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Why Vague Sentencing Guidelines Violate the Due Process Clause

The United States Sentencing Guidelines (the Guidelines) are used to calculate sentencing ranges for roughly 75,000 defendants each

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year.[1] Despite that ubiquity, the law is unsettled on a very basic question: whether the Guidelines trigger defendants' rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. Specifically, the federal courts of appeals are split regarding whether use of a vague Guideline at sentencing deprives the defendant of liberty without due process of law.[2]

The importance of this split has come into sharp relief following *Johnson v. United States*,[3] in which the United States Supreme Court struck down as unconstitutionally vague a portion of the penalty provisions of the Armed Career Criminal Act (ACCA) known as the "residual clause."[4] That clause imposed a fifteen-year mandatory minimum prison term for defendants with at least three prior convictions for "a violent felony or a serious drug offense."[5] Included in the statutory definition of "violent felony" was any crime "involv[ing] conduct that presents a serious potential risk of physical injury to another."[6] The Court held that the use of this latter statutory phrase to increase a defendant's sentence violated the Due Process Clause of the United States Constitution because "the wide-ranging inquiry" it requires "both denies fair notice to defendants and invites arbitrary enforcement by judges."[7]

The Guidelines also contain a residual clause. It is textually identical to the statutory phrase struck down in *Johnson*.[8] Just as the ACCA residual clause increased the applicable mandatory minimum, the Guidelines' residual clause dramatically increases the sentencing range

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1 *See* U.S. SENTENCING COMM'N, ANNUAL REPORT A-4 (2014), http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/annual-report-2014 [hereinafter 2014 COMM'N REPORT].

2 On the last day of the October 2015 term, the Court granted certiorari in a case raising this question. *See* Beckles v. United States, 136 S. Ct. 2510, 2510 (2016).

3 135 S. Ct. 2551, 2555 (2015).

4 *Id.* at 2557. The provision got its name because it is the last, catch-all part of the statute's definition of "violent felony." *Id.* at 2556.

5 18 U.S.C. § 924(e)(1) (2012).

6 18 U.S.C. § 924(e)(2)(B)(ii).

7 *Johnson*, 135 S. Ct. at 2557.

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

for a federal defendant[9]—often by a decade or more.[10] Because of these similarities, *Johnson* casts serious doubt on the validity of the sentences of defendants whose Guidelines ranges were calculated with a residual-clause enhancement. The Third, Sixth, Seventh, Tenth, and D.C. Circuit Courts of Appeals have held that *Johnson*'s constitutional reasoning "applies with equal force to the Guidelines' residual clause."[11]

There is, however, a difference between the ACCA and the Guidelines: while the ACCA imposed a *mandatory* sentencing enhancement, the Guidelines are *advisory*. Although a federal judge is required to calculate the Guidelines range in every criminal case, the judge need not adhere to that range when selecting a sentence. After *Johnson*, the Eleventh Circuit Court of Appeals concluded this difference was dispositive, holding the Guidelines' advisory nature rendered them immune from due process challenges on vagueness grounds.[12]

Does *Johnson* doom the Guidelines' residual clause? The answer to this question is critical to hundreds of defendants whose Guidelines ranges were increased by the residual clause.[13] But looming behind this

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9 The sentencing-range increase under the Guidelines operates very similarly to the ACCA's mandatory-minimum increase described in the text accompanying notes 5 and 6, *supra*. The increased Guidelines range is tied to whether the defendant is designated a "career offender." *Id.* § 4B1.1(b). That designation applies if (1) the instant offense of conviction and (2) at least two prior felony convictions are for "a crime of violence or a controlled substance offense." *Id.* § 4B1.1(a)(1). Just as the ACCA's residual clause was part of the definition of "violent felony" under the statute, the Guidelines' residual clause is part of the definition of "crime of violence." *Id.* § 4B1.2(a)(2).

10 PAUL J. HOFER, SENTENCING RES. COUNSEL PROJECT, DATA ANALYSES 1 (2016), http://www.src-project.org/wp-content/uplaods/2016/04/Data-Analyses-1.pdf. In FY 2014, the average guideline minimum was 204 months for career offenders, compared to 83 months for non-career offenders. *Id.* The average sentence actually imposed was 138.6 months for career offenders, compared to 62 months for non-career offenders. *Id.*

11 United States v. Pawlak, 822 F.3d 902, 907 (6th Cir. 2016); *accord* United States v. Hurlburt, 835 F.3d 715, 725 (7th Cir. 2016) (en banc); United States v. Sheffield, 832 F.3d 296, 312 (D.C. Cir. 2016); United States v. Calabretta, 831 F.3d 128, 135 (3d Cir. 2016); United States v. Madrid, 805 F.3d 1204, 1210–11 (10th Cir. 2015).

12 The Eleventh Circuit is the only court to have reached this conclusion in a published decision. United States v. Matchett, 802 F.3d 1185, 1196 (11th Cir. 2015). However, as explained later and in an accompanying text, other federal appellate courts have long barred vagueness challenges to the sentencing guidelines. The Eleventh Circuit relied on the reasoning of those cases in deciding *Matchett*. *See infra*, notes 87–90.

13 The size of this group is unknown but undoubtedly quite large. *See* Douglas A. Berman, *How Many Federal Prisoners Have "Strong* Johnson *Claims" (and How Many Lawyers Will Help Figure This Out?)*, SENT'G L. & POL'Y BLOG (June 26, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/how-many-federal-prisoners-have-strong-johnson-claims-and-how-many-lawyers-will-help-figure-this-out

question is an even larger one: do defendants have a due process right to Guidelines provisions that can be interpreted with reasonable precision? This Article takes a historical, jurisprudential, and pragmatic approach to that question, examining the roots of the Guidelines, the changes wrought by the shift from mandatory to advisory Guidelines, and the continuing effect of the Guidelines on federal sentencing practice. From that examination, several truths emerge. First, the Guidelines are used to calculate sentencing ranges for tens of thousands of federal defendants each year.[14] Second, even though the Guidelines are advisory, overwhelming empirical evidence demonstrates how powerfully they influence the sentencing practice of federal judges.[15] And third, the Supreme Court has taken a consistently pragmatic approach in Guidelines cases, prizing their actual effect on sentencing practice over their technical designation as advisory. Because the Guidelines reliably and significantly influence the duration of deprivations of liberty, this Article argues the Due Process Clause

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.html ("I suspect that there are likely many hundreds, and perhaps even thousands, of current federal prisoners who do have strong *Johnson* claim[s]."). The Guidelines ranges of about 2,000 defendants each year are enhanced as a result of a "career offender" designation. U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDER (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf (reporting that 2232 individuals were sentenced in federal court as "career offenders" in 2012, and ninety-five percent of them had increased Guidelines ranges as a result). However, that does not mean anywhere near 2000 individuals per year would be entitled to *Johnson* relief. The residual clause is just one of several ways a career offender enhancement is triggered. The Sentencing Commission does not disaggregate sentencing enhancements based on how the defendant qualified as a career offender, so we do not know how many career offenders' designations rest on past crime-of-violence convictions rather than controlled-substance convictions, much less what subset of the crime-of-violence determinations arose from the residual clause. Further complicating matters, some defendants subject to residual-clause enhancements still would qualify as career offenders on other grounds even if the residual clause were eliminated. *Cf.* United States v. Welch, 683 F.3d 1304, 1313 (11th Cir. 2012) (finding it unnecessary to decide whether robbery qualified as a "crime of violence" under the "elements clause" of the ACCA statutory definition because the conviction "suffice[d] under the residual clause"). Moreover, how many defendants might be entitled to resentencing because of *Johnson* depends not just on the main question addressed in this article, whether the Guidelines can be challenged on vagueness grounds, but also on whether *Johnson* is retroactive on collateral review in Guidelines cases such that prisoners can challenge their sentences through petitions for habeas corpus. That second question, a full exploration of which is beyond the scope of this article, is itself the subject of a split in the courts. *See infra*, notes 177 and 180.

14 *See* 2014 COMM'N REPORT, *supra* note 1.

15 *See* Peugh v. United States, 133 S. Ct. 2072, 2084 (2013) ("Even after *Booker* rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion.").

grants defendants the right to challenge the Guidelines on vagueness grounds.[16]

I
DUE PROCESS, VAGUENESS, AND *JOHNSON*

Federal courts may strike down a statute as void for vagueness for "either of two independent reasons."[17] A law is unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [the law] prohibits."[18]

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[16] I pause here to acknowledge the profusion of academic discourse regarding *Johnson*, and to explain the particular contribution of this Article to that discussion. *Johnson* was a big deal. *See* Erwin Chemerinsky, *Chemerinsky: The Best, Worst, and Most Surprising SCOTUS Opinions of 2015*, ABA J. DAILY NEWS (Jan. 7, 2016), http://www.abajournal.com/news/article/chemerinsky_top_highlights_from_2015_and_what_we_can_look_for_from_scotus_i (calling *Johnson* the "most important decision of the year for the federal courts"). As a result, much has been written about the decision. *See*, *e.g.*, Douglas A. Berman, *W[ha]t does* Johnson *mean for the past, present and future of the career offender guidelines?*, Sentencing Law and Policy Blog (July 1, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/07/want-does-johnson-mean-for-the-past-present-and-future-of-the-career-offender-guidelines-.html ("In sum: *Johnson* + career offender guidelines = lots and lots of uncertainty and interpretive headaches."); Leah M. Litman, *Circuit Splits & Original Writs: What the Supreme Court Must Address—and Now—in the Wake of* Johnson v. United States, CASETEXT (Dec. 17, 2015), https://casetext.com/posts/circuit-splits-original-writs; Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 FED. SENT'G REP. 45, 45 (2015); Carissa Byrne Hessick, Johnson v. United States *and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J. L. & LIBERTY 152, 158 (2016). Hessick and Berman also collaborated on an amicus brief, urging the Eleventh Circuit to reconsider *en banc* its determination the Guidelines cannot be challenged on vagueness grounds. Brief of Law Professors as Amicus Curiae in Support of Defendant-Appellant United States v. Matchett, 802 F.3d 1185, 1185 (2015) (No. 14-10396), 2015 WL 6723558, at *1. Many of these pieces simply point to the questions *Johnson* left open about the Guidelines' residual clause without attempting to answer them. Others, notably the amicus brief and Litman's Federal Sentencing Reporter article, dig into the question of the vagueness doctrine's applicability to the Guidelines and either propose an answer (Berman and Hessick argue immunizing the Guidelines from vagueness challenges conflicts with Supreme Court vagueness and Guidelines precedent and is inconsistent with the structure of federal sentencing) or highlight interesting arguments on both sides (Litman notes the tension between the Supreme Court's pragmatic approach to the influence of the sentencing Guidelines in *Peugh v. United States* and the Court's determination that the Guidelines did not violate the Sixth Amendment so long as they are advisory.) Litman, 28 FED. SENT'G REP. at 46. This Article contributes to this body of work by taking a sustained look at the history of the Guidelines, the case law on the vagueness doctrine, and the underpinnings of the Due Process Clause, in an attempt to answer the broad question whether advisory sentencing guidelines may be challenged on vagueness grounds.

[17] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[18] *Id.*

Alternatively, a statute is impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement."[19] A law that falls into either category runs afoul of the Constitution's guarantee of due process.[20] These principles apply to criminal laws, including those that "fix sentences."[21] They also apply to civil laws so long as those laws reach "a substantial amount of constitutionally protected conduct."[22] The requirements of due process change depending on the restriction at issue: more process is due—i.e., more precision is required and less vagueness tolerated—as the deprivation becomes more serious.[23] Thus, criminal laws must be more precise than economic regulations.[24]

Johnson focused on whether a portion of the ACCA's definition of "violent felony" was unconstitutionally vague.[25] The statute "forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms."[26] The general penalty for violating this ban is up to ten years' imprisonment.[27] But if the defendant has "three or more earlier convictions for a 'serious drug offense' or a 'violent felony,'" the

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[19] *Id.*

[20] Courts disagree over whether vagueness violates substantive or procedural due process, but the weight of authority is with procedural due process. *See* ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 348 (5th Cir. 2008); C.B. By and Through Breeding v. Discoll, 82 F.3d 383, 388 n.4 (11th Cir. 1996); San Filippo v. Bongiovanni, 961 F.2d 1125, 1139 (3d Cir. 1992); United States v. Morrison, 844 F.2d 1057, 1070 n.19 (4th Cir. 1988); United States v. Prof. Air Traffic Controllers Org. (PATCO), Patco Local 202, 678 F.2d 1, 2 (1st Cir. 1982); S. Ohio Coal Co. v. United Mine Workers of Am., 551 F.2d 695, 705 n.11 (6th Cir. 1977). *But see* Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 689 (2d Cir. 1996) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees."); *see also* Johnson v. United States, 135 S. Ct. 2551, 2569–70 (2015) (Thomas, J., dissenting) (linking the vagueness doctrine to substantive due process jurisprudence and questioning the validity of vagueness as a due process concept).

