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Doubting Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker

James R. Dillon*

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I. INTRODUCTION

The Supreme Court’s watershed decision in United States v. Booker, which declared the United States Sentencing Guidelines unconstitutional as written and excised two sections of the Guidelines’ enabling statute so as to render them “advisory” rather than “binding” on the federal courts, has produced ripples throughout the federal sentencing system that are likely to keep courts and scholars busy adjusting to—and to some extent, creating—a new sentencing paradigm for years to come. While the Booker decision has prompted an abundance of academic commentary analyzing its holding and debating the best course of sentencing reform to be taken in its aftermath, the majority of academic discussion thus far has focused on Booker’s direct effects on federal sentencing. For example, the literature has discussed the appropriate scope of the “reasonableness” review announced by Justice Breyer’s remedial opinion, what legislative steps, if any, Congress should take to reform federal sentencing in response to Booker, and, of course, what the Court’s dense and “conceptually muddled” dual 5-4 majority opinions actually mean for federal sentencing, both in terms of present practice and future developments. Though the analysis of Booker’s primary effects on federal sentencing is obviously a matter of overriding importance to the legal and academic communities, the Guidelines’ transition from a set of binding rules from which sentencing judges could depart only pursuant to certain well-defined exceptions to a set of “advisory” principles from which judges enjoy greater discretion—the precise scope of which remains unclear—to depart has created peripheral questions about the interpretation and application of the Guidelines that have not been widely addressed in academic discussions. The Guidelines’ post-Booker status is perhaps sui generis in the body of federal law: they are something less than fully prescriptive legislative enactments that tightly bind the authority of the sentencing court and yet, as this Article shall argue, something more than mere “guide-
posts" or recommendations advising the court as to the exercise of its unfettered discretion.\footnote{7}

This Article shall discuss one of the peripheral issues created by the post-Booker Guidelines’ unique status that has the potential to develop into a significant split between the federal courts of appeals: whether the Ex Post Facto Clause of the federal Constitution, which prohibits the retroactive application of criminal laws which, among other things, increase the measure of punishment for a criminal offense above the level that would have applied under the law in effect at the time the offense was committed,\footnote{8} continues to prohibit the application of upwardly revised Sentencing Guidelines to criminal defendants whose offenses were committed when some earlier, more lenient version of the Guidelines was in effect.\footnote{9} Prior to Booker, the federal courts unanimously recognized that, notwithstanding the general rule that a sentencing court is to apply the version of the Guidelines Manual in effect on the date of sentencing, the Ex Post Facto Clause prohibited the application of a revised Guidelines Manual to the calculation of a defendant’s sentence when that application would result in a sentencing range higher than the one that would have applied under the Guidelines in effect at the time the offense was committed, a conclusion to which the United States Sentencing Commission\footnote{10} belatedly acquiesced. In the aftermath of Booker, however, a number of federal courts have held, or have suggested in dicta, that application of the Guidelines to the calculation of a defendant’s sentence no longer implicates ex post facto concerns, and that a sentencing court must calculate every defendant’s sentencing range on the basis of the Guidelines that are in effect on the date of sentencing. The leading case in this group is the decision of the United States Court of Appeals for the Seventh Circuit in United States v. Demaree,\footnote{11} the only federal circuit court opinion to date that has ex-

\footnote{7}Rifai v. U.S. Parole Comm’n, 586 F.2d 695, 698 (9th Cir. 1978); see infra Part III.

\footnote{8}Article I of the Constitution contains two Ex Post Facto Clauses. The first, which pertains to the federal government, states simply that “[n]o Bill of Attainder or ex post facto Law shall be passed.” U.S. CONST. art. I, § 9, cl. 3. The second, which governs the states, provides that “[n]o State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . .” Id. at art. I, § 10, cl. 1. References to the “Ex Post Facto Clause” in this Article shall generally be to the former clause, which governs federal legislation such as the Sentencing Guidelines. However, because the constitutional analysis is identical under both clauses, reference will be made on occasion to federal cases applying the latter clause. The seminal case of Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), for example, involved an ex post facto challenge to a state law under Article 1, § 10, but has formed the basis of the Supreme Court’s ex post facto jurisprudence under both clauses. See infra Part II.B.

\footnote{9}One recent law review article has addressed this question. See Christine M. Zeivel, Note, Ex Post Booker: Retroactive Application of Federal Sentencing Guidelines, 83 CHI.-KENT L. REV. 395 (2008). Although applying a somewhat different constitutional analysis, Zeivel reaches the same ultimate conclusion regarding the constitutionality of retroactive application of the post-Booker Sentencing Guidelines as does this Article.

\footnote{10}Hereinafter the “Sentencing Commission” or “Commission.”

\footnote{11}459 F.3d 791 (7th Cir. 2006), cert. denied, 127 S. Ct. 3055 (2007).
pressly held that the Ex Post Facto Clause no longer prohibits the retroactive application of upwardly revised Sentencing Guidelines as it did prior to *Booker*. Other courts have held that the application of the Ex Post Facto Clause to Guidelines calculations was unaffected by *Booker*, and continue to apply the version of the Guidelines in effect at the time of the offense when the application of a later version would result in a higher sentencing range. Most of the courts that have reached the latter holding, however, have done so only implicitly, by continuing to apply pre-*Booker* case law to post-*Booker* Guidelines calculations without considering whether the advisory nature of the Guidelines in the post-*Booker* era removes them from the scope of the Ex Post Facto Clause.

As this Article shall demonstrate, all of the courts that have held or suggested that the Ex Post Facto Clause no longer applies to the Sentencing Guidelines have done so on the basis of a purely formal methodology that looks exclusively to the de jure discretion to depart from the Guidelines that is afforded to the district courts under the Supreme Court's *Booker* opinion and subsequent decisions, while undertaking no analysis of the extent to which district courts in the post-*Booker* era continue to perceive their sentencing discretion as being actually constrained, as a practical matter, by the "advisory" Guidelines, or the heightened level of appellate review—whether officially acknowledged or otherwise—to which sentences outside the Guidelines range are subjected by the appellate courts. This formal methodology was developed by the federal courts of appeals in response to a number of cases challenging the retroactive application of revisions to the United States Parole Commission's Guidelines for Decisionmaking on ex post facto grounds. The Parole Guidelines cases draw a categorical distinction for ex post facto purposes between legislative enactments that are "laws" and those that are not, on the basis of the extent to which the governmental agency to which a given enactment applies retains discretion to disregard the enactment's recommendations in individual cases. The enactment is held to be subject to the Ex Post Facto Clause only if the governmental entity's discretion to depart from it is tightly constrained or nonexistent.

The purely formal methodology applied by the circuit courts in the Parole Guidelines cases was inconsistent with controlling Supreme Court precedent even as it was being developed. The Court's interpretations of the Ex Post Facto Clause both before and after the Parole Guidelines cases were decided have rejected bright-line classifications of "law" or "not law" for evaluating the Ex Post Facto Clause's applicability to a given legislative enactment, and make it clear that the adjudication of ex post facto challenges to the post-*Booker* Sentencing Guidelines requires not only an analysis of the Guidelines' formal characteristics, but also an empirical examination of the degree to which the district courts' sentencing decisions are actually influenced by the Sentencing Guidelines in order to determine whether the retroactive application of upwardly revised Sentencing Guidelines creates a substantial risk of increasing a defendant's ultimate measure of punishment beyond the level that would have been imposed under the Guidelines in effect at the time of the offense. Although the Court's focus on the practical effects rather than the formal characteristics of
legislative enactments when evaluating the applicability of the Ex Post Facto Clause has been embodied in the law since the nineteenth century, the Court recently reaffirmed the practical focus of its ex post facto jurisprudence in *California Department of Corrections v. Morales*\textsuperscript{12} and again in *Garner v. Jones*.\textsuperscript{13} *Garner* applied a two-tiered inquiry into both the formal aspects of a legislative enactment and its empirically demonstrable practical effects in order to determine whether the retroactive application of the enactment is barred by the Ex Post Facto Clause. *Garner* was decided after most of the circuit courts' Parole Guidelines cases, and therefore was not available to the circuit courts during the development of the ex post facto analysis applied by those cases, but it should have alerted the *Demaree* court and the other federal courts that have expressed sympathy for *Demaree*'s holding that an appropriate ex post facto analysis requires not only a consideration of the district court's formal discretion to depart from the post-*Booker* Sentencing Guidelines, but also an examination of the Guidelines' actual effects on sentencing outcomes. Applying the methodology articulated by *Garner*, this Article shall conclude that the formal aspects of post-*Booker* appellate review of non-Guidelines sentences make the Guidelines more than merely "advisory" on the courts, and that the Guidelines continue to exert sufficient influence over the outcomes of criminal sentencing proceedings that they remain subject to the limitations of the Ex Post Facto Clause.

Part II of this Article shall undertake a brief survey of the history of the United States Sentencing Guidelines and the application of the Ex Post Facto Clause thereto, both before and after *Booker*. Part III shall examine the historical development of the Supreme Court's Ex Post Facto Clause jurisprudence as well as that of the methodology applied by *Demaree*, from its initial development by the federal appellate courts in cases addressing ex post facto challenges to retroactive application of upwardly revised Parole Guidelines through its ultimate repudiation by the Supreme Court in *Morales* and *Garner*. Part IV shall apply the *Garner* analysis to the post-*Booker* Guidelines, examining two formal aspects of post-*Booker* appellate review of sentencing decisions—the presumption of reasonableness of within-Guidelines sentences and the extent-of-the-variance review applied to sentences outside the Guidelines range—as well as empirical data demonstrating the practical effects of the Guidelines on outcomes in post-*Booker* sentencing proceedings to conclude that, notwithstanding the technically "advisory" nature of the post-*Booker* Sentencing Guidelines, they nevertheless continue to exert significant practical influence on sentencing decisions. In conclusion, Part V shall argue that because the post-*Booker* Sentencing Guidelines create a substantial risk of increased punishment if applied retroactively, they are subject to the restrictions placed upon federal legislation by the Ex Post Facto Clause.

\textsuperscript{12} 514 U.S. 499, 504 (1995).

\textsuperscript{13} 529 U.S. 244, 245 (2000).
II. A BRIEF HISTORY OF THE RELATIONSHIP BETWEEN THE EX POST FACTO CLAUSE AND THE UNITED STATES SENTENCING GUIDELINES

The Sentencing Guidelines were initially developed in response to an abrupt shift in the legal and political communities during the latter part of the twentieth century away from the failed theories of penology that prevailed during the late nineteenth and early twentieth centuries. This philosophical shift haled into existence the contemporary era of criminal justice, in which the federal courts’ power to craft individualized punishment for criminal offenders has been curtailed and control over individual sentencing determinations has been shifted toward the legislative branch and its administrative delegates. When the Guidelines were initially adopted, neither Congress nor the Sentencing Commission expected that they would be subject to the constitutional limitations imposed on ex post facto legislation; however, the federal courts quickly determined that the retroactive application of upwardly revised Sentencing Guidelines implicated the policies underlying the Ex Post Facto Clause, and the Sentencing Commission eventually implemented remedial provisions to avoid ex post facto violations in the application of the Guidelines. However, after the Supreme Court’s determination in Booker that the Sentencing Guidelines must be rendered merely advisory on the federal courts in order to comport with the Sixth Amendment’s right to a jury trial, some federal courts have expressed skepticism toward the proposition that the retroactive application of upwardly revised Guidelines continues to raise ex post facto concerns.

A. Historical Development of the Sentencing Guidelines Before and After United States v. Booker

From the late nineteenth century until around 1970, the federal criminal justice system operated on a “medical” model in which criminal offenders were viewed primarily as patients in need of care and rehabilitation by the penal system. This model emphasized the rehabilitation of criminals, rather than punishment for or deterrence of crime, as the primary purpose of the penal system, and called upon sentencing judges and parole officials “to craft individualized, rehabilitation-oriented sentences ‘almost like a doctor or social worker exercising clinical judgment.’” In order for district courts to discharge their institutional obligation to conduct the individualized assessment called for by the medical model, it was necessary for them to enjoy essentially unfettered discretion to sentence offenders anywhere within the generally broad statutory ranges set forth by Congress. Moreover, sentencing courts frequently imposed “indeterminate” sentences, placing the ultimate authority to determine the actual amount of time that a defendant would remain incarcerated with the Board of

14 Dufresne v. Baer, 744 F.2d 1543, 1547 (11th Cir. 1984).
The sentencing court also possessed some discretion to dictate the point within a sentence at which the offender would be eligible for parole. Parole eligibility could not be postponed beyond one-third of the prisoner's total sentence, but could be expedited to the extent that "[i]n theory, a person could walk into prison one day and be paroled the next."[17] Although the medical model of criminal justice presented a pleasant image of a merciful and sympathetic society, America's decades of experience with that model revealed a significant drawback: the medical model did not work very well at its avowed purpose of prisoner rehabilitation. As one study conducted at the end of the medical model's era of predominance concluded:

When inmates with similar backgrounds and past records are compared, neither institutional program participation and achievement, nor disciplinary record, nor the level and type of pre-incarceration or post-release supervision programs, have any measurable impact on the probability of successful rehabilitation, the rate of recidivism, or the likelihood of later parole success. Holding other factors constant, time served in an institution appears to have, if anything, a slightly negative effect on the inmate's chances for success once he or she is released. Nor do "expert" decisions by parole officers or psychologists appear any more accurate in discerning likely success than decisions by lay people. There simply is no way to know when "rehabilitation" has occurred in an individual.[18]

As the nation's infatuation with the medical model waned, many critics took issue with the broad discretion bestowed on sentencing courts, perceiving the courts' sentencing authority no longer as a tool for the edification and enlightenment of the downtrodden criminal offender, but rather as a source of arbitrariness and unpredictability in sentencing outcomes. Focusing on the fact that district courts' unconstrained discretion in sentencing often created significant disparities between the sentences of similarly situated offenders, judges and lawmakers urged the adoption of tighter legislative controls over federal sen-
tencing. Judge Marvin Frankel of the Southern District of New York, for example, argued in 1973 that "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." Senator Edward Kennedy echoed Judge Frankel's sentiments, referring to the state of federal sentencing in 1977 as a "national scandal" in which the "glaring disparity" in sentencing could "be traced to the unfettered discretion" exercised by judges acting "without any statutory guidelines or review procedures" guiding their deliberative processes.

The public movement for sentencing reform that took root in the 1970s culminated in the Sentencing Reform Act of 1984, which expressly abandoned the goal of prisoner rehabilitation as a primary purpose of incarceration and established the United States Sentencing Commission for the purpose of promulgating a set of binding guidelines that would constrain the federal courts' sentencing discretion into a much narrower range of permissible sentences. In compliance with this statutory mandate, the Sentencing Commission produced the United States Sentencing Guidelines, the first edition of which went into

19 See Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 883-84 (1990) ("The purpose of the [Sentencing Reform] Act was to attack the tripartite problems of disparity, dishonesty, and for some offenses, excessive leniency, all seemingly made worse by a system of near unfettered judicial discretion. For decades, empirical studies repeatedly showed that similarly situated offenders were sentenced, and did actually serve, widely disparate sentences. Furthermore, the disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant's race, sex, or social class. For a system claiming equal justice for all, disparity was an inexplicable yet constant source of embarrassment." (footnotes omitted)).

20 MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973). Elaborating on this argument, Judge Frankel observed that on the day that any given defendant appears for sentencing, "[t]he occupant of the bench . . . may be punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic. The vice in our system is that all such qualities have free rein as well as potentially fatal impact upon the defendant's finite life." Id. at 23.


23 See 28 U.S.C. § 994(k) (2006) (instructing the Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment").

effect in 1987.\textsuperscript{25} The Guidelines' Sentencing Table identifies a narrow sentencing range for each offender based on the offender's "Criminal History Category" and the "Offense Level" of the offense, subject to various adjustments based on the characteristics of the offense and the offender and certain universally applicable policy statements.\textsuperscript{26} The Criminal History Category is based on a numeric score derived from the offender's prior convictions, and is divided into six categories of increasing severity.\textsuperscript{27} The Offense Level assigns a score of one to forty-three based on the crime for which the defendant is being sentenced and the individual circumstances of the crime.\textsuperscript{28} To calculate the defendant's Offense Level, the sentencing court must first look to the base offense level identified in Chapter Two of the Guidelines Manual; the base level must then be modified to the extent that the court finds, on the basis of a preponderance of the evidence, that various aggravating or mitigating circumstances identified in Chapters Two and Three of the Guidelines apply.\textsuperscript{29} Having determined the defendant's Criminal History Category and Offense Level, the court then finds the intersection of those scores on the Sentencing Table, which indicates the sentencing range prescribed for the defendant. Subject to certain limited exceptions and grounds for departure, district courts were required under the pre-	extit{Booker} Guidelines to impose a sentence "of the kind, and within the range" identified by the Sentencing Guidelines.\textsuperscript{30} The Sentencing Commission is empowered to review the Guidelines and propose amendments to them, often for the purpose of altering a base offense level or sentencing factor that the Commission finds does not optimally reflect the seriousness of the offense in question.\textsuperscript{31} The Commission submits an annual report of proposed Guidelines amendments to Congress no later than May 1 of each year; if Congress takes no action to expressly disapprove of the proposed amendments, they become effective on November 1 of the same year.\textsuperscript{32}

Although the Sentencing Guidelines quickly attracted criticism from federal judges and commentators who argued that they excessively constrained


\textsuperscript{27} See Sentencing Table, supra note 26.

\textsuperscript{28} See id.

\textsuperscript{29} See Guidelines Manual, supra note 25, § 1B1.1(b), (c) (instructing district court to adjust base offense level on the basis of offense characteristics identified elsewhere in the Guidelines Manual).


\textsuperscript{32} See id. § 994(p) (2006).
judicial discretion to tailor individualized punishment for specific defendants, or imposed penalties that were disproportionate to the offense, the Guidelines system remained in place, subject only to minor annual amendments by the Sentencing Commission, until the Supreme Court’s landmark Booker decision. In Booker, a deeply divided Court issued two 5-4 majority opinions, holding the Sentencing Guidelines unconstitutional under the Sixth Amendment and excising two sections of the Sentencing Reform Act so as to render the Guidelines purportedly “advisory” on the courts. The first opinion, authored by Justice Stevens, relied on the Court’s recent Sixth Amendment precedent to conclude that the Sentencing Guidelines’ system of Offense Level adjustments, which required the court to adjust the defendant’s sentencing range on the basis of facts found by the court under a preponderance of the evidence standard, violated the Sixth Amendment’s fiat that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”

Justice Breyer’s remedial opinion did not follow the logic of Apprendi, Blakely, and Justice Stevens’s Booker opinion to its predictable end point by holding that any facts upon which the Guidelines would permit an upward adjustment to the defendant’s sentencing range must be submitted to the jury and proven beyond a reasonable doubt. Justice Breyer concluded that such an outcome would “destroy the system” crafted by Congress by “prevent[ing] a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial” and would “undermine the sentencing statute’s basic aim of ensuring similar sentences for those who have committed

33 For example, former Judge John Martin of the Southern District of New York identified the “unnecessarily cruel and rigid” system imposed by the Guidelines as his principal reason for retiring from the bench, explaining that he “no longer want[ed] to be a part of our unjust criminal justice system.” John S. Martin Jr., Let Judges Do Their Jobs, N.Y. TIMES, June 24, 2003, at A31; see also Daniel J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681 (1992).

34 See, e.g., Freed, supra note 33, at 1686 (noting the “powerful sense” among district court judges “that the guidelines dictate unjust sentences in too many cases . . .”); Markus Dirk Dubbler, Book Review, Judicial Positivism and Hitler’s Injustice, 93 COLUM. L. REV. 1807, 1830 (1993) (observing that “[t]he federal sentencing guidelines are infamous for their brutal penalties in drug cases, particularly in crack cocaine cases, which disproportionately affect minority defendants”); United States v. Ekhator, 853 F. Supp. 630, 632 (E.D.N.Y. 1994) (describing Guidelines sentences as “in far too many cases, draconian and irrational . . .”).


