Article

One-Book, Two Sentences: *Ex Post Facto* Considerations of the One-Book Rule After *United States v. Kumar*

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Abstract

This article addresses the ongoing discord among the federal courts of appeals with respect to the implications of the U.S. Sentencing Guidelines' "one-book rule" and its constitutionality under the Ex Post Facto Clause. A recent decision by the Second Circuit, *United States v. Kumar*, produced the most extreme position in a three-way split among the circuits by holding that the application of a single Guidelines manual to multiple offenses—even offenses predating that manual's publication—is always permissible under the Ex Post Facto Clause. The issue brings together two separate and difficult areas of jurisprudence applying the Ex Post Facto Clause: the permissibility of allowing one crime to "trigger" heightened punishments for previous crimes and the ongoing circuit split over the application of the Ex Post Facto Clause to the Sentencing Guidelines.

This Article explores the history of the application of the Ex Post Facto Clause in order to establish that, contrary to the assertions of courts and commentators, the single concern of the Ex Post Facto Clause has been putting people on notice of the consequences of their actions. The Article then argues that *Kumar*, though an outlier amongst the circuits, was indeed correct in its constitutional analysis of the one-book rule. Nevertheless, the same constitutional concepts at work in *Kumar* ultimately imply that the one-book rule runs counter to the goals of the Sentencing Guidelines themselves—uniformity of sentencing—even if its application is ultimately

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constitutional. The Article concludes by advancing two potential resolutions to the problems left unresolved by *Kumar*, the courts of appeals, and the Sentencing Guidelines themselves.

I. Introduction

In April of 2006, Sanjay Kumar, the former CEO of Fortune 500 software company Computer Associates, and Stephen Richards, Computer Associates' top salesman, each pled guilty to orchestrating a long-running accounting fraud, as well as to obstructing the government's investigation into that fraud.[1] Kumar and Richards's crimes were separated by several years, the accounting fraud having concluded in 2000 and the obstruction occurring during the government's subsequent investigation. In the time between the commission of their first offense and their second offense, the

1. Alex Berenson, *Software Chief Admits to Guilt in Fraud Case*, N.Y. TIMES, Apr. 25, 2006, *available at* http://www.nytimes.com/2006/04/25/technology/25fraud.html?ref=sanjaykumar#.

United States Sentencing Guidelines were amended to provide for a substantially higher recommended punishment based on the amount of financial "loss" resulting from frauds for most loss amounts.[2] Nevertheless, the Guidelines instructed the district court to apply the amended, and arguably retroactive, edition of the Guidelines to Kumar and Richards's fraud offense as well as their obstruction offenses.[3] This instruction is known as the "one-book rule."[4] The district court followed that instruction, applied the heightened sentencing range, and was affirmed on appeal in a decision by the Second Circuit, *United States v. Kumar*.[5]

The Ex Post Facto Clause of the United States Constitution[6] poses considerable difficulties for deriving a single, coherent sentence in the case of multiple offenses occurring over the course of one or more changes to the penalties for those offenses. *Kumar* is among the most recent cases requiring the courts to grapple with the application of the Ex Post Facto Clause to such offenses, referred to here as "Straddle Offenses."[7] *Kumar* grapples with the ex post facto implications of a particular provision of the Sentencing Guidelines, namely the "one-book rule."[8] This rule instructs district courts to apply the most recent version of the Guidelines when calculating a recommended sentence, even if one of the offenses subject to calculation occurred prior to the publication of that version.[9] Despite a first-blush appearance of retroactivity, this Article argues that *Kumar* properly upheld the application of the one-book rule in the face of an Ex Post Facto Clause challenge.

Nevertheless, the one-book rule's constitutionality does not render its application to past offenses perfectly fair and reasonable. Because the Sentencing Guidelines are cognizable "laws" for purposes of the Ex Post Facto Clause, as a majority of the circuit courts of appeals have held,[10] courts must consider the punishment for a given offense frozen as of the time the

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2. In the circumstances of Kumar and Richards's offenses, a Guidelines recommended sentence of 97 to 121 months imprisonment changed to a recommendation of life imprisonment. *See* United States v. Kumar, 617 F.3d 612, 625 n.10 (2d Cir. 2010).

3. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2004).

4. *Id.* § 1B1.11(b) (2011).

5. 617 F.3d 612, 624 (2d Cir. 2010). Further details of Kumar and Richards's offenses and the specifics of their sentencing are discussed below, *infra* Part V.C.

6. U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."). Though the Constitution actually contains two "Ex Post Facto Clauses," the content of each clause has been interpreted identically, and I will refer throughout this article to "the Ex Post Facto Clause" as if it were a single provision.

7. I borrow the term "Straddle Crime" and "Straddle Offense" from Professor J. Richard Broughton's article *On Straddling Crimes and the* Ex Post Facto *Clauses*, 18 GEO. MASON L. REV. 719, 720 (2011).

8. *See Kumar*, 617 F.3d at 625–28 (discussing the diverse holdings from many courts of appeals on the issue of the one-book rule).

9. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011); *see also infra* Part V.