[21] *Johnson*, 135 S. Ct. at 2557.

[22] Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

[23] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (considering the nature of "the private interest that will be affected by the official action" in determining what due process requires).

[24] *Vill. of Hoffman Estates*, 455 U.S. at 498; *see also Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting) (arguing that because "[t]he fear is that vague laws will trap the innocent," the vagueness doctrine "has less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question" (quotation marks and citation omitted)).

[25] *Johnson*, 135 S. Ct. at 2555.

[26] *Id.* (citing 18 U.S.C. § 922(g) (2012)).

[27] 18 U.S.C. § 924(a)(2) (2012).

ACCA imposes a minimum prison term of 15 years and a maximum prison term of life.[28] The definition of "violent felony" thus took on tremendous significance for a set of criminal defendants. The ACCA defines "violent felony" as:

> 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*.[29]

Pursuant to the statute, a defendant's prior conviction thus may qualify as a "violent felony" under three circumstances: (1) if the crime meets the elements test of subsection (i); (2) if the crime is one of the enumerated offenses listed in the first part of subsection (ii); or (3) if the crime falls within the final, italicized catch-all provision, which has come to be known as the residual clause.[30]

Certain criminal convictions easily meet the requirements of one of the first two categories. Often, however, the federal courts were left to parse a state statute to determine whether crimes such as unlawful restraint,[31] vehicular flight,[32] theft of firearms from a licensed dealer,[33] or criminal recklessness[34] fell within the residual clause. Because defendants in federal courts bring with them prior convictions under the criminal statutes of more than fifty states and territories, this interpretive task took on seemingly infinite variations. The results were inconsistent, creating "a black hole of confusion and uncertainty."[35] Different courts reached different conclusions regarding whether nearly identical crimes qualified as residual-clause violent felonies.[36]

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[28] *Johnson*, 135 S. Ct. at 2555 (citing 18 U.S.C. § 924(e)(1) and Johnson v. United States, 559 U.S. 133, 136 (2010)).

[29] 18 U.S.C. § 924(e)(2)(B) (emphasis added).

[30] *See, e.g.*, United States v. Schmidt, 623 F.3d 257, 265 (5th Cir. 2010) (describing the ACCA's "three disjunctive prongs, under any one of which an offense may be deemed a crime of violence").

[31] *See* Harrington v. United States, 689 F.3d 124, 133 (2d Cir. 2012).

[32] United States v. Petite, 703 F.3d 1290, 1296–97 (11th Cir. 2013).

[33] *See Schmidt*, 623 F.3d at 265.

[34] *See* United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008).

[35] United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring).

[36] *Compare, e.g.*, United States v. Montgomery, 402 F.3d 482, 488–49 (5th Cir. 2005) (holding that the Texas statute criminalizing retaliation against government officials does not involve conduct that presents a serious potential risk of physical injury to another because the harm threatened need not be physical), *with* United States v. Sawyers, 409 F.3d

Splits appeared over not only whether the clause applied to a particular crime, but also "the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider."[37] Underscoring the problem, the Supreme Court dove into the fray four times between 2007 and 2011, attempting to provide guidance to lower courts.[38] Instead of fostering uniformity, these decisions engendered further splits.[39] In each of the first three cases, dissenting or concurring justices bemoaned the Sisyphean task of determining whether the residual clause applied to a given crime.[40] Finally, in *Sykes v. United States*, Justice Scalia expressly argued in dissent that the residual clause was insufficiently precise to survive a constitutional vagueness challenge.[41]

In *Johnson*, the constitutional reasoning of Justice Scalia's *Sykes* dissent garnered a six-justice majority. Because it was "convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," the Court struck down the clause, holding that "[i]ncreasing a defendant's sentence under the clause denies due process of law."[42]

After *Johnson*, it is clear that federal defendants' statutory sentencing ranges can no longer be enhanced because their prior convictions qualify as residual-clause violent felonies. But *Johnson* left a number of questions unanswered. One of those questions is whether various similarly worded statutory phrases will be struck down as void

732, 742–43 (6th Cir. 2005) (holding that the Tennessee statute with virtually identical text qualified as a violent felony under the residual clause).

37 Johnson v. United States, 135 S. Ct. 2551, 2559–60 (2015).

38 Sykes v. United States, 131 S. Ct. 2267, 2270 (2011); Chambers v. United States, 555 U.S. 122, 123 (2009); Begay v. United States, 553 U.S. 137, 141 (2008); James v. United States, 550 U.S. 192, 195 (2007).

39 *See* United States v. Martin, 753 F.3d 485, 495 (4th Cir. 2014) (Diaz, J., concurring) ("The Supreme Court has struggled mightily to make sense of this sphinx-like provision, but the clause remains an elusive target.").

40 *Chambers*, 555 U.S. at 132 (Alito, J., concurring) (opining that after twenty years, "only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently"); *Begay*, 553 U.S. at 150 (Scalia, J., concurring) (criticizing the Court's "piecemeal, suspenseful, Scrabble-like approach to the interpretation of" the residual clause); *James*, 550 U.S. at 216–17 (Scalia, J., dissenting) (characterizing the residual clause as, "to put it mildly, not a model of clarity").

41 *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting) ("We have demonstrated by our opinions that the clause is too vague to yield 'an intelligible principle,' . . . . [E]ach attempt to ignore that reality producing a new regime that is less predictable and more arbitrary than the last.").

42 *Johnson*, 135 S. Ct. at 2557.

for vagueness.[43] Another of those questions is whether the residual clause of the Guidelines, found at U.S.S.G. § 4B1.2(a)(2), is also unconstitutionally vague.

In every criminal sentencing in federal court, the sentencing judge must calculate an advisory sentencing range pursuant to the Guidelines. This advisory range is increased when the defendant is a career offender.[44] Career offender, in turn, is defined as an individual whose instant offense was either a crime of violence or a controlled substance offense and who has at least two prior convictions for crimes of violence or controlled substance offenses.[45] The Guidelines' definition of crime of violence is substantially the same as the ACCA definition of violent felony. The Guidelines define crime of violence as the following:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*[46]

As noted, the two residual clauses are textually identical; as a result, federal courts have applied ACCA residual-clause precedent to Guidelines residual-clause cases, and vice versa.[47]

At first glance, the question of *Johnson*'s applicability to the Guidelines residual clause seems straightforward: because the two residual clauses are textually identical, it is hard to see how one clause could comply with due process if the other violates it. But digging deeper, the issue is more complicated; as set forth in more detail in Part

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[43] *See, e.g.*, Dimaya v. Lynch, 803 F.3d 1110, 1114 (9th Cir. 2015) (striking down for vagueness 8 U.S.C. § 16(b), which makes a noncitizen removable from the United States if she is convicted of a felony that "by its nature[] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *cert. granted*, No. 15–1498, 2016 WL 3232911 (Sept. 29, 2016); United States v. Hernandez-Lara, 817 F.3d 651, 653 (9th Cir. 2016) (holding that, pursuant to *Dimaya*, the portion of U.S Sentencing Guidelines that incorporates by reference the vague text from section 16(b) must be stricken).

[44] U.S. SENTENCING GUIDELINES § 4B1.1(B) (U.S. SENTENCING COMM'N 2015).

[45] *Id.* § 4B1.1(a). As with the ACCA, the sentence enhancement also is triggered by certain drug offenses. *Id.* Prior "crime of violence" convictions also trigger enhancements under other provisions of the Guidelines. *See id.* § 2K1.3 & cmt. n.2; *id.* § 2K2.1(a)(2) & cmt. n.1; *id.* § 2S1.1 & cmt. n.1; *id.* § 4A1.2(p); *id.* § 5K2.17 & cmt. n.1; *id.* § 7B1.1(a)(1) & cmt. n.2.

[46] *Id.* § 4B1.2(a) (emphasis added).

[47] *See, e.g.*, United States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013).

II.D of this Article, a number of courts consider advisory Guidelines to be different from mandatory statutes in constitutionally significant ways. The arguments raised by those courts are far from frivolous. However, they are ultimately outweighed by the way the Guidelines as actually applied implicate the core concerns underlying the vagueness doctrine. To understand why, it is helpful to review a bit of history.

II
DUE PROCESS AND THE SENTENCING GUIDELINES

A. History of the Sentencing Guidelines: Promulgation to Booker

Until the 1980s, sentencing schemes in the United States were "indeterminate": within the confines of any applicable statutory minimum or maximum, judges had broad discretion to set a term of imprisonment.[48] The sentence generally was for a range of years rather than for a definite term.[49] After an offender had served some portion of the sentence, a parole board would consider whether he was ready for release.[50] The indeterminate sentencing schemes afforded both judges and parole boards broad discretion in an attempt to "individualize the treatment of offenders and facilitate rehabilitation . . . ."[51] The idea was that a prisoner would be more motivated to rehabilitate himself if a shorter sentence were available as a reward.

In the late 1970s and early 1980s, however, indeterminate sentencing came under fire for creating uncertainty and unwarranted sentencing disparities.[52] These criticisms came from both sides of the political aisle; progressives derided indeterminate sentencing as racially discriminatory, while conservatives argued it gave judges

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48 BARBARA BELBOT ET AL., THE LEGAL RIGHTS OF THE CONVICTED 28 (LFB Scholarly Publishing 2d ed. 2015).

49 *Id.*

50 *See, e.g.*, LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS IN A NUTSHELL 116–17 (West 9th ed. 2013). For example, a statute might fix the available sentencing range for armed robbery between one and fifteen years' imprisonment; a judge might sentence a defendant to a term of two to twelve years' imprisonment; and the parole board would determine how much of that term the defendant actually would spend behind bars. LISA M. SEGHETTI & ALISON M. SMITH, CONG. RESEARCH SERV., FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 8 (2005).

51 SEGHETTI & SMITH, *supra* note 50, at 9.

52 *Id. See generally* Peter W. Low, *Marvin E. Frankel's Criminal Sentences: Law Without Order* New York: Hill & Wang (1973), 87 HARV. L. REV. 687 (1974) (book review) (summarizing criticisms of indeterminate sentencing).

leeway to be soft on crime.[53] As a result of these critiques and general anxiety about the rising crime rate in the United States, in the 1970s state legislatures turned their attention to sentencing reform.[54] Led by Minnesota, states began to replace their indeterminate sentencing schemes with "determinate" sentencing schemes, which either mandated or recommended particular sentencing ranges based on the seriousness of the crime and the offender's criminal history.[55] These reforms typically did not completely eliminate a judge's discretion in selecting a sentence; Minnesota's, for example, permitted departures from the guidelines if the judge justified the departure in writing.[56] Nonetheless, judges had significantly less discretion to select a sentence under the new determinate systems. The reforms were touted as a way to reduce sentencing disparities and promote cost-effective, just sentences.[57] The changes thus were intended to promote fairness (similar offenders committing similar crimes receive similar punishments, a "just desserts" theory of sentencing) over individualized flexibility (reductions in punishment as a result of rehabilitation).[58]

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53 BELBOT ET AL., *supra* note 48, at 28; Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 680 (2006) (noting that shift to determinate sentencing was "originally the product of a remarkable cross-ideological consensus" that "the prior discretionary system violated principles of the rule of law").

54 SEGHETTI & SMITH, *supra* note 50, at 8.

55 BELBOT ET AL., *supra* note 48, at 29–30; BRANHAM, *supra* note 50, at 104.

56 BRANHAM, *supra* note 50, at 105–06.

57 *Id.* at 106–07. Whether the reforms achieved these goals is a subject for a different article. Briefly, however, many commentators have argued determinate sentencing schemes do not so much eliminate discretion in sentencing as shift that discretion to another point in the process. *See id.* at 102, 114–15 (describing how prosecutors circumvent mandatory minimums by, for example, charging defendants with lesser crimes). It is well-documented that such discretion, like the discretion of sentencing judges, is widely exercised in a racially discriminatory manner. *See generally* Crystal S. Yang, *Free At Last? Judicial Discretion and Racial Disparities in Federal Sentencing,* 44 J. LEGAL STUD. 75 (2015); Sonja Starr & Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker, L. & ECON. WORKING PAPERS, Paper 53 (Nov. 2012), http://repository.law.umich.edu/law_econ_current/53.