37 See Booker, 543 U.S. at 236-37 (Stevens, J).

38 Id. at 227-28 (Stevens, J.) (quoting Apprendi, 530 U.S. at 490). In Blakely, the Court clarified “that the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303 (emphasis omitted).
similar crimes in similar ways." Justice Breyer's decision instead opted to excise two sections of the Sentencing Reform Act: 18 U.S.C. § 3553(b)(1), which provided that the district court "shall" impose a sentence within the Guidelines range, and 18 U.S.C. § 3742(e), which provided for de novo review of sentences outside the Guidelines range. The excision of section 3553(b)(1) renders the Guidelines "effectively advisory," thereby avoiding the Sixth Amendment problem identified in Justice Stevens's opinion, though the district court is still required by 18 U.S.C. § 3553(a)(4) to "consult" the Guidelines "and take them into account when sentencing" alongside the other factors identified in section 3553(a). The excision of section 3742(e) replaced de novo review of sentences falling outside the Guidelines range with a single standard of "reasonableness" review for all sentences, whether within or without the now-advisory Guidelines range. After removing these two sections to create an advisory system subject to a single standard of appellate review, Justice Breyer's remedial opinion concluded that the resulting system was "perfectly valid" constitutionally.

Although Booker asserted that the "reasonableness" review it created by excising section 3745(e) was implicit in another section of the Sentencing Reform Act, the precise scope of post-Booker reasonableness review has been a source of significant confusion and disagreement among the lower courts. The federal circuit courts have, however, reached a general consensus that reasonableness review "encompasses both the reasonableness of the length of the sentence, as well as the method by which the sentence was calculated," and thus incorporates both a procedural and a substantive aspect. A sentencing court

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39 *Booker*, 543 U.S. at 252 (Breyer, J).
40 *Id.* at 245.
41 *Id.* at 264. *See generally* 18 U.S.C. § 3553(a) (factors sentencing court must consider).
42 *Id.* at 262-63.
43 *Id.* at 258.
44 *Id.* at 261-62 (citing 18 U.S.C. § 3742(e)(3)).
45 *See, e.g.*, United States v. Kandirakis, 441 F. Supp. 2d 282, 293 (D. Mass. 2006) (arguing that Justice Breyer's remedial opinion is responsible for the fact that "appellate guidance concerning when it is permissible for a sentencing court to deviate from the suggested Guideline range, based on what facts, is mind-numbingly incoherent" (footnote omitted)).
46 United States v. Kristl, 437 F.3d 1050, 1055 (10th Cir. 2006) (emphasis omitted); *see also* United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006). In *United States v. Rattoballi*, 452 F.3d 127, 131-32 (2d Cir. 2006) (footnote omitted), the Second Circuit succinctly stated the essence of post-Booker reasonableness review, observing that

[r]easonableness review has two components: (1) procedural reasonableness, whereby we consider such factors as whether the district court properly (a) identified the Guidelines range supported by the facts found by the court, (b) treated the Guidelines as advisory, and (c) considered the Guidelines together with the other factors outlined in 18 U.S.C. § 3553(a); and (2) substantive reasonableness, whereby we consider whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a).
applying the post-Booker Guidelines "must (1) acknowledge the applicable Guideline range; (2) discuss the reasonableness of a variation from that range; (3) consider the advisory provisions of the Guidelines; and (4) consider the other factors set forth in 18 U.S.C. § 3553(a)."\textsuperscript{47} Failure to correctly follow that procedure constitutes an error that renders a sentence procedurally unreasonable under Booker.\textsuperscript{48} Courts have recognized that "it is more difficult to describe the content of substantive reasonableness review,"\textsuperscript{49} but agree that it involves an inquiry into "whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a)."\textsuperscript{50}

In 2007, the Supreme Court issued three opinions intended to clarify the scope and operation of post-Booker reasonableness review. The general theme of these opinions was to encourage sentencing courts to take greater liberties in imposing non-Guidelines sentences, and to encourage circuit courts to take a more deferential approach in reviewing the substantive reasonableness of non-Guidelines sentences. However, the extent to which these efforts will alter actual sentencing and review practices in the lower courts remains to be seen. In \textit{Rita v. United States},\textsuperscript{51} the Supreme Court's first post-Booker decision to address issues of federal sentencing, the Court approved the application of a presumption of substantive reasonableness to within-Guidelines sentences, a practice which had been adopted by seven federal appellate courts since Booker. In his concurring opinion in \textit{Rita}, Justice Stevens explained that substantive reasonableness review is equivalent to review for abuse of discretion,\textsuperscript{52} while Justice Scalia argued that reasonableness review should be limited solely to its procedural component.\textsuperscript{53} In \textit{Kimbrough v. United States},\textsuperscript{54} the Court held it to be substantively reasonable for sentencing courts to impose a non-Guidelines sentence on the basis of their disagreement with the 100-to-1 ratio between crack and powder cocaine that until recently was embodied in the Sentencing Guidelines for offenses related to those drugs. Finally, in \textit{Gall v. United States},\textsuperscript{55} the

\textsuperscript{47} United States v. Howard, 216 F. App'x 463, 476 (6th Cir. 2007), cert. denied, 127 S. Ct. 2900 (2007).

\textsuperscript{48} See, e.g., United States v. Canova, 485 F.3d 674, 679 (2d Cir. 2007) ("With respect to procedural reasonableness, '[a]n error in determining the applicable Guideline range or the availability of departure authority would be the type of procedural error that could render a sentence unreasonable under Booker." (quoting United States v. Seliotusky, 409 F.3d 114, 118 (2d Cir. 2005))).

\textsuperscript{49} United States v. Wallace, 458 F.3d 606, 610 (7th Cir. 2006).

\textsuperscript{50} United States v. Bello-Mosqueda, 183 F. App'x 133, 134 (2d Cir. 2006).

\textsuperscript{51} 127 S. Ct. 2456 (2007).

\textsuperscript{52} \textit{Id.} at 2470-71 (Stevens, J., concurring) ("Simply stated, Booker replaced the de novo standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called 'reasonableness' review." (quoting United States v. Booker, 543 U.S. 220, 262 (2005) (Breyer, J.).)

\textsuperscript{53} \textit{Rita}, 127 S. Ct. at 2482 (Scalia, J., concurring in part and concurring in the judgment).

\textsuperscript{54} 128 S. Ct. 558 (2007).

\textsuperscript{55} 128 S. Ct. 586 (2007).
Court held that substantive reasonableness review requires circuit courts to review all sentences, whether within the Guidelines range or not, under a single abuse-of-discretion standard, though the appellate courts may continue to apply a presumption of reasonableness to within-Guidelines sentences.\textsuperscript{56}

B. \textit{Ex Post Facto Doctrine and its Application to the Sentencing Guidelines Prior to Booker}

The Ex Post Facto Clause bars any legislative act "which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ."\textsuperscript{57} The federal courts' interpretation of the meaning and purpose of the Ex Post Facto Clause\textsuperscript{58} has remained essentially consistent for over two hundred years, as courts today still cite the Supreme Court's 1798 opinion in \textit{Calder v. Bull}\textsuperscript{59} as the authoritative statement of the purpose and scope of the constitutional prohibition against ex post facto laws.\textsuperscript{60} In \textit{Calder}, the Court held that the phrase "ex post facto" is a legal term of art that applies only to laws that retroactively increase criminal liabilities or penalties, and not to civil matters. In reaching that conclusion, Justice Chase observed that the purpose of the Ex Post Facto Clause was not to "secure the citizen in his private rights, of either property, or contracts . . . [but] to secure the person of the subject from injury, or punishment, in consequence of such law."\textsuperscript{61} Subsequent opinions of the Court have elaborated upon \textit{Calder}'s explanation of the purpose of the Ex Post Facto Clause, noting that its primary purposes are "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," and to "restrain[] arbitrary and potentially vindictive legislation."\textsuperscript{62}

\begin{footnotes}
\item[56] The Court's decisions in \textit{Rita}, \textit{Gall}, and \textit{Kimbrough} shall be discussed in greater detail in Part IV.A.
\item[57] \textit{Beazell v. Ohio}, 269 U.S. 167, 169 (1925).
\item[58] As previously noted, this Article shall refer to the two Ex Post Facto Clauses contained in the Constitution collectively in the singular form because the Supreme Court's ex post facto doctrine draws no distinctions between the two clauses, and commonly cites opinions addressing one clause when resolving a case arising under the other. \textit{See supra} note 8 and accompanying text.
\item[59] 3 U.S. (3 Dall.) 386 (1798).
\item[60] Some scholars argue that this consistency has been one of form over substance. \textit{See, e.g.}, Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: \textit{An Empirical Analysis of Ex Post Facto Claims in State Courts}, 12 WM. & MARY BILL RTS. J. 439, 465-66 (2004) ("Despite the fact that over the years the Court has, with regularity, insisted that the categories \{of ex post facto laws identified in \textit{Calder}\} are sacrosanct . . . their erratic application has been disappointing to say the least." (footnotes omitted)).
\item[61] \textit{Calder}, 3 U.S. (3 Dall.) at 390 (Chase, J).
\end{footnotes}
Calder and subsequent cases applying it identified two essential characteristics of ex post facto legislation, which remain at the core of the federal courts' ex post facto analysis to this day: first, an ex post facto law "must be retrospective, that is, it must apply to events occurring before its enactment," and second, it must operate to the defendant's detriment—as Calder noted, retrospective legislation "that mollifies the rigor of the criminal law" does not fall within the scope of ex post facto prohibition, but rather "only those [laws] that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction" may be invalidated when applied retroactively. Calder identified four categories of criminal laws that fall within the prohibition of the Ex Post Facto Clause:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

In Collins v. Youngblood, the Supreme Court conducted an extensive survey of its prior ex post facto opinions, from which it derived a simple and concise statement of the meaning of the Ex Post Facto Clause that is consistent with the principles articulated in Calder: "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."

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63 Id. at 29; see also Calder, 3 U.S. (3 Dall.) at 391 (Chase, J).
64 Calder, 3 U.S. (Dall.) at 391. In addition to the two essential elements of retroactivity and detrimental effect, the Court has also held that legislation that merely affects "modes of procedure" rather than "substantial personal rights" does not fall within the scope of ex post facto prohibition. Beazell v. Ohio, 269 U.S. 167, 171 (1925); see also Dobbert v. Florida, 432 U.S. 282, 292 (1977) (holding that retroactive application of statute that permitted jury only to render an advisory opinion as to propriety of death sentence was "procedural, and on the whole ameliorative," and therefore not in violation of Ex Post Facto Clause).
65 Calder, 3 U.S. (3 Dall.) at 390.
66 497 U.S. 37, 43 (1990); see California Dep't of Corr. v. Morales, 514 U.S. 499, 506-07 n.3 (1995) ("After Collins, the focus of the ex post facto inquiry . . . [is] on whether a legislative change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."). Although the Collins formulation of the ex post facto test does not expressly include the fourth category of ex post facto laws identified by Calder—laws that retroactively alter the rules of evidence to permit a conviction on less or different testimony than would have been required under the rules in effect at the time of the offense—the Supreme Court subsequently reaffirmed the continued vitality of the fourth Calder category in Carmell v. Texas, 529 U.S. 513, 539 (2000) (footnote omitted), which rejected the respondent's argument that Collins had abrogated
When the Sentencing Guidelines were initially implemented, neither Congress nor the Sentencing Commission anticipated that the Ex Post Facto Clause would apply to revisions of the Guidelines that increased a defendant’s sentencing range above the level that would have applied under the Guidelines in effect at the time the defendant’s offense was committed. However, the Supreme Court’s 1987 decision in *Miller v. Florida* compelled the lower courts and the Sentencing Commission to reconsider the issue. In *Miller*, the Court considered an ex post facto challenge to Florida’s sentencing guidelines, which operated in a manner virtually identical to the federal Guidelines. Under the Florida system, defendants were assigned a score based on the severity of their primary offense and various other aspects of the crime and the defendant’s personal characteristics. The defendant’s score was then compared to a chart, “which provided a presumptive sentence for that composite score.” The presumptive sentence was “assumed to be appropriate,” and judges were permitted to depart from it only upon a finding of “clear and convincing reasons to warrant aggravating or mitigating the sentence.” Only sentences outside the guidelines range were subject to appellate review. The petitioner’s challenge involved two revisions to the Florida guidelines that were implemented after his offense was committed, and which raised his “presumptive” sentence from 5 ½ to seven years. The Supreme Court held that the retroactive application of the revised Florida guidelines violated the Ex Post Facto Clause, noting that Miller was “substantially disadvantaged” by the application of the revised guidelines because they “directly and adversely affect[ed]” the sentence he received. In reaching that conclusion, the Court rejected the state’s argument that Miller was not disadvantaged because he could not prove “definitively” that he would have received a lower sentence under the previous version of the Florida guidelines, presumably referring to the trial judge’s ability to enhance a sentence on the basis of clear and convincing evidence demonstrating the need for an upward departure. The Court determined that, notwithstanding the possibility that

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67 See infra note 83.
69 *Id.* at 425-26 (describing Florida’s sentencing guidelines system).
70 *Id.*
71 *Id.* at 426.
72 *Id.* (quoting Fla. R. Crim. Proc. 3.701(d)(8) (1983)).
73 *Id.* (quoting Fla. R. Crim. Proc. 3.701(d)(11) (1983)).
74 *Id.* (citing Fla. Stat. § 921.001(5) (1983)).
75 *Miller*, 482 U.S. at 427.
76 *Id.* at 433.
77 *Id.* at 435.
78 *Id.* at 432.
Miller might have received the same sentence under the previous version of the guidelines, he was nevertheless injured by the application of the revised version because "it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law." 79

Although Miller did not address the implications of its holding on the federal Sentencing Guidelines, the lower courts quickly developed a consensus that the Court's reasoning was equally applicable to the retroactive application of revisions to the federal Guidelines that were detrimental to criminal defendants. 80 In response to the appellate courts' view that Miller compelled the courts to apply the Ex Post Facto Clause to the federal Guidelines, the Sentencing Commission adopted U.S.S.G. § 1B1.11(a) and (b)(1)-(2) in the November 1992 edition of the Guidelines Manual. 81 Section 1B1.11(a) provides that, as a general matter, "[t]he [sentencing] court shall use the Guidelines Manual in effect on the date that the defendant is sentenced." However, if the court determines that compliance with subsection (a) would violate the Ex Post Facto Clause, subsection (b)(1) instructs the court to "use the Guidelines Manual in effect on the date that the offense of conviction was committed," while subsection (b)(2), often called the "One Book Rule," directs the court to apply the entire Guidelines Manual in effect on a single date, rather than applying different sections from different versions of the Guidelines Manual. For example, if the court determines that the application of one section of the Guidelines Manual in effect on the date of sentencing would violate the Ex Post Facto Clause, it must apply the entire Guidelines Manual that was in effect at the time the offense was committed. 82 In its commentary to section 1B1.11, the Sentencing Commission reiterated its view that the Ex Post Facto Clause does not apply to the Sentencing Guidelines, but acknowledged that the section was added in response to the federal circuit courts' holdings to the contrary. 83 In 1993, the Commission

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79 Id. at 433.
80 See, e.g., United States v. Bertoli, 40 F.3d 1384, 1402-03 (3d Cir. 1994); United States v. Kussmaul, 987 F.2d 345, 351-52 (6th Cir. 1993); United States v. Golden, 954 F.2d 1413, 1417-18 (7th Cir. 1992); United States v. Molina, 952 F.2d 514, 522-23 (D.C. Cir. 1992); United States v. Morrow, 925 F.2d 779, 782-83 (4th Cir. 1991); United States v. Underwood, 938 F.2d 1086, 1089-90 (10th Cir. 1991); United States v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir. 1990); United States v. Stephenson, 921 F.2d 438, 440-41 (2d Cir. 1990); United States v. Suarez, 911 F.2d 1016, 1020-22 (5th Cir. 1990); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam). But see United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994) (Easterbrook, J., concurring) (arguing that the Ex Post Facto Clause does not apply to the Sentencing Guidelines because the "[g]uidelines are not 'laws' . . . the guidelines are administrative rules").
82 See United States v. Bailey, 123 F.3d 1381, 1403-05 (11th Cir. 1997) (explaining the One Book Rule in detail).
83 U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (2002), application note background ("Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. While the Commission concurs in the policy expressed by Con-
modified the One Book Rule with the addition of section 1B1.11(b)(3), which provides that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses."84

C. United States v. Demaree and the Federal Courts’ Emerging Disagreement About the Ex Post Facto Clause’s Applicability to Post-Booker Guidelines Revisions

Although many federal courts have continued to apply the Ex Post Facto Clause to Guidelines revisions in the post-Booker era, relatively few have considered whether Booker’s transformation of the Guidelines from mandatory to advisory affects the applicability of the Ex Post Facto Clause to situations in which a post-offense Guidelines revision increases the defendant’s Guidelines range to a level higher than that which would have applied under the Guidelines Manual in effect at the time the offense was committed. At present, the Seventh Circuit, in United States v. Demaree, is the only federal appellate court that has officially adopted the view that the Ex Post Facto Clause has no applicability to the post-Booker Guidelines.85 However, other federal courts have expressed sympathy for Demaree’s reasoning in dicta, and at least one district court outside the Seventh Circuit has applied Demaree to hold that the Ex Post Facto Clause no longer applies to the Sentencing Guidelines. It therefore seems likely that Demaree may become the wedge in an emerging circuit split on the issue of the Ex Post Facto Clause’s applicability to the post-Booker Sentencing Guidelines.

In Demaree, Judge Posner wrote on behalf of a unanimous panel that, notwithstanding the government’s confession of error, the district court did not err in calculating the offense level for the defendant’s conviction for wire fraud, which was committed in 2000, on the basis of the 2004 Guidelines Manual in effect on the date of her sentencing, despite the fact that the application of the 2004 Manual increased the defendant’s sentence range from 18-24 months to 27-33 months.86 The court recognized that several circuit courts have assumed, without discussion, that the Ex Post Facto Clause continues to apply to the

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84 U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (1993). At least one commentator has argued that compliance with subsection (b)(3) is itself a violation of the Ex Post Facto Clause. See William P. Ferranti, Comment, Revised Sentencing Guidelines and the Ex Post Facto Clause, 70 U. Chi. L. Rev. 1011 (2003); see also United States v. Safavian, 461 F. Supp. 2d 76, 78-82 (D.D.C. 2006) (holding that compliance with subsection (b)(3) violates the Ex Post Facto Clause where the offense committed after the relevant Guidelines revision is unrelated to the offense committed prior to the revision).

85 459 F.3d 791, 794-95 (7th Cir. 2006), cert. denied, 127 S. Ct. 3055 (2007).

86 Id. at 792-95.
Guidelines in the post-Booker era, but rejected that assumption on the basis of its view that “the ex post facto clause should apply only to laws and regulations that bind rather than advise . . . .” In support of this conclusion, Demaree relied on the Sixth Circuit’s decision in United States v. Barton, in which the court suggested in dicta that “[n]ow that the Guidelines are advisory, the Guidelines calculation provides no . . . guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the Ex Post Facto Clause itself is not implicated” when a revised Guideline is retroactively applied to a pre-revision offense. Demaree elaborated on Barton’s reasoning, observing that the Supreme Court has found the essential aspects of an ex post facto law to be whether it places the defendant at a disadvantage or substantial disadvantage compared to the law as it stood when he committed the crime of which he has been convicted, changed the definition of the crime or increased the maximum penalty for it, or imposed a significant risk of enhanced punishment,

and conceded that, if “interpreted literally,” the Supreme Court’s prior statements of the ex post facto doctrine “would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges’ sentencing decisions.” Nevertheless, the court determined that a “literal[]” reading of the Supreme Court’s ex post facto decisions, “without reference to context,” would be a “disservice” to the Court and would produce a result in which “the constitutional prohibition [against ex post facto laws] will be unmoored from both its purpose and the circumstances in which statutes and regulations have heretofore been deemed to be ex post facto laws.” The court concluded that the Ex Post Facto Clause does not apply to the advisory Guidelines because, although consideration of upwardly revised Guidelines may influence judges to impose longer sentences than they otherwise

87 Id. at 793. Demaree cites a number of post-Booker cases in which circuit courts applied the Ex Post Facto Clause to the post-Booker Sentencing Guidelines without considering whether Booker rendered the Ex Post Facto Clause inapplicable to the Guidelines. See id. (citing United States v. Lopez-Solis, 447 F.3d 1201, 1204-05 (9th Cir. 2006); United States v. Roberts, 442 F.3d 128, 130 (2d Cir. 2006); United States v. Cruzado-Laureano, 404 F.3d 470, 488 (1st Cir. 2005); United States v. Iskander, 407 F.3d 232, 242-43 (4th Cir. 2005); United States v. Reasor, 418 F.3d 466, 479 (5th Cir. 2005); United States v. Harmon, 409 F.3d 701, 706 (6th Cir. 2005); United States v. Baretz, 411 F.3d 867, 873-77 (7th Cir. 2005); United States v. Foote, 413 F.3d 1240, 1248-49 (10th Cir. 2005)).
88 Demaree, 459 F.3d at 795.
89 455 F.3d 649, 655 n.4 (6th Cir. 2006).
91 Id. at 794.
would have, the fact that the sentencing court's "freedom to impose a reasonable sentence outside the [Guidelines] range is unfettered," and "subject therefore to only light appellate review," renders the Guidelines' effect on sentencing too indirect and uncertain to raise constitutional concerns. The court further justified its holding by noting that, in light of the district court's discretion to depart from the advisory Guidelines range, "a rule that a guidelines change cannot be applied retroactively if it would be adverse to the defendant ... would have in the long run a purely semantic effect," because the sentencing judge could always "say that in picking a sentence consistent with section 3553(a) he had used the information embodied in the new (i.e., revised) guideline." Because "[a] judge is certainly entitled to take advice from the Sentencing Commission," a district court that wishes to impose a longer sentence on a defendant for the reasons underlying the Sentencing Commission's subsequent upward revision of the offense level for the crime of which the defendant was convicted could simply state that its discretion is guided by the Sentencing Commission's decision that the offense should be treated more harshly than it previously had been. Thus, Demaree concluded that since the district court could exercise its discretion under the post-Booker paradigm to sentence a defendant pursuant to an upwardly revised Guideline range as if the Ex Post Facto Clause did not apply, there is no reason to continue to apply that clause to revised Guidelines offense levels as had been done in the pre-Booker era.

