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THE CONSTITUTIONALITY OF POST-CRIME GUIDELINES SENTENCING

Benjamin Holley†

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Since 1987, the Federal Sentencing Guidelines Manual has dominated criminal sentencing practice in the federal courts. Revised regularly, the Manual provides base offense levels, aggravating and mitigating factors, and a range of sentences for a sentencing judge to consider. Because of the slow pace of the judicial system, defendants sometimes commit their crimes while one Manual is in effect, but are not sentenced until after a new Manual is issued. When the new Guidelines increase the range of punishments, potential ex post facto problems arise.

United States v. Booker famously excised the mandatory provisions of the statute authorizing the Guidelines, thereby making the Guidelines “effectively advisory.” Judges are still required to calculate the applicable Guidelines range, however, and will rarely be overturned if they impose a within-Guidelines sentence. The question thus arises: if the Guidelines are not formally mandatory, but remain the de facto basis for sentencing, does use of post-crime Guidelines violate the Ex Post Facto Clause? A circuit split on this issue has developed; the Seventh Circuit has authorized the use of post-crime Guidelines, while the D.C. Circuit held that such use can violate the ex post facto prohibition. Because the Guidelines are a critical and ever-present part of federal criminal practice, the resolution of this issue will have wide-ranging implications.

2. Id. ch. 1, pt. A.4(b), introductory cmt. (2009); see id. ch. 1, pt. A.1.2 (noting that the commission has authority to submit guideline amendments to Congress each year).
5. Id.
7. See infra note 37 and accompanying text.
8. “Post-crime Guidelines,” as used in this article, means Sentencing Guidelines that take effect after the crime for which the defendant is being sentenced.
This article addresses the arguments for each side, considers both the legal standards and empirical evidence, and ultimately argues that use of post-crime Guidelines does not violate the \textit{Ex Post Facto} Clause. Part I begins by providing a short primer on Guidelines sentencing and an example of the \textit{ex post facto} problem.\textsuperscript{11} Part II considers \textit{ex post facto} jurisprudence, particularly as developed in cases analyzing and measuring the use (or non-use) of discretion. Part III then examines the intersection of the Guidelines and \textit{ex post facto} jurisprudence, outlining the facts and holdings of the relatively few cases that have considered this issue. Finally, using recent data demonstrating how the Guidelines are applied in practice, Part IV argues that the use of post-crime Guidelines does not violate the \textit{Ex Post Facto} Clause because it does not significantly increase the likelihood of a harsher sentence, either as a legal matter or as an empirical one.

I. GUIDELINES SENTENCING AND BOOKER

A. Structure and History of the Sentencing Guidelines\textsuperscript{12}

The Sentencing Guidelines Manual is produced and regularly revised by the United States Sentencing Commission, which is composed of seven voting members (at least three of whom are federal judges) and two nonvoting \textit{ex officio} members.\textsuperscript{13} The Sentencing Commission continually refines the Guidelines, increasing and (less often) decreasing base offense levels, adding or (less often) removing aggravating and mitigating factors, and creating new guidelines to reflect new criminal laws.\textsuperscript{14}

The Guidelines and their amendments are both descriptive and prescriptive: the Commission seeks to reflect actual sentencing practice, but also alters the Guidelines to comply with congressionally-mandated directives and new laws.\textsuperscript{15} The proposed

\textsuperscript{11}. See discussion \textit{infra} Part I.

\textsuperscript{12}. It is assumed the reader is familiar with the basics of calculating sentences using the Guidelines. For additional background, see \textsc{U.S. Sentencing Guidelines Manual}, ch. 1, pt. B (2009).

\textsuperscript{13}. See id. ch. 1, pt. A.1.1.

\textsuperscript{14}. See id. ch. 1, pt. 2 (describing the process by which the United States Sentencing Commission refines the guidelines).

\textsuperscript{15}. See Gall v. United States, 552 U.S. 38, 46 (2007) (“[The Guidelines are] the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”); \textit{id.} at 46 n.2 (“Notably, not all of the Guidelines are tied to this empirical evidence.”).
amendments are released on or before the first day of May of each year; the revised Guidelines Manual then automatically goes into effect the first day of November, unless Congress affirmatively rejects it.

These annual changes lead to the *ex post facto* problem. As an example, consider a defendant convicted of illegal possession of hydrocodone, a Schedule III controlled substance. Under the 2008 Guidelines, trafficking 700,000 units of hydrocodone would constitute a base offense level of 20; using the 2009 Guidelines, that same offense would receive a base level of 30. Assuming no criminal history and no aggravating or mitigating factors, the 2008 Guidelines suggest a sentence of 33 to 41 months, while the 2009 Guidelines provide a suggested sentence of 97 to 121 months, three times as much as the prior range.

When developing the Guidelines system, Congress, “[a]lthough aware of possible *ex post facto* clause challenges to application of the guidelines in effect at the time of sentencing[,] . . . did not believe that the *Ex Post Facto* Clause would apply to amended sentencing guidelines.” The Sentencing Commission concurred with this belief and initially did not address the issue. Despite these expectations, every court of appeals held that the use of post-crime mandatory Guidelines would violate the *Ex Post Facto* Clause. The Supreme Court likewise held that similar example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.


20. *See id.*


23. *Id.* § 1B1.11(a), cmt. background (citing S. REP. NO. 98-225, at 77–78 (1983)).