58 BELBOT ET AL., *supra* note 48, at 29. As part of these reforms and the "tough on crime" movement, some states eliminated parole boards entirely or passed "truth in sentencing" laws designed to limit the boards' ability to grant offenders early release. *See* PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, TRUTH IN SENTENCING IN STATE PRISONS (Jan. 1999). In combination with other measures, including mandatory minimums and "three strikes" laws, these reforms ratcheted up criminal sentences, resulting in dramatically longer terms of imprisonment than had previously been the norm. *See* Low, *supra* note 52 (predicting this result); James M. Anderson, Jeffrey R. King & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 294 (1999) (noting that

Congress took up sentencing reform several times in the 1970s,[59] but did not eliminate indeterminate sentencing in the federal system until passing the Sentencing Reform Act of 1984.[60] Following the state trends, the law's major goals were "to reduce the unwarranted disparities and unpredictability of indeterminate sentencing."[61] The Sentencing Reform Act expressly abandoned rehabilitation as a goal of criminal sentencing, instead citing "retribution, education, deterrence, and incapacitation" as the objectives of sentencing policy.[62] In pursuit of those goals, the statute created the United States Sentencing Commission (the Commission), "an independent body within the judicial branch of the federal government . . . charged . . . with promulgating guidelines for federal sentences."[63]

The Commission was tasked with developing sentencing guidelines that fulfilled three congressional mandates: "'honesty' (the term imposed would be the term served), 'uniformity' (similar offenders would receive similar sentences for similar conduct), and 'proportionality' (crimes of differing severity would receive different sentences)."[64] Although the Commission is an independent body within the judiciary, some of its actions remain subject to legislative oversight. Most notably, the Commission annually submits to Congress proposed changes to the Guidelines, along with a proposed effective date for each amendment; the changes take effect absent congressional action to modify or disapprove them.[65]

"overall sentence lengths are rising over time"); John R. Sutton, *Symbol and Substance: Effects of California's "Three Strikes" Law on Felony Sentencing*, 47 L. & SOC'Y REV. 37, 37 (2013) (including in the "important substantive impacts" of California's "Three Strikes" law a measurable trend of harsher sentences, "particularly in conservative counties"); Aimée Tecia Canty, Note, *A Return to Balance: Federal Sentencing Reform After the "Tough-on-Crime" Era*, 44 STETSON L. REV. 893, 909 (2015) ("The war on drugs and a focus on retributive punishment rather than treatment has resulted in astronomical increases in the number of people held in federal and state prisons and the amount of money spent on housing incarcerated persons.").

[59] *See, e.g.*, U.S. Congress, Senate Committee on the Judiciary, *Criminal Code Reform Act of 1977*, Report on S. 1437, 95th Cong., 1st sess., S. Rept. 95-605, part I, 10–15 (Govt. Print. Off. 1977).

[60] *See* SEGHETTI & SMITH, *supra* note 50, at 12 (referring to Chapter II of the Comprehensive Crime Control Act of 1984).

[61] ARTHUR W. CAMPBELL, THE LAW OF SENTENCING § 4.6 (West 3d ed. 2004).

[62] 28 U.S.C. § 994(k) (2012); 18 U.S.C. § 3553(a) (2012); CAMPBELL, *supra* note 61, at § 4.6; SEGHETTI & SMITH, *supra* note 50, at 13.

[63] SEGHETTI & SMITH, *supra* note 50, at 12; 28 U.S.C. §§ 991, 994, 995 (2012).

[64] CAMPBELL, *supra* note 61, at § 4.6 (quoting U.S. SENTENCING COMM'N, GUIDELINE MANUAL 2–3 (1989) [hereinafter GUIDELINE MANUAL]).

[65] 28 U.S.C. § 994(p).

The central organizational scheme of the Guidelines is a grid. Along one axis of the grid is a "base offense level."[66] This is a number between one and forty-three, designed to reflect the seriousness of the offense for which the defendant is going to be sentenced.[67] Along the other axis of the grid is a "criminal history category."[68] Determining the appropriate criminal history category involves adding up the points assigned to the defendant's previous convictions under the Guidelines.[69] The total number of points fits into one of a set of ranges corresponding to Roman numerals between I and VI.[70] However, if the defendant is designated a "career offender,"[71] that designation overrides the point-based criminal history category and automatically imposes category VI.[72]

66 U.S SENTENCING GUIDELINES § 1B1.1(a)(2) (U.S. SENTENCING COMM'N 2015); *see id.* §§ 2A–2X; 1B1(b) (listing aggravating and mitigating circumstances for which the base offense level should be adjusted upward or downward); *see also* §§ 1B1.1(c); 3A1.1–1.4; 3B1.1–1.3; 3C1.1; 3D1.1–1.5; 3E1.1 (victim's status, offender's role, obstruction of justice, multiple counts, acceptance of responsibility).

67 *See* Notice of Promulgation of Temporary, Emergency Amendments to the Sentencing Guidelines and Commentary, 68 Fed. Reg. 3080, 3085 (Jan. 22, 2003) (amending base offense level for certain campaign finance crimes from 6 to 8 to reflect "the fact that these offenses . . . generally are more serious [than generic theft, property destruction, and fraud crimes] due to the additional harm, or potential harm, of corrupting the elective process").

68 U.S SENTENCING GUIDELINES § 1B1.1(a)(6) (U.S. SENTENCING COMM'N 2015).

69 *Id.* § 4A1.1.

70 *Id.* Ch. 5, pt. A.

71 *Id.* § 4B1.1(a).

72 *Id.* § 4B1.1(b).

Figure 1. Federal Sentencing Guidelines[73]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
Zone A	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone B	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone C	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
Zone D	29	87-108	97-121	108-135	121-151	140-175	151-188
Zone D	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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After determining the adjusted offense level and criminal history category, the court consults the grid to find the place where the two intersect.[74] The point of intersection provides the Guidelines range, which recommends a minimum and maximum term of imprisonment. The sentencing judge then selects a period of incarceration designed to serve a set of a statutory goals that include: the need to protect the

[73] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (U.S. SENTENCING COMM'N, 2015).

[74] *Id.* § 1B1.1(g).

public from additional crimes committed by the defendant; the need to provide the defendant with correctional treatment, education, or vocational training, or medical care in the most effective manner; and the need for restitution.[75]

When they were enacted, the Guidelines were mandatory; the statute provided "the court *shall* impose a sentence . . . within the [Guidelines] range . . . 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."[76] The statute further constrained judges' discretion in determining whether to depart from the Guidelines range by directing judges to "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in determining whether a particular "circumstance was adequately taken into consideration."[77]

The provisions of the law governing appellate review solidified the presumptive power of the Guidelines. If a judge imposed a sentence outside of the Guidelines range, the sentence could be appealed by the government (if it was below the Guidelines range)[78] or the defendant (if it was above the Guidelines range).[79] Non-Guidelines sentences could be overturned for a number of reasons, including because the district court failed to provide a written statement of reasons for the sentence;[80] because the sentence departed "to an unreasonable degree from the applicable guidelines range";[81] or because the departure was "not justified by the facts of the case."[82] Appeals of within-Guidelines sentences, by contrast, were tightly constrained. Federal appellate courts had jurisdiction to hear appeals of Guidelines sentences under only two circumstances: if the sentence was imposed "in violation of the law" or if the sentence was imposed "as a result of an incorrect application of the sentencing Guidelines."[83] These statutory phrases, in turn, were narrowly construed. The D.C. Circuit Court, for example,

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75 18 U.S.C. § 3553(a) (2012); BRANHAM, *supra* note 50, at 109–10.

76 18 U.S.C. § 3553(b)(1) (emphasis added).

77 *Id.*

78 *Id.* § 3742(b)(3).

79 *Id.* § 3742(a)(3).

80 *Id.* § 3742(e)(3)(A).

81 *Id.* § 3742(e)(3)(C).

82 *Id.* § 3742(e)(3)(B)(iii).

83 *Id.* §§ 3742(a)(1)–(2), (b)(1)–(2).

stated that a district judge's refusal to impose a below-Guidelines sentence likely only would be "in violation of the law" if the judge's refusal rested on "some illegal reason, such as the defendant's race or religion."[84] In the same case, the court mused, "[o]ne might wonder how a judge could ever misapply the Guidelines by refusing to impose a sentence outside the guideline range. Departures are discretionary."[85] In sum, the statutory scheme made "all [federal] sentences basically determinate."[86]

Soon after the Guidelines' introduction, defendants argued the implementation of the Guidelines triggered rights under the Due Process Clause of the Fifth Amendment. These challenges took the form of attacks on various Guidelines as void for vagueness. Three federal appellate courts held the Guidelines could not be challenged on vagueness grounds. The Fifth Circuit, for example, distinguished between "recidivism statutes that increase the statutory maximum penalty" and "sentence enhancement for recidivism pursuant to the Guidelines, which merely adjusts the applicable guideline sentence within the same statutory maximum."[87] The court held no due process notice rights attached to the latter: "Due process does not mandate . . . either notice, advice, or a probable prediction of where, within the statutory range, the guideline sentence will fall."[88] The Eighth Circuit reasoned that "[b]ecause there is no constitutional right to sentencing guidelines—or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines—the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague."[89] The Sixth Circuit reached the same conclusion.[90]

By contrast, relying on the Supreme Court's statement that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given

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84 United States v. Sammoury, 74 F.3d 1341, 1343 (D.C. Cir. 1996).

85 *Id.*

86 Mistretta v. United States, 488 U.S. 361, 367 (1989); *see also* Irizarry v. United States, 553 U.S. 708, 713 (2008) (explaining that, pre-*Booker*, "the Guidelines were mandatory" and "the Sentencing Reform Act . . . prohibited district courts from disregarding the mechanical dictates of the Guidelines except in narrowly defined circumstances" (quotation marks omitted)).

87 United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990).

88 *Id.*

89 United States v. Wivell, 893 F.2d 156, 160 (8th Cir. 1990).

90 United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996).

criminal statute,"[91] the Ninth Circuit concluded the Guidelines could be challenged on vagueness grounds.[92] At least four other appellate courts entertained vagueness challenges to the Guidelines without acknowledging or addressing the underlying constitutional question.[93] State courts, like federal courts, were split on the applicability of the Due Process Clause to state-law sentencing guideline schemes.[94] But before the United States Supreme Court could resolve the split, a series of cases fundamentally altered the Guidelines.

B. Booker *and the Shift to an Advisory Scheme*

In 2000 and 2004, the United States Supreme Court decided the watershed Sixth Amendment cases *Apprendi v. New Jersey*[95] and *Blakely v. Washington*.[96] In *Apprendi*, the defendant challenged a New Jersey statute that permitted judges to increase the maximum term of imprisonment if they found by a preponderance of the evidence that certain aggravating factors were present.[97] The Court struck down the statute, holding it violated the Sixth Amendment's guarantee of a right to a trial by jury.[98] In *Blakely*, the Court struck down a Washington statute permitting a judge to increase the maximum term of imprisonment if he or she found beyond a reasonable doubt the crime had been committed with "deliberate cruelty."[99] Commentators widely predicted *Apprendi* and *Blakely* spelled the end of the Guidelines.[100]

The following year, in *United States v. Booker*, the Supreme Court concluded the Sixth Amendment right to a jury trial applied to the

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91 United States v. Batchelder, 442 U.S. 114, 123 (1979).

92 United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997).

93 *E.g.*, United States v. Savin, 349 F.3d 27, 38 (2d Cir. 2003); United States v. Rutherford, 175 F.3d 899, 906 (11th Cir. 1999); United States v. Moore, No. 95-5586, 1997 WL 71707 at *1 (4th Cir. Feb. 20, 1997) (unpublished); United States v. Jones, 979 F.2d 317, 318–20 (3d Cir. 1992).

94 *Compare* State v. Wilson, 980 P.2d 244, 250–51 (Wash. Ct. App. 1999), *with* State v. Givens, 332 N.W.2d 187, 189–90 (Minn. 1983).

95 530 U.S. 466, 497 (2000).

96 542 U.S. 296, 305 (2004).

97 *Apprendi*, 530 U.S. at 468–69.

98 *Id.* at 497.

99 *Blakely*, 542 U.S. at 313.

100 *See, e.g.*, Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT'G REP. 316, 316 (2004) (stating that *Blakely* "threatens the operation of the Federal Sentencing Guidelines"); Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on Blakely,"* 2 OHIO ST. J. CRIM. L. 619, 622 (2005) (describing the "virtually unanimous consensus at the Roundtable . . . that the Court would extend *Blakely* to the federal system").