Although no other federal appellate court has yet adopted Demaree's conclusion that the Ex Post Facto Clause no longer applies to the Sentencing Guidelines, Demaree's holding has been applied numerous times by subsequent panels of the Seventh Circuit and by district courts within that circuit, and several courts outside the Seventh Circuit have expressed varying degrees of sympathy with Demaree's reasoning. For example, in her concurring opinion in United States v. Rodarte-Vasquez, Chief Judge Jones of the Fifth Circuit approvingly cited Demaree for its "persuasive" presentation of the view that "[a] logical corollary to Booker would seem to be that the ex post facto clause does not apply if the sentence imposed by the court need not be harsher under later guidelines than it would have been under the guidelines in effect when the of-

92 Id. at 795.
93 Id.
94 Id.
95 Id.
96 See, e.g., United States v. Bell, 226 F. App'x 596, 598 (7th Cir. 2007); United States v. Angle, 216 F. App'x 557, 559 n.1 (7th Cir. 2007); United States v. Drakulich, 209 F. App'x 599, 600-01 (7th Cir. 2006); United States v. Musurlian, 209 F. App'x 592, 594 (7th Cir. 2006); United States v. Zimmer, 199 F. App'x 555, 560 (7th Cir. 2006); see also United States v. Monti, 477 F. Supp. 2d 943, 945-46 (holding that Demaree does not entitle government to seek to alter terms of a plea agreement, which stipulated that Guidelines in effect at the time the offense was committed would apply at sentencing, so as to apply upwardly revised Guidelines in effect at the time of sentencing).
fense was committed." 97 Chief Judge Jones noted that "[p]ost-Booker, the guidelines are informative, not mandatory," and argued that "[a] purely advisory regulation does not present an ex post facto problem solely because it is traceable to Congress and will possibly disadvantage a defendant." 98 Likewise, in United States v. Mathis, the Eleventh Circuit noted in dicta that "post-Booker, it is not clear that using one Guidelines Manual over another violates the Ex Post Facto Clause" because when the Guidelines are merely advisory, "it is difficult to say the Guidelines, rather than the district court exercising discretion, are the source of the harsher punishment when the district court consults... the current version of the Guidelines." 99 In United States v. Gilmore, the district court cited Demaree and Barton in support of its conclusion that the Ex Post Facto Clause did not preclude the application of the Guidelines Manual in effect on the date of the defendant’s sentencing, despite the fact that the revised Guidelines calculation increased the defendant’s advisory sentence from 97-121 months to life. 100 In United States v. Kingsbury, the district court found that Demaree had "unmistakably cast into disrepute" the First Circuit’s precedent applying the Ex Post Facto Clause to the post-Booker Sentencing Guidelines, but nevertheless applied the Ex Post Facto Clause to the defendant’s Guidelines calculation on stare decisis grounds. 101

Though Demaree has caused some courts outside the Seventh Circuit to express doubts about the Ex Post Facto Clause’s continued applicability to the Sentencing Guidelines, most courts have continued to apply the Ex Post Facto Clause to Guidelines calculations without mentioning the issues raised by the Seventh Circuit’s ruling. 102 Only four courts have expressly rejected Demaree’s reasoning by expressly holding or stating in dicta that the post-Booker Guidelines remain subject to the constitutional prohibition on ex post facto laws, and

97 488 F.3d 316, 325 (5th Cir. 2007) (Jones, C.J., concurring).
98 Id.
99 239 F. App’x 513, 517 n.2 (11th Cir. 2007).
100 470 F. Supp. 2d 233, 238-42 (E.D.N.Y. 2007). In the interest of full disclosure, it should be noted that the author is currently a law clerk to the district court judge who decided Gilmore.
102 See, e.g., United States v. Wood, 486 F.3d 781 (3d Cir. 2007); United States v. Stanford, 206 F. App’x 178, 179 (3d Cir. 2006); United States v. Gonzalez-Delgado, 195 F. App’x 120, 122-23 (4th Cir. 2006); United States v. Velasco, 465 F.3d 633, 637 n.3 (5th Cir. 2006); United States v. Gardiner, 463 F.3d 445, 462-64 (6th Cir. 2006); United States v. Bragg, 196 F. App’x 442, 444-45 (8th Cir. 2006); United States v. Stevens, 462 F.3d 1169, 1170-72 (9th Cir. 2006); United States v. Leider, 203 F. App’x 226, 228 n.5 (10th Cir. 2006); see also Douglas A. Berman, Third Circuit (Unthinkingly?) Applies Pre-Booker Ex Post Facto Rules, SENTENCING LAW AND POLICY, http://sentencing.typepad.com/sentencing_law_and_policy/2007/05/third_circuit_u.html (May 17, 2007, 6:34 PM) ("The Seventh Circuit has given this important issue [of the Ex Post Facto Clause’s applicability to the post-Booker Guidelines] fitting attention in its Demaree opinion... but other district and circuit courts (improperly) have taken for granted that Booker does not change the pre-Booker rules.").

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only one of those courts undertook a thorough analysis of the issue in support of its holding. In United States v. Gilman, the First Circuit acknowledged Demaree’s holding but suggested that its applicability in the First Circuit “is doubtful.”103 Gilman went on, however, to conclude that the appellant’s ex post facto argument was deficient on the merits, thereby avoiding the need to conclusively resolve the Demaree issue.104 In United States v. Carter,105 the Eighth Circuit briefly noted Demaree’s holding but deferred to its own prior holding in United States v. Larrabee, a post-Booker decision which “recognize[d] that ‘retrospective application of the Guidelines implicates the ex post facto clause.’”106 In United States v. Safavian,107 the district court cited Demaree in passing and briefly summarized its holding, but tacitly rejected Demaree’s reasoning by holding that compliance with U.S.S.G. § 1B1.11(b)(3) would violate the Ex Post Facto Clause when the offense committed after the effective date of a Guidelines Manual revision is not related to the offense for which the revised Guidelines Manual increased the sentencing range. Finally, in United States v. Restrepo-Suares,108 the district court acknowledged the ex post facto issues discussed in Demaree and held, primarily on the basis of the Supreme Court’s decision in Garner v. Jones109 and the D.C. Circuit’s holdings in the Fletcher v. District of Columbia series of opinions,110 that the Ex Post Facto Clause continues to govern the retroactive application of upwardly revised sentencing Guidelines.111 Thus, while Demaree has attracted relatively little judicial comment outside the Seventh Circuit thus far,112 it seems likely in view of the divergent positions taken by the handful of federal courts that have addressed this issue that more circuit courts will adopt Demaree’s holding as district court decisions addressing ex post facto challenges to the post-Booker Guidelines increasingly make their way into the appellate docket, thereby expanding the nascent circuit split created by Demaree.

103 478 F.3d 440, 449 (1st Cir. 2007).
104 Id.
105 490 F.3d 641, 643 (8th Cir. 2007).
106 436 F.3d 890, 894 (8th Cir. 2006) (quoting United States v. Bell, 991 F.2d 1445, 1447 (8th Cir. 1993)).
109 529 U.S. 244 (2000).
110 Fletcher v. Dist. of Columbia, 391 F.3d 250, 251 (D.C. Cir. 2004); Fletcher v. Reilly, 433 F.3d 867, 876-77 (D.C. Cir. 2006).
111 516 F. Supp. 2d at 117-19; see infra Part III.C for a detailed discussion of Garner, Restrepo-Suares, and the Fletcher series.
112 In United States v. Jones, Nos. 05-1329, 06-1105, 2007 WL 3302441, at *18 (10th Cir. Nov. 7, 2007), the Tenth Circuit recognized the emerging disagreement among the federal courts regarding the applicability of the Ex Post Facto Clause to the post-Booker Sentencing Guidelines, but took no position on the issue.
III. DEVELOPMENT OF EX POST FACTO METHODOLOGY IN THE FEDERAL COURTS

Implicit in Demaree's analysis are two fundamental principles of law that the Seventh Circuit evidently believed to be dispositive of the ex post facto issue: first, that the Ex Post Facto Clause draws a categorical distinction between "laws and regulations that bind" the court and those that merely "advise" it with respect to the exercise of its discretion, and applies only to "binding" enactments that "guarantee" that a criminal defendant will receive a greater measure of punishment than would have been the case under the law in effect at the time the offense was committed, and second, that in determining whether a particular legislative enactment is subject to the Ex Post Facto Clause, the reviewing court need only look to the formal aspects of the enactment, making no inquiry into its practical effects or the manner in which it is actually applied. Although Demaree made only passing reference to the origin of these principles, they are both derived from the "predicative analysis" developed by the federal courts of appeals in response to an ex post facto issue similar in many respects to that presented to the Demaree court: whether the United States Parole Commission's guidelines for assessing the suitability of federal inmates for parole are subject to the Ex Post Facto Clause. Every federal circuit court to consider that question ultimately concluded that the retroactive application of revised Parole Guidelines is not subject to ex post facto limitation, either because the Parole Guidelines are not "laws" for purposes of the ex post facto analysis, or because upwardly revised Parole Guidelines, being "merely procedural guideposts" to the exercise of the Parole Commission's discretion, are not detrimental to a parole candidate's interests, notwithstanding the Parole Commission's very high rate of compliance with the Parole Guidelines' recommendations when making individual parole determinations. A compelling analogy can be drawn between the Parole Guidelines, which are technically "advisory" in the sense that the Parole Commission possesses some discretion to depart from the "presumptive" range of time to be served by an individual prisoner

114 United States v. Barton, 455 F.3d 649, 655 n.4, cited in Demaree, 791 F.3d at 794.
115 See Demaree, 791 F.3d at 795.
117 The United States Board of Parole was renamed the Parole Commission by the Parole Commission and Reorganization Act of 1976 ("PCRA"), Pub. L. No. 94-233, 90 Stat. 219 (1976). This Article shall hereinafter refer to the federal agency responsible for making parole decisions before the PCRA as the "Board of Parole," and to the same agency after the enactment of the PCRA as the "Parole Commission." For general discussion without reference to a specific time frame, the agency shall be referred to as the "Parole Commission."
118 Rifai v. U.S. Parole Comm'n, 586 F.2d 695, 698 (9th Cir. 1978).
prior to parole, and the Sentencing Guidelines, which are advisory in the sense that the sentencing court is required to "consider" the Sentencing Guidelines’ recommendations, but has discretion to depart from those recommendations when the court feels that a sentence outside the recommended range is warranted. If the analogy between the Parole Guidelines and the Sentencing Guidelines is a valid one, then the cases holding that the Ex Post Facto Clause does not apply to the Parole Guidelines imply that the same result should obtain in the case of the federal Sentencing Guidelines in the post-Booker era—assuming, of course, that the Parole Guidelines cases are consistent with controlling Supreme Court precedent.

This Part shall argue that the analogous relationship between the Parole Guidelines and the Sentencing Guidelines does not justify Demaree’s holding, because the two fundamental principles underlying the ex post facto analysis applied by Demaree and the Parole Guidelines cases were inconsistent with the Supreme Court’s ex post facto doctrine when the Parole Guidelines cases were decided and have been further abrogated by the Court’s subsequent pronouncements. The ex post facto analysis utilized by the Supreme Court both before and after the Parole Guidelines cases were decided draws no categorical distinction between legislative enactments that formally constrain the court’s exercise of discretion within some arbitrarily narrow range of acceptable outcomes and those that do not, opting instead to require a broader analysis of both the formal characteristics and the practical effects of the enactment at issue. As the Court clarified after the Parole Guidelines cases were decided, this analysis includes an empirical inquiry into the manner in which the enactment is actually implemented by the government entity to which it applies, and seeks to determine

119 In Miller v. Florida, 482 U.S. 423, 434-35 (1987), discussed in Part II.B, supra, the Supreme Court rejected Florida’s attempt to analogize its mandatory sentencing guidelines to the Parole Guidelines and to rely on the Parole Guidelines cases in support of its position that the retroactive application of the Florida Sentencing Guidelines was consistent with the Ex Post Facto Clause. The Court provided three bases for distinguishing the Florida Sentencing Guidelines from the Parole Guidelines: first, having been enacted by the Florida Legislature, the Florida Sentencing Guidelines carried the “force and effect of law,” while the Parole Guidelines presumably did not; second, the Florida Sentencing Guidelines’ requirement of clear and convincing evidence to justify a departure from the guidelines range “create[d] a high hurdle that must be cleared before discretion [to depart] can be exercised,” while the Parole Guidelines provided mere “flexible ‘guideposts’” to the exercise of the Parole Commission’s discretion; and third, retroactive application of revised Florida Sentencing Guidelines would “directly and adversely affect the sentence” imposed on Florida defendants. Id. at 435.

Demaree did not discuss at length the distinctions drawn by the Miller Court between the Parole Guidelines and the Florida Sentencing Guidelines, but it is clear that the post-Booker Guidelines more closely resemble the Parole Guidelines than did the Florida Sentencing Guidelines at issue in Miller, or the pre-Booker Sentencing Guidelines. As this Article shall argue in Part III.C, however, subsequent developments in the Supreme Court’s ex post facto jurisprudence have undermined the premises on which the Parole Guidelines cases rely, notwithstanding the Court’s apparent acceptance of those premises in its dicta in Miller. Indeed, one federal circuit court has recognized that its constitutional analysis of the retroactive application of the Parole Guidelines was implicitly abrogated by the Supreme Court’s decision in Garner v. Jones, 529 U.S. 244 (2000). See infra notes 228-229 and accompanying text.
whether the enactment creates a significant risk—not a “guarantee”—that its retroactive application will result in a greater measure of punishment than would have been the case under the law in effect at the time the offense was committed. If the court concludes that the enactment does create such a risk, then the Supreme Court’s rulings dictate that the Ex Post Facto Clause prohibits the retroactive application of the enactment, regardless of whether it is formally “binding” or “advisory.”

A. The History and Operation of the Federal Parole Guidelines

As discussed above,120 from the late nineteenth century until about 1970, federal sentencing law was dominated by the medical model, which viewed the criminal offender as a sick individual in need of treatment and therefore placed primary emphasis on rehabilitation rather than on punishment or deterrence. The same expectation that justified the investment of expansive, virtually unguided discretion in the sentencing court to select a sentence within a broad statutory range—that effective treatment required an individually tailored term of incarceration and rehabilitation—also justified the similarly expansive, unguided discretion vested in the Board of Parole to make determinations, subject to vague statutory directives and deferential appellate review, about whether a particular inmate was sufficiently rehabilitated to be safely reintroduced into society via parole. Under the law in effect prior to 1972, the only legal guidance on which the Board of Parole was compelled to rely in making decisions was “the rather vague and general statutory directive that a prisoner could be released on parole if (1) ‘there (was) a reasonable probability that such prisoner (would) live and remain at liberty without violating the laws,’ and (2) ‘such release (was) not incompatible with the welfare of society.’”121 Parole hearings during this period afforded prisoners few procedural or substantive rights, and the Board of Parole was not required to provide a statement of the reasons for its decision to grant or deny parole.122 The individual prisoner, lacking a right to counsel or to present evidence in favor of her application for parole, “was merely to appear, to be scrutinized, to answer the questions put and ask no others, and to assume the attitude he or she believed best indicated ‘readiness’ for parole.”123 Not surprisingly, the Board of Parole’s essentially unfettered discretion and ability to make parole decisions without stating the

120 See supra Part II.A.
122 See Yale Report, supra note 18, at 820 (“The courts, to the extent they were willing to review the parole decision at all, agreed with the Board that any attempt to impose even minimal due process constraints on the hearing or decisional process would unnecessarily interfere with [the Board’s] fulfillment of its duty to engage in psychological diagnoses and prognoses . . . .” (footnote omitted)).
123 Id. at 821 (footnote omitted).
reasons on which those decisions were based led to significant disparity in outcomes among similarly situated parole applicants.\textsuperscript{124} As the federal legal system moved from the rehabilitation-based model to the current punishment- and deterrence-based one, the degree of discretion vested in the Board of Parole came to be seen not as a desirable feature of a criminal justice system operating in the best interests of the inmates, but as a source of unpredictability in the decision-making process and unjustifiable disparity in the treatment of parole applicants. "Critics called for structuring discretion through articulated standards, or for eliminating discretion altogether."

The Board of Parole responded to these concerns in 1972 by implementing a "pilot" system of "Guidelines for Decision-Making" that operate in a manner strikingly similar to the Sentencing Guidelines that were promulgated fifteen years later.\textsuperscript{126} The Parole Guidelines assign each parole applicant two scores: Offense Severity, which ranges from one to six and reflects the severity of the offense for which the offender was originally sentenced as well as any criminal offenses committed while on probation,\textsuperscript{127} and "Parole Prognosis," also known as an offender's "Salient Factor" score, a "risk prediction"\textsuperscript{128} scale of one to ten indicating the likelihood that the inmate could be successfully reintegrated as a productive and law-abiding member of society.\textsuperscript{129} After calculating an inmate's Offense Severity and Salient Factor scores, the Parole Commission locates the intersection of those scores on a chart, which indicates a range of months for each combination. This range of months is the "customary range of time to be served before release,"\textsuperscript{130} based on the inmate's scores; however, the Parole Guidelines state explicitly that "[t]hese time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines..."
Notwithstanding the fact that the Parole Commission has de jure discretion to depart from the Parole Guidelines’ recommendations, the Parole Guidelines were “designed to . . . lead to] more nearly uniform decisions, and more restricted decision-making.” Immediately after the Parole Guidelines’ implementation, a large majority of the Board of Parole’s decisions fell within the Parole Guidelines’ recommended range.

The Parole Guidelines pilot system expanded across all regions between 1972 and 1974, and was formally implemented by the Parole Commission and Reorganization Act of 1976, which announced a shift in federal criminal policy from the medical model to a punishment- and deterrence-based model in which “any rehabilitation an offender might obtain would be a coincidental result of his incarceration.” Under the PCRA, the Parole Commission is permitted to depart from the Parole Guidelines only upon a finding of “good cause” for doing so, and the Commission’s determination that good cause has been shown is subject to judicial review. The Parole Guidelines themselves, however, continued to operate after the PCRA essentially as they did when the pilot program was initially implemented in 1972.

B. The Circuit Courts’ Application of Ex Post Facto Principles to the Parole Guidelines

After the Parole Guidelines system went into effect, the federal circuit courts were soon inundated with appeals by federal prisoners arguing that the application of upwardly revised Parole Guidelines to prisoners who were sentenced prior to the revision in question violated the Ex Post Facto Clause by extending the amount of time that the prisoner must serve before being granted parole, thereby effectively extending the prisoner’s sentence. Although the Supreme Court never directly addressed this issue, Justice Rehnquist, sitting as a Circuit Justice, held that the application of revised Parole Guidelines did not implicate ex post facto concerns, and every federal appellate court to address the issue reached the same conclusion. The majority of appellate courts held that the Ex Post Facto Clause did not apply to the Parole Guidelines because they were not sufficiently binding on the Parole Commission’s exercise of discretion.