24. *Id.*

mandatory state guidelines violated the clause.\footnote{26}

Bowing to the courts’ interpretation, the Commission added language to the Guidelines instructing courts to “use the Guidelines Manual in effect on the date that the defendant is sentenced” unless “the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the \textit{Ex Post Facto} Clause of the United States Constitution,” in which case “the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.”\footnote{27} Because every federal court had already concluded that the application of the post-crime Guidelines would violate the \textit{Ex Post Facto} Clause, district courts routinely used the time-of-crime Guidelines Manual.

\textbf{B. Booker Changes the Game}

The rationale for this practice—that mandatory Guidelines are functionally “laws” and thus subject to the \textit{Ex Post Facto} Clause—was undercut in 2005 with the Supreme Court’s decision in \textit{United States v. Booker}.\footnote{28} The “remedial” portion of \textit{Booker} famously rendered the Guidelines “effectively advisory” by excising the portions of the statute making them mandatory.\footnote{29} District courts were instructed to consider the Guidelines as only one of the several sentencing factors listed in 18 U.S.C. § 3553(a) and appellate courts were told to review sentencing decisions for “reasonableness.”\footnote{30}

Justice Scalia, in dissent, wondered whether a reasonableness review would

\begin{quote}
preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges. . . . [W]ill it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion?
\end{quote}

\footnote{31}

\begin{thebibliography}{9}
\bibitem{26} See generally Miller v. Florida, 482 U.S. 423 (1987). \textit{Miller} is discussed in detail \textit{infra} Part II.B.

\bibitem{27} U.S. \textit{SENTENCING GUIDELINES MANUAL} § 1B1.11(a)–(b) (1) (1992).

\bibitem{28} 543 U.S. 220, 222 (2005) (holding in part that mandatory sentencing guidelines violate the Sixth Amendment).

\bibitem{29} \textit{Id.} at 245.

\bibitem{30} \textit{Id.} at 224, 245.

\bibitem{31} \textit{Id.} at 313 (Scalia, J., dissenting). Justice Scalia wrote that “[t]ime may tell” the effects of \textit{Booker}’s remedial opinion, and, as argued \textit{infra} Part IV.B, it has. \textit{Id.}
\end{thebibliography}
Courts of appeal struggled to answer such questions, taking varying approaches to the weight to give sentences that fell within the Guidelines and those that were outside the recommended range. The Supreme Court has thus had to revisit and clarify the holding in *Booker* in several subsequent cases.

*Rita v. United States* held that appellate courts may consider a within-Guidelines sentence presumptively reasonable, because by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

*Gall v. United States*, issued just a few months after *Rita*, emphasized that “the Guidelines are only one of the factors to consider when imposing sentence,” and that, while appellate courts may apply a presumption of reasonableness to within-Guideline sentences, district courts may not. *Gall* also clarified that no court may presume that an outside-the-Guidelines sentence is unreasonable.

*Kimbrough v. United States*, issued the same day as *Gall*, continued the Court’s emphasis on discretion, holding that district courts may (at least in cocaine cases) impose sentences outside the Guidelines based on no more than a policy disagreement with the Commission. Two years later, *Spears v. United States* demonstrated the increasingly exasperated feeling on the Court, as the per curiam decision strongly chastised lower court interpretations of *Kimbrough*, writing that “[i]f the error of [the lower court] opinions

33. *Id.* at 347.
37. *Id.* at 51.
38. *Id.* at 51.
40. *Id.* at 91.
41. 129 S. Ct. 840, 845 (2009) (per curiam). “The dissent says that ‘Apprendi, Booker, Rita, Gall, and Kimbrough have given the lower courts a good deal to digest over a relatively short period.’ True enough—and we should therefore promptly remove from the menu the Eighth Circuit’s offering, a smuggled-in dish that is indigestible.” *Id.* (internal citation omitted).
is, as we think, evident, they demonstrate the need to clarify at once the holding of Kimbrough."

II. **Ex Post Facto Clause Jurisprudence**

A. **History and Purpose of the Ex Post Facto Clause**

Article I, Section 9 of the Constitution explicitly forbids *ex post facto* legislation, stating that "[n]o Bill of Attainder or ex post facto Law shall be passed." This bare assertion, with no definition or further guidance, leaves substantial room for interpretation. However, "'[a]lthough the text of the Ex Post Facto Clause is not self-explanatory, its basic coverage has been well understood at least since 1798," when Justice Chase outlined four types of *ex post facto* laws in *Calder v. Bull*:

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.

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42. *Id.*

43. U.S. CONST. art. I, § 9, cl. 3. Section 10 further prohibits states from passing *ex post facto* legislation, one of the few restrictions on the states in the Constitution. U.S. CONST. art. I, § 10, cl. 1. The two clauses are interpreted *in pari materia* and the Supreme Court has developed the doctrine in cases arising from both state and federal courts. See Stogner v. California, 539 U.S. 607, 610 (2003) (discussing the "Constitution's two Ex Post Facto Clauses" in tandem) (arising out of state court); Livingston v. Moore, 32 U.S. 469 (1833) (arising out of federal court).


45. 3 U.S. 386, 390 (1798).
The Supreme Court continues to rely on this definition in modern cases, thereby mitigating at least some of the clause’s ambiguity.

The purpose of the clause, according to the Court, is twofold. First, it is designed “to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” Second, it seeks to “restrain[] arbitrary and potentially vindictive legislation.” It does not, however, protect “an individual’s right to less punishment,” and “should not be employed for ‘the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.’”

Moreover, as the Seventh Circuit has recognized, the clause was not designed to “enable criminals to calculate with precision the punishments that might be imposed on them.” for doing so would “be both remote from the concerns that animate the ex post facto clause and infeasible.”