Guidelines and held the Sentencing Act was unconstitutional to the extent it made the Guidelines mandatory.[101] The five-justice majority first reaffirmed judges could exercise discretion in sentencing without running afoul of the Sixth Amendment.[102] But the Court held the Guidelines fundamentally altered this usual, constitutionally permissible exercise of discretion.[103] Their binding nature gave the Guidelines "the force and effect of laws."[104] The availability of departures from the Guidelines in some cases did not remedy the Sixth Amendment problem, because "departures [we]re not available in every case, and in fact [we]re unavailable in most."[105] The Guidelines could not survive the constitutional challenge because they permitted imposition of "a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict" without requiring the facts supporting that enhanced sentence to be found by a jury beyond a reasonable doubt.[106]

A different five-justice majority fashioned a remedy.[107] It excised the provision of the Guidelines that rendered them mandatory, but left the Guidelines in place as advisory.[108] Going forward, federal judges

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101 543 U.S. 220, 233 (2005).

102 *Id.* ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

103 *See id.* at 248.

104 *Id.* at 234.

105 *Id.*

106 *Id.* at 244.

107 *Booker* was an unusual Supreme Court opinion. The majority opinion is split into two parts, written by almost completely different five-justice majorities, with only Justice Ginsburg joining both majority opinions. Justice Stevens authored the Sixth Amendment portion of the opinion; he was joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 225–44. Justice Breyer authored a dissent, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, arguing the Guidelines did not run afoul of the Sixth Amendment. *Id.* at 326–34. These four dissenters joined with Justice Ginsburg in the remedial portion of the majority opinion, which Justice Breyer wrote. *Id.* at 244–71. Justice Stevens, joined by Justice Souter in full and by Justice Scalia in part, dissented from Justice Breyer's majority opinion. *Id.* at 271–303. Finally, Justices Scalia and Thomas filed their own dissents. *Id.* at 303–27. The fact that eight of the nine Supreme Court justices believed a major part of the *Booker* opinion was wrong underscores the difficulty of interpreting the opinion of the Court as a cohesive whole. *See* McConnell, *supra* note 53, at 680 ("Few legal observers have praised the *Booker* opinions, at least in tandem, for their logical and doctrinal quality.").

108 *Booker*, 543 U.S. at 258–60.

would be required to consider the Guidelines range, but they would not be required to follow it in imposing a sentence.[109]

How different would federal sentencing look under this new, advisory system? After *Booker*, there was wide disagreement. Some judges hewed very closely to the old, mandatory system, while others felt *Booker* permitted them a near-total return to the prior indeterminate sentencing system.[110] Some judges began to consider characteristics they had been barred from considering under the mandatory Guidelines system, such as family history, lack of guidance as a youth, and disadvantaged background.[111] The Sentencing Commission opined *Booker* required courts to give "substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose."[112] Some commentators predicted a "return to a sentencing system characterized by unfairness and inconsistency."[113] Others characterized *Booker*'s effect on federal sentencing practice as "strikingly modest" and predicted the Guidelines would "remain the predominant factor in determining individual sentences for years to come."[114] Still others forecasted a gradual shift away from the Guidelines, eventually reaching a point where judges who "gr[e]w up on [a] fully voluntary guidelines system . . . [will] start to use more and more of their discretionary powers."[115]

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109 *Id. See generally* SEGHETTI & SMITH, *supra* note 50, at 5–6 (describing the *Apprendi*, *Blakely*, and *Booker* decisions' effect on the Guidelines); BELBOT ET AL., *supra* note 48, at 38–40.

110 *See* Gilles R. Bissonnette, Comment, *"Consulting" the Federal Sentencing Guidelines After Booker*, 53 UCLA L. REV. 1497, 1521–22 (2006) (describing the emergence of "two divergent views" in the federal judiciary and discussing whether the Guidelines "should be the dominant factor in any sentencing analysis" or "should merely be consulted along with the [other] relevant sentencing factors enumerated by Congress"); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 800 (2005) (collecting cases applying each approach).

111 Gregory & Kenner, *supra* note 110, at 800.

112 Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong. 4, 17 FED. SENT. REP. 299, 300 (2005) (prepared testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission).

113 Gregory & Kenner, *supra* note 110, at 800.

114 Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal System After* Booker, 43 HOUSTON L. REV. 279, 319 (2006).

115 Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 411 (2005).

Jurisprudential developments have created a new framework for the Guidelines.[116] The Supreme Court held a district court is barred from presuming a within-Guidelines sentence is reasonable; instead, each case must be assessed individually.[117] Courts of appeals, however, may apply a presumption of reasonableness to a within-Guidelines sentence because:

> [B]y the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.[118]

By contrast, courts of appeals are not permitted to apply a presumption of unreasonableness for outside-Guidelines sentences.[119] In all cases, "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[120] For this reason, failure to calculate the correct range constitutes reversible procedural error.[121]

The Court acknowledged these rules might "encourage sentencing judges to impose Guideline[] sentences."[122] Justice Stevens stated: "I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*."[123] Dissenting from the decision sanctioning the appellate presumption of reasonableness for within-Guidelines sentences, Justice Souter predicted "a presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done."[124]

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116 For a thorough discussion of how principles of appellate review apply differently in the post-*Booker* federal sentencing context, see generally Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 18–25 (2008).

117 Nelson v. United States, 555 U.S. 350, 352 (2009) (per curiam).

118 Rita v. United States, 551 U.S. 338, 347 (2007).

119 Gall v. United States, 552 U.S. 38, 51 (2007).

120 *Id.* at 49.

121 *Id.* at 51.

122 *Rita*, 551 U.S. at 354.

123 *Id.* at 366 (Stevens, J., concurring).

124 *Id.* at 390 (Souter, J., dissenting). *But see id.* at 366 (Stevens, J., concurring) (opining Justice Souter "overestimates the 'gravitational pull' toward the advisory Guidelines that will result from a presumption of reasonableness").

*C. Assessing the Effects of the Post-*Booker *Guidelines*

A decade after *Booker*, we can look to federal sentencing data to ascertain some differences between the mandatory and advisory Guidelines. Based on that data, the post-*Booker* Guidelines can be summed up in two broad statements. First, although the share of below-Guidelines sentences has increased since *Booker*, it does not appear that *Booker* is responsible for that change. And second, it is clear that even post-*Booker*, the Guidelines continue to exert tremendous power over federal sentences.

In the years immediately preceding *Booker*, about seventy percent of offenders sentenced in the federal system received within-Guidelines sentences; now, that figure has dropped below fifty percent.[125] In fiscal year 2014, "78.5 percent of all [federal] sentences . . . were either within the applicable guidelines range, above the range, or below the rage [sic] at the request of the government."[126] In the years before *Booker*, between eighty-five and ninety-four percent of federal sentences fell into this group.[127] In addition, sentences are, on the whole, shorter now than they were before *Booker*. The change has been small but measurable: in the year before *Booker*, the average term of imprisonment for a federal defendant was forty-six months; in fiscal year 2011, it was forty-three months.[128] These trends do not appear, however, to be exclusively, or perhaps even directly, traceable to *Booker*.[129]

Both trends—the rising share of non-Guidelines sentences and the declining length of the average sentence—predate *Booker*. Long-term tracking of federal sentencing practice from 1996 to 2012 shows a steady *decrease* in the percentage of within-Guidelines sentences and

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125 U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 69 (2012) [hereinafter 2012 BOOKER REPORT]; 2014 COMM'N REPORT, *supra* note 1, at A-5 (showing that in fiscal year 2014, about forty-six percent of offenders received within-Guidelines sentences).

126 2014 COMM'N REPORT, *supra* note 1, at A-5.

127 *Id.*

128 Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1678 (2012).

129 It is, of course, difficult if not impossible to pin down causation here with certainty. A number of factors apart from *Booker* appear to have contributed to the decrease in within-Guidelines sentences and the corresponding increase in non-Guidelines sentences. For example, the U.S. Sentencing Commission noted in its 2014 Annual Report that "the 2014 data shows a noticeable decrease in the within range rate of sentences imposed in drug trafficking cases," including "an increase in the rates for . . . government-sponsored below range sentences . . . in those cases. This decrease appears to be attributable to anticipation of the Commission's 2014 drug amendment lowering the base offense levels for drug trafficking case[s]." 2014 COMM'N REPORT, *supra* note 1, at A-5.

a steady *increase* in below-Guidelines sentences.[130] Similarly, the average sentence length has slowly, steadily decreased over the past two decades, with no apparent acceleration in the rate of change after *Booker* was decided.[131] There is an upward "bump" in these trends, but it does not align with the *Booker* decision. Instead, this "bump" occurs pre-*Booker* and appears attributable to a Congressional amendment which "ordered the [Sentencing] Commission to 'substantially reduce[]' the incidence of judicial downward departures" from the Guidelines and imposed a stricter standard of review for out-of-Guidelines sentences.[132] *Booker*, of course, mooted these changes, and the "bump" accordingly dissipated. In sum, although there is a steady downward trend in the average term of imprisonment and a steady upward trend in the percentage of non-Guidelines sentences, those trends predate *Booker* and do not appear to have been significantly accelerated by *Booker.*

Notwithstanding these trends, it is clear that the Guidelines continue to exert enormous influence over sentences.[133] As explained above, in

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130 2012 BOOKER REPORT, *supra* note 125, at 69 (2012); Gregory & Kenner, *supra* note 110, at 798.

131 *See* Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1235–36 figs.1A &1B, 1236 fig.2 (2014) [hereinafter Bowman] (tracking mean and median sentences from 2000 to 2012). The average length of sentence, considered in a vacuum, tells us nothing about the influence of the Guidelines. It is noteworthy here only because pre-*Booker* criticism of the Guidelines focused on the Guidelines' supposed harshness; many commentators predicted a dramatic drop in average sentence length post-*Booker* once judges were unfettered by mandatory directives. As noted, though there has been a measurable decline in sentence length, it has been "negligible." McConnell, *supra* note 53, at 676.

132 Baron-Evans & Stith, *supra* note 128, at 1665 (second alteration in original).

133 A number of scholars have attempted to explain *why* an advisory system continues to produce sentences that hew so closely to the Guidelines. One part of the answer appears to be a question of focus: as one commentator explained, "[t]his early issue of post-Booker sentencing turned away from the question: 'How well does the recommendation comply with the statutory factors?,' and substituted 'How mandatorily should the guidelines still be treated?' Analysis focused on the proper degree of judicial 'discretion' rather than the reasonableness of the guidelines' recommendations." Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 690 (2011). Another part of the answer is that guidelines, even advisory ones, create "anchoring bias"—a phenomenon where sentencing judges' mere awareness of recommendations causes them to view those recommendations as a norm. *See, e.g.*, Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 502–11 (2014) (summarizing studies documenting anchoring bias in judges); Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439–43 (2011). Finally, as one commentator has observed, "[j]udges faced with the task [of quantifying punishment for crime] are acutely aware of the inevitable subjectivity of the exercise and are customarily grateful for standards provided by officially anointed experts,

2014, nearly half of sentences were within the applicable Guidelines range, and a large majority of sentences were either within-Guidelines or below-Guidelines at the government's request.[134] In a series of reports, the Commission has tracked federal sentencing trends after *Booker*. The most recent report, released in 2012, stated "the guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly."[135] After reviewing sentencing statistics both pre- and post-*Booker*, the report goes on to conclude there is "relative stability over time in the relationship between the average guideline minimum and the average sentence for offenses in the aggregate."[136]

The best evidence of the Guidelines' continuing influence is how closely sentences track the Guidelines. This can be measured by examining the relationship between the Guidelines range and the sentence actually imposed. If a Guidelines-range increase results in a corresponding increase in sentencing practice, that is powerful evidence the Guidelines are "anchoring" sentences even as those sentence are more likely to diverge from the Guidelines.[137] Here, the statistics are remarkably steady both pre- and post-*Booker*. The average sentence length for all cases in both time periods is about ten months

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even if they may not always agree with the experts in particular cases." Bowman, *supra* note 131, at 1269.

134 *See also* Jon O. Newman, *Easing Mandatory Minimums Will Not Be Enough*, 100 JUDICATURE 28, 28 (2016) (noting "federal judges impose a sentence within the calculated range in nearly half of all cases, and impose a sentence within or above the range (or below when the government requests a cooperation reduction) in more than three-quarters of all cases," and arguing this continuing influence means revisions to the Guidelines will be necessary to ensure reforms designed to ease mandatory minimums have their intended effect).