131 28 C.F.R. § 2.20(c) (1972).
133 See Yale Report, supra note 18, at 825 n.75 (noting that in the first six months after the Parole Guidelines’ effective date, 91.7 percent of the Board of Parole’s decisions were within the Parole Guidelines range).
135 Dufresne v. Baer, 744 F.2d 1543, 1547 (11th Cir. 1984).
137 Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1986) (en banc).
to qualify as "laws," while the Third Circuit found that the exercise of discretion did not necessarily remove the Parole Guidelines from the scope of the Ex Post Facto Clause, but concluded as a practical matter that the Parole Guidelines were applied with sufficient flexibility that they lacked the binding force characteristic of law.

The earliest effort by a federal appellate court to resolve an ex post facto challenge to the retroactive application of the Parole Guidelines was the Sixth Circuit's decision in Ruip v. United States. In that case, the appellant, having pleaded guilty to involvement in an armed bank robbery, was sentenced on July 27, 1971, to a term of imprisonment of 18 years. After Ruip's sentencing but prior to his initial parole hearing, the Parole Commission adopted the Parole Guidelines "to promote what it felt was a more consistent and equitable exercise of its discretion." At Ruip's initial hearing, the panel recommended that he be released on parole on January 20, 1976; however, the panel's recommendation was rejected by the National Appellate Board on the ground that, notwithstanding Ruip's favorable institutional record, the Parole Guidelines applicable to him "indicate[d] a range of more than 65 months to be served before release for cases with good institutional program performance and adjustment." The National Appellate Board therefore ruled that Ruip's incarceration would continue until March 1977, at which point he would be reconsidered for parole. Ruip commenced an action in federal court challenging the application of the Parole Guidelines to his case on ex post facto grounds. The district court denied relief, and on appeal, the Sixth Circuit, while recognizing that parole decisions were "based not on formally articulated criteria or policies, but on the discretionary judgment of the members of the Parole Commission" at the time the appellant was sentenced, nevertheless held that application of the formalized Parole Guidelines to Ruip's case did not violate the Ex Post Facto Clause because the Parole Guidelines "are not law, but guideposts which assist the Parole Commission ... in exercising its discretion." In support that conclusion, the court observed that the guidelines "are not fixed and rigid, but are flexible. The [Parole] Commission remains free to make parole decisions outside of these guidelines.

139 555 F.2d 1331 (6th Cir. 1977), abrogation recognized by Michael v. Ghee, 498 F.3d 372, 380-81 (6th Cir. 2007)); see infra Part III(C) (discussing the Sixth Circuit's recognition in Michael that its prior decision in Ruip was implicitly overruled by the Supreme Court's ruling in Garner v. Jones, 529 U.S. 244 (2000)).
140 Ruip, 555 F.2d at 1332-33.
141 Id. at 1333 (citing 28 C.F.R. § 2.20 (1976)).
142 Id.
143 Id.
144 Id.
145 Id.; cf. Kellogg v. Shoemaker, 46 F.3d 503, 509 (6th Cir. 1995) (holding that revised Ohio parole regulation that mandated revocation of parole for any parolee convicted of a crime while on parole, which was previously a decision committed to the discretion of the Ohio Adult Parole
Although *Ruip* addressed an ex post facto challenge to a situation in which the Parole Guidelines were applied to an offender whose crime was committed during the pre-guidelines era in which the Parole Commission enjoyed virtually unguided discretion in evaluating parole applications, its reasoning was followed by many other federal courts in cases in which an appellant whose offense was committed after the formal Parole Guidelines were implemented objected on ex post facto grounds to the retroactive application of a revision to the Parole Guidelines that increased the appellant’s Offense Severity or Salient Factor score, thus resulting in a longer presumptive range than would have been the case under the Parole Guidelines in effect at the time of the offense. For example, in *Rifai v. United States*, a ruling that was reaffirmed en banc in *Wallace v. Christensen*, the Ninth Circuit held that the Parole Commission’s application of the Parole Guidelines in effect at the time of the appellant’s parole hearing did not violate the Ex Post Facto Clause, notwithstanding the fact that the revised Parole Guidelines were less favorable to the appellant than the Parole Guidelines in effect at the time the appellant’s offense was committed, because the Parole Guidelines were mere “procedural guideposts without the characteristics of laws.”

The majority of federal appellate courts relied on a purely formal interpretive approach when evaluating the applicability of the Ex Post Facto Clause to revised Parole Guidelines. That is, despite the occasional suggestion that the Authority, violated Ex Post Facto Clause when retroactively applied; distinguishing *Ruip* on the ground that *Kellogg* “involves binding regulations that are mandatory after September 1, 1992, and eliminates any discretion in the parole agency to consider mitigating circumstances”).

146 Other cases addressed substantially identical facts, holding that the application of the Parole Guidelines system to the cases of prisoners whose crimes were committed before the Parole Guidelines were implemented did not violate the Ex Post Facto Clause. See, e.g., *Warren v. U.S. Parole Comm’n*, 659 F.2d 183, 195 (D.C. Cir. 1981) (holding that retroactive application of the Parole Guidelines to parole candidate whose offense was committed prior to the Parole Guidelines’ implementation did not violate the Ex Post Facto Clause because “[a] change merely in the manner in which the Board, now the Commission, exercises its discretion thus cannot offend the ex post facto clause”); *Farmer v. U.S. Parole Comm’n*, 588 F.2d 54 (4th Cir. 1978); see also *Paschal v. Wainwright*, 738 F.2d 1173, 1180 (11th Cir. 1984) (application of Florida parole guidelines to state prisoner whose crime was committed before guidelines were adopted did not violate Ex Post Facto Clause because “[t]he guidelines merely stated and rationalized the exercise of the [Florida] Parole Commission’s discretion”).

147 See, e.g., *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977) (stating in dicta that “the guidelines do not constitute impermissible ex post facto laws when applied to an adult offender since . . . they merely clarify the exercise of administrative discretion . . . ”); *Priore v. Nelson*, 626 F.2d 211, 217 (2d Cir. 1980); *Stroud v. U.S. Parole Comm’n*, 668 F.2d 843 (5th Cir. 1982); *Inglese v. U.S. Parole Comm’n*, 768 F.2d 932 (7th Cir. 1985); *Prater v. U.S. Parole Comm’n*, 802 F.2d 948, 953-54 (7th Cir. 1986); *Yamamoto v. U.S. Parole Comm’n*, 794 F.2d 1295 (8th Cir. 1986); *Dufresne v. Baer*, 744 F.2d 1543 (11th Cir. 1984).

148 586 F.2d 695 (9th Cir. 1978).

149 802 F.2d 1539 (9th Cir. 1986) (en banc).

150 *Rifai*, 586 F.2d at 698, quoted in *Wallace*, 802 F.2d at 1553.
practical effects of revised Parole Guidelines on individual parole decisions might be relevant to the ex post facto inquiry, the courts generally restricted their analysis to the language of the Parole Guidelines and their enabling statutes, holding that, so long as the regulatory scheme implementing the Parole Guidelines preserved the Parole Commission’s de jure discretion to depart from the Parole Guidelines’ recommendations in cases where it found such departure to be appropriate, the Parole Guidelines did not carry the force of law and therefore the retroactive application of revised Parole Guidelines could not implicate ex post facto concerns, even though, as an empirical matter, the Parole Commission’s decisions complied with the Parole Guidelines’ recommendations in most cases. For example, Wallace rejected the appellant’s argument that the Parole Guidelines were “laws” because approximately 85% of the Parole Commission’s decisions fell within the recommended range as established by the Parole Guidelines, observing that “[g]iven the discretion retained by the Commission, the frequency with which the Guidelines are followed does not convert the Guidelines into laws for purposes of the ex post facto clause.” 151 In Inglese v. United States Parole Commission, the Seventh Circuit rejected the same argument, holding that “[t]he key to finding that guidelines are guides merely, and not laws, is that the Parole Commission has a congressional mandate, expressed both in the statute and the regulations, to exercise discretion. How often that discretion is exercised is immaterial.” 152 Virtually all of the other appellate courts to consider the issue reached the same conclusion. 153 Although the Supreme Court never considered a prisoner’s assertion that the application of revised Parole Guidelines violated the Ex Post Facto Clause, Justice Rehnquist, sitting as a Circuit Justice, adopted the view of the consensus of federal circuit courts in Portley v. Grossman. 154 In that case, Justice Rehnquist denied an application for a stay of execution of the Ninth Circuit’s mandate denying the applicant’s petition for a writ of habeas corpus, holding that the application of the Parole Guidelines in effect at the time of the applicant’s eligibility for re-parole did not violate the Ex Post Facto Clause because “the guidelines operate only to provide a framework for the Commission’s exercise of its statutory discretion,” and therefore “neither deprive applicant of any pre-existing right nor enhance the punishment imposed.” 155

151 Wallace, 802 F.2d at 1554; see also Rifai, 586 F.2d at 698 (rejecting similar argument while noting that “[u]nder this theory, any policy or practice followed with some frequency would constitute a ‘law’ from which an agency could not vary”).
152 768 F.2d 932, 937 (7th Cir. 1986) (citations omitted).
153 For example, in Dufresne, the Eleventh Circuit held that even though the Parole Commission complied with the Parole Guidelines “in the vast majority of cases,” and despite the fact that the Commission was empowered to depart from the Parole Guidelines only for good cause, the Ex Post Facto Clause did not apply because “[t]he Commission may follow its guidelines, disregard them, or change them. Parole remains an act of discretion.” 744 F.2d at 1550 (citing 18 U.S.C. § 4206(c) (1982)).
154 444 U.S. 1311 (1980).
155 Id. at 1312.
Only the Third Circuit initially resisted the consensus among the federal appellate courts that the Ex Post Facto Clause does not apply to the Parole Guidelines, reasoning that the Parole Commission’s very high rate of compliance with the Parole Guidelines’ recommendations, coupled with the enhanced level of appellate review of decisions to depart, might mean that, as a practical matter, the Parole Commission lacked any appreciable authority to depart from the Parole Guidelines the majority of cases, thus giving the Parole Guidelines the force and effect of law. In *Geraghty v. United States Parole Commission*, the appellant was convicted in 1973 of conspiracy to commit extortion and making false declarations to a grand jury, and ultimately sentenced to a term of incarceration of 30 months. Like *Ruip*, Geraghty’s offense was committed prior to the implementation of the Parole Guidelines pilot program, but by the time of his first parole hearing, the Board of Parole had implemented the pilot program in Geraghty’s region. Although Geraghty was eligible for immediate parole, the applicable Parole Guidelines identified a presumptive range of 26-36 months to be served before parole. The Board of Parole therefore denied his application for parole on the ground that a downward departure from the Parole Guidelines’ recommended range “[did] not appear warranted.” Because of his relatively short 30-month sentence, the Board of Parole’s compliance with the 26-36 month range meant that Geraghty “could not be granted parole before the end of his sentence as reduced by ‘good time’ credits.” In 1976, after his second application for parole was denied on similar grounds, Geraghty commenced a class action against the Parole Commission in which he argued that the application of the Parole Guidelines to prisoners who had been convicted and sentenced while the previous parole system was in effect violated the Ex Post Facto Clause. The district court denied class certification and dismissed the action, and the Third Circuit reversed, noting that the legislative history to the PCRA indicates that the Parole Guidelines “are designed to be not mere hortatory clarifications of policy, but rules which are to be followed except for substantial reason to the contrary,” and holding that the Parole Commission’s high rate of compliance with the Parole Guidelines’ presumptive ranges

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157 *Id.* at 242 n.7.
158 *Id.* at 242.
159 *Id.*
160 *Id.*
161 Although Geraghty’s sentence was completed shortly after his second application for parole was denied in June 1976, the Third Circuit held that he was not barred by the mootness doctrine from maintaining a class action challenging the retroactive application of the Parole Guidelines to similarly situated federal prisoners. *Id.* at 252.
163 *Geraghty*, 579 F.2d at 267 (quotation marks omitted).
164 *See id.* (noting the Parole Commission’s concession that “in 1975 prisoners were granted parole prior to their ‘customary release dates’ in only 8.7% of cases”).
raised a question of material fact as to whether the Parole Commission “engages in individualized consideration of prisoners similar to that which it undertook before the guidelines went into effect . . . .”165 The Geraghty court intimated that, if the Parole Commission did not actually exercise substantial discretion to depart from the Parole Guidelines in appropriate cases, then the “‘channel for discretion’ provided by the guidelines” might be “in actuality an unyielding conduit,” in which case the application of upwardly revised Parole Guidelines to a prisoner whose crime was committed when a more favorable version of the Parole Guidelines was in effect would violate the Ex Post Facto Clause.166

The Supreme Court reversed the Third Circuit’s decision in Geraghty without reaching the merits of the ex post facto issue,167 and the Third Circuit subsequently revisited the issue in United States ex rel. Forman v. McCall.168 In that case, the Third Circuit “reaffirm[ed] Geraghty’s holding that the retroactive application of parole guidelines may constitute a violation of the ex post facto clause,”169 concluding that the extent to which the Parole Commission actually exercised discretion in individual parole determinations, as opposed to operating mechanically on the basis of the Parole Guidelines grid, was an issue of fact dispositive of the question whether the application of upwardly revised Parole Guidelines violated the Ex Post Facto Clause. Forman I addressed more explicitly than Geraghty had the underlying question to which the issue of the Parole Commission’s discretion was directly relevant: whether the Parole Guidelines qualified as “laws” subject to the Ex Post Facto Clause. Forman I acknowledged the “decisions of other courts that have found the guidelines ‘not [to] constitute impermissible ex post facto laws [because] they merely clarify the exercise of administrative discretion without altering any existing considerations for parole release,”170 but rejected that conclusion on the ground that, because the Parole Guidelines “define a fairly tight statutory framework to circumscribe the Board’s statutorily broad power,”171 the Parole Guidelines would carry the force

165 Id.
166 Id.
168 709 F.2d 852 (3d Cir. 1983) [hereinafter “Forman I”].
169 Id. at 853 (emphasis omitted).
170 Id. at 860 (quoting Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977)) (alterations in original).
171 Forman I, 709 F.2d at 861 (quoting Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974)). Pickus held that the Parole Board’s revisions to the Parole Guidelines were subject to the rulemaking protocols of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553, rejecting the Parole Board’s argument that the Parole Guidelines were mere “interpretative rules” or “general statements of policy.” 507 F.2d at 1113-14. In reaching that holding, Pickus concluded that the Parole Guidelines did not fall within the APA’s exception for “rules of agency procedure and practice” because they were “likely to have considerable impact on ultimate agency decisions.” Id. at 1114. Notwithstanding the apparent relevance of the Pickus court’s determination that the Parole Guidelines “have the effect of law and are not reviewable except for arbitrariness,” id., to the issue of their status as law in the context of ex post facto challenges to the retroactive applica-
of law, and therefore be subject to the limitations of the Ex Post Facto Clause, "if applied without substantial flexibility." Following Geraghty's example, however, Forman I declined to hold as a matter of law that the Parole Guidelines were "'laws' within the meaning of the Ex Post Facto Clause," holding instead that "[i]n light of the importance of the constitutional question before us, the contrary holdings of other courts of appeals, and the opinion in Geraghty," the case should be remanded to the district court to conduct fact finding on the question whether "the Parole Commission does in fact act with substantial flexibility." On remand, the district court conducted a lengthy empirical inquiry from which it "distilled" three significant findings of fact:

1) Statistically, the Parole Commission decisions fall within the guideline parameters in 85-90% of the cases, thus a deviation of only 10-15%. 2) The range and contour of the individualized decisions is relatively smooth and, for the greatest part, within the guidelines. 3) Nominally the Parole Guidelines are discretionary but in actuality, discretion is so absent that the guidelines are revamped whenever it appears that a percentage of the Parole Commission decisions fall outside of the guideline parameters.

On the basis of these findings, the district court concluded that "the guidelines are woodenly applied, thus constituting an 'unyielding conduit,' void of 'substantial flexibility,'" and concluded that "the Parole Commission Guidelines constitute 'laws' within the meaning of the ex post facto clause." The government appealed the district court’s ruling, and, in an opinion sometimes critical of his own prior decision in Forman I, Judge Becker reversed the district

172 Forman I, 709 F.2d at 862.
173 Id.
174 Id. at 863.
176 Id. at *6 (quoting Forman I, 709 F.2d at 862-63).
177 United States ex rel. Forman v. McCall, 776 F.2d 1156, 1159 (3d Cir. 1985) [hereinafter "Forman II"] (noting that Forman I's reasoning "has since been rejected by every other circuit
court's holding, concluding that the evidence presented to the district court "unequivocally demonstrates that the guidelines are applied with substantial flexibility."\footnote{Id. at 1158.} \textit{Forman II} determined that, properly interpreted, the statistical evidence examined by the district court demonstrated that "the average annual percentage of within-guideline decisions [was] 75.4%," a figure that it found to be "strong evidence of 'substantial flexibility' in the application of the parole guidelines."\footnote{Id.} In light of this evidence, the \textit{Forman II} court held that "the guidelines are being administered with sufficient flexibility that they do not constitute 'laws' for purposes of the ex post facto clause," thereby reversing the district court and creating a unanimous consensus among the federal courts of appeals that the Parole Guidelines are not subject to the Ex Post Facto Clause.\footnote{Id.}

\section{C. The Supreme Court's Clarification of Ex Post Facto Methodology}

In citing the Parole Guidelines cases in support of the conclusion that \textit{Booker} rendered the Ex Post Facto Clause inapplicable to the Sentencing Guidelines, \textit{Demaree} neglected to acknowledge that the categorical distinction drawn by those cases—the distinction between administrative guidelines that carry the force of law and those that lack full legal status because the governmental entity to which they apply has some discretion to depart from the guidelines' recommendations—was never endorsed by the Supreme Court, and was rejected by the Court in two opinions issued after the Parole Guidelines cases were decided: 


\textit{Morales} held that the Ex Post Facto Clause applies to administrative regulations that provide for the exercise of discretion in their application so long as the retroactive application of the regulation at issue would create a sufficient risk of increasing the measure of punishment imposed on the criminal defendant,\footnote{Morales, 514 U.S. at 509.} while \textit{Garner} established a two-pronged inquiry evaluating both the formal characteristics and the practical effects of a legislative enactment when assessing the likelihood that a given legislative enactment creates a risk of increased punishment sufficient to bring it within the scope of the Ex Post Facto Clause.\footnote{Garner, 529 U.S. at 254-55.}

Although the functional approach applied by both cases was well-established in the Supreme Court's ex post facto jurisprudence when the Parole Guidelines cases were decided—indeed, more than a century before the adoption of the
Parole Guidelines, the Court recognized that the framers of the Ex Post Facto Clause "intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised," and noted that "[i]f the inhibition [against ex post facto laws] can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding"—the Garner decision reiterated that principle in the context of an ex post facto challenge to a parole statute similar, insofar as it vested significant discretion in the relevant governmental entity to depart from its recommendations in individual cases, to the Parole Guidelines. The Garner Court cited neither Geraghty nor Forman, but its decision is nevertheless a vindication of the empirical approach applied by those decisions, and requires that the same sort of empirical analysis be applied to the issue of whether the Ex Post Facto Clause applies to the post-Booker Sentencing Guidelines.

In Morales, the Court upheld the retroactive application of an amended rule of the California Board of Prison Terms, which permitted that Board to delay parole hearings of prisoners convicted of multiple murders for up to three years after an initial denial of parole, against an ex post facto challenge. Morales was convicted of first-degree murder in 1971, and sentenced to life in prison. He was released into a halfway house in April 1980 and was married shortly thereafter to a woman with whom he had corresponded while incarcerated. Mr. Morales's wife was reported missing in July 1980, and although her body was never found, Morales pleaded nolo contendere to second-degree murder in connection with her disappearance later in 1980. He was sentenced to a term of 15 years to life, and became eligible for parole in 1990. In July 1989, Morales appeared before the California Board of Prison Terms for a parole hearing, at which the Board determined that Morales was unsuitable for parole for a variety of reasons generally related to the violent nature of his crimes. Under the law in effect at the time Morales committed the second murder, he would have been entitled to subsequent hearings on an annual basis; however, in 1981, the California legislature amended the relevant rule to permit the California Board of Prison Terms to defer parole hearings for up to three years "if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing the following years and states the bases for the

185 Cummings v. Missouri, 71 U.S. 277 (1877). Likewise, in Weaver v. Graham, 450 U.S. 24, 31 (1981), decided prior to many of the Parole Guidelines cases, the Court recognized that "it is the effect, not the form, of the law that determines whether it is ex post facto."