The four categories established in Calder are strictly interpreted. “[T]he focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of ‘disadvantage’ . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.” The Supreme Court has explicitly refused to accept the argument that the Ex Post Facto Clause “forbids any


48. Id. at 29 (citations omitted). See also Calder, 3 U.S. at 389 (Chase, J.). With very few exceptions, the advocates of [ex post facto laws in England] were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.

49. Weaver, 450 U.S. at 30.


52. Id. at 793.

53. Morales, 514 U.S. at 506 n.3 (internal citation omitted).
legislative change that has any conceivable risk of affecting a prisoner’s punishment.”

Minor changes “might create some speculative, attenuated risk of affecting a prisoner’s actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes.”

Determining the required quantum of change has thus been the subject of several cases before the courts; laws permitting discretion further complicate the analysis.

B. Discretion and the Ex Post Facto Clause

The interaction between the Ex Post Facto Clause and discretionary decisions has received significant attention from the Court. A key case in this regard is Lindsey v. Washington, which considered the effect of a statute removing sentencing judges’ discretion for certain crimes. The petitioners in Lindsey were convicted of grand larceny; at the time of their crime, the relevant sentencing statute permitted the judge to impose a sentence of anywhere from zero to fifteen years in prison. At the time of sentencing, however, a new law directed that “the court . . . shall fix the maximum term of such person’s sentence only,” thus eliminating the judge’s discretion and requiring imposition of a fifteen-year sentence. The Supreme Court held that this elimination of discretion constituted an ex post facto violation because “the standard of punishment adopted by the new statute is more onerous than that of the old . . . . It is plainly to the substantial disadvantage of petitioners . . . .” Thus, even though the judge could have sentenced petitioners to the sentence they ultimately received, his inability to sentence them to less time violated the prohibition on ex post facto legislation.

The Court addressed more subtle limits on judicial discretion in Miller v. Florida, a case involving sentencing guidelines remarkably similar to the pre-Booker federal system. The Florida guidelines at issue in Miller were functionally mandatory; the state

54. Id. at 508.
55. Id. at 508–09.
56. 301 U.S. 397 (1937).
57. Id. at 398.
58. Id. at 398 (quoting 1935 Wash. Sess. Laws 308) (omissions in original).
59. Id. at 401–02.
60. 482 U.S. 423 (1987).
rule provided that “[d]epartures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure.”61 Unlike sentences outside the guideline range, within-guidelines sentences were not subject to appellate review.

Therefore, the Court noted, “even if the revised guidelines law did not ‘technically . . . increase . . . the punishment annexed to [petitioner’s] crime,’ . . . it foreclosed his ability to challenge the imposition of a sentence longer than the presumptive sentence under the old law.”62 Writing for a unanimous Court, Justice O’Connor distinguished previous parole guideline cases, noting that the Florida guidelines did not “simply provide flexible ‘guideposts’ for use in the exercise of discretion; instead, they create a high hurdle that must be cleared before discretion can be exercised.”63 Thus, while judges retained discretion, the Court believed that they were highly unlikely to exercise it; actual practice overcame the formal rule.

A few years later, in California Department of Corrections v. Morales,65 the Court adopted the same fact-based approach, but reached the opposite conclusion. Morales considered a change to the rules of the California Board of Prison Terms that allowed the Board to delay parole hearings for certain prisoners for up to three years, if the Board, in its discretion, believed that it was “not reasonable to expect that parole would be granted at a hearing during the following years.”66 The rule replaced the one in effect at the time of Morales’s crime, which provided for parole hearings on an annual basis.67 Importantly, a parole hearing did not guarantee release; it merely provided the Board the discretion to grant or

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63. Miller, 482 U.S. at 433 (quoting Lindsey v. Washington, 301 U.S. 397, 401 (1937) (omissions and bracket in original)).
64. Id. at 435.
66. Id. at 503 (quoting CAL. PENAL CODE § 3041.5(b)(2) (West 1982) (amended 1994)).
67. Id.
deny parole. Morales argued that application of the new rule constituted an *ex post facto* violation because, by making parole hearings less accessible, the rule increased the length of his sentence. The Ninth Circuit agreed, holding that because “the state has denied Morales opportunities for parole that existed under prior law, [it made] the punishment for his crime greater than it was under the law in effect at the time his crime was committed.”

The Supreme Court reversed and held that, “[i]n light of the particularized findings required under the amendment and the broad discretion given to the Board, the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings.” The Court also noted that a contrary holding would mean that “any legislative change that has any conceivable risk of affecting a prisoner’s punishment” would be a violation of the clause. Embracing such a 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.” Because the California rule created “only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment,” the Court rejected Morales’s claims.

*Morales* distinguished prior cases by arguing that, “[i]n contrast to the laws at issue in *Lindsey* . . . and *Miller* (which had the purpose and effect of enhancing the range of available prison terms . . . ),” the Amendment only applied to “prisoners who have no reasonable chance of being released.” That is, while the Board formally retained discretion to grant parole, it was highly unlikely to do so.

The unifying factor of *Lindsey*, *Miller*, and *Morales* is the Court’s view of how discretion is used in practice. When the sentencing judge has no discretion to impose a lesser sentence (as in *Lindsey*) or discretion that can only be exercised by passing over a “high hurdle” (*Miller*), the Court finds an *ex post facto* violation. When,

68. *Id.*
69. *Id.* at 504.
70. *Morales v. Cal. Dep’t of Corr.*, 16 F.3d 1001 (9th Cir. 1994).
72. *Id.* at 508.
73. *Id.*
74. *Id.* at 509.
75. *Id.* at 507.
alternatively, favorable (to the defendant) discretion is unlikely, even if formally available, no violation is present (*Morales*). Interestingly, in none of these cases did the Court consider empirical evidence, opting instead for its own perception of likely practice.