135 2012 BOOKER REPORT, *supra* note 125, at 60; *see also* United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008) ("It is hardly surprising that most federal sentences fall within Guidelines ranges even after *Booker*—indeed, the actual impact of *Booker* on sentencing has been minor.").

136 2012 BOOKER REPORT, *supra* note 125, at 60.

137 Interestingly, early evidence from a particular set of cases suggested the Guidelines' influence would be substantially diminished after *Booker*. These so-called *Booker* "pipeline cases" were "cases in which the defendant was sentenced prior to *Booker* but the case was not yet final, usually because it was on appeal." McConnell, *supra* note 53, at 667. Judge Michael O'Connell, from the U.S. Court of Appeals for the Tenth Circuit, published a statistical analysis of the results in pipeline cases remanded for resentencing. *See id.* Upwards of twenty percent of defendants in these remands received a reduced sentence. *Id.* at 669–70. The Tenth Circuit reversed and remanded for resentencing approximately one-third of *Booker* pipeline cases, and roughly two-thirds of those received a decreased sentence on remand. *Id.* at 668, 670 fig.3. The analysis was drawn from an admittedly small sample size and complicated by the standards of review applicable in different cases. *See id.* at 667–68. In any case, no effect of this size materialized in the post-*Booker* sentencing statistics.

below the average Guidelines range.[138] The power of the Guidelines is even clearer when the data is distilled by offense type, where the advisory Guidelines range and the average sentence imposed often track one another in "nearly perfect tandem."[139] There are exceptions. For example, the Guidelines appear to exert significantly less influence for economic crimes.[140] Moreover, as was true before *Booker*, the relationship between the Guidelines range and the sentence imposed varies from district to district and judge to judge.[141] Overall, however, "[t]he endurance of the Guidelines, but more particularly the degree to which they continue to drive actual sentences, has surprised nearly everyone."[142]

In *Peugh v. United States*,[143] the Supreme Court explicitly acknowledged the Guidelines' continuing influence. The defendant in *Peugh* was convicted of engaging in a check-kiting scheme in 1999 and 2000.[144] He was not sentenced, however, until 2010.[145] The district court applied the Guidelines in effect at the time of sentencing, resulting in a range of seventy to eighty-seven months' imprisonment, and sentenced the defendant to seventy months in prison.[146] The court rejected the defendant's argument that he was constitutionally entitled to have his Guidelines range calculated using the Guidelines in effect at the time he committed the crimes.[147] The difference was significant: under the Guidelines in effect in 1999 and 2000, the applicable range would have been thirty to thirty-seven months' imprisonment.[148]

The defendant argued the application of the 2010 Guidelines range in his case violated the Ex Post Facto Clause of the United States

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138 *Id.* at 1677.

139 Bowman, *supra* note 131, at 1249–50; *see also id.* at 1245–49 figs.10 & 14 (showing the relationship between the Guidelines range and average sentence for various offense types).

140 *Id.* at 1250–51; *see also id.* at 1249 fig.14.

141 *See* McConnell, *supra* note 53, at 673 ("The Tenth Circuit district courts were significantly more Guidelines-compliant than the national average prior to *Booker*, and have exercised their *Booker* discretion less aggressively than their counterparts in other circuits, in both downward and upward directions."); Bowman, *supra* note 131, at 1261 ("[A] few districts adhere to the Guidelines as much or even more than they ever did, while in others the rate of Guidelines compliance has fallen by 40%–50%.").

142 *Id.* at 1268.

143 133 S. Ct. 2072, 2084 (2013).

144 *Id.* at 2078.

145 *Id.*

146 *Id.* at 2079.

147 *Id.*

148 *Id.* at 2078.

Constitution.[149] That clause proscribes "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."[150] The clause ensures "individuals have fair warning of applicable laws" and "safeguards a fundamental fairness interest."[151] In evaluating an ex post facto challenge, the "touchstone of [the Supreme] Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attachment to the covered crimes.'"[152] The government argued the post-*Booker* Guidelines could never violate the Ex Post Facto Clause because they were merely advisory.[153]

The Court disagreed.[154] Its reasoning was rooted in a pragmatic assessment of the Guidelines' continuing influence over sentencing:

> [The defendant] points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges. Even after *Booker* rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion . . . . Moreover, the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it . . . . The federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing.[155]

In short, the *Peugh* Court refused to reject an ex post facto challenge simply because every sentencing judge had the *authority* to depart from the Guidelines. The Court was convinced that the relevant consideration was the Guidelines' *actual* effect on sentencing practices.

The Court underscored its commitment to a pragmatic assessment of the Guidelines' effect on sentences in *Molina-Martinez v. United States*.[156] In *Molina-Martinez*, the Court considered when an incorrectly calculated Guidelines range is "plain error" within the meaning of Federal Rule of Criminal Procedure 52(b).[157] Rule 52(b)

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149 *Id.*

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

151 *Peugh*, 133 S. Ct. at 2085.

152 *Id.* at 2082 (quoting Garner v. Jones, 529 U.S. 244, 250 (2000)).

153 *Id.* at 2085.

154 *Id.* at 2088.

155 *Id.* at 2084.

156 136 S. Ct. 1338 (2016).

157 *Id.* at 1342–43.

governs appellate review of errors the defendant failed to "br[ing] to the court's attention" through an objection.[158] A reviewing court has discretion to consider arguments regarding such "forfeited" errors only if the error was "obvious" and "affect[s] substantial rights."[159] Typically, this requires the defendant to demonstrate "prejudice," which the Court has defined as "a reasonable probability that, but for the error," the outcome of the proceeding would have been different.[160] The Fifth Circuit Court of Appeals had created a categorical rule requiring a defendant seeking review of a forfeited sentencing error to show prejudice by introducing "additional evidence" beyond the incorrect Guidelines range itself.[161] All eight justices rejected that categorical rule, and the six-justice majority held a defendant may show plain error simply by demonstrating his Guidelines range was (1) incorrect and (2) higher than the correct range.[162] There is no separate requirement to make a further showing of prejudice, even when the sentence actually imposed falls within both the incorrect and correct ranges.[163]

Just as in *Peugh*, the Court's decision rested on "the real and pervasive effect the Guidelines have on sentencing."[164] Quoting heavily from *Peugh*, the Court summarized the statistics regarding the close relationship between the Guidelines range and the sentence actually imposed.[165] The Court then went on to state:

> These sources confirm that the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence . . . . From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing

158 FED. R. CRIM. P. 52(b); *Molina-Martinez*, 136 S. Ct. at 1343.

159 *See* United States v. Olano, 507 U.S. 725, 734, 735 (1993) (citations omitted).

160 United States v. Dominguez Benitez, 542 U.S. 74, 76, 82 (2004).

161 *Molina-Martinez*, 136 S. Ct. at 1344–45.

162 *Id.* at 1345; *see also id.* at 1349 (Alito, J., concurring) ("I agree with the Court that the Fifth Circuit's rigid approach to unpreserved Guidelines errors is incorrect."). Justice Alito, writing for himself and Justice Thomas, took issue with the majority's "speculat[ion] about how the reasonable probability test will be satisfied in future cases," objecting to the implicit prediction "that sentencing judges will continue to rely very heavily on the Guidelines in the future[.]" *Id.*; *see also supra* note 107 and accompanying text.

163 *Molina-Martinez*, 136 S. Ct. at 1345.

164 *Id.* at 1346.

165 *Id.*

> outcome would have been different had the correct range been used.[166]

The purpose of the Guidelines is to promote uniformity and proportionality.[167] In *Molina-Martinez*, the Court concluded that, "[i]n the ordinary case the Guidelines accomplish their purpose."[168] *Peugh* and *Molina-Martinez* confirm that the Guidelines' empirically-demonstrated effect on sentences has legal consequences. With that driving principle in mind, I return to the vagueness doctrine.

*D. The Post-*Johnson *Circuit Split*

At the time *Johnson* was decided, the federal courts of appeals stood fractured on the question of vagueness challenges to the Guidelines: four courts had rejected such challenges outright;[169] one court had squarely held the Constitution permitted such challenges;[170] and at least four courts entertained such challenges without directly weighing in on the constitutional question.[171]

Because *Johnson* was about a provision of a criminal statute, there was no reason for the Court to address this extant circuit split. Despite the lopsided split *against* permitting vagueness challenges to the Guidelines, however, early signs after *Johnson* suggested the Guidelines' residual clause was doomed. To begin, the Supreme Court vacated and remanded, "for further consideration in light of *Johnson*," the pending appeals of defendants whose sentences had been calculated using a residual clause-enhanced Guidelines range.[172] Then, in those

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166 *Id.*

167 *Id.* at 1342 (quoting Rita v. United States, 551 U.S. 338, 349 (2007)).

168 *Id.* at 1349.

169 United States v. Tichenor, 683 F.3d 358, 363–66, 365 n.3 (7th Cir. 2012); United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1995); United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990); United States v. Wivell, 893 F.2d 156, 160 (8th Cir. 1990). The Seventh Circuit recently overruled *Tichenor*. *See infra* notes 214–219 and accompanying text.

170 United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997).

171 United States v. Savin, 349 F.3d 27, 38–39 (2d Cir. 2003); United States v. Rutherford, 175 F.3d 899, 906 (11th Cir. 1999); United States v. Moore, No. 95-5586, 1997 WL 71707, at *1 (4th Cir. Feb. 20, 1997); United States v. Jones, 979 F.2d 317, 318–20 (3d Cir. 1992).

172 *See, e.g.*, Beckles v. United States, 579 F. App'x 833, 833–34 (11th Cir. 2014), *vacated*, 135 S. Ct. 2928 (2015); United States v. Maldonado, 581 F. App'x 19, 22–23 (2d Cir. 2014), *vacated*, 135 S. Ct. 2929 (2015); *see also* United States Supreme Court, Order List: 576 U.S. (June 30, 2015), https://www.supremecourt.gov/orders/courtorders/063015zr_pnk0.pdf (remanding for reconsideration in light of *Johnson* forty-three criminal appeals and habeas petitions, including cases involving at least eight individuals whose advisory Guidelines ranges were increased pursuant to the Guidelines' residual clause). However, these remand orders "ha[ve] no precedential weight and [do] not dictate how the lower court

and other pending appeals, the Department of Justice took the position that the Guidelines are susceptible to vagueness challenges and that *Johnson* invalidated the Guidelines' residual clause.[173] Finally, in response to *Johnson*, the Commission moved quickly to propose revisions to the Guidelines. Within six weeks of the decision in *Johnson*, the Commission announced a plan to "eliminate . . . the residual clause" in order to "make the guideline consistent with the Supreme Court's recent decision in *Johnson* . . . ."[174] The Commission followed through on that plan, proposing an amendment to section 4B1.2(a)(2) that, among other changes, deletes the residual clause.[175] The amendment took effect August 1, 2016.[176] For individuals sentenced now and in the future, *Johnson* sounded the death knell of the residual clauses of both the ACCA *and* the Guidelines.

This does not render the question of *Johnson*'s effect on the Guidelines' residual clause moot, though. The fates of hundreds of defendants with residual clause-enhanced Guidelines ranges remain uncertain.[177] The amendment to the Guidelines eliminating the residual

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should rule on remand." Texas v. United States, 798 F.3d 1108, 1116 (D.C. Cir. 2015) (citations omitted).

173 *See* Government Supplemental Brief at *2, United States v. Matchett, No. 14-10396, (11th Cir. Aug. 27, 2015) ("*Johnson*'s constitutional holding . . . applies to the identically worded residual clause of the career offender guideline."); *accord* Government Supplemental Brief at *2, United States v. Grayer, 2015 WL 4999426 (6th Cir. Aug. 20, 2015); Government Supplemental Brief at *10, United States v. Madrid, 2015 WL 4985890 (10th Cir. Aug. 20, 2015); Government Supplemental Brief. at *2, United States v. Lee, No. 13-10507 (9th Cir. Aug. 17, 2015); Government Supplemental Brief at *6–*7, United States v. Pagán-Soto, 2015 WL 4872453 (1st Cir. Aug. 11, 2015).

174 UNITED STATES SENTENCING COMM'N, *News Release: U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence* (Aug. 7, 2015), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories-press-releases-20150 807_Press_Release.pdf.

175 Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August, 1, 2016, 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016).

176 *Id.* at 4741.