186 Garner, 529 U.S. at 252-53.

187 Morales, 514 U.S. at 503.

188 Id. at 502.

189 Id.

190 Id.

191 Id. at 502-03.
Pursuant to the amended rule, the Board scheduled Morales’s next suitability hearing for 1992, three years after his initial hearing. Morales then filed a federal habeas corpus action pursuant to 28 U.S.C. § 2254, arguing that the retroactive application of the rule permitting the Board to defer his parole rehearing violated the Ex Post Facto Clause. The United States District Court for the Central District of California denied his petition, but the Ninth Circuit reversed, holding that the Ex Post Facto Clause compelled the California Board of Prison Terms to grant Morales an annual rehearing for the duration of his imprisonment.

The Supreme Court reversed the Ninth Circuit’s decision, holding that California’s retroactive application of the revised parole rehearing rule was not barred by the Ex Post Facto Clause. The Court distinguished its prior holdings in Lindsey v. Washington, Miller v. Florida, and Weaver v. Graham on the ground that the legislative enactments at issue in each of those cases “had the purpose and effect of enhancing the range of available prison terms,” whereas the purpose of the revised California law was simply to save resources by permitting the California Board of Prison Terms to decline to hold annual rehearings for prisoners with no realistic possibility of being found suitable for parole. The Court also rejected Morales’s argument that the Ex Post Facto Clause should be held to prohibit “any legislative change that has any conceivable risk of affecting a prisoner’s punishment,” concluding that such a broad principle “would require that we invalidate any of a number of minor . . . mechanical changes that might produce some remote risk of impact on a prisoner’s expected term of confinement.” To the contrary, the Court stated that in order to evaluate whether the retroactive application of the revised parole rehearing rule would violate the Ex Post Facto Clause, “we must determine whether it

192 Id. at 503 (quoting CAL. PENAL CODE ANN. § 3041.5(b)(2) (1982)).
193 Id.
194 Id. at 504.
195 Id. (citing Morales v. Cal. Dep’t of Corr., 16 F.3d 1001 (9th Cir. 1994)).
196 Id. at 514.
197 301 U.S. 397 (1937).
198 482 U.S. 423 (1987); see supra note 68 and accompanying text.
200 Morales, 514 U.S. at 508. The same is true of revised Sentencing Guidelines, which also have the purpose and effect of extending the range of defendants’ prison terms. Morales might arguably be read, therefore, to suggest that the Sentencing Guidelines may be held subject to the Ex Post Facto Clause without reference to the “sufficient risk” test articulated in that case. While such an inference is not implausible on the basis of Morales and Garner, this Article shall focus on the alternative argument that upwardly revised Sentencing Guidelines satisfy the criteria for ex post facto laws set forth in those cases by creating a substantial risk of increased punishment to a criminal defendant if applied retroactively.
201 Id. at 504-06.
202 Id.
produces a sufficient risk of increasing the measure of punishment attached to
the covered crimes.” Applying that standard, the Court held that the revised
parole rehearing rule did not violate the Ex Post Facto Clause if applied retroac-
tively, for two reasons: first, the rule applied only to prisoners incarcerated for
multiple murders, “a class of prisoners for whom the likelihood of release on
parole is quite remote,” and second, that the Board’s authority to defer parole
rehearings was “carefully tailored” to increase the efficiency of the system
without adversely affecting the rights of prisoners. Specifically, the Court
noted that the Board’s authority to defer rehearings was constrained by the re-
quirement that it specifically find that the prisoner had no realistic chance of
being found suitable for parole in the intervening years, and that the revised rule
gave the Board “authority to tailor the frequency of subsequent suitability hear-
ings to the particular circumstances of the individual prisoner,” including the
specific characteristics of the underlying crimes and the prisoner’s institutional
record. In light of these considerations, the Court found that the revised pa-
role rehearing rule created “only the most speculative and attenuated possibility
of producing the prohibited effect of increasing the measure of punishment for
covered crimes,” and therefore was not prohibited by the Ex Post Facto Clause.
Notably, the Court did not elicit or consider empirical evidence regarding the actual amounts of time served by prisoners subject to the revised rule in comparison with the time served prior to the effective date of the revision

203 Id. at 509. Although Morales’s “sufficient risk” language has been quoted and applied by
many subsequent courts, including the Supreme Court in Garner v. Jones, 529 U.S. 244 (2000), it
would be trivially tautological if interpreted literally, resulting in a rule that the Ex Post Facto
Clause applies to those legislative enactments which, if applied retroactively, create a risk of
increased punishment sufficient that the Ex Post Facto Clause applies to them. In the context of
Morales and subsequent cases, it is clear that the Court intended to require a
substantial risk of
increased punishment in order to invoke the application of the Ex Post Facto Clause.
204 Id. at 510.
205 Morales, 514 U.S. at 510-11.
206 Id. at 511. Demaree cited Morales’s discussion of the California Board of Prison Terms’s
discretion to individually tailor parole rehearing dates for the proposition that “the ex post facto
clause should apply only to laws and regulations that bind rather than advise, a principle well
established with reference to parole guidelines whose retroactive application is challenged under
the ex post facto clause,” 459 F.3d at 795 (citing Morales, 514 U.S. at 511-13), but this interpreta-
tion is not supported by the Court’s treatment of the issue in Morales. If Morales stood for the
proposition that the existence of discretion categorically exempts a legislative enactment from the
scope of the Ex Post Facto Clause, the Court could have said that more directly, and without con-
sidering the question of whether the respondent had established the existence of a sufficient risk
that the retroactive application of the rule would result in an enhanced measure of punishment. A
more plausible reading of the Court’s holding in Morales is that the Board’s discretion was rele-
vant to the issue of whether a sufficient risk of increased punishment existed because the Board
was permitted to exercise its discretion to delay parole rehearings for more than one year only to
prisoners whom it determined were unlikely to be found suitable for parole within one year, and
such a practice would not be likely to result in lengthening the amount of time served by any
prisoner.
207 Morales, 514 U.S. at 509.
in reaching its conclusion that the revised rule did not create a sufficient risk of increasing the measure of punishment, but based its analysis solely on the text of the rule and the Court’s own intuitive understanding of its likely effects.\(^{208}\)

In \textit{Garner v. Jones},\(^{209}\) the Court addressed a fact pattern and ex post facto issue similar to that presented in \textit{Morales} but took its analysis one step further, retaining \textit{Morales}’s principle that a plaintiff seeking to establish an ex post facto violation must demonstrate a sufficient risk of increased punishment while clarifying that the determination of whether such a risk exists requires both an examination of the formal terms of the legislative enactment at issue as well as an evaluation of the practical effects of that enactment.\(^{210}\) The regulation at issue in \textit{Garner} was a rule of the Georgia Board of Pardons and Paroles\(^{211}\) regarding the frequency with which prisoners serving life sentences were entitled to reconsideration hearings following an initial denial of parole. Under the policy in effect at the time the respondent Robert L. Jones committed the second of the two murders for which he was sentenced, prisoners serving life sentences were entitled to an initial parole hearing after seven years, and to a reconsideration hearing every three years thereafter.\(^{212}\) In 1985, while Jones was incarcerated, the Georgia Parole Board amended the rule to provide that reconsideration hearings for inmates serving life sentences “shall take place at least every eight years.”\(^{213}\) Under the amended rule, the Georgia Parole Board had the authority to schedule a reconsideration hearing at any time within a period of eight years after the initial hearing, and could, in its discretion, expedite a previously scheduled hearing when an inmate demonstrated a change in circumstances or when the Board discovered new information relevant to its assessment of the prisoner’s suitability for parole.\(^{214}\)

When the Georgia Parole Board applied the new rule to Jones, scheduling his next reconsideration hearing for eight years after a hearing at which he was found unsuitable for parole, he filed an action against the Board under 42 U.S.C. § 1983, arguing that the application of the revised rule to his case violated the Ex Post Facto Clause.\(^{215}\) The district court granted summary judgment to the state, and the Eleventh Circuit reversed, holding that the retroactive application of the revised rule violated the Ex Post Facto Clause.\(^{216}\) The Eleventh Circuit’s holding rested in part on its conclusion that, when the revised rule was applied to the large population of prisoners serving life sentences in the state of

\begin{footnotes}
\footnote{\textit{Id.} at 512-13.}
\footnote{\textit{529 U.S. 244} (2000).}
\footnote{\textit{Id.} at 254-55.}
\footnote{Hereinafter the "Georgia Parole Board."}
\footnote{Ga. Rules & Regs., Rule 475-3-.05(2) (1979), \textit{cited in Garner}, 529 U.S. at 247.}
\footnote{\textit{Garner}, 529 U.S. at 247 (quoting Ga. Rules & Regs., Rule 475-3-.05(2) (1985)).}
\footnote{\textit{Garner}, 529 U.S. at 248.}
\footnote{\textit{Id.} at 247.}
\footnote{\textit{Jones v. Garner}, 164 F.3d 589, 595 (11th Cir. 1999).}
\end{footnotes}
Georgia, it "seem[ed] certain that some number of inmates [would] find the length of their incarceration extended in violation of the Ex Post Facto Clause of the Constitution."217

The Supreme Court reversed the Eleventh Circuit's decision, holding that "[t]he Court of Appeals’ analysis failed to reveal whether the amendment . . . in its operation, created a significant risk of increased punishment for respondent."218 The phrase "in its operation" is of special significance to the Court's holding and to the methodology it applied. The Court began its analysis by observing that "[w]hether retroactive application of a particular change in parole law respects the prohibition on ex post facto legislation is often a question of particular difficulty when the discretion vested in a parole board is taken into account,"219 while emphasizing that "the presence of discretion does not displace the protections of the Ex Post Facto Clause."220 Citing Morales for the proposition that the dispositive inquiry for ex post facto purposes is whether the revised rule creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes,"221 the Court applied a two-pronged inquiry to determine whether the respondent had demonstrated that the retroactive application of the Georgia Parole Board's revised rule created a risk of increased punishment sufficient to bring the rule within the scope of the Ex Post Facto Clause.

First, the Court applied a formal analysis, looking to the language of the rule to determine whether a risk of increased punishment was evident from the text itself.222 Finding that the formal examination of the rule did not reveal such a risk, the Court explained that the textual analysis does not end the inquiry, noting that "[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule’s practical implementation . . . that its retroactive application will result in a longer period of incarceration than under the earlier rule."223 The Court held that Jones had not carried his burden on that point, having provided insufficient empirical evidence about the Georgia Parole Board’s implementation of the revised rule to permit the Court to assess whether the application of the rule to Jones’s case created a sufficient risk of enhanced punishment.224 The court therefore remanded the case to permit the lower courts to consider whether to grant Jones additional discovery so as to further develop the factual record necessary to satisfy the empirical prong of the Court’s ex post facto inquiry.225

217 Id.
218 Garner, 529 U.S. at 257.
219 Id. at 250.
220 Id. at 253.
221 Id. at 250 (quoting United States v. Morales, 514 U.S. 499, 509 (1995)).
222 Id. at 252-53, 256.
223 Id. at 255.
224 Id. at 256.
225 Id. at 257.
Although Jones was unable to carry his evidentiary burden with respect to the ex post facto issue presented in his case, the *Garner* Court’s clear articulation of a two-pronged ex post facto inquiry that requires examining both the formal characteristics and the practical effects of a legislative enactment unequivocally demonstrates that the categorical distinction between enactments that “bind” and those that merely “advise,” which *Demaree* and the Parole Guidelines cases found to be of dispositive significance, is simply not recognized by the Constitution as a basis for distinguishing those legislative enactments to which the Ex Post Facto Clause applies from those to which it does not. The *Demaree* court was aware of *Garner*, but its treatment of the case suggests that the Seventh Circuit failed to grasp the significance of the Supreme Court’s decision. *Demaree* cited *Garner* for the proposition that “the ex post facto clause should apply only to laws and regulations that bind rather than advise,” but failed to recognize that *Garner* rejected the categorical approach on which that distinction rests. It was undisputed in *Garner* that the revised parole rule at issue gave the Georgia Parole Board discretion to hold a parole reconsideration hearing more frequently than every eight years, but the Court expressly rejected the argument that the Board’s discretion to depart from the revised rule was sufficient to remove the revised parole statute from the scope of the Ex Post Facto Clause.

Subsequent appellate decisions have recognized that the bright-line distinction between “law” and “not law” upon which the Parole Guidelines cases relied was rejected by *Morales* and *Garner*, and that where an ex post facto violation is not apparent on the face of the legislative enactment at issue, *Garner* requires courts to take the additional step of empirically examining the extent to which the enactment actually influences the exercise of discretion by the governmental entity to which it applies in order to determine whether its retrospective application creates a substantial risk of increasing the measure of punishment imposed on the defendant above the level that would have applied under the law in effect at the time the offense was committed. For example, in *Michael v. Ghee*, the Sixth Circuit recognized that *Garner* implicitly overruled its decision in *Ruip*, holding that “*Ruip* should no longer be followed because it is inconsistent with the Supreme Court’s holding in *Garner v. Jones*.”

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226 459 F.3d at 795 (citing *Garner*, 529 U.S. at 256).

227 *Garner*, 529 U.S. at 253 (recognizing that “the presence of discretion does not displace the protections of the Ex Post Facto Clause . . .”). *Demaree* also ignored the fact that the Florida parole guidelines held subject to the Ex Post Facto Clause in *Miller v. Florida* likewise granted the sentencing court some discretion to depart in cases where the court found clear and convincing evidence of aggravating or mitigating factors. See supra note 73 and accompanying text.

228 *Ruip* v. United States, 555 F.2d 1331 (6th Cir. 1977); see supra note 139 and accompanying text.

229 *Michael* v. *Ghee*, 498 F.3d 372 (6th Cir. 2007). The Sixth Circuit has long recognized the significance of *Garner*, though it did not acknowledge that case’s implicit overruling of *Ruip* until its decision in *Michael*. For example, in *Dyer v. Bowlen*, 465 F.3d 280, 288-89 (6th Cir. 2006), the court discussed *Morales* and *Garner* extensively in the context of an ex post facto challenge to
Involving an ex post facto challenge to parole guidelines adopted by the Ohio Adult Parole Authority in 1998 that were made retroactively applicable to inmates sentenced prior to July 1, 1996. The Ohio guidelines functioned in a manner similar to the federal Parole Guidelines, in that the inmate's presumptive term of incarceration was determined by locating the intersection on a grid of two numeric scores reflecting the seriousness of the offense and the likelihood that the offender could be safely released; significantly, like the Parole Commission, OAPA "retain[ed] discretion to depart from the guidelines" in appropriate circumstances. A group of inmates filed an action against OAPA under 42 U.S.C. § 1983 in which they argued that retroactive application of the 1998 parole guidelines violated the Ex Post Facto Clause. The district court granted summary judgment to the defendants, citing Ruip for the proposition that the parole guidelines at issue were not laws, and therefore were not subject to the Ex Post Facto Clause. In the alternative, the district court held that even if the Ex Post Facto Clause applied to the parole guidelines, the defendants

the retroactive application of two statutes governing the Tennessee parole board's decisionmaking process that were not in effect when the appellant's crime was committed, and remanded the case "with instructions to conduct an evidentiary hearing on the practical effects of the statutes' retroactive application . . . because Garner requires an inmate to demonstrate a sufficient risk of increased punishment that is either inherent on the face of the new statutes or is evidenced by the statutes' practical implementation." Numerous earlier unpublished Sixth Circuit opinions recognize the same principles. See, e.g., Kilbane v. Kinkela, 24 F. App'x 241, 243 (6th Cir. 2001) (affirming dismissal of 42 U.S.C. § 1983 action challenging retroactive application of Ohio Parole Guidelines on the ground that "[t]he Ohio regulations by their own terms do not show a significant risk of increased punishment for prisoners generally . . . . Furthermore, the plaintiffs merely presented conclusory allegations and provided no evidence that the new guidelines have diminished the possibility of release for persons like themselves . . . ." (citing Garner)); Fraser v. Tennessee Bd. of Paroles, 238 F.3d 420 (6th Cir. 2000) (unpublished table decision) ("The question is whether retroactive application of the change in law creates a sufficient risk of increasing the measure of punishment attached to the covered crimes. When the rule does not by its own terms demonstrate a significant risk, the prisoner challenging the retroactive application of the amendment must demonstrate, by evidence drawn from the rule's practical implementation, that its retroactive application will result in a longer period of incarceration than under the earlier rule." (citing Garner)).

Prior to July 1, 1996, Ohio utilized an indeterminate sentencing system in which the sentencing court would impose a minimum and maximum sentence, with the decision of precisely how much time within that range the defendant would actually serve left to OAPA. Michael, 498 F.3d at 373-74. In 1995, Ohio adopted legislation, effective as of July 1, 1996, that "abandoned [indeterminate sentences] in favor of fixed terms of incarceration determined by the defendant's presiding judge." Id. at 374 (citing OHIO REV. CODE § 5120 et seq.). This legislation abolished the parole system for all defendants sentenced after that date, but because it was not retroactive, OAPA continued to conduct parole hearings for defendants sentenced under the indeterminate sentencing system that was in effect prior to the effective date of the new legislation. See Michael, 498 F.3d at 373-74.

Id.

Id. at 374.

See id. at 380-81.
were entitled to summary judgment because the retroactive application of the 1998 parole guidelines would not “create a sufficient risk of increasing the measure of punishment attached to the underlying crime.”\textsuperscript{235} The Sixth Circuit affirmed the grant of summary judgment on the basis of the district court’s alternative holding, but held that the district court’s reliance on \textit{Ruip} was misplaced because that opinion was irreconcilable with \textit{Garner}.\textsuperscript{236} Michael identified three aspects of \textit{Garner}’s holding as inconsistent with prior Sixth Circuit jurisprudence: first, contrary to the Sixth Circuit’s holding in \textit{Ruip}, “the [\textit{Garner}] Court made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny”\textsuperscript{237} second, \textit{Garner} involved an ex post facto challenge to regulations issued by a state administrative agency rather than by the legislature, and therefore implicitly held that administrative regulations are not categorically exempt from the purview of the Ex Post Facto Clause;\textsuperscript{238} and third, \textit{Garner} contravened prior Sixth Circuit authority, which had held that the retroactive application of revised parole guidelines to a prisoner serving a life term could not violate the Ex Post Facto Clause because it could not extend the duration of the prisoner’s sentence beyond the period to which the prisoner was originally sentenced,\textsuperscript{239} by remanding for discovery on the issue whether the Georgia Parole Board’s revised rule created a significant risk of increasing the actual amount of time that Jones would actually be required to serve, notwithstanding the fact that the rule could not have the effect of extending his sentence beyond the maximum term of life to which he was originally sentenced.\textsuperscript{240} Synthesizing these three aspects of the Supreme Court’s ruling, \textit{Michael} held that “[a]fter \textit{Garner}, the relevant inquiry, therefore, is not whether the challenged parole regulation is a ‘law’ or whether the guidelines present a significant risk of increasing the plaintiff’s maximum penalty, but rather whether the new guidelines present a significant risk of increasing the plaintiff’s amount of time actually served.”\textsuperscript{241}

In addition to its discussion of the \textit{Garner} opinion itself, \textit{Michael} also relied on the D.C. Circuit’s opinions in \textit{Fletcher v. District of Columbia}\textsuperscript{242} and

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at 380.
\item \textsuperscript{236} \textit{Id.} at 382.
\item \textsuperscript{237} \textit{Id.} (citing \textit{Garner}, 529 U.S. at 253).
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} \textit{Id.} (citing \textit{Hunt v. Wilkinson}, 79 F. App’x 861, 862 (6th Cir. 2003) ("Hunt was sentenced . . . to life in prison, consecutive to other terms of imprisonment, with the possibility of a discretionary grant of parole. The new regulations, which may increase the periods between parole hearings, and do not give Hunt a projected release date, do nothing to increase the punishment to which Hunt was originally sentenced.").")
\item \textsuperscript{240} \textit{See id.} at 380-82.
\item \textsuperscript{241} \textit{Id.} at 383.
\item \textsuperscript{242} 391 F.3d 250 (D.C. Cir. 2004) [hereinafter \textit{‘Fletcher II’}].
\end{itemize}
its successor, *Fletcher v. Reilly*, in support of its conclusion that *Garner* implicitly overruled *Ruip*. The first opinion in the *Fletcher* series, which Chief Judge Ginsburg wrote for a unanimous panel including then-Judge John Roberts, relied on the D.C. Circuit’s pre-*Garner* Parole Guidelines decisions as grounds for affirming the dismissal of the plaintiff’s ex post facto challenge to the retroactive application of the federal reparole guidelines, holding that “a parole guideline is not a ‘law’ within the proscription of the Ex Post Facto Clause.” The plaintiff filed a petition for rehearing which called the court’s attention to *Garner*, and in *Fletcher II*, the same panel unanimously vacated its decision in *Fletcher I*, holding that *Garner* “foreclosed our categorical distinction between a measure with the force of law and ‘guidelines [that] are merely policy statements from which the Commission may depart in its discretion.’” *Fletcher II* recognized that, after *Garner*, the dispositive question for ex post facto purposes is “one of practical effect,” and remanded the case to the district court “for further proceedings consistent with *Garner*.“ In *Fletcher III*, the court reaffirmed its decision in *Fletcher II*, recognizing that “under *Garner v. Jones*, the critical question in ex post facto challenges to retroactively applied parole/reparole regulations is whether, as a practical matter, the retroactive application creates a significant risk of prolonging an inmate’s incarceration.” The *Fletcher III* court also described the district court’s conclusion that the exercise of discretion removed the Parole Commission’s reparole guidelines from

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243 *Fletcher v. Reilly*, 433 F.3d 867, 868-73 (D.C. Cir. 2006) [hereinafter “*Fletcher III*”]. The National Capital Revitalization and Self-Government Improvement Act of 1997 transferred responsibility for offenders convicted under the District of Columbia Code [hereinafter “D.C. Code”] from the District of Columbia Board of Parole [hereinafter “D.C. Board”] to the United States Parole Commission. At issue in the *Fletcher* series of opinions was the plaintiff’s ex post facto challenge to the Parole Commission’s application of its own reparole guidelines, which did not formally take into account his post-incarceration efforts at rehabilitation, to Fletcher’s reparole hearing, instead of the D.C. Board’s reparole regulations, which did consider post-incarceration rehabilitation. Fletcher, who was convicted under the D.C. Code in 1980 and whose parole was revoked in 1998, argued that, by failing to take his rehabilitation into account, application of the Parole Commission’s reparole guidelines to his case created a substantial risk of increasing the length of time he would serve prior to reparole beyond the time he would have served under the D.C. Board’s guidelines. *Fletcher III* was not an appeal following remand in *Fletcher II*, but rather an appeal in a related case filed by the same plaintiff which presented the same ex post facto argument as a petition for habeas corpus rather than as a 42 U.S.C. § 1983 action. See id. at 874-75.