Determining the appropriate line separating sufficient use of discretion from formally-available-but-unlikely-in-practice discretion is difficult.\(^{76}\) The Court’s initial decisions were obtuse on this point. *Morales* noted vaguely that the Court has “long held that the question of what legislative adjustments ‘will be held to be of sufficient moment to transgress the constitutional prohibition’ must be a matter of ‘degree.’”\(^{77}\) The appropriate standard, it indicated, is “whether [the new law] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.”\(^{78}\) The meaning of “sufficient” is thus critical, though the Court explicitly refused to “articulate a single ‘formula’ for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition.”\(^{79}\) It did hold, however, that “speculative and attenuated” and other “such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause.”\(^{80}\)

Five years after *Morales*, in *Garner v. Jones*,\(^{81}\) the Court provided greater specificity, making the standard one of “significant risk.”\(^{82}\) *Garner*, like *Morales*, involved the retrospective application of a rule reducing the frequency of parole hearings, in this case from once every three years to once every eight years.\(^{83}\) The Court held that the rule change did not violate the *Ex Post Facto* Clause, even though the Parole Board issued statements “indicating that its

\(^{76}\). *Cf.* Garner v. Jones, 529 U.S. 244, 250 (2000) (“Whether 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.”).

\(^{77}\). *Morales*, 514 U.S. at 509 (quoting Beazell v. Ohio, 269 U.S. 167, 171 (1925)).

\(^{78}\). *Id.*

\(^{79}\). *Id.*

\(^{80}\). *Id.*

\(^{81}\). 529 U.S. 244 (2000).

\(^{82}\). *Id.* at 251. Interestingly, Justice Souter’s dissent characterized the issue as a “‘sufficient’ or substantial” risk. *Id.* at 260–61 (Souter, J., dissenting) (citations omitted). None of the opinions explicated the import, if any, of this distinction.

\(^{83}\). *Id.* at 255.
policies were intended to increase time served in prison.\(^8^4\)

To reach this result, Garner established a two-prong inquiry for evaluating whether a change in policy “create[s] a significant risk of increased punishment.”\(^8^5\) First, the Court conducts a formal analysis of the law to determine if, on its face, the law constitutes an impermissible \textit{ex post facto} law.\(^8^6\) Second, the Court looks to actual practice and the “operation” of the law “as a matter of fact.”\(^8^7\) The burden is placed on the defendant to make this showing: “When 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 by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.”\(^8^8\)

In applying this second prong, unlike its previous cases, the Court took note of statistical data regarding the percentage of inmates who were likely to face increased sentences. Though the dissent warned that “[e]ighty percent were . . . at least potentially negatively affected by the change,”\(^8^9\) the Court held that the prisoner-respondent had not provided enough information to indicate that the new rule “increase[d], to a significant degree, the likelihood or probability of prolonging respondent’s incarceration.”\(^9^0\) Such “speculation” was insufficient to warrant \textit{ex post facto} protection.

The Court also noted that “where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised.”\(^9^1\) That is, an

\(^8^4\) \textit{Id.} at 261 (Souter, J., dissenting).

\(^8^5\) \textit{Id.} at 257. \textit{See also} James R. Dillon, Doubting Demaree: The Application of \textit{Ex Post Facto} Principles to the United States Sentencing Guidelines After United States v. Booker, 110 W. VA. L. Rev. 1033, 1037 (2008) (“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 enactments is barred by the \textit{Ex Post Facto} Clause.”).

\(^8^6\) \textit{Garner}, 529 U.S. at 249–52.

\(^8^7\) \textit{Id.} at 256.

\(^8^8\) \textit{Id.} at 255.

\(^8^9\) \textit{See id.} at 251 (“[A]bout 90% of all prisoners are found unsuitable for parole at the initial hearing, while 85% are found unsuitable at the second and subsequent hearings.” (quoting Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 510–11 (1995))).

\(^9^0\) \textit{Garner}, 529 U.S. at 264 n.4 (Souter, J., dissenting).

\(^9^1\) \textit{Id.} at 256.

\(^9^2\) \textit{Id.}

\(^9^3\) \textit{Id.} at 253.
inmate’s expectation of any particular sentence is misplaced and, absent evidence of formal or practical limits on discretion, the inmate’s misplaced expectation does not give rise to an ex post facto claim. The existence of such formal and practical barriers to the exercise of discretion forms the heart of the post-crime Sentencing Guidelines debate.

III. COMBINING BOOKER AND EX POST FACTO

Both the Seventh Circuit and the D.C. Circuit, in factually similar cases, have considered the use of post-crime Guidelines, but they have reached opposite conclusions. This Part will consider these two cases and note how their differing analytic focus led to different results.

The Seventh Circuit, only a few months after the Supreme Court issued Booker, addressed the use of post-crime Guidelines. United States v. Demaree, authored by Judge Posner, considered a defendant convicted of wire fraud based on acts committed in 2000; her sentencing was not held until 2004. The 2000 Guidelines range was 18 to 24 months; under the 2004 version it was 27 to 33 months. The district judge imposed a sentence of 30 months, but noted that if he had used the 2000 Guidelines, he would have sentenced her to only 27 months, a 10% decrease (though still above the range given in the 2000 Guidelines). Demaree appealed and the Government confessed error. Despite this, the Seventh Circuit affirmed the sentence.