177 There are two groups of individuals who seek to challenge the Guidelines' residual clause after *Johnson.* The first group is composed of defendants whose convictions and sentences were pending on direct appeal when *Johnson* was decided; the second, and undoubtedly larger, group is composed of prisoners whose direct appeals have been exhausted and who must make their *Johnson* arguments through petitions for habeas corpus. For the first group, the main legal question is the one tackled in this Article: whether *Johnson*'s invalidation of the ACCA's residual clause necessarily invalidates the Guidelines' residual clause. The second group's access to *Johnson* relief depends on both the answer to the first question and on whether *Johnson* is "retroactive" pursuant to Teague v. Lane, 489 U.S. 288, 301 (1989). As relevant here, *Teague* says a new constitutional rule is "retroactive"—that is, can be used to challenge a final sentence through a petition for habeas corpus—if it is a "substantive" rather than "procedural" rule and if the Supreme Court "made" the rule retroactive. In Welch v. United States, No. 15–6418, 2016 WL

clause is not retroactive, so it cannot alter sentences already being served.[178] This means defendants already serving their sentences must seek resentencing through either an appeal or a petition for habeas corpus. Defendants' ability to obtain resentencing under *Johnson* via these routes is in doubt because the federal courts disagree on both (1)

1551144 (2016), the Supreme Court held *Johnson* announced a new substantive rule made retroactive on collateral review. As explained in note 173, *supra*, and accompanying text, the government has consistently conceded that *Johnson*'s holding invalidates the Guidelines' residual clause on vagueness grounds. Even before *Welch* was decided, the government also conceded that *Johnson* is retroactive in *ACCA* cases. *See Welch*, 136 S. Ct. at 1263 ("[T]he United States . . . agrees with Welch that *Johnson* is retroactive[.]") However, the government has taken the position that *Johnson* is *not* retroactive on collateral review in *Guidelines* cases. *See* United States v. Willoughby, — F. Supp. 3d. —, 2015 WL 7306338, *6 (N.D. Ohio Nov. 18, 2015) ("The Government admits *Johnson* establishes a new, retroactive substantive rule as to the ACCA, but nonetheless argues it creates nothing more than a non-retroactive procedural rule as to the Sentencing Guidelines."). In support of this position, the government relies heavily on Hawkins v. United States, 724 F.3d 915, 917 (7th Cir. 2013), in which the Seventh Circuit held that all "errors in applying the advisory guidelines are procedural" for purposes of the *Teague* retroactivity analysis. In response, advocates for prisoners seeking to use *Johnson* to challenge their Guidelines sentences on collateral review have pointed to a line of federal appellate cases in which courts—including the Seventh Circuit—have held Supreme Court decisions narrowing the ACCA's definition of "violent felony" are retroactive to Guidelines cases on collateral review. *See* United States v. Doe, 810 F.3d 132, 154 & n.13 (3d Cir. 2015); Narvaez v. United States, 674 F.3d 621, 625–26 (7th Cir. 2011); Reina-Rodriguez v. United States, 655 F.3d 1182, 1187 (9th Cir. 2011). After *Welch*, federal appellate courts are divided on whether *Johnson* is retroactive in Guidelines cases. *Compare*, *e.g.*, In re Patrick, 833 F.3d 584, 587 (6th Cir. 2016) (holding *Johnson* is retroactive in Guidelines cases) *and* In re Hubbard, 825 F.3d 225, 235 (4th Cir 2016) (same) *with* In re Griffin, 823 F.3d 1350, 1355 (11th Cir. 2016) (holding *Johnson* is not retroactive in Guidelines cases) *and* In re Arnick, 826 F.3d 787, 789 (5th Cir. 2016) (same). A full exploration of the retroactivity split is beyond the scope of this Article. However, on the last day of the October 2015 term, the Supreme Court granted certiorari in a case that may resolve both the split on the applicability of the vagueness doctrine to the Guidelines and the split on *Johnson*'s retroactivity in Guidelines cases. *See* Beckles v. United States, 136 S. Ct. 2510, 2510 (2016).

178 The Commission has the authority to make amendments to the Guidelines retroactive. *See* United States v. Navarro, 800 F.3d 1104, 1108 (9th Cir. 2015) (discussing retroactive amendments to the Guidelines ranges designed to ameliorate discrepancies in the advisory sentencing ranges for powder and crack cocaine). The amendment to the residual clause is not retroactive. Douglas Berman posits this may be because the Commission decided retroactive application "could prove almost administratively impossible." Douglas A. Berman, *US Sentencing Commission Promulgates "*Johnson *fix" Guideline Amendment and Proposes Many Other Notable Amendments*, SENT'G L. & POL'Y BLOG (Jan. 8, 2016), http://sentencing.typepad.com/sentencing_law_and_policy/2016/01/us-sentencing-commission-promulgates-johnson-fix-guideline-amendment-and-proposes-many-other-notable.html. This is presumably a reference to the difficulty of determining whether a residual-clause enhancement was a necessary condition for the Guidelines range and the size of the group for which this determination would have to be made. *See supra* note 13 (explaining why it is difficult to figure out how many defendants have viable *Johnson* claims).

whether *Johnson*'s constitutional holding applies to the Guidelines[179] and (2) whether *Johnson* is retroactive on collateral review in Guidelines cases.[180] A defendant's access to *Johnson* relief thus depends on the circuit or district in which he or she was convicted or is incarcerated.[181]

After *Johnson*, the Eleventh Circuit was the first federal court of appeals to analyze the constitutional issue.[182] In *United States v. Matchett*, the court rejected the government's concession that *Johnson* invalidated the Guidelines' residual clause, instead holding the prohibition of vagueness in criminal statutes did not apply to the Guidelines.[183]

First, the court quoted *Johnson* for the proposition that the "vagueness doctrine 'appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.'"[184] The *Matchett* court concluded the Guidelines do not "fix" sentences because they are "merely 'the starting point and the initial benchmark' designed to

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179 *See infra,* notes 183–219 and accompanying text.

180 *See supra* note 177.

181 For example, some district courts in the Fourth Circuit permitted *Johnson* challenges to the Guidelines, while others barred them. *Compare* United States v. Cotton, No. 7:15-CR-21-FL, 2015 WL 4757560, at *9 (E.D.N.C. Aug. 12, 2015) (holding Guidelines immune from vagueness challenges) *and* McRae v. United States, No. 13-3331, 2015 WL 4641167 at *4 n.1 (D. Md. Aug. 3, 2015), *with* Lucas v. United States, 162 F. Supp. 3d 883, 887 (D.S.D. Feb. 10, 2016) (applying *Johnson* to invalidate Guidelines' residual clause). The defendant in *Cotton* filed an appeal, which is currently pending before the Fourth Circuit. United States v. Cotton, No. 15-4480, 2016 WL 3746407, (M.D. Fla. July 13, 2016).

182 Many federal courts of appeals have avoided the constitutional question, either by accepting the government's concession and assuming, without deciding, that *Johnson* invalidated the Guidelines' residual clause or by remanding for the district court to make a determination on the constitutional question. *See* United States v. Torres, — F.3d —, 2016 WL 3770517, at *9 (9th Cir. July 14, 2016) ("Based on the Government's concession, we assume without deciding that *Johnson*'s holding nullifies § 4B1.2(a)(2)'s identically worded residual clause."); United States v. Soto-Rivera, 811 F.3d 53, 59 n.8 (1st Cir. Jan. 22, 2016) ("Given that the government has explicitly waived any reliance on [the Guidelines' residual clause here, this is not the cause for us to opine on [the constitutionality of that clause.]"); United States v. Frazier, 621 F. App'x 166, 168 (4th Cir. Aug. 28, 2015) (assuming without deciding that *Johnson* invalidated the Guidelines' residual clause); United States v. Maldonado, 581 F. App'x 19, 22–23 (2d Cir. 2014) ("Because the parties do not dispute this issue, we decline to decide whether the due process concerns that led the *Johnson* Court to rule the ACCA's residual clause void for vagueness are equally applicable to the Sentencing Guidelines.").

183 802 F.3d 1185, 1194 (11th Cir. 2015). In part of her excellent essay about open questions after *Johnson*, Leah Litman examines the court's decision to reject the government's concession in light of traditional notions of waiver and forfeiture. Litman, *supra* note 16.

184 United States v. Matchett, 802 F.3d 1185, 1194 (2015) (alteration in original) (quoting *Johnson*, 135 S Ct. at 2557).

'assist . . . the sentencing judge' in determining a sentence."[185] The court noted before the Guidelines, judges exercised broad discretion to impose a sentence within statutory limits.[186] The Guidelines, which merely place some mandatory (pre-*Booker*) or advisory (post-*Booker*) constraints on that discretion, could not trigger due process protection because defendants have "no constitutional right . . . to a less discretionary application of sentences than that permitted prior to the Guidelines."[187]

The court next placed great weight on a 2008 Supreme Court decision, *United States v. Irizarry*.[188] *Irizarry* concerned a defendant's constitutional right to notice and an opportunity to be heard before a judge imposed a sentence above the applicable Guidelines range for any ground not raised in the presentence report or in a party's prehearing submission.[189] Before *Booker*, a defendant had been entitled to such notice pursuant to Federal Rule of Civil Procedure 32(h).[190] In *Irizarry*, the Court concluded that a post-*Booker* "variance" (the term for a deviation from the now-advisory Guidelines range) was not the same as a pre-*Booker* "departure" within the meaning of the federal rule.[191] The Court also held that, assuming there had been a pre-*Booker* "expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range,"[192] that expectation and corresponding right to notice did not transfer to the post-*Booker* advisory system.[193] Because the Guidelines were now advisory, "neither the Government nor the defendant may place the same degree of reliance on the type of

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185 *Id.* (quoting Gall v. United States, 552 U.S. 38, 49 (2014) and United States v. Tichenor, 683 F.3d 358, 364 (7th Cir. 2012)).

186 *Id.* at 1195.

187 *Id.* (quoting United States v. Wivell, 893 F.2d 156, 160 (8th Cir. 1990)).

188 553 U.S. 708, 708 (2008).

189 *Id.* at 709.

190 *Id.*

191 *Id.* at 714 ("'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.").

192 Before *Booker*, the Supreme Court never actually decided whether such notice was *constitutionally* required. Federal Rule of Civil Procedure 32(h) was promulgated in response to the Court's decision in Burns v. United States, 501 U.S. 129, 129 (1991). In that case, the Supreme Court interpreted the previous version of Rule 32 to include a notice requirement for departures from the Guidelines range, noting that to read the rule otherwise would require the Court "to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

193 Irizarry v. United States, 553 U.S. 708, 713–14 (2008).

'expectancy' that gave rise to a special need for notice" before *Booker*.[194]

The Eleventh Circuit interpreted *Irizarry* to hold that, post-*Booker*, criminal defendants had no due process right to notice of the Guidelines that would apply at their sentencing.[195] Citing the vagueness doctrine's roots in concerns about fair notice, the *Matchett* court read *Irizarry* to foreclose the doctrine's application to the Guidelines.[196] Finally, the court rejected the defendant's argument that *Peugh* meant the Due Process Clause applies to the Guidelines.[197] The court distinguished the ex post facto "sufficient risk of a higher sentence" test from the vagueness doctrine's "fix sentences" test, and stated that "[w]hether the Ex Post Facto Clause applies to the advisory guidelines in no way informs our analysis."[198]

Other federal appellate courts disagreed. In *United States v. Madrid,* the Tenth Circuit focused on the second concern undergirding the vagueness doctrine: that vague statutes produce arbitrary results.[199] The court noted such arbitrariness would be unavoidable in adjudicating questions about the applicability of the Guidelines' residual clause to a given crime: "it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA."[200] For the *Madrid* court, the post-*Booker* advisory nature of the Guidelines did not change the analysis, because they remain "the beginning of all sentencing determinations."[201] The court acknowledged the circuit split on the applicability of the due process right to notice of the Guidelines.[202] But it noted that the split predated *Peugh*, which affirmed the Guidelines "are subject to constitutional challenge 'notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.'"[203]

The Sixth Circuit also held the Guidelines may be challenged on vagueness grounds.[204] *United States v. Pawlak* held special

194 *Id.*

195 United States v. Matchett, 802 F.3d 1185, 1194 (11th Cir. 2015).

196 *Id.*

197 *Id.* at 1195.

198 *Id.*

199 United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015).

200 *Id.* at 1211.

201 *Id.*

202 *Id.* at 1211 n.9.

203 *Id.* at 1211 (quoting Peugh v. United States, 133 S. Ct. 2072, 2082 (2013)).