244 *Fletcher v. District of Columbia*, 370 F.3d 1223 (D.C. Cir. 2004) [hereinafter “*Fletcher I*”].

245 *Id.* at 1228 (citing Blair-Bey v. Quick, 151 F.3d 1036, 1049 n.12 (D.C. Cir. 1998); Warren v. U.S. Parole Comm’n, 659 F.2d 183, 197 n.57 (D.C. Cir. 1981)).

246 *Fletcher II*, 391 F.3d at 251 (quoting *Fletcher I*, 370 F.3d at 1228) (alteration in original).

247 *Id.*

248 *Fletcher III*, 433 F.3d at 869-70 (internal citations omitted). Judge Roberts, having been appointed Chief Justice of the United States Supreme Court, was not a member of the *Fletcher III* panel. He was replaced by Senior Circuit Judge Harry Edwards, who wrote the *Fletcher III* opinion.
the scope of the Ex Post Facto Clause as a “misconception,” holding that after *Garner*, “[t]he labels ‘regulation’ and ‘guideline’ are not determinative. And the existence of discretion is not dispositive.” The court therefore remanded the case to the district court in order to conduct an empirical inquiry pursuant to *Garner* and *Fletcher II* for the purpose of determining whether the Parole Commission’s application of the federal reparole regulations “created a significant risk that [Fletcher] will be subjected to a lengthier incarceration than he would have been if the Commission had adhered to the rules and practices of the D.C. Board.”

In addition to *Michael* and the *Fletcher* series, a number of other appellate court cases have likewise recognized the “highly fact intensive” nature of the ex post facto analysis applied by *Garner*, and one district court has applied *Garner* and *Fletcher* to hold that the Ex Post Facto Clause bars the retroactive application of post-*Booker* Sentencing Guidelines when that application would increase the defendant’s sentencing range, expressly rejecting the Seventh Circuit’s reasoning in *Demaree*. In *United States v. Restrepo-Suárez*, the court addressed a federal prisoner’s petition pursuant to 28 U.S.C. § 2255 to vacate his sentence of 72 months’ imprisonment on the ground that the court incorrectly applied the upwardly revised Sentencing Guidelines in effect at the time of the petitioner’s sentencing in violation of the Ex Post Facto Clause. Restrepo-Suárez had pleaded guilty to conspiracy to import, manufacture, and distribute cocaine, an offense that was ongoing from January 1994 to January 2004. At his sentencing on January 31, 2007, the court applied the 2006 Guidelines Manual, which provided for a sentencing range of 70 to 87 months. In his section 2255 petition, Restrepo-Suárez argued that the court should have applied

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249 *Id.* at 876.

250 *Id.* at 879.

251 Olstad v. Collier, 205 F. App’x 308, 310 (5th Cir. 2006) (holding that the district court’s sua sponte dismissal of the appellant’s ex post facto challenge to the retroactive application of revised Texas parole statutes was an abuse of discretion in light of the statistical evidence that the appellant submitted in his objections to the magistrate judge’s report and recommendation that purportedly demonstrated the substantial risk of increased punishment to which he would be exposed by retroactive application of the statutes at issue); *see also* Richardson v. Pa. Bd. of Probation and Parole, 423 F.3d 282, 293 (3d Cir. 2005) (applying *Garner* test, affirming dismissal of plaintiff prisoner’s challenge to retroactive application of 1996 amendments to Pennsylvania Parole Act where the plaintiff “has not provided any . . . evidence of disadvantage as a result of the 1996 Amendments”); Henderson v. Scott, 260 F.3d 1213, 1218 (10th Cir. 2001) (applying two-pronged *Garner* analysis to prisoner’s ex post facto challenge to Oklahoma law extending time between initial parole hearing and rehearing, but dismissing appeal and denying certificate of appealability because “Mr. Henderson has not shown that the Oklahoma statute, as amended, will have the effect of prolonging his punishment either on the face of the statute or as applied to his specific circumstances”). *But see* Warren v. Baskerville, 233 F.3d 204, 208 (4th Cir. 2000) (post-*Garner* decision holding that revised parole policy affecting accumulated good time credit was not subject to the Ex Post Facto Clause because Virginia Parole Board’s Policy Manual “did not for ex post facto purposes have the force and effect of law”).

the 2003 Guidelines Manual, in effect at the time the conspiracy of which he was convicted was completed, which would have indicated a sentencing range of 46 to 57 months. Addressing the petitioner’s argument, the court first noted the “divergent views on whether the Guidelines, now ‘advisory,’ present the same [ex post facto] problem [that was universally recognized prior to Booker],” briefly contrasting the Seventh Circuit’s decision in Demaree with the decisions in Safavian, Kingsbury, and United States v. Kandirakis. However, the court observed that while those cases “are useful in describing the nature of the disadvantage suffered by a defendant under even an advisory Guidelines regime . . . they do not squarely confront the threshold issue of whether a non-binding guideline can . . . present an ex post facto violation.” In resolving this “threshold” question, the district court relied on Garner and the D.C. Circuit’s Fletcher series to conclude that “in this Circuit at least, an advisory guideline is not exempt from ex post facto analysis simply because of its non-binding status,” rejecting Demaree’s holding to the contrary as “squarely at odds with the Fletcher cases . . . .” The court then noted that, having concluded that the post-Booker Sentencing Guidelines remain subject to the Ex Post Facto Clause as a general matter, it “still must consider whether application of the 2006 Guidelines would result in an ex post facto violation based on the ‘significant risk’ standard articulated in Garner and the Fletcher cases” in order to determine whether the retroactive application of the 2006 Guidelines was barred by the Ex Post Facto Clause in Restrepo-Suares’s case. Relying primarily on the Sentencing Commission’s statistical data that is discussed at length in Part IV.B below, which indicates a very high rate of conformity with the Guidelines’ “advisory” recommendations in the post-Booker era, the court concluded that the retroactive application of the 2006 Guidelines did create a significant risk of imposing a greater measure of punishment on the petitioner than would have been the case under the 2003 Guidelines; the court also noted the formal aspects of the post-Booker sentencing structure that would contribute to such a risk, including the fact that “sentencing courts remain obligated to calculate and consider the appropriate guidelines range,” and that the Guidelines are intended to

253 Id. at 116 (citing United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 127 S. Ct. 3055 (2007); United States v. Safavian, 461 F. Supp. 2d 76, 82-83 (D.D.C. 2006); United States v. Kingsbury, No. CR-05-51-B-W, 2006 WL 2575484, at *3 (D. Me. Sept. 1, 2006); United States v. Kandirakis, 441 F. Supp. 2d 282, 335 (D. Mass. 2006)); see supra note 101 (discussing Kingsbury); 107 (discussing Safavian) In Kandirakis, 441 F. Supp. 2d 282, 335 (D. Mass. 2006), the district court invoked the doctrine of constitutional avoidance to apply the Guidelines range in effect at the time the defendant’s offense was committed, but noted that “were the Guidelines truly ‘advisory,’ Kandirakis’s argument would lose much of its force, as the Court could fashion an individualized sentence based on the best sociological and penological data known to it at the time of sentence.” 441 F. Supp. 2d at 335.

254 Restrepo-Suares, 516 F. Supp. 2d at 116-17.

255 Id. at 117.

256 Id.
represent a reasonable application of the section 3553(a) factors in the majority of cases.\textsuperscript{257} Ultimately, the court concluded that

[i]n light of the empirical data indicating that a clear majority of sentences fall within the Guidelines range, the legal precedent giving the Guidelines range a prominent role in determining the proper sentence, and this Court’s own practice of giving some weight to the Guidelines range and often sentencing within that range, the Court concludes that application of the revised 2006 Guidelines . . . instead of the 2003 Guidelines, would create a significant risk of a longer period of incarceration, and thus would violate the ex post facto clause. Therefore, pursuant to [U.S.S.G.] § 1B1.11(b)(1), the Court holds that defendant is entitled to resentencing based on an advisory Guidelines range determined under the Guidelines Manual in effect on the date that the offense was committed—that is, the 2003 Guidelines.\textsuperscript{258}

The court therefore granted Restrepo-Suárez’s section 2255 petition and vacated his sentence pending resentencing pursuant to the 2003 Guidelines.\textsuperscript{259}

IV. APPLICATION OF THE \textit{GARNER} INQUIRY TO THE POST-\textit{BOOKER} SENTENCING GUIDELINES

Had \textit{Demaree} and the opinions endorsing its reasoning considered Garner’s instruction to examine not only the technical form of the Sentencing Guidelines, but also their practical effects on sentencing outcomes, as carefully as the district court in \textit{Restrepo-Suárez} did, they might have reached a different conclusion about the Ex Post Facto Clause’s continued appliability to the Guidelines. However, even the purely formal methodology that \textit{Demaree} applied should have persuaded the Seventh Circuit that the retroactive application of upwardly revised post-\textit{Booker} Sentencing Guidelines would violate the principles underlying the Ex Post Facto Clause in more than a pejoratively “literal” way. Two formal aspects of post-\textit{Booker} reasonableness review—the presumption of reasonableness of within-Guidelines sentences and extent-of-the-variance review—operate in a manner such that the location of a defendant’s

\textsuperscript{257} \textit{Id.} at 118 (quoting United States v. Ventura, 481 F.3d 821, 823 (D.C. Cir. 2007)). The court further noted that “it is the practice of this Court always to consider the Guidelines range and generally to impose a sentence within the Guidelines range, absent adequate grounds for a departure,” which the court described as an “infrequent occurrence . . . for the simple reason acknowledged in \textit{Rita}—the Guidelines are designed to reflect [the section 3553(a)] factors, and . . . the Guidelines typically achieve that goal.” \textit{Id.} (citing \textit{Rita v. United States}, 127 S. Ct. 2456 (2007)).

\textsuperscript{258} \textit{Id.} at 118-19 (footnote omitted).

\textsuperscript{259} \textit{Id.} at 119.
sentence vis-à-vis the Guidelines range makes a real, and at times dispositive, difference in whether the sentence is affirmed on appeal or reversed as unreasonable. While the Supreme Court’s recent decisions in *Rita* and *Gall* may affect the manner in which these formal aspects of substantive reasonableness review are applied in the future, those opinions provide no reason to expect that the circuit courts’ adherence to the Guidelines as benchmarks for substantive reasonableness will relax to the extent that the retroactive application of upwardly revised Guidelines will no longer create a substantial risk of greater punishment to the defendant. Moreover, post-*Booker* sentencing statistics clearly reveal that in the vast majority of cases, district courts continue to sentence defendants within the Guidelines range, and appellate courts are far more deferential to within-Guidelines sentences than to variances. Taken together, the formal characteristics and empirical realities of post-*Booker* sentencing demonstrate that the Sentencing Guidelines remain a powerful influence on sentencing courts’ decisions, such that the retroactive application of upwardly revised Sentencing Guidelines inevitably creates a substantial risk of greater punishment for criminal defendants.

A. Formal Aspects of Post-Booker Appellate Review

In the years since *Booker*, most of the federal courts of appeals have applied reasonableness review in ways that, in the words of Senior Judge Graham Mullen of the Western District of North Carolina and J.P. Davis, render the Guidelines “effectively mandatory.” Mullen and Davis identify two features of post-*Booker* appellate review—the presumption of reasonableness and extent-of-variance review—that they argue undermine the spirit of *Booker*’s holding, thereby “resurrect[ing]” the pre-*Booker* system of mandatory Sentencing Guidelines “to stalk our jurisprudence once more.” Because they have the effect of pushing federal sentencing back toward the pre-*Booker*, mandatory-Guidelines model, those same features demonstrate that under the post-*Booker* sentencing scheme that has been approved by the Supreme Court, an upward revision of the Sentencing Guidelines creates a sufficiently substantial risk of increased punishment to warrant the continued application of the Ex Post Facto Clause to the Guidelines, notwithstanding their theoretically advisory nature in the post-*Booker* paradigm.

The first aspect of post-*Booker* appellate review discussed by Mullen and Davis, the presumption of reasonableness, has been adopted by seven federal circuits—the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Cir-
circuits—while the First, Second, Third, Ninth, and Eleventh Circuits have rejected it. Under this rule, an appellate court reviewing a sentence that falls within the Guidelines range applies a theoretically rebuttable presumption that the within-Guidelines sentence is substantively reasonable with respect to all of the section 3553(a) factors. Mullen and Davis argue that the presumption effectively eliminates the need for independent examination of the other section 3553(a) factors; “at the absolute most, [the sentencing judge] is required to state that he has considered the factors in § 3553(a) with no further elaboration,”

Mullen and Davis classify Jimenez-Beltre as a case “tacitly enforcing” the presumption of reasonableness, but this characterization does not appear well-founded in light of Jimenez-Beltre’s language and holding. Mullen & Davis, supra note 260, at 636 & n.71. Mullen and Davis rest their characterization of Jimenez-Beltre on the basis of the court’s comment that “the guidelines cannot be called just ‘another factor’ in the statutory list . . . because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges.” Jimenez-Beltre, 440 F.3d at 518, cited in Mullen & Davis, supra note 260, at 636 n.71. However, the court went on to recognize in the next paragraph that “the guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases,” and ultimately approved of the district court’s sentencing procedure, which involved “sequential[ly] determin[ing] . . . the guideline range, including any proposed departures, followed by the further determination whether other factors identified by either side warrant an ultimate sentence above or below the guideline range.” Jimenez-Beltre, 440 F.3d at 518-19 (citations omitted). The court then affirmed the district court’s denial of the defendant’s requested downward variances as reasonable. Placing the language cited by Mullen and Davis in context, it does not appear that Jimenez-Beltre was technically rejecting the presumption of reasonableness while actually applying the same standard; rather, the court seems to be simply acknowledging the unique nature of the Guidelines with respect to the other § 3553(a) factors, while applying a broad standard of review weighing the reasonableness of the sentence without bestowing a presumption of reasonableness upon the Guidelines.

Mullen and Davis’s assertion that the Third Circuit also “tacitly enforced” a presumption of reasonableness in Cooper is equally implausible. Mullen & Davis, supra note 260, at 636 & n.71. Like Jimenez-Beltre, Cooper explicitly declined to adopt a presumption of reasonableness. Though it acknowledged that “a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range,” 437 F.3d at 331, the court made clear that it based that assertion simply on the fact that “[t]he federal sentencing guidelines represent the collective determination of three governmental bodies—Congress, the Judiciary, and the Sentencing Commission—as to the appropriate punishments for a wide range of criminal conduct,” id. at 331 n.10, and immediately followed its statement with the observation that “a within-guidelines sentence is not necessarily reasonable per se,” concluding that to hold otherwise “would come close to restoring the mandatory nature of the guidelines excised in Booker.” Id. at 331.

264 Mullen & Davis, supra note 260, at 633.
though some authority suggests that not even a pro forma invocation of the other factors is necessary to affirm a within-Guidelines sentence as reasonable when the presumption is applied. Although the presumption of reasonableness is technically rebuttable, "[a] defendant can only rebut the presumption [that] a properly calculated Guidelines range is reasonable 'by demonstrating that the sentence is unreasonable when measured against the § 3553(a) factors,'" which gives the hypothetical possibility of rebutting the presumption an air of practical futility in light of the courts' rather circular assumption that "sentences within guidelines range are presumptively reasonable in part due to incorporation of § 3553(a) factors into the guidelines." Even Judge McConnell of the Tenth Circuit has conceded that "the rebuttability of the presumption is more theoretical than real." Mullen and Davis argue that the application of the presumption of reasonableness to within-Guidelines sentences has reintroduced "a mandatory Guidelines system with greater ground for departure . . . than before," adding that for practical purposes, "absolutely nothing has changed" since the Booker decision, as "[i]n the average, run-of-the-mill case, the Sentencing Guidelines are just as mandatory as ever." 

265 See United States v. Johnson, 445 F.3d 339, 345 (4th Cir. 2006) (holding that district courts are not "obligated to conduct a § 3553(a) roll call," in part because "[a]ny of the § 3553(a) factors are already incorporated into any Guidelines determination . . . "). As discussed below, the Supreme Court's decision in Rita v. United States, 127 S. Ct. 2456 (2007), held that the sentencing court is required to provide a statement of the reasons underlying its sentencing decision even when imposing a within-Guidelines sentence, though that statement may be brief. See infra note 281 and accompanying text.

266 United States v. Hegmon, 233 F. App'x 288, 289 (4th Cir. 2007) (per curiam) (quoting United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006)).

267 United States v. Davis, 233 F. App'x 292, 297 (5th Cir. 2007) (citing Johnson, 445 F.3d at 342-43).

268 United States v. Pruitt, 502 F.3d 1154, 1166 (10th Cir. 2007) (McConnell, J., concurring).

269 Mullen & Davis, supra note 260, at 640.

270 Id. at 641. It is noteworthy that federal sentencing under the presumption of reasonableness bears a striking resemblance to the Florida sentencing scheme examined by the Supreme Court in Miller v. Florida, 482 U.S. 423 (1987), which the Court found to violate the Ex Post Facto Clause if applied retroactively. See supra note 68 and accompanying text. In Miller, the Florida sentencing guidelines provided a "presumptive" sentencing range from which the sentencing judge could depart only upon finding "'clear and convincing reasons to warrant aggravating or mitigating the sentence,'" and permitted appellate review only of sentences outside the guidelines range. 482 U.S. at 426 (quoting Fla. R. CRiM. P. 3.701(d)(11) (1983)). The Supreme Court held that the retroactive application of upwardly revised sentencing guidelines under Florida's system violated the Ex Post Facto Clause because defendants were "substantially disadvantaged" by the likelihood of receiving a greater sentence, notwithstanding the fact that the court had some discretion to depart in individual cases, and because, whereas an upward departure could have been challenged on appeal, the imposition of a within-guidelines sentence under a retroactively-enhanced guidelines range could not. Id. at 427. Likewise, under the post-Booker Sentencing Guidelines in a circuit that has adopted the presumption of reasonableness, a defendant is adversely affected when she is sentenced under a retroactively-enhanced Guidelines range that enjoys the presumption of reasonableness that an upward variance would not. This observation belies Demaree's suggestion that the application of the Ex Post Facto Clause to the post-Booker Sentencing Guidelines "would
The Supreme Court approved the application of the presumption of reasonableness to within-Guidelines sentences in *Rita v. United States*, but held that the presumption could be applied only by the appellate court reviewing a sentence, and not by the district court in lieu of an independent examination of the section 3553(a) factors. In *Rita*, the petitioner was convicted of perjury and several lesser offenses in connection with his false statements to federal agents investigating the illegal importation of machine gun kits by a corporation from which Mr. Rita had purchased such a kit. At sentencing, Rita argued for a downward variance from his Guidelines range of 33 to 41 months because of his poor physical condition, his vulnerability in prison as a former law enforcement official, and his status as a 25-year military veteran, but the district court rejected those arguments, sentencing him to a period of incarceration of 33 months. On appeal, the Fourth Circuit applied the presumption of reasonableness to Rita’s within-Guidelines sentence and concluded that Rita’s special circumstances did not make the sentence unreasonable.