The Demaree court’s reasoning rested primarily on interpretation of Supreme Court precedent, tying Booker together with the Court’s rulings on the Ex Post Facto Clause. Demaree did not formally adopt the two-prong approach of Garner, though it did consider both the legal and practical limits on the sentencing judge’s discretion. On the practical level, the court argued that a

94. Id. at 259.
95. 459 F.3d 791 (7th Cir. 2006).
96. Id. at 792.
97. Id.
98. Id. at 792–93.
99. Id. at 793.
100. Id. at 795.
101. Id. at 793. The Court did not focus on additional problems created by the retroactive application of Booker; this article will likewise consider only the retroactive effects of the Guidelines. Id. at 795.
102. Id. at 795.
sentencing judge could easily bypass a rule requiring him to ignore the current Guidelines by simply indicating "not that he based his sentence on [the new Guideline] but that he took the advice implicit in it. A judge is certainly entitled to take advice from the Sentencing Commission." Because district court judges should not be expected to ignore the current Guidelines, formal application of post-crime Guidelines poses no greater risk of an increased sentence than application of the time-of-crime Guidelines.

Demaree also rejected the parties' argument that because within-Guidelines sentences are presumptively reasonable, judges are unlikely to actually exercise their discretion and would instead opt to avoid reversal by remaining within the Guideline range. The court rejected this practical point by turning to formal, legal analysis. "All [a judge] has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a)." So, while the Guidelines "nudge[]" the judge toward a particular sentence, "his freedom to impose a reasonable sentence outside the range is unfettered." Accordingly, the court affirmed Demaree's sentence.

The D.C. Circuit, in *United States v. Turner*, reached the opposite conclusion, largely on the basis of expectations about actual practice. *Turner*, like *Demaree*, arose in a white-collar context; in 2001, Peter Turner forged a document in an attempt to fraudulently cash in a life insurance policy. His sentencing range according to the 2001 Guidelines was 21 to 27 months, but the district court applied the then-current 2006 Guidelines, which

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103. *Id.*
104. *See id.*

105. This proposition was settled in the Seventh Circuit at the time and later approved by the Supreme Court in *Rita*. *See supra* note 37 and accompanying text.

107. *Id.*
108. *Id.* at 795.
109. *Id.*

110. *Id.* Somewhat oddly, the court did not address the district judge’s indication that he would have actually given a lighter sentence if he had used the time-of-crime Guidelines. *See id.*

111. 548 F.3d 1094 (D.C. Cir. 2008).
112. *Id.* at 1100.
113. *Id.* at 1095.
provided a range of 33 to 41 months. The D.C. Circuit remanded for resentencing, holding that the use of post-crime Guidelines violated the Ex Post Facto Clause because the Guidelines, though legally advisory, are de facto mandatory.

Specifically, Turner "conduct[ed] an ‘as applied’ constitutional analysis." It found significant the fact that the district court sentenced Mr. Turner at the low end of the (seemingly) applicable range. The court concluded, on this basis alone, that had the judge used the time-of-crime Guidelines “it is likely that Turner’s sentence would have been less than 33 months.” This was then re-phrased into a “substantial risk that Turner’s sentence was more severe” than it otherwise might have been, “thus resulting in a violation of the Ex Post Facto Clause.” With that decision, Turner created a “crisp and clear” circuit split.

IV. POST-CRIME GUIDELINES DO NOT IMPLICATE THE EX POST FACTO CLAUSE

Demaree established the correct rule under both the Supreme Court’s Booker and ex post facto jurisprudence. Indeed, additional Supreme Court cases and empirical evidence not available at the time of Demaree further strengthen its holding. This section advances, in two subparts, the argument that the use of post-crime Sentencing Guidelines does not violate the ex post facto prohibition. Part A considers the formal prong of the Garner test, arguing that Booker and subsequent cases have made application of the Guidelines purely discretionary. Part B addresses the second Garner prong, and argues that empirical evidence indicates that the formal discretion granted in Booker is, in fact, used by sentencing

114. Id. at 1096.
115. Id. at 1099–1100.
116. Id. at 1100.
117. Id.
118. Id.
119. Id.
120. See Douglas A. Berman, DC Circuit Produces Crisp Split on Ex Post Issues after Booker (Finally!!), SENT’G L. & POL’Y (Dec. 5, 2008, 11:26 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2008/12/dc-circuit-produces-crisp-split-on-ex-post-issues-after-booker-finally.html (“[T]hanks to a ruling today by the DC Circuit in United States v. Turner, this fascinating issue is now the subject of a crisp and clear circuit split.” (citation omitted)). Other appellate courts have addressed this issue in dicta, but none have addressed the issue head-on as in Demaree and Turner.
A. Formal Analysis Demonstrates Discretion

The legal landscape of the Guidelines post-Booker has become increasingly clear, as the Supreme Court has repeatedly emphasized the discretionary nature of the Guidelines in increasingly strong terms. Booker called the Guidelines “effectively advisory”\(^\text{121}\); Gall affirmed that non-Guidelines sentences were not presumptively unreasonable\(^\text{122}\); Kimbrough held that sentencing courts could vary from the Guidelines based on policy disagreements;\(^\text{123}\) and Irizarry noted that, because of the advisory nature of the Guidelines, “neither the Government nor the defendant may place the same degree of reliance on the type of ‘expectancy’ [of a particular sentence].”\(^\text{124}\)

