree*, 459 F.3d at 795. The *Demaree* court noted that under the advisory Guidelines, a sentencing judge may also take into account the factors in 18 U.S.C. § 3553(a). *Id.* A logical inference is that the Sentencing Commission is also influenced by these same factors in determining the applicable sentencing range for a crime. *Demaree* argued, however, that if a

with little merit, as it baselessly calls into question the integrity of the judges themselves.

As more and more courts are confronted with this issue, the weight of authority and reasoning leans towards the *Turner* approach.<sup>133</sup> Even courts that do not explicitly adopt that holding have gone through an “as applied” analysis.<sup>134</sup> This is not to suggest that the *Ex Post Facto* Clause will always be, or even will frequently be violated by the application of increased Guidelines. Courts on both sides of the issue have agreed that increased sentences are justified in light of other policy considerations.<sup>135</sup> Also, since the standard of review on appeal is for abuse of discretion, the likelihood that a significant number of sentences will be overturned is slight.<sup>136</sup> For these reasons, courts should presume that a within-Guidelines sentence, whether those Guidelines have been upwardly revised or not, is reasonable. Yet the inquiry should not stop there, as courts should go through the facts on a case-by-case basis in order to ensure that each individual sentence does not run afoul of the *Ex Post Facto* Clause.

## V. CONCLUSION

In sum, *Demaree's* arguments for a hard-line rule are simply not convincing. Yet on the opposite extreme, considerations of past precedent indicate that in light of the advisory nature of the Guidelines, it is no longer the case that retroactive application of increased Guidelines automatically violates the *Ex Post Facto* Clause. Therefore, a more moderate approach similar to the one adopted by the D.C. Circuit in *Turner* is the best way to address future *ex post facto* challenges to sentences under upwardly

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hard-line rule was enacted forbidding judges from sentencing according to upwardly revised Guidelines, judges would circumvent this rule by saying they were sentencing under the older Guidelines, but that the § 3553(a) factors led to the higher sentence. *Id.* While such a rule would presumably permit judges to increase sentences on the basis of those enumerated factors, it is not a logical inference to assume that sentencing judges would not follow such a rule, if enacted, or that they would go so far as to conceal the true factors behind their sentences.

133. *Turner*, 548 F.3d at 1100; *Lewis*, 606 F.3d at 199; *Knight*, 606 F.3d at 178; *Ortiz*, 2010 U.S. App. LEXIS, at \*13.

134. See *Gilman*, 478 F.3d at 449 (declining to adopt the “substantial risk” approach advocated by the D.C. Circuit in *Turner*, but nonetheless going on to conduct an “as applied” analysis); *Duane*, 533 F.3d at 447 (same). Although these cases declined to explicitly adopt the *Turner* approach, the fact that they conducted “as applied” analyses acknowledges that the *Ex Post Facto* Clause may be violated by the advisory Guidelines and that they would not follow *Demaree's* holding.

135. *Demaree*, 459 F.3d at 795; *Turner*, 548 F.3d at 1100.

136. Dillon, *supra* note 122, at 1044. This is a fairly deferential standard of review, meaning that a majority of sentences are likely to be upheld even after the “as applied” analysis is conducted.

revised Guidelines. While courts should presume that in a majority of cases the *Ex Post Facto* Clause will not be violated, they should still consider the facts on a case-by-case basis. This is the best way to preserve the constitutional guarantee that there will be no *ex post facto* laws.