The Supreme Court granted Rita’s petition for certiorari and affirmed both the Fourth Circuit’s practice of applying the presumption of reasonableness to within-Guidelines sentences and its conclusion that Rita’s sentence was reasonable. Justice Breyer, writing for the majority, reasoned that because the Sentencing Guidelines “seek to embody the § 3553(a) considerations, both in principle and in practice . . . it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,” and concluded that when both the sentencing court and the Commission arrive at the same outcome after applying the section 3553(a) factors, “[t]hat double determination significantly increases the likelihood that the sentence is a reasonable one.” The majority rejected the concerns raised in Justice Scalia’s concurring opinion that the presumption of reasonableness have in the long run a purely semantic effect.” United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006). Even if it is true that “[a] judge is certainly entitled to take advice from the Sentencing Commission” by taking into account the fact that the Commission has increased the advisory sentence for the crime of which a defendant is committed, the fact remains that an upward variance on that basis would not be entitled to a presumption of reasonableness on appeal. *Id.*. Because the available statistics clearly indicate that sentencing courts are more deferential to within-Guidelines sentences than to upward variances, this distinction is far from “semantic.” *Id.; see infra* Part IV.B.
threatened to reintroduce mandatory sentencing enhancements on the basis of judge-found facts not proven to a jury or admitted by the defendant—the constitutional defect that motivated the Court’s rulings in Apprendi, Blakely, and Booker—on the ground that, because the sentencing court is free to sentence the defendant to any length of time within the statutory range, post-Booker reasonableness review does not implicate the Sixth Amendment concerns identified in those cases. The Court next held that the district court’s statement of reasons for the sentence imposed was “brief but legally sufficient” under section 3553(a), reasoning that although the judge “might have said more” in response to Mr. Rita’s arguments, “context and the record make clear” that the sentencing court “thought the Commission in the Guidelines had determined a sentence that was proper in the minerun of roughly similar perjury cases; and that he found that Rita’s personal circumstances here were simply not different enough to warrant a different sentence.” Finally, the Court concluded that Rita’s sentence was substantively reasonable, holding that “we simply cannot say that Rita’s special circumstances are special enough that, in light of § 3553(a), they require a sentence lower than the sentence the Guidelines provide.”

The Rita majority conceded that “Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences,” but asserted that “we do not see how that fact could change the constitutional calculus.” For purposes of the “constitutional calculus” applicable to the Sixth Amendment issues raised in Rita, the Court may be correct, and that question is in any event beyond the scope of this Article. However, the fact that the presumption of reasonableness “may” encourage within-Guidelines sentences—including conformity to enhanced sentencing ranges if upwardly revised Guidelines are applied retroactively—is of paramount importance to the ex post facto analysis applied by Garner. As discussed in Part IV.B, statistical evidence from the post-Booker periods both prior to and immediately following the Rita deci-

277 Apprendi v. New Jersey, 530 U.S. 466 (2000); see supra note 36 and accompanying text.
278 Blakely v. Washington, 542 U.S. 296 (2004); see supra note 36 and accompanying text.
279 United States v. Booker, 543 U.S. 220 (2005); see supra note 35 and accompanying text.
280 Rita, 127 S. Ct. at 2466.
281 Id. at 2469. Whether this is tantamount to a requirement that Guidelines variances be justified by a more detailed rationale than within-Guidelines sentences is not clearly addressed by the Rita opinion, though that inference could reasonably be drawn from the Court’s explanation that a within-Guidelines sentence “will not necessarily require a lengthy explanation,” because “[c]ircumstances may well make clear that the judge rests his decision upon the Commission’s own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case,” whereas when “the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.” Id. at 2468.
282 Id. at 2470.
283 Id. at 2467.
sion indicates that district courts in circuits applying the presumption of reasonableness are even more likely than other districts to sentence defendants within the Guidelines range. Whether that trend will continue now that \textit{Rita} has clarified the scope of reasonableness review and the effect of the presumption of reasonableness remains to be seen, as several themes run through the \textit{Rita} opinions that, if taken seriously by the lower courts, may mitigate the likelihood that the application of the presumption of reasonableness to retroactively-applied Guidelines revisions will create a substantial risk of increased punishment. For example, both the majority and Justice Stevens's concurring opinion emphasize that the presumption of reasonableness is not conclusive of the substantive reasonableness of a within-Guidelines sentence. Justice Breyer's majority opinion notes that the presumption of reasonableness is "not binding"\textsuperscript{284} and lacks "independent legal effect," but "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."\textsuperscript{285} Likewise, Justice Stevens's concurring opinion emphasizes the point that "the rebuttability of the presumption [of reasonableness] is real," and notes his "trust that those judges who had treated the Guidelines as virtually mandatory during the post-\textit{Booker} interregnum will now recognize that the Guidelines are truly advisory."\textsuperscript{286} Moreover, the \textit{Rita} majority reiterated that the presumption of reasonableness "is an \textit{appellate} court presumption," reminding the lower courts that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply" when determining the defendant's sentence in the first instance,\textsuperscript{287} and empha-

\textsuperscript{284} \textit{Id.} at 2463.

\textsuperscript{285} \textit{Id.} at 2465.

\textsuperscript{286} \textit{Id.} at 2474 (Stevens, J., concurring); see also \textit{id.} at 2478 n.3 (Scalia, J., concurring in part and concurring in the judgment) (noting that Justice Souter's desire to assure sentencing courts "that the entire sentencing range set by statute is available to them" is "a proper goal—indeed, an essential one . . ."). However, as discussed below, statistical evidence from the period after \textit{Rita} indicates that the Court's exhortation that sentencing courts should be less deferential to the Sentencing Guidelines made virtually no difference in the courts' rate of compliance with the Guidelines' recommendations. See \textit{infra} Part IV.B.

\textsuperscript{287} \textit{Id.} at 2465 (majority opinion). \textit{Rita}'s conclusion that the presumption of reasonableness applies only at the level of appellate review is consistent with the manner in which the presumption has been applied in the appellate courts. See, e.g., United States v. Gama-Gonzalez, 469 F.3d 1109, 1110 (7th Cir. 2006) (Easterbrook, J.) ("To say that a sentence within the range presumptively is reasonable is \textit{not} to say that district judges ought to impose sentences within the range. It is only to say that, \textit{if} the district judge does use the Guidelines, then the sentence is unlikely to be problematic.") (citing United States v. Demaree, 459 F.3d 791, 794-95 (7th Cir. 2006))); United States v. Pickett, 475 F.3d 1347, 1353 (D.C. Cir. 2007) (concluding that although the appellate court may presume the reasonableness of a within-Guidelines sentence, "[a] sentencing judge cannot simply presume that a Guidelines sentence is the correct sentence. To do so would be to take a large step in the direction of returning to the pre-\textit{Booker} regime" (footnote omitted)); see also United States v. Tucker, 232 F. App'x 597, 599 (7th Cir. 2007) (recognizing that the district court's statement that it must presume the Guidelines sentence to be reasonable was "not correct.
sized that even where the presumption of reasonableness is applied, "appellate courts may not presume that every variance from the advisory Guidelines is unreasonable."\(^{288}\)

Although *Rita* may change the manner in which the presumption of reasonableness is applied in the future, Mullen and Davis persuasively argue that the appellate courts' insistence that the pre-*Rita* presumption of reasonableness did not equate to a presumption of unreasonable as to Guidelines variances was "demonstrably false."\(^{289}\) They point out that when the presumption of reasonableness applied, "the burden [was] on the defendant . . . [to provide] facts demonstrating that a Guidelines sentence would be unreasonable," and that "without affirmative factual evidence that a Guidelines sentence would be unreasonable and a detailed list of reasons supporting that determination, the sentencing court [could not] impose a sentence outside the Guidelines range,"\(^{290}\) concluding that "[i]f this does not qualify as a presumption against an outside-of-Guidelines sentence, it is unclear what such a presumption would look like."\(^{291}\) While it is too early to tell whether the Court's admonitions in *Rita* will cause the lower courts to show less deference to the Guidelines than has thus far been the case, the formal presumption of reasonableness unquestionably creates a "gravitational pull"\(^{292}\) toward the Guidelines range. If the appellate courts continue to apply the presumption of reasonableness in the same manner in which it was applied prior to *Rita*, it is difficult to imagine how the increased risk—indeed, the substantial likelihood—of greater punishment where upwardly revised Guidelines are retroactively applied is not built directly into the appellate review system.

The second aspect of post-*Booker* sentencing that Mullen and Davis identify as responsible for the de facto reintroduction of mandatory Guidelines sentencing is "extent-of-the-variance review," pursuant to which an appellate court treats the Guidelines range as a benchmark against which sentencing courts are required to articulate increasingly compelling justifications for departure. In other words, "the farther the judge's sentence departs from the guide-

\(^{288}\) *Rita*, 127 S. Ct. at 2467.

\(^{289}\) Mullen & Davis, *supra* note 260, at 639.

\(^{290}\) *Id.* at 639-40.

\(^{291}\) *Id.* at 640.

\(^{292}\) *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting).
lines sentence ... the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.\textsuperscript{293} Although the lines of demarcation distinguishing the federal circuit courts that have adopted this type of review from those that have not are not as clearly defined as they are in the case of the presumption of reasonableness, the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have applied extent-of-the-variance review to at least some Guidelines variances.\textsuperscript{294} While the courts that have adopted this approach to reasonableness review justify it by observing that the Sentencing Guidelines represent "the best estimate of Congress's conception of reasonableness,"\textsuperscript{295} and therefore an "extreme divergence [from the Guidelines] ... should be considered reasonable only under dramatic facts,"\textsuperscript{296} Mullen and Davis cite the Fourth Circuit's decision in \textit{United States v. Moreland}, in which it held that the mitigating factors identified by the district court as justifying a downward variance from a 360-month Guidelines range to 120 months were sufficient to warrant some downward variance, but were not "so compelling as to warrant a two-thirds reduction from the bottom of the advisory guideline range,"\textsuperscript{297} as "abundantly clear [evidence] that any variance imposed in the Fourth Circuit is judged by the degree that it varies from the Guidelines range, not how well it serves the \S 3553(a) factors."\textsuperscript{298}

The Supreme Court attempted to clarify the constitutional status of extent-of-the-variance review in \textit{Gall v. United States},\textsuperscript{299} but like its decisions in \textit{Booker} and \textit{Rita}, \textit{Gall}'s attempt to articulate a compromise position on the issue risks introducing greater uncertainty by eliminating the relatively clear rules that the courts of appeals had developed and replacing them with a vague standard that provides little guidance in specific cases. In \textit{Gall}, the petitioner had pleaded guilty to participating in a conspiracy to distribute ecstasy for approximately seven months, from February or March 2000 through September 2000, while a student at the University of Iowa. After withdrawing from the conspiracy, Gall graduated from the university and lived a law-abiding life until April 2004, when he was indicted on the conspiracy charge stemming from his in-

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\textsuperscript{293} United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005). Although \textit{Dean} held that extent-of-the-variance review applies equally "in either direction—that of greater severity, or that of greater lenity," \textit{id.}, a statistical review of appellate court rulings illustrates that the courts are uniformly more deferential to upward variances than to downward ones. \textit{See infra} Part IV.B.

\textsuperscript{294} \textit{See} United States v. Rattoballi, 452 F.3d 127, 135 (2d Cir. 2006); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); \textit{Dean}, 414 F.3d at 729; United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005); United States v. Cage, 451 F.3d 585, 594 (10th Cir. 2006); United States v. Martin, 455 F.3d 1227, 1238-39 (11th Cir. 2006).

\textsuperscript{295} \textit{Cage}, 451 F.3d at 594.

\textsuperscript{296} \textit{Id.}

\textsuperscript{297} \textit{Moreland}, 437 F.3d at 437, \textit{quoted in} Mullen & Davis, \textit{supra} note 260, at 636.

\textsuperscript{298} Mullen & Davis, \textit{supra} note 260, at 636.

\textsuperscript{299} 128 S. Ct. 586 (2007).
Involvement in the distribution organization. Gall pleaded guilty pursuant to a
plea agreement, and cooperated with the government by fully disclosing all that
he knew of the distribution operation; he was, however, ineligible for a govern-
ment-sponsored below-Guidelines sentence pursuant to U.S.S.G. § 5K1.1 be-
cause the information he provided was already known to the government. At
sentencing, the government acknowledged Gall’s substantial efforts at self-
rehabilitation in the years following his withdrawal from the conspiracy, but
urged the court to impose a sentence within the Guidelines range of 30-37
months. The district court rejected the government’s request and sentenced Mr.
Gall to 36 months’ probation, citing the fact that he voluntarily withdrew from
the conspiracy after a relatively short period of time and had lived a law-abiding
life in the years since then as the primary reasons motivating the below-
Guidelines sentence.

The government appealed the district court’s decision, and the Eighth
Circuit reversed. Applying extent-of-the-variance review, the appellate court
“held that a sentence outside of the Guidelines range must be supported by a
justification that ‘is proportional to the extent of the difference between the ad-
visory range and the sentence imposed,’”300 and “characterize[d] the difference
between a sentence of probation and the bottom of Gall’s advisory Guidelines
range . . . as ‘extraordinary’ because it amounted to ‘a 100% downward vari-
ance.’”301 The Eighth Circuit therefore vacated the sentence, holding “that such
a variance must be—and here was not—supported by extraordinary circum-
stances.”302

The Supreme Court granted Gall’s petition for certiorari, and in an opin-
ion written by Justice Stevens which sought to clarify both the propriety of ex-
tent-of-the-variance review and the scope of substantive reasonableness review
in general, reversed the Eighth Circuit’s decision, holding that the appellate
court was insufficiently deferential to the district court’s determination that a
sentence of probation would satisfy the section 3553(a) factors in Gall’s case.
The Court rejected the Eighth Circuit’s premise that a sentence outside the
Guidelines range must be justified by “extraordinary” circumstances, as well as
its “use of a rigid mathematical formula that uses a percentage of a departure as
the standard for determining the strength of the justifications required for a spe-
cific sentence,” finding that both of those approaches “come too close to creat-
ing an impermissible presumption of unreasonableness for sentences outside the
Guidelines range.”303 Moreover, the Court concluded that application of the

300 Id. at 594 (quoting United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006)).
301 Gall, 128 S. Ct. at 594 (quoting Gall, 446 F.3d at 889). As the Supreme Court subsequently
noted, the Eighth Circuit’s characterization of the sentence of probation as “extraordinary” be-
cause it constituted a 100% downward variance from the Guidelines range is conceptually unhelp-
ful because “a sentence of probation will always be a 100% departure regardless of whether the
Guidelines range is 1 month or 100 years.” 128 S. Ct. at 595.
302 Id. at 594.
303 Id. at 595.
exceptional circumstances requirement and the "rigid mathematical formulation" approach "reflect a practice . . . of applying a heightened standard of review to sentences outside the Guidelines range," in contravention of what was, in the Court's view, Booker's "pellucidly clear" instruction "that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." The Court then summarized its view of the appropriate procedure for sentencing and review under the post-Booker Guidelines: first, the sentencing court must correctly calculate and consider the defendant's Guidelines range, and should then hear from the parties and consider whether imposing a sentence within the Guidelines range is consistent with the section 3553(a) factors; the court may not presume the Guidelines range to be reasonable or appropriate during this process. If the district court concludes that a non-Guidelines sentence is appropriate, "he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." The court of appeals must then apply a deferential abuse of discretion standard of review to the sentence imposed by the district court, regardless of whether the sentence is within the Guidelines range or not, though the appellate court may, as Rita indicated, apply a presumption of reasonableness to a sentence within the Guidelines range. While it may not presume a non-Guidelines sentence to be unreasonable, the court may "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range," though it must give "due deference to the district court's decision that the § 3553(a) factors . . . justify the extent of the variance." Applying this procedure to Gall's sentence, the Supreme Court reviewed the reasons that the Eighth Circuit gave for reversing the district court's sentence as unreasonable. The Court held that the Eighth Circuit's decision failed to "give[] due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence," and therefore reversed the appellate court's decision.

While the Court obviously intended its decision in Gall to clarify the scope of substantive reasonableness review and to define the roles of sentencing courts and appellate courts in the federal sentencing process more precisely than they previously had been, its opinion contains enough ambiguity and apparent contradiction that circuit courts will find justification for widely divergent review practices within its text. It is difficult to reconcile the Court's statement
that appellate courts may "take the degree of variance into account and consider the extent of a deviation from the Guidelines" and its observation that "we find it uncontroversial that a major departure should be supported by a more significant justification than a minor one" with its insistence that the courts of appeals may not demand "extraordinary" justifications for "extraordinary" departures from the Guidelines range, or apply a "mathematical" formulation based on the extent to which the sentence imposed varies in absolute terms from the Guidelines range in order to determine the magnitude of justification required to sustain the sentence as substantively reasonable. Indeed, in light of the appellate courts' demonstrated reluctance to displace the Guidelines' central role in federal sentencing in response to Booker or Rita, a likely outcome of Gall's holding will be that, while appellate courts may be somewhat more deferential toward non-Guidelines sentences, extent-of-the-variance review will continue to be exercised as it was prior to Gall under the guise of review for abuse of discretion, while the modicum of transparency and predictability provided by formalized practices such as the Eighth Circuit's exceptional circumstances requirement and mathematical approach will be eliminated from the review process. Regardless of the ultimate validity of extent-of-the-variance review in the post-Booker sentencing scheme, so long as the Sentencing Guidelines operate as "a benchmark or a point of reference or departure" that will exert "appreciable influence" over the sentencing court—a practice of which Gall expressly approved—the application of an upwardly revised Guideline range to a defendant whose crime was committed prior to the revision will continue to create a substantial risk of increased punishment, and is therefore prohibited by the Ex Post Facto Clause.

311 Id. at 595.
312 Id. at 597.
313 Id. at 595.
314 United States v. Rubenstein, 403 F.3d 93, 98-99 (2d Cir. 2005); see also United States v. Gama-Gonzalez, 469 F.3d 1109, 1110-11 (7th Cir. 2006) ("One permissible use of discretion is to start with the Guidelines' framework, which is designed to curtail unjustified disparity in sentences-for avoiding unjustified disparity is one of the statutory objectives.").
315 Rubenstein, 403 F.3d at 98-99.
316 See Gall, 128 S. Ct. at 596 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").
317 On the same day that it issued its decision in Gall, the Supreme Court also issued a decision in Kimbrough v. United States, 128 S. Ct. 558 (2007), which held that a sentencing court may impose a non-Guidelines sentence for an offense involving crack cocaine on the basis of its disagreement with the policy underlying the 100-to-1 ratio that until recently applied to offenses involving crack and powder cocaine. Kimbrough, however, was largely a statutory interpretation case, as the primary issue confronting the Court was whether the 100-to-1 ratio contained in the Guidelines was mandated by the Anti-Drug Abuse Act of 1986, 100 Stat. 3207 (1986). The portion of the Kimbrough opinion that pertains to substantive reasonableness review simply holds that any disparities in sentencing that may result from the fact that some district court judges may disagree with certain policies underlying the Guidelines, while others may not, is not a sufficient reason to prohibit the imposition of non-Guidelines sentences on the basis of such disagreement;
B. Empirical Assessment of the Post-Booker Guidelines' Practical Effects on Sentencing

Henry Friendly, in an effort to articulate a definition of judicial discretion, wrote that “the trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees.” By Judge Friendly’s standard, district courts enjoy very little discretion in sentencing criminal defendants in the post-Booker era. While the above discussion of the formal, de jure aspects of post-Booker sentencing raises a strong inference that the Sentencing Guidelines, even in their reduced “advisory” status, remain a sufficiently powerful influence on sentencing outcomes that the Ex Post Facto Clause prohibits retroactive application of upwardly revised Guidelines, the second step of the Garner inquiry—an empirical analysis of the Sentencing Guidelines’ practical effects on sentencing in actual cases—demonstrates even more persuasively that the Guidelines continue to be applied as the default benchmark for sentencing in all federal criminal cases, such that the retroactive application of an upwardly revised Guidelines Manual creates a substantial risk that the defendant will be punished more severely than would have been the case had the court applied the Guidelines in effect at the time the offense was committed. In some cases, the practical effect that an upwardly revised Sentencing Guideline has on the outcome of a defendant’s sentence is obvious—in Demaree, for example, the sentencing judge stated explicitly that he would have imposed a lower sentence had he applied the pre-revision Guidelines Manual to the calculation of Demaree’s Guidelines range. Although the court’s deference to the Sentencing Guidelines as a benchmark or starting point is not expressly acknowledged in every case, a review of post-Booker sentencing statistics and reversal rates throughout the federal court system presents a clear picture of the central role that the Sentencing Guidelines continue to play as the de facto arbiter of “reasonableness.”