1. Required Consultation Does Not Make Guidelines Mandatory

Despite the Court’s holdings and rhetoric, some argue that because “sentencing courts remain obligated to calculate and consider the appropriate guidelines range,”\(^\text{125}\) the Ex Post Facto Clause continues to apply.\(^\text{126}\) This approach is mistaken for several reasons. First, though sentencing judges are required to calculate a Guidelines range, they are also required to consider several other sentencing factors mentioned in § 3553(a).\(^\text{127}\) The sentence should reflect these factors, with the Guidelines serving merely as a starting point for consideration. Moreover, because district courts are not permitted to presume the reasonableness of within-Guidelines sentences, their analysis must necessarily go beyond the

126. See, e.g., United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008); Dillon, supra note 85. This argument, though phrased in legal terminology, implies that the use of discretion is likely limited in practice. In that regard, it might be better suited to analysis under Garner’s second prong, discussed infra part IV.B. The argument is refuted here, however, because it relies on legal standards for its premise. Regardless, the empirical demonstration provided infra Part IV.B responds to any alleged lack of actual discretion.
Guidelines.\textsuperscript{128}

Second, assuming that mere consultation of the Guidelines is sufficient to constitute an \textit{ex post facto} violation leads to absurd results. As Demaree noted, such an approach “would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges’ sentencing decisions.”\textsuperscript{129} For a violation of the \textit{Ex Post Facto} Clause to exist, a defendant must demonstrate a close nexus between the matter causing the risk of an increased sentence and the judge’s determination to increase the sentence. Otherwise, “any regulation traceable to Congress that disadvantages a criminal defendant” would be an \textit{ex post facto} law, a result that would “unmoor[] the constitutional prohibition . . . from both its purpose and the circumstances in which statutes and regulations have heretofore been deemed to be \textit{ex post facto} laws.”\textsuperscript{130} Merely noting that judges are to consider the Guidelines, then, does not inexorably lead to the conclusion that the Guidelines increase the likelihood of a higher sentence in a manner that violates the \textit{Ex Post Facto} Clause.\textsuperscript{131}

2. Review of Variances Does Not Make Guidelines Mandatory

The fact that appellate courts are required to consider the extent of a variance from the Guidelines is likewise insufficient to demonstrate an \textit{ex post facto} violation. Though the Supreme Court has indicated that significant departures from the Guidelines require more significant justifications by the sentencing court,\textsuperscript{132} it has rejected both the use of “rigid mathematical formula[e]” to determine the reasonableness of a non-Guidelines sentence and the requirement that district courts must provide “extraordinary” justifications for

\begin{thebibliography}{132}
\bibitem{128} See Gall, 552 U.S. at 49–50.
\bibitem{129} United States v. Demaree, 459 F.3d 791, 794 (7th Cir. 2006).
\bibitem{130} Id.
\bibitem{131} See United States v. Rodarte-Vasquez, 488 F.3d 316, 325 (5th Cir. 2007) (Jones, C.J., concurring) (“A logical corollary to Booker would seem to be that the \textit{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 offense was committed. Post-Booker, the guidelines are informative, not mandatory. A purely advisory regulation does not present an \textit{ex post facto} problem solely because it is traceable to Congress and will possibly disadvantage a defendant.”).
\bibitem{132} Gall, 552 U.S. at 46–47.
\end{thebibliography}
substantial variances. Requiring greater justification for greater variances merely recognizes that appellate courts generally require more information to judge the reasonableness of such sentences and thus encourages the district courts to provide that information. As the Supreme Court noted in *Irizarry*, “there is no longer a limit . . . on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in [§ 3553(a)].” These decisions indicate that, at least for the formal prong of the *Garner* inquiry, the Guidelines are not so rigid as to significantly increase the risk of a longer sentence.

B. Empirical Evidence Demonstrates Discretion

The *Garner* Court’s second prong is based on actual practice rather than legal rules. “When 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 by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.” Empirical data demonstrate not only that discretion is prevalent in the federal system, but that its use has consistently risen since *Booker*.

133. *Id.* at 47.
136. Dillon, *infra* note 85. Dillon, who argues that the Guidelines should still be subject to *ex post facto* analysis, concedes that the post-*Rita* empirical evidence “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,” and further notes that, at the time of publication, it was still “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.” *Id.* at 1037, 1083–84. As discussed *infra* the statistics now available demonstrate that *Rita* has indeed had the effect of increasing the exercise of discretion. *See infra* Part IV.B.1–2.
1. The Data Show an Increasing Rate of Non-Guidelines Sentences

In 2006, immediately after *Booker*, courts sentenced 38.2% of defendants outside the Guidelines, or 13.6%, if one excludes government-sponsored below-range sentences (G-S B-R). In 2007, the rate had risen to 39.1% (13.5% without G-S B-R). The non-Guidelines rate continued to rise in 2008, with 40.5% of sentences falling outside the Guidelines (14.9% without G-S B-R). The most current data, reflecting sentences from October 1, 2009 through September 30, 2010, indicate that 45.4% of sentences imposed were outside the Guidelines (19.7% without G-S B-R).