204 United States v. Pawlak, 822 F.3d 902 (6th Cir. 2016).

significance because the Sixth Circuit, unlike the Tenth, had longstanding precedent barring vagueness attacks on the Guidelines.[205] The Sixth Circuit expressly overruled that precedent as inconsistent with *Peugh*, reasoning that the Supreme Court's ex post facto holding in *Peugh* "rests on the very same principles of fair notice and avoiding arbitrary enforcement underlying" a vagueness challenge to the Guidelines.[206] The court continued: "Post-*Johnson* and *Peugh*, the fact that the Guidelines are not mandatory is a distinction without a difference. In our view, *Johnson*'s rationale applies with equal force to the Guidelines' residual clause."[207]

The Third Circuit weighed in next, agreeing with the Sixth and Tenth Circuits.[208] Like the Tenth Circuit in *Madrid*, the court in *United States v. Calabretta* focused on the vagueness doctrine's function as a safeguard against arbitrary decision-making.[209] The Third Circuit relied heavily on its "prior case law" interpreting the Guidelines' "crime of violence" definition identically to the ACCA's "violent felony" definition.[210] The court reasoned that "if the ACCA's residual clause invites arbitrary enforcement, so does the residual clause in § 41B.2."[211] Just two weeks later, the D.C. Circuit endorsed the reasoning of the Third, Sixth, and Tenth Circuits in holding that a district court's use of the residual clause in calculating the Guidelines range constituted plain error after *Johnson*.[212] Quoting *Peugh*, the court wrote that "[w]here the Guidelines 'exert controlling influence on the sentence that the court will impose,' an unconstitutionally vague Guidelines provision that has the effect of doubling or tripling a defendant's sentence is constitutionally problematic in its own right."[213]

Most recently, the Seventh Circuit joined the Third, Sixth, Tenth, and D.C. Circuits to hold that the Guidelines can be challenged on

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205 *Id.* (citing United States v. Smith, 73 F.3d 1414, 1417–18 (6th Cir. 1994)); *see also* United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990).

206 Pawlak, 822 F.3d at 906.

207 *Id.*

208 United States v. Calabretta, 831 F.3d 128, 133–34 (3d Cir. 2016).

209 *See id.* at 136–37 (concluding that "regardless of whether defendants are entitled to 'fair notice' under an advisory Guidelines system, the due process concerns over arbitrary enforcement are implicated here" (footnote omitted)).

210 *Id.* at 134.

211 *Id.* at 135.

212 United States v. Sheffield, 832 F.3d 296, 313 (D.C. Cir. 2016).

213 *Id.* (quoting Peugh v. United States, 133 S. Ct. 2072, 2085 (2013)).

vagueness grounds.[214] In *United States v. Hurlburt*, the court had to revisit a 2012 decision, *United States v. Tichenor*, which had held "that the Guidelines, as a matter of law, are not susceptible to vagueness challenges."[215] *Tichenor* concluded the vagueness doctrine did not apply to the Guidelines for two reasons: "because [the Guidelines] do not declare any conduct illegal" and because *Booker* "demoted the guidelines from rules to advice."[216] The *Hurlburt* court concluded that *Johnson*—a decision about a sentencing provision that did not declare any conduct illegal—"conclusively refutes *Tichenor*'s first premise."[217] And *Peugh*, which focused on the Guidelines' enduring real-world consequences, "fatally undermined" the second premise.[218] The Seventh Circuit overruled *Tichenor* and "join[ed] a growing consensus among the circuits" that *Johnson* renders the Guidelines' residual clause unconstitutionally vague.[219]

Going forward, *Johnson* presents two questions relevant to the Guidelines, one narrow and one broad. The narrow question is whether the Court's invalidation of the ACCA's residual clause on vagueness grounds necessarily voids a textually identical Guidelines provision. The deletion of the residual clause from the Guidelines mooted that narrow question going forward.[220] Regardless of changes to the Guidelines, however, the narrow question remains alive and significant for hundreds of defendants serving sentences imposed after their Guidelines range was calculated using the residual clause. Moreover, whether *Johnson* invalidates the Guidelines' residual clause necessarily raises a broader question: does the vagueness doctrine apply to the advisory Guidelines at all?[221]

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214 United States v. Hurlburt, 835 F.3d 715, 725 (7th Cir. 2016) (en banc).

215 683 F.3d 358, 367 (7th Cir. 2012).

216 *Hurlburt*, 835 F.3d at 721–22.

217 *Id.* at 722.

218 *Id.*

219 *Id.* at 725.

220 *See supra* notes 174–76 and accompanying text.

221 The current state of the circuit split on this question can be characterized as 5–1 or 6–3, depending on which decisions you count. The "score" is 5–1 in favor of permitting vagueness challenges counting only the post-*Johnson* decisions in *Matchett*, *Madrid*, *Pawlak*, *Calabretta*, *Sheffield*, and *Hurlburt* but shifts to a narrower 6–3 in favor of vagueness challenges reaching back to bring in the pre-*Booker* decisions. It is not entirely clear which is the "correct" count. On the one hand, it seems reasonable to include the pre-*Booker* decisions; it makes little sense to think a court that decided the vagueness doctrine did not apply to mandatory Guidelines could determine the vagueness doctrine *does* apply to advisory Guidelines without running afoul of the old precedent. On the other hand, courts of appeals with case law in the pre-*Booker* category do not appear to consider that case law controlling. *See, e.g.*, United States v. Lee, 821 F.3d 1124, 1127 (9th Cir. 2016)

III
DUE PROCESS MAKES THE GUIDELINES SUSCEPTIBLE TO VAGUENESS CHALLENGES

The residual clauses of the ACCA and the Guidelines are textually identical: both state that a conviction qualifies as a "violent felony" or "crime of violence" if it "involves conduct that presents a serious potential risk of physical injury to another."[222] Just as the ACCA's residual clause significantly enhanced the applicable statutory minimum and maximum sentences, the Guidelines' residual clause dramatically affects the advisory sentencing range. It generally does this in two ways: by imposing a mandatory criminal history category of VI (the highest criminal history category) and by placing a floor on the offense level.[223] The effect of these two changes varies from case to case, but frequently increases the applicable Guidelines range by up to a decade of imprisonment. In 2014, the average guideline minimum for a career offender was ten years longer than the minimum for a non-career offender, and the average sentence actually imposed for career offenders was more than six years longer than for non-career offenders.[224] As the Supreme Court acknowledged in *Peugh* and *Molina-Martinez*, we know a higher Guidelines range in the aggregate exerts tremendous influence on the sentence actually imposed. The question, then, is whether the due process analysis is different because a judge in any given case is free to depart from the Guidelines range, while a judge applying the ACCA's enhanced minimum has no such discretion.

(acknowledging "division among our sister circuits as to whether the residual clause in the Guidelines . . . is . . . void for vagueness," but declining to address the constitutional question); United States v. Gonzalez-Longoria, 813 F.3d 225, 228 (5th Cir. 2016) ("We have not previously decided [whether guideline provisions are subject to vagueness challenges] in a published case, though unpublished cases have agreed with the approach adopted by the Eleventh Circuit."). At the very least, it is clear the circuits are in disagreement. As stated in note 2, *supra*, the Supreme Court has granted certiorari in a case that may resolve the split.

222 *Compare* 18 U.S.C. § 924(e)(2)(B) (2012), *with* U.S SENTENCING GUIDELINES § 4B1.2(a)(2) (U.S. SENTENCING COMM'N 2015).

223 *See supra* note 73; U.S SENTENCING GUIDELINES § 4B1.1(a) (U.S. SENTENCING COMM'N 2015). The "career offender" provision is the most common way a residual clause determination comes into play. As explained in note 45, *supra*, however, there are also other Guidelines provisions that use the "crime of violence" definition.

224 PAUL J. HOFER, SENTENCING RES. COUNSEL PROJECT, DATA ANALYSES 1 (2016), http://www.src-project.org/wp-content/uplaods/2016/04/Data-Analyses-1.pdf.

A. If the Guidelines Can't Be Challenged on Vagueness Grounds, Federal Courts Will Be Forced to Issue Arbitrary Decisions

It strikes at the heart of the Due Process Clause to suggest the inconsistent, arbitrary precedent struck down in *Johnson* could continue to be applied to calculate thousands of Guidelines ranges each year without running afoul of due process. As the Tenth Circuit explained, a core purpose of the vagueness doctrine is "to prevent judges from imposing arbitrary or systematically inconsistent sentences. The Supreme Court made this clear when it struck down the ACCA's residual clause because of the 'unavoidable uncertainty and arbitrariness of the adjudication' that it created."[225]

Johnson brings this point into sharp relief. The Supreme Court minced no words when it held that the ACCA's residual clause *could not* be interpreted consistently; despite the Court's best efforts, it inexorably resulted in unfairness to defendants.[226] It follows that any court opinions applying the textually identical Guidelines' residual clause will *necessarily* be arbitrary. After *Johnson*, the Commission acted to eliminate the Guidelines' residual clause going forward.[227] But that action was entirely voluntary; there is no guarantee the Commission would take such action in the future.[228] In fact, the Commission would be free to resurrect the residual clause if it chose to do so. Furthermore, *Johnson* is a reminder that there may well be provisions in application now that pose serious vagueness concerns. Defendants must have an avenue to challenge those provisions if they prove impossible to interpret or enforce with consistency.[229]

The arbitrariness issue is underscored by the following thought experiment: how would a federal court decide whether a conviction

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225 United States. v. Madrid, 805 F.3d 1204, 1210 (2015) (quoting Johnson v. United States, 135 S. Ct. 2551, 2562 (2015)).

226 *See Johnson*, 135 S. Ct. at 2562 (stating the Court's previous "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy").

227 Notably, the Commission did not acknowledge any *constitutional* deficiency; it appears to have acted on grounds of fairness and pragmatism. Moreover, the Commission has not made the change to Guidelines retroactive, even though it has the power to do so. *See supra* note 178. Accordingly, although the amendment eliminates this particular vagueness problem going forward, it does nothing to address the concerns of defendants *already sentenced* with a residual-clause Guidelines enhancement. As discussed in note 13, *supra*, that group likely is quite large.

228 *See* Baron-Evans & Stith, *supra* note 128, at 1643–45 (detailing the Commission's insulation from judicial review and political accountability).

229 *See* Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void-for Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813 (2008).

qualifies as a residual-clause "crime of violence" after *Johnson*? Recall that federal appellate courts applied the same precedent to cases involving the ACCA's and Guidelines' residual clauses. Didn't *Johnson* necessarily invalidate that entire line of precedent? In the wake of *Johnson*, what process could a federal court follow to determine if a prior conviction is for a "crime of violence" within the meaning of the residual clause?

The Ninth Circuit's recent decision in *United States v. Lee* highlights this problem. In that case, the majority sidestepped deciding whether *Johnson* invalidated the Guidelines' residual clause by determining that the district court's "career offender" determination was erroneous even under pre-*Johnson* case law.[230] In dissent, Judge Ikuta criticized the majority for avoiding the hard constitutional question by improperly applying "precedent that has been overruled and effectively rendered non-existent by the Supreme Court."[231] Judge Ikuta went on to explain that she would hold the Guidelines are immune from vagueness challenges.[232] Nonetheless, she argued that *Johnson* doomed the Guidelines' residual clause on other grounds. Specifically, she reasoned that "given the residual clause's inscrutability in the ACCA context, application of the residual clause would violate the Supreme Court's instruction that the district court 'begin all sentencing proceedings by correctly calculating the applicable Guidelines range.'"[233] As a result, any court using the residual clause to calculate the Guidelines range would commit procedural error because such an arbitrary calculation would not be "correct."[234]

The path of Judge Ikuta's reasoning nicely illustrates the post-*Johnson* pitfalls of attempting to interpret the residual clause. First, there is the problem of following precedent declared dead by the Supreme Court because that precedent was arbitrary. Second, there is the problem of making a legal determination the Supreme Court has clearly stated can only be made in an arbitrary fashion. Judge Ikuta attempts to distance these problems from the Due Process Clause, and she is correct the problems are not only about arbitrariness—they also arise because the Supreme Court instructs lower courts to follow its precedent (which includes abandoning precedent the Court overrules) and correctly calculate the Guidelines range. But these issues are

230 United States v. Lee, 821 F.3d 1124, 1127 (2016).

231 *Id.* at 1136 (Ikuta, J., dissenting).

232 *Id.* at 1135.

233 *Id.* at 1133 (quoting Gall v. United States, 552 U.S. 38, 49 (2007)).