319 See United States v. Demaree, 459 F.3d 791, 792-93 (7th Cir. 2006), cert. denied, 127 S. Ct. 3055 (2007) (“The judge applied the 2004 guidelines . . . and sentenced Demaree to 30 months. But he added that if the 2000 guidelines were applicable to her case instead, he would have sentenced her to only 27 months . . . .”).

320 Judge Nancy Gertner of the District of Massachusetts has explained that sentencing courts’ deference to the Guidelines range as a benchmark against which to exercise their sentencing dis-
According to the Sentencing Commission’s statistics, the “rate of conformance with the sentencing guidelines,” defined as the combined rate of within-Guideline and government-sponsored below-Guideline sentences in all federal district courts, was 85.9 percent in the first calendar year after Booker, but down from 93.7 percent in the 13-month period preceding Blakely, but easily sufficient to demonstrate that the Guidelines remain a dominant influence on sentencing courts. For fiscal year 2006, the same rate increased to 86.3 percent, increased again to 86.7 percent for fiscal year 2007 and remained at 86.7 percent in the first quarter of fiscal year 2008, according to the Sentencing Commission’s preliminary quarterly data. Finally, the Sentencing Commission recently released a report comparing sentencing statistics prior to the Court’s decisions in Gall and Kimbrough on December 10, 2007, with statistics after that date. This report indicates that the rate of Guidelines compliance in the months after Gall and Kimbrough was 84.8 percent, not substantially lower than the cumulative rate of Guidelines compliance during the period from the Court’s decision in Booker through the end of the fourth quarter of 2007, which the report found to be 86.1 percent. This high rate of compliance with the Guidelines strongly supports the conclusion that the Ex Post Facto Clause continues to apply to the Sentencing Guidelines under current law. Although the discretion may be inevitable regardless of the degree of formal discretion to impose a non-Guidelines sentence that they may enjoy, due to the psychological concept of “anchoring.” Judge Gertner writes that “[a]nchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard.” When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction. In effect, the 300-odd page Guideline Manual provides ready-made anchors.” Nancy Gertner, What Yogi Berra Teaches About Post-Booker Sentencing, 115 YALE L.J. POCKET PART 137, 138 (2006) (quoting Birte Englich & Thomas Mussweiler, Sentencing Under Uncertainty: Anchoring Effects in the Courtroom, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536 (2001)).


322 Id. at 45 n.242 (defining the “post-PROTECT Act time period”), 46.

323 UNITED STATES SENTENCING COMMISSION, FINAL QUARTERLY DATA REPORT FISCAL YEAR 2006 1 (2007), available at http://www.ussc.gov/sc_cases/USSC_Quarter_Report_Final_06.pdf. It should be noted that because the government’s fiscal year runs from October 1 through September 30, sentencing data from the first quarter of fiscal year 2006 is counted both in the Booker Report, supra note 321 and in this report.


327 Id. at 2.
Third Circuit's decision in *Forman II* held that a compliance rate of 75.4 percent with the Parole Guidelines was insufficient to establish that the Parole Guidelines were "laws" within the meaning of the Ex Post Facto Clause, the rate of compliance with the post-*Booker* Sentencing Guidelines is much higher, and the Supreme Court's opinions in *Morales* and *Garner* suggest that *Forman II* applied an excessively restrictive standard to the identification of legislative enactments governed by the Ex Post Facto Clause. The correct inquiry is not, as *Forman II* held, whether the Guidelines form an "unyielding conduit" from which the governmental entity charged with their implementation lacks "substantial flexibility" to depart, but rather whether the Guidelines exert sufficient influence over the entity's exercise of discretion so as to create "a sufficient risk of increasing the measure of punishment attached to the covered crimes." Although the district court in *Garner* never determined on remand whether the revised parole rule at issue in that case did in fact create a sufficient risk of increased injury, and the Supreme Court has not revisited the issue since *Garner*, the fact that district courts impose within-Guidelines or government-sponsored below-Guidelines sentences between 86 and 87 percent of the time in the post-*Booker* era provides compelling evidence that retroactive application of upwardly revised Sentencing Guidelines would present a significant risk of increased punishment, and that the Ex Post Facto Clause therefore continues to prohibit the retroactive application of the Guidelines.

When the rate of appellate reversal of Guidelines variances is taken into account, the conclusion that retroactive application of upwardly revised Guidelines creates a substantial risk of increased punishment becomes inescapable. Although the Sentencing Commission has never promulgated a statistical analysis of the relationship between appellate reversals and the Sentencing Guidelines range under post-*Booker* reasonableness review, the New York Council of Defense Lawyers ("NYCDL") undertook such an analysis of 1,515 appellate cases decided between January 1, 2006, and November 16, 2006, which it submitted as an Appendix to its *amicus curiae* brief in support of the petitioner in *Rita*. The NYCDL Report found that, while the circuits that have not explicitly adopted a presumption of reasonableness are slightly more tolerant of Guidelines variances than circuits that have adopted the presumption, all of the federal appellate circuits indisputably treat the Sentencing Guidelines range as the default "reasonable" sentence, one for which a sentencing court need not provide any justification beyond the fact that it is recommended by the Guidelines, while variances from the Guidelines, particularly sentences below the Guidelines

328 *Forman II*, 776 F.2d 1156, 1163 (3d Cir. 1985).
329 *Id.* at 1160 (quoting *Forman I*, 709 F.2d 852, 862 (3d Cir. 1983)).
range, are subjected to much more onerous scrutiny. Of the 1,152 appeals of within-Guidelines sentences that the NYCDL reviewed, only sixteen, or approximately 1.4 percent, were reversed—and fifteen of those reversals were on procedural grounds. Moreover, significant disparities existed between appeals of above-Guidelines variances, which were affirmed as reasonable in 147 of 154 cases, and below-Guidelines variances, which were reversed as unreasonably lenient in 60 of the 71 cases appealed by the government, but affirmed in all 138 cases appealed by the defendant. Indeed, some courts have gone so far as to suggest that a below-Guidelines sentence can never be unreasonably high.

While the formal analysis in Part IV.A above might suggest that the Ex Post Facto Clause should apply to revised Sentencing Guidelines only in those circuits that apply the presumption of reasonableness, the NYCDL’s research indicates that the application of upwardly revised Guidelines at sentencing would create a significant risk of increased punishment for defendants in any federal court, as even the federal circuits that do not apply a formal presumption of reasonableness are nevertheless highly deferential to the Guidelines in practice. The seven federal circuits that have adopted the presumption of reasonableness collectively affirmed within-Guidelines sentences appealed by the defendant in 686 out of 693 cases, or approximately 99 percent. By comparison, the five circuits that have not adopted the presumption affirmed within-Guidelines sentences in 450 of 459 cases, or 98 percent. Both groups of circuit courts have shown a similar tolerance for above-Guidelines variances and hostility to below-Guidelines variances. Circuits applying the presumption of reasonableness collectively affirmed 88 of 93 upward variances—approximately

332 Id. at 3a. In United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006), the only case in which a federal appellate court has found a within-Guidelines sentence to be substantively unreasonable, the successful appellant was subsequently re-sentenced to the same 87-month sentence that the circuit court initially vacated, and her re-sentencing was affirmed as reasonable. See United States v. Goodwin, 486 F.3d 449 (8th Cir. 2007).

333 NYCDL Report, supra note 331, at 2a.

334 Id.

335 For example, in United States v. George, 403 F.3d 470, 473 (7th Cir. 2005), the court commented that “[i]t is hard to conceive of below-range sentences that would be unreasonably high,” a sentiment that was reaffirmed and expanded in United States v. Tahzib, 513 F.3d 692 (7th Cir. 2008) (“If a below-guidelines sentence will almost never be unreasonable, the same must be true for the lowest possible within-guidelines sentence.”) (citing George, 403 F.3d at 473). See also United States v. Griffin, 187 F. App’x 13, 16 (1st Cir. 2006) (observing that although “[a] presumption of reasonableness may not attach to a guidelines sentence . . . a sentence below the guideline range nonetheless suggests mitigating factors are already at work”).


337 NYCDL Report, supra note 331, at 3a.

338 Id.
95 percent—while the other circuits collectively affirmed 59 of 61 upward variances, or 97 percent.\textsuperscript{339} Conversely, the circuits applying the presumption of reasonableness collectively reversed 47 of the 51 downward variances that were appealed by the government during the relevant time frame, a reversal rate of 92 percent, while the other circuits collectively reversed 13 of 20 downward variances appealed by the government—a reversal rate of 65 percent.\textsuperscript{340} Although the reversal rate of downward variances in circuits not applying the presumption of reasonableness is significantly lower than the rate in circuits that do apply the presumption, the relatively small set of downward variance cases in no-presumption circuits examined in the NYCDL Report, in conjunction with the facts that those circuits still reversed over half of the downward variances appealed by the government and that the vast majority of defendants even in no-presumption circuits are sentenced within the Guidelines, suggests that even in those circuits, sentencing outcomes are still tightly bound to the Sentencing Guidelines, and that the application of upwardly revised Guidelines to a defendant’s sentence will almost inevitably result in a higher sentence than would have been the case under the Guidelines in effect at the time of the offense.

Of course, \textit{Demaree} might nevertheless be defended as correctly decided if the Seventh Circuit, despite having adopted the presumption of reasonableness and applying extent-of-the-variance review, were a statistical anomaly in which the general sentencing trends identified by the NYCDL did not apply. However, the NYCDL’s analysis demonstrates that, although the Seventh Circuit has formally defined “reasonableness” under \textit{Booker} in quite deferential terms “as meaning ‘something like lying well outside the boundaries of permissible differences of opinion,’”\textsuperscript{341} its application of that standard to Guidelines’ variances, particularly downward variances, has not borne out in practice \textit{Demaree}’s promise of “light appellate review”\textsuperscript{342} of sentencing decisions. The NYCDL Report indicates that, during the relevant time frame, the Seventh Circuit reversed four of the six downward variances appealed by the government, while affirming all eight upward variances appealed by the defendant, and reversing—on procedural grounds—only one of the 86 within-Guidelines sentences appealed by the defendant.\textsuperscript{343} In the Sixth Circuit, which issued the dicta in \textit{Barton} upon which \textit{Demaree} relied,\textsuperscript{344} the NYCDL Report indicates that the court affirmed 90 of the 91 within-Guidelines sentences and 15 of the 17 above-Guidelines variances, while reversing one of the two downward variances pre-

\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} United States v. Wallace, 458 F.3d 606, 610 (7th Cir. 2006) (quoting Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002)).
\textsuperscript{342} United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006), \textit{cert. denied}, 127 S. Ct. 3055 (2007).
\textsuperscript{343} NYCDL Report, \textit{supra} note 331, at 5a, 116a-31a.
\textsuperscript{344} United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006), \textit{cited in Demaree}, 459 F.3d at 794; \textit{see supra} note 89 and accompanying text.
sented for review. Likewise, notwithstanding Chief Judge Jones’s description of the Sentencing Guidelines as merely “informative” and “purely advisory” in Rodarte-Vasquez, the Fifth Circuit’s record of appellate review demonstrates quite clearly that it views the Guidelines as far more than simple “advice.” The NYCDL found that, during the same time frame, the Fifth Circuit affirmed 27 of 28, or 96 percent, of the upward variances it reviewed, and affirmed all 86 within-Guidelines sentences, while reversing all five downward variances that were appealed by the government. The same is true in the Eleventh Circuit, despite that court’s expression of sympathy for Demaree’s holding in Mathis. According to the NYCDL Report, the Eleventh Circuit, despite having declined to adopt a presumption of reasonableness, affirmed all 23 upward variances and 190 of 191 within-Guidelines sentences appealed by the defendant within the relevant time frame, while reversing 5 of the 9 downward variances appealed by the government. In these circuits, as in all other federal circuits, the review statistics clearly indicate that the Guidelines continue to strongly influence sentencing decisions and reasonableness review, and that the retroactive application of an upwardly revised Guidelines range would create a substantial risk of increased punishment for a criminal defendant sentenced under the revised Guidelines Manual.

V. CONCLUSION: THE EX POST FACTO CLAUSE PROHIBITS RETROACTIVE APPLICATION OF UPWARDLY REVISED SENTENCING GUIDELINES IN THE POST-BOOKER ERA

The Seventh Circuit’s decision in United States v. Demaree applied an obsolete methodology to a set of implausible assumptions about the realities of post-Booker sentencing in order to reach a patently unjust outcome, stripping criminal defendants of a fundamental constitutional protection against ex post facto legislation on the basis of the Sentencing Guidelines’ supposedly “advisory” status that is, both in form and practice, much more than merely advisory on the courts. The result is a one-way ratcheting system that almost inevitably increases the degree of punishment imposed on defendants to whom it is applied. Under Demaree, the sentencing court must retroactively apply the Guidelines Manual in effect on the date of the defendant’s sentencing, including any revisions that result in a higher Guidelines range than would have been the case under the Guidelines in effect at the time the defendant’s offense was commit-

345 NYCDL Report, supra note 331, at 5a, 95a-115a.
346 United States v. Rodarte-Vasquez, 488 F.3d 316, 325 (5th Cir. 2007) (Jones, C.J., concurring); see supra note 97 and accompanying text.
347 NYCDL Report, supra note 331, at 5a, 72a-94a.
348 United States v. Mathis, 239 F. App’x 513, 517 n.2 (11th Cir. 2007); see supra note 99 and accompanying text.
349 NYCDL Report, supra note 331, at 6a, 204a-39a.

https://researchrepository.wvu.edu/wvlr/vol110/iss3/6
If the district court grants a downward variance from the "advisory" Guidelines range, its leniency is likely to be reversed as "unreasonable" by the appellate court, while a sentence within or above the revised Guidelines range is almost certain to be affirmed. This is precisely the type of situation, involving the failure to provide fair notice to defendants of the potential penalties imposed by law on their actions, and, more significantly, creating the possibility of arbitrary or vindictive legislation, that the Ex Post Facto Clause was intended to prevent.

The Supreme Court's chief concern in Booker, as well as earlier cases such as Apprendi and Blakely, was with protecting a criminal defendant's Sixth Amendment rights against unconstitutional sentence enhancements imposed on the basis of judicially-found facts proved only by a preponderance of the evidence. Despite the Court's pro-defendant intentions, however, the Seventh Circuit's decision in Demaree, in conjunction with the manner in which post-Booker reasonableness review has been implemented by the federal courts of appeals, has created a perverse situation in which defendants are deprived of another fundamental right—the constitutional protection against ex post facto laws—while enjoying no appreciable increase in protection from sentencing enhancements applied on the basis of judicially-found facts than was the case under the pre-Booker regime. In light of that reality, the Demaree court's suggestion that its holding was in the interests of criminal defendants, protecting them from the government's "rearguard action against Booker," rings hollow.

Some district courts within the Seventh Circuit have mitigated the effects of Demaree by assuming the discretionary ability to apply either the Guidelines in effect at the time of sentencing or those in effect at the time the offense was committed. See United States v. Jung, 473 F.3d 837, 844 (7th Cir. 2007); United States v. Caputo, 456 F. Supp. 2d 970, 983-84 (N.D. Ill. 2006); see also Douglas Berman, SENTENCING LAW AND POLICY, Does The Seventh Circuit Know Its Own Law?, http://sentencing.typepad.com/sentencing_law_and_policy/2007/01/does_the_sevent.html/ (Jan. 18, 2007 5:06 PM). While the assertion of the discretionary ability to apply the lower Guidelines in effect when the offense was committed avoids some of the unfairness that would accompany a consistent application of the Demaree rule, that approach is flatly inconsistent with the Guidelines Manual's express direction that the sentencing court "shall" apply the Guidelines in effect on the date of sentencing, unless doing so would violate the Ex Post Facto Clause—which, under Demaree, cannot happen. U.S.S.G. § 1B1.11(a) (emphasis added). The fact that some courts within the Seventh Circuit feel compelled to apply an earlier version of the Guidelines in clear violation of § 1B1.11(a) is further proof that these courts view the Guidelines range as a benchmark that makes a real difference to a defendant's ultimate sentence even in the post-Booker era.

Cf. Rita v. United States, 127 S. Ct. 2456, 2476 (2007) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the Court's development of substantive reasonableness review "has reintroduced the constitutional defect that Booker purported to eliminate"); see also United States v. Kandirakis, 441 F. Supp. 2d 282, 297, 320 (D. Mass. 2006) (arguing that under post-Booker reasonableness review, "the Guidelines—and their judge-made factual findings—are still the driving force behind federal sentencing," and that "[t]he jury is now relegated to an advisory capacity").

Given the Seventh Circuit’s established practice of reversing most downward variances while affirming virtually all within-Guidelines sentences and upward variances, Demaree’s reference to the “advisory” nature of the post-Booker Guidelines hardly seems a defendant-friendly justification for depriving defendants of a constitutional prohibition on ex post facto legislation intended to protect them from increased punishment.

No other federal circuit court has yet adopted the view that the Ex Post Facto Clause no longer applies to the retroactive application of revised editions of the Sentencing Guidelines Manual in the post-Booker era, but several courts have been sufficiently persuaded by the superficial appeal of Demaree’s reasoning to express sympathy for its holding in dicta, and at least one district court outside the Seventh Circuit has held on the basis of Demaree that the retroactive application of upwardly revised Sentencing Guidelines is no longer precluded by the Ex Post Facto Clause. More circuit courts will have to address ex post facto challenges to the application of revised Sentencing Guidelines in the foreseeable future; it is therefore essential for courts facing this issue to recognize that the Supreme Court’s decisions in California Department of Corrections v. Morales and Garner v. Jones rejected the categorical distinction between “laws” and “guideposts” that was developed by the federal appellate courts in response to ex post facto challenges to the Parole Guidelines, and to apply the two-pronged Garner analysis to the Sentencing Guidelines more carefully than Demaree did. The other federal courts of appeals should decline to extend Demaree’s erroneous ruling to their own jurisdictions, thereby limiting the injustice created by the Demaree rule to a single federal circuit and, one might hope, encouraging the Seventh Circuit to revisit the issue en banc. In a hypothetical world in which Booker and Demaree’s promise of a sentencing scheme in which district courts enjoy broad discretion to depart from the Guidelines to whatever extent they find justified by an individualized assessment of the circumstances presented in a defendant’s case was fulfilled, and in which the appellate courts applied a standard of reasonableness review that was as deferential to the district court’s judgment as the fictitious characterization of post-Booker appellate review employed by the Demaree court to rationalize its holding, or the idealized standard described by the Supreme Court in Rita and Gall, then a compelling case might be made that subsequent revisions to the Sentencing Guidelines, reflecting the informed expertise of the Sentencing Commission, should not be limited in their retroactive application by the constitutional restraint imposed by the Ex Post Facto Clause. Until the day arrives, however, when appellate courts’ review practices match Demaree and Rita’s deferential rhetoric, the constitutional rights of criminal defendants should not be sacrificed to a formalistic ex post facto analysis that ignores both Supreme Court precedent and the reality of the United States Sentencing Guidelines’ overriding influence in post-Booker sentencing.