The Sentencing Commission has also compiled data reflecting total post-Booker and post-Gall/Kimbrough cases. That data reflects that 38.6% of all post-Booker sentences have been outside the Guidelines, and, continuing the trend noted in the above data,
post-Kimbrough/Gall cases\textsuperscript{145} show an increase to 40.8%.\textsuperscript{144} Interestingly, the D.C. Circuit, home of the Turner opinion, has the lowest rate of within-Guidelines sentences, with over half (52.0\%) of post-Booker sentences falling outside the Guidelines and 62.1\% of post-Kimbrough/Gall sentences outside the range.\textsuperscript{145} Even discounting government-sponsored below-range sentences,\textsuperscript{146} nearly one in five (18.9\%) post-Kimbrough/Gall sentences in the D.C. Circuit were outside the Guidelines.\textsuperscript{147} These statistics demonstrate a large and growing independence from the Guidelines and certainly do not indicate that the Guidelines present a “significant risk of increased punishment.”\textsuperscript{148}

The Third Circuit, in the parole guidelines context, considered whether any specific rate of compliance is necessary to establish a \textit{de facto} mandatory system. In \textit{Geraghty v. United States}

\begin{footnotesize}
\textsuperscript{143} “Post-Kimbrough/Gall means the period from the date of the United States Supreme Court decision in \textit{Kimbrough v. United States}, 552 U.S. [85] (2007) and \textit{Gall v. United States}, 552 U.S. [38] (2007) (December 10, 2007) and afterward.” \textit{Id.}
\textsuperscript{144} \textit{Id.} at tbl.1.

The cases in this table described as Post-Kimbrough/Gall reflect the 61,898 cases sentenced subsequent to the date of \textit{Kimbrough v. United States} and \textit{Gall v. United States} (December 10, 2007), through September 30, 2008 with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by February 10, 2009. Of these, 1,581 cases were excluded because information was missing from the submitted document that prevented the comparison of the sentence and the guideline range. The cases in this table described as Post-Booker reflect the 213,704 cases sentenced after the date of \textit{United States v. Booker} (January 12, 2005) through December 9, 2007. Of these, 8,102 cases were excluded for the above reason.

\textit{Id.} at tbl.1, n.1.
\textsuperscript{145} \textit{Id.} at tbl.1-DC.

The cases in this table described as Post-Kimbrough/Gall reflect the 326 cases sentenced in the D.C. Circuit subsequent to the date of \textit{Kimbrough v. United States} and \textit{Gall v. United States} (December 10, 2007), through September 30, 2008 with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by February 10, 2009. Of these, two cases were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range. The cases in this table described as Post-Booker reflect the 1,379 cases sentenced in the D.C. Circuit after the date of \textit{United States v. Booker} (January 12, 2005) through December 9, 2007. Of these, 15 cases were excluded for the above reason.

\textit{Id.} at tbl.1-DC, n.1.
\textsuperscript{146} See supra note 143.

\textsuperscript{147} \textit{Post-Gall Report}, supra note 142, at tbl.1-DC. In the Seventh Circuit, 24.9\% of nongovernment-sponsored, post-Kimbrough/Gall sentences were outside the guidelines. \textit{Id.} at tbl.1-7.
\end{footnotesize}
Parole Commission, for example, the court indicated that a non-guideline rate of 60% “might” indicate that “discretion is, in fact, unfettered,” while a within-guideline rate of “88% to 94%” would mean that “the ‘channel for discretion’ provided by the guidelines is in actuality an unyielding conduit.” In a later case, the court engaged in extensive statistical analysis and found that 24.6% of parole decisions fell outside of the parole guideline ranges. This, the court held, was “strong evidence of ‘substantial flexibility’ in the application of the parole guidelines.” As Judge Higginbotham’s concurrence noted, the court did not find a particular “degree of adherence [that] would suffice to make the guidelines ‘laws,’ though it is now apparent that 75.4% adherence is not enough.” Using this standard, apparently the only attempt at specific numerical analysis developed in the federal courts of appeal, the post-Booker sentencing guidelines would qualify as sufficiently flexible.

2. Within-Guidelines Sentences Do Not Indicate a Lack of Discretion

In addition, there are broader problems with the assumption that the available statistics indicate the existence of a de facto mandatory system. Turner argued that the high rate of within-Guidelines sentencing indicates that Booker had only a “minor” effect on sentencing and that this high rate of compliance will continue because “[p]ractically speaking, applicable Sentencing Guidelines provide a starting point or ‘anchor’ for judges and are likely to influence the sentences judges impose.” Given that the Guidelines are designed to be somewhat reflective of actual

150. United States ex rel. Forman v. McCall, 776 F.2d 1156, 1161, 1163 (3d Cir. 1985). This number was derived after excluding certain data. Id. at 1163. The Parole Commission asserted that “79.9% to 86.5% of the parole decisions have fallen within the guideline ranges” and that “the highest and lowest rates of compliance by a single regional office are 90.7% and 76.7%.” Id. at 1161.
151. Id. at 1163.
152. Id. at 1165 (Higginbotham, J., concurring).
154. United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008). As noted above, this assumption was the extent of Turner’s analysis of the empirical Garner prong. See supra note 116.
sentencing practice,\textsuperscript{155} within-Guidelines sentences do not necessarily indicate that judges are crafting sentences because of the Guidelines. Indeed, a well-designed Guideline system should mirror the actual sentences given in most cases. As the Court recognized in \textit{Rita}, because the 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.”\textsuperscript{156} It was precisely this congruence that led the Court to accept within-Guidelines sentences as reasonable, for if both the sentencing court and the Guidelines agree, it “significantly increases the likelihood that the sentence is a reasonable one.”\textsuperscript{157}

Moreover, the \textit{Turner} analysis provides no bright line separating when the Guidelines are followed often enough to be de facto mandatory and when they are not. Does a 51\% rate of within-Guidelines sentences constitute de facto reliance on the Guidelines, thus raising ex post facto concerns? Does the calculus change at 49\%? How often must these statistics be updated? Should they be considered on a national basis, within a district, or judge-by-judge? As Judge Higginbotham noted, courts have “not yet stated what percentage of compliance transforms a guideline into a law.”\textsuperscript{158}

If a bright-line test were developed, however, “the assumption seems to be [that] the district courts need only periodically check what the current figure is to see whether the Parole Commission is acting as a quasi-legislature.”\textsuperscript{159}

\textsuperscript{155} The Commission bases much of its work on actual practice. See Gall v. United States, 552 U.S. 38, 46 (2007) (“[The Guidelines are] the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”). The Commission also attempts to incorporate Congressional directives. See id. at 46 n.2 (“Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.”).