234 *Id.* at 1136.

inextricably bound up in the Due Process Clause. Due process does not countenance judicial application and enforcement of arbitrary rules. A court applying pre-*Johnson* residual clause case law necessarily runs afoul of this principle. Judge Ikuta's non-constitutional "fix" does not solve this problem. It is true that a court holding a defendant's prior conviction was for a crime of violence under the residual clause would violate the Supreme Court's directive to correctly calculate the Guidelines range. But a court refusing to determine whether a prior conviction qualified as a residual-clause crime of violence *also* would run afoul of that directive, because it would be ignoring part of the formula for calculating that range. As long as the residual clause is a part of the formula for calculating the Guidelines range, a court could *never* "correctly" calculate the applicable range for any defendant with a prior conviction that might qualify under the residual clause, because ignoring the clause as if it didn't exist does not yield a "correct" answer either. The only remedy is to strike the vague language.

Some courts have pushed back against concerns about arbitrariness in the Guidelines context, arguing such concerns do not implicate the Due Process Clause because sentencing is an arena uniquely defined by judicial discretion. In *Matchett*, the Eleventh Circuit cautioned that opening up the Guidelines to vagueness challenges would "upend" the sentencing regime because "many [Guidelines] provisions could be described as vague."[235] The court identified two such provisions: the offense level enhancement if the crime "involved sophisticated means" and the offense level decrease triggered by a role as a "minor participant."[236] Because judges might vary in their application of these provisions, the court reasoned, "[h]olding that advisory guidelines can be unconstitutionally vague would invite more, not less, instability."[237] Decades earlier, the Eighth Circuit in *Wivell* raised a similar concern:

> Because there is no constitutional right to sentencing guidelines—or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines—the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague . . . . Even vague guidelines cabin discretion more than no guidelines at all. *What a defendant may call arbitrary and capricious, the legislature may call discretionary*, and

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235 United States v. Matchett, 802 F.3d 1185, 1195–96 (11th Cir. 2015).

236 *Id.* (quoting U.S. SENTENCING GUIDELINES §§ 2B1.1(b)(10) & 3B1.2(b) (U.S. SENTENCING COMM'N 2015).

237 *Id.*

> the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.[238]

This reasoning is unpersuasive for two reasons. First, it ignores the fact that, as demonstrated by the statistics about the relationship between Guidelines ranges and sentences actually imposed, Guidelines that change the offense level or criminal history category are qualitatively different than traditional sentencing considerations that may influence a judge's discretion in an amorphous manner. There is a principled way to draw a line between challenges to Guidelines provisions and challenges to exercises of discretion in sentencing. Indeed, the Supreme Court has drawn such a line many times. In *Booker*, the Court saw no Sixth Amendment problem with a judge exercising "discretion to select a specific sentence within a defined range."[239] Nonetheless, it found mandatory application of the Guidelines violated the right to trial by jury because the Guidelines had "the force and effect of laws."[240] Similarly, in *Johnson*, the Court took the time to note that its holding the ACCA's residual clause was unconstitutionally vague did not cause it to question "the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'"[241]

Second, the "instability" the *Matchett* court referred to appears to be litigation challenging the application of these provisions. But, while the Due Process Clause protects against the instability of arbitrary decision-making, it provides no protection for courts against the "instability" of litigation. In any event, any concern that permitting vagueness challenges to the Guidelines will lead to a flood of litigation striking down Guidelines provisions left and right is overblown. Any statute affecting deprivations of life, liberty, or property may be challenged on vagueness grounds now, yet it is quite rare for one of those challenges to succeed. This is best underscored by the Ninth Circuit and other courts who for decades have addressed vagueness challenges to the Guidelines on their merits without opening the door to the parade of horribles feared by the *Matchett* court.

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238 United States v. Wivell, 893 F.2d 156, 160 (8th Cir. 1990) (emphasis added).

239 Booker v. United States, 543 U.S. 220, 233 (2005).

240 *Id.* at 234.

241 Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) (quoting Nash v. United States, 229 U.S. 373, 377 (1913)).

As *Johnson* demonstrates, immunizing the Guidelines from vagueness challenges would sometimes leave courts with no choice but to issue arbitrary decisions. That result is incompatible with the Due Process Clause. The Supreme Court has declared the text of the residual clause hopelessly indeterminate; applying basic due process safeguards against arbitrariness, the clause must go.

B. Advisory Guidelines Implicate Valid Notice Interests

The other concern underlying the vagueness doctrine is fair notice.[242] Part of the process that is due an individual is notice of what the law requires, including the length of the sentence. There is often a wide gulf between the statutory minimum and maximum sentences for a crime. Empirical evidence establishes the Guidelines as the most significant factor in influencing how sentencing judges will navigate that gulf. The legal manifestation of this practical reality is that defendants have a constitutional right to notice of the Guidelines that will apply in a given case. A vague Guideline deprives them of that notice.

The Eleventh Circuit in *Matchett* disputed the notion that defendants have a due process right to notice of the Guidelines that will apply in a given case, holding there is "no constitutional right . . . to a less discretionary application of sentences than that permitted prior to the Guidelines."[243] This ignores the fact that an individual might react quite differently to very broad unfettered discretion (for example, a three-to-twelve-year statutory range with no advisory guidelines) than to a narrowing guideline range making it significantly more likely the sentence will fall in a particular segment of the statutory range (say, advisory ranges of three to five years versus ten to twelve years.) In other words, a rational actor contemplating committing a crime would feel differently about a likely four-year sentence with the possibility of an eleven-year-sentence than he or she would about a likely eleven-year sentence with the possibility of a four-year sentence.[244]

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242 Hill v. Colorado, 530 U.S. 703, 732 (2000).

243 United States v. Matchett, 802 F.3d 1185, 1195 (11th Cir. 2015).

244 The idea that a potential offender may choose not to commit a crime because of the harshness of the punishment for that crime is known as general deterrence. Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 34 (2011) ("[T]he goal of general deterrence . . . suggests that punishing a given offender can serve as an example for other potential wrongdoers, tipping their cost-benefit analysis against committing crime."). The government has argued for above-Guidelines sentences based on the need for general deterrence, arguing credit card skimmers, as "rational actors," would be responsive

Since 2008, the courts that have held the Guidelines cannot be challenged on vagueness grounds have grounded their decisions in part on *Irizarry*'s statement that a defendant has no "expectation subject to due process protection that [he or she] w[ill] receive a sentence within the presumptively applicable Guidelines range."[245] But *Irizarry* did not hold that defendants had no notice rights attached to the Guidelines generally, much less declare the Guidelines' independence from the Due Process Clause. It held that, post-*Booker*, criminal defendants have constitutionally adequate notice that a sentencing judge *may* impose a sentence that is outside the Guidelines range.[246] The decision said nothing about a defendant's broader notice right to know what that range is in a given case, and it did not touch on any due process concerns beyond notice.

Moreover, *Irizarry* addressed a different type of notice than the type implicated by vagueness challenges to the Guidelines. As Carissa Byrne Hessick and F. Andrew Hessick explain, due process encompasses two types of notice: "ex ante" notice, which includes the requirement that the "law must give notice to the public of what conduct is prohibited and the consequences for performing that conduct," and adversarial notice, which in the sentencing context is about giving defendants notice of the reasons on which the court will base its sentencing determination.[247] Knowing which Guidelines apply to a particular crime and defendant is ex ante notice, while knowing the judge is contemplating a departure from the advisory range reached pursuant to those Guidelines is adversarial notice.[248] Thus, *Irizarry*'s determination that due process does not mandate a particular type of *adversarial* notice says nothing about what type of *ex ante* notice is required.[249]

Peugh supports this narrow reading of *Irizarry*. The *Peugh* majority rejected the argument that *Irizarry* barred a constitutional challenge to the Guidelines, noting that "the Ex Post Facto Clause does not merely protect reliance interests. It also reflects principles of 'fundamental

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to enhanced penalties for fraud. *See* United States v. Edmondson, 394 F. App'x 511, 515 (11th Cir. 2009).

245 Irizarry v. United States, 553 U.S. 708, 713 (2008); *see also Matchett*, 802 F.3d at 1194; United States v. Tichenor, 683 F.3d 358, 364 (7th Cir. 2012).

246 *Irizarry*, 553 U.S. at 715.

247 *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 210 (2014).

248 *See id.* at 212 (explaining *Irizarry* in these terms).

249 *See* United States v. Pawlak, 822 F.3d 902, 909 (6th Cir. 2016).

justice.'"[250] At first glance, this statement might be read to suggest that *Irizarry* barred a due process challenge to the Guidelines but left open other constitutional challenges. But procedural due process is not *only* about notice. As the Supreme Court has acknowledged, it is "undoubtedly correct" to say that the Due Process and Ex Post Facto Clauses "safeguard" certain "common interests," including "the prevention of the arbitrary and vindictive use of the laws."[251] Because the Supreme Court has so clearly stated that the Ex Post Facto *and* Due Process Clauses guard against arbitrariness, the statement in *Peugh* about "merely protect[ing] reliance interests" must be read to narrow the scope of *Irizarry*, not to limit the reach of the Due Process Clause.[252] The best reading of *Irizarry*—and of *Peugh*'s interpretation of *Irizarry*—is as a narrow decision that defendants are not constitutionally entitled to a particular form of adversarial notice in a very specific context.

Finally, an examination of defendants' due process rights in the supervised release[253] context reveals the practical value of vagueness challenges with respect to fair notice. For example, the Second Circuit considered a challenge to a requirement that the defendant inform the probation office if he entered into a "significant romantic relationship."[254] The court held this condition violated the Due Process Clause because "people of common intelligence . . . would find it impossible to agree on the proper application" of the term "significant romantic relationship."[255] In another case, the Ninth Circuit invalidated on vagueness grounds a condition prohibiting the defendant from "access[ing] via computer any material that relates to pornography of any kind."[256]

If the Guidelines cannot be challenged on vagueness grounds, the Commission would be free to promulgate provisions that do not put

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250 Peugh v. United States, 133 S. Ct. 2072, 2085 (2013).

251 Rogers v. Tennessee, 532 U.S. 451, 460 (2001); *see also* Miller v. Florida, 482 U.S. 423, 429 (1987) (identifying both lack of notice and the arbitrary or vindictive decision making as concerns underlying the Ex Post Facto Clause).

252 *Peugh*, 133 S. Ct. at 2085.

253 "Supervised release came into existence as part of Congress's 1984 sentencing reform . . . . During a term of supervised release, the defendant is not incarcerated but is subject to restrictions on his liberty. The Second Circuit has characterized supervised release as 'the reformed successor to federal parole.'" 3 FED. PRAC. & PROC. CRIM. § 584 (4th ed.) (quoting United States v. Reyes, 283 F.3d 446, 458 (2d Cir. 2002)).

254 United States v. Reeves, 591 F.3d 77, 80 (2d Cir. 2010).

255 *Id.* at 81.

256 United States v. Stoterau, 524 F.3d 988, 1002 (9th Cir. 2008).

defendants on notice that they may apply—for example, by increasing the offense level (and the corresponding Guidelines range) for online harassment "relat[ing] to pornography of any kind"[257] or committed against the defendant's partner in a "significant romantic relationship."[258] The Commission could even authorize a judge to increase the Guidelines range if the defendant committed a crime in a "sexually inappropriate" manner—a classic example of the sort of expansive term that triggers fair notice concerns. Guideline provisions reliably change the duration of deprivation of liberty, and a rational actor might make a different decision depending on which Guideline provisions will apply in a particular case. Accordingly, the Guidelines raise notice concerns under the Due Process Clause.

CONCLUSION

The vagueness doctrine serves two purposes: it ensures laws affecting criminal liability and punishment are specific enough to put defendants on fair notice of the consequences of their actions, and it protects against arbitrary enforcement of those laws. Holding the Guidelines immune from vagueness challenges runs afoul of both principles, with devastating consequences. The applicability of the Guidelines' residual clause in a given case often alters the recommended sentencing range by years, if not a decade or more.

The questions raised by *Johnson* reach far beyond the now-defunct Guidelines' residual clause. The vagueness doctrine is an important safeguard against arbitrary deprivations of liberty without adequate process. Roughly 75,000 individuals are sentenced each year in the federal system.[259] For each of them, the Guidelines are the mandatory starting point, the most likely ending point, and a powerful gravitational force. Immunizing the Guidelines from vagueness challenges deprives these individuals both of notice of the likely consequences of their actions and of any meaningful way to challenge arbitrary enforcement of the Guidelines. The Due Process Clause requires the application of the vagueness doctrine to the Guidelines.

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257 *Id.*

258 *Reeves*, 591 F.3d at 80.

259 *See* 2014 COMM'N REPORT, *supra* note 1, at A-5.