\textsuperscript{157} Id. at 347.

\textsuperscript{158} United States \textit{ex rel.} Forman v. McCall, 776 F.2d 1156, 1166 (3d Cir. 1985) (Higginbotham, J., concurring) (citing Geraghty v. U.S. Parole Comm’n (\textit{Geraghty I}), 579 F.2d 238, 267 (3d Cir. 1978)).

\textsuperscript{159} Id. The Gall Court argued, albeit in a different context, that “the mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications. . . . The formula is a classic example of attempting to measure an inventory of apples by counting oranges.” Gall, 552 U.S. at 49.
Furthermore, as Demaree noted, requiring time-of-crime Guideline use would be futile. Because sentencing judges are free to consider factors external to the Guidelines (and indeed must do so), a judge otherwise prohibited from applying the post-crime Guidelines “can always say not that he based his sentence on [post-crime Guidelines], but that he took the advice implicit in it. A judge is certainly entitled to take advice from the Sentencing Commission.”

The Turner court dismissed this argument in one sentence, asserting only that the court “reject[s] the idea that district judges will misrepresent the true basis for their actions.” This misses the point, however. The argument is not that judges will lie, obfuscate, or hide their reasoning, but that they are permitted to consider the Sentencing Commission’s judgments. If a judge believes the post-crime Guidelines more accurately capture the culpability of the defendant, she may impose the sentence for reasons noted in the Guidelines, without relying on the Guideline calculation per se. Indeed, the First Circuit has held that “it was entirely appropriate for the [district] court to consider what it viewed as the congressional intent behind the sentencing guidelines in evaluating the individual characteristics of this case.” “Although the guidelines had a significant influence on the district court’s sentencing decision, it plainly treated them as advisory... There is surely no error in that.” The Turner court necessarily rejected this argument out of hand, because its holding cannot otherwise account for this problem.

160. United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006).
161. Gall, 552 U.S. at 59 (“[T]he Guidelines are only one of the factors to consider when imposing sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment.”).
162. Demaree, 459 F.3d at 795; see also United States v. Gilman, 478 F.3d 440, 446 (1st Cir. 2007) (“[G]iven the continuing importance of the guidelines as a means for bringing the policy decisions of the Sentencing Commission into the sentencing process, the court’s measured deference to the policies behind the guideline recommendations for Gilman’s economic crimes was entirely appropriate.”).
164. Updated Guidelines should often better address culpability than older editions, as they are often updated specifically to better address the nuances of criminal acts. See sources cited supra notes 17 and 162.
165. Gilman, 478 F.3d at 448.
166. Id. at 446.
V. CONCLUSION

Despite legal and empirical arguments, the use of post-crime Guidelines might still strike some observers as unfair, because defendants could not have known that the applicable Guideline range at sentencing would be higher than it was when they committed their crime. The nonmandatory nature of the Guidelines addresses this concern, however. While a judge must consider the Guidelines range, including the newly heightened section applicable to the defendant, she is also able to consider the defendant’s argument regarding timing and lack of notice. To the extent the judge believes imposition of the higher sentence is inappropriate, unwarranted, or unfair, she can impose a lighter sentence.

Moreover, because judges are only constrained by the statutory minima and maxima (as was true pre-Guidelines), defendants have no reason to expect any particular sentence within that range. As Justice Scalia argued in his concurrence in Garner, “[d]iscretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes.” Any variation from an expected sentence “is merely part of the uncertainty which [is] inherent in [a] discretionary . . . system, and to which [a defendant] subjected himself when he committed his crime.”

The Ex Post Facto Clause has a specific and defined role, one that no longer applies to the Sentencing Guidelines. Garner establishes a clear two-part test that puts the onus on the defendant to demonstrate harm caused by a retroactive rule. On the formal level, the Court has re-emphasized, in increasingly strong language, the advisory nature of the Guidelines. Empirically, the data demonstrate that sentencing judges have taken this language to

167. See, e.g., United States v. Larrabee, 436 F.3d 890, 893 (8th Cir. 2006) (“In assessing the reasonableness of Larrabee’s sentence, we also find persuasive the amendments to the sentencing guidelines which became effective on November 1, 2004, subsequent to the date of Larrabee’s offense. . . . Here we do not apply the amended guidelines, but reference them because they are instructive as to the range of reasonableness.”); see also United States v. Rodarte-Vasquez, 488 F.3d 316, 322 (5th Cir. 2007) (“[The defendants’] success, however, may only be fleeting because, when resentenced under the now advisory guidelines regime, the new sentences can conceivably be the same as those vacated today.”).
169. Id. at 259.
170. See supra Part IV.A.
heart and are treating the Guidelines in the advisory role *Booker* envisioned. A defendant’s sentence, therefore, is not due to the strictures of the Guidelines, but to his own conduct and the district judge’s sense of reasonableness. Because the Guidelines merely inform—rather than bind—the judicial exercise of discretion, the use of post-crime Guidelines does not violate the Constitution’s *Ex Post Facto* Clause.

171. *See supra* Part IV.B.