10. *See infra* Part V.

offense is completed.[11] In order to constitutionally apply the one-book rule where prior offenses are involved, therefore, *Kumar* rightly notes that the second offense—committed after a revised and harsher version of the Guidelines is published—becomes the offense to which greater punishment is applied, even if that punishment is calculated by reference to a prior offense.[12] Though this is in line with centuries of precedent,[13] the application of heightened punishment to a second crime results in sentencing disparity and a lack of uniformity that the Sentencing Commission appears never to have intended. The one-book rule is suspect, therefore, not because it is unconstitutional, but because its application runs counter to the expected goals of the Sentencing Guidelines themselves.

This Article examines the issues faced by district courts in sentencing defendants convicted of straddle offenses, and the circuit courts of appeals' various approaches to handling such offenses in light of ex post facto challenges. Part II describes the underlying concerns of the Ex Post Facto Clause and attempts to demonstrate that the provision of prospective notice to defendants of the consequences of their actions is the primary—indeed, the sole—concern of the Ex Post Facto Clause. Part III addresses the application of the Ex Post Facto Clause to "procedural" rules, and particularly to the now-advisory Sentencing Guidelines. Part IV addresses the courts' long history of jurisprudence with respect to straddle crimes, and particularly with respect to statutes that increase the punishment for second or subsequent offenses on the basis of prior offenses. Part V turns to the ex post facto problems posed by the application of the Sentencing Guidelines, and specifically the one-book rule, to straddle offenses, and concludes that the application of the one-book rule to straddle offenses does not violate the Ex Post Facto Clause. Part VI argues that in spite of the one-book rule's constitutional acceptability, the rule nevertheless undermines the goal of uniformity underpinning the Guidelines themselves. The contradiction posed by the one-book rule warrants redress by the district courts, if not the Sentencing Commission, in order to devise a system of punishment that prevents a form of "double-counting" for culpability based on recidivism and to promote the important goal of sentencing uniformity.

II. The Ex Post Facto Clause as a Notice Requirement

The Constitution expressly prohibits Congress and the States from passing ex post facto criminal laws.[14] The text of the Constitution suggests that the meaning of the Latin phrase was plain to, or widely agreed upon by, its authors as there is no definition provided along with the cursory

11. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. n.2 (2011).
12. *Kumar*, 617 F.3d at 629–30.
13. *See infra* Part III.
14. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

prohibition.[15] Indeed, courts faced with interpreting the Clause have long agreed on its basic prohibition. Justice Chase, in 1798, provided the now-standard definition of an ex post facto law:

> 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. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[16]

During the two hundred years since Justice Chase's opinion in *Calder*, courts have adhered to this definition and commented on the concerns that underlie the Clause.[17] In *Weaver v. Graham*, the Supreme Court identified the chief concern of the Ex Post Facto Clause: by including the Clause in the Constitution, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[18] The Court also noted that the Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[19]

This second concern bears no substance beyond that borne by the

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15. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1, ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

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

17. *See, e.g.*, Cummings v. Missouri, 71 U.S. 277, 325–26 (1866) ("By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."); *see also* Lindsey v. Washington, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re* Medley, 134 U. S. 160, 171 (1890) (internal citations omitted) ("[I]t may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."); *cf.* Rooney v. North Dakota, 196 U.S. 319, 325 (1905) ("[T]he statute of 1903 is not repugnant to the constitutional provision declaring that no state shall pass an *ex post facto* law. It did not create a new offense, nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense.").

18. Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

19. *Id.* at 29. The Court, in a footnote to this discussion, also mentioned a third concern underlying the Clause, namely that "[t]he *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Id*. at n.10.

first and primary concern for notice. The Clause does not prohibit the passage of arbitrary or vindictive legislation generally, but only legislation that is arbitrary or vindictive *on account of* its retroactive application.[20] A law may be condemned as irrationally spiteful[21] or as an impermissible breach of restrictions on legislative power,[22] but the constitutional basis for that review will not be the Ex Post Facto Clause unless the spitefulness or overreach takes the form of retroactive punishment. Thus, the overarching concern is with fair notice of the consequences of one's actions: does the state already prescribe criminal sanctions for the action at the time of action, and if so, is the actor on prospective notice of the quantum of punishment applicable under those sanctions?

On occasion, commentators ascribe some independent substance to the *Weaver* court's second concern, but without a convincing explanation as to why the ex post facto prohibition should be considered a general bar on arbitrary or unfair legislation, in the manner of a substantive due process provision.[23] For instance, commentators occasionally emphasize the "goal" of substantive restraint as paramount to a proper ex post facto analysis. For example, one commentator has argued for the unconstitutionality of the one-book rule, which provides the subject of the main discussion below,[24] on the ground that, even if the provision were to satisfy the requirements of fair notice, "there remains a problem with a lack of governmental restraint."[25]

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20. A law is retroactive, or "retrospective," if it "changes the legal consequences of acts completed before its effective date." *Id.* at 31.

21. *See, e.g.*, United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

22. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

23. *See* William P. Ferranti, *Revised Sentencing Guidelines and the* Ex Post Facto *Clause*, 70 U. CHI. L. REV. 1011, 1031 (2003) ("Even if retrospective application of revised guidelines under § 1B1.11(b)(3) satisfies the fair warning element of the Ex Post Facto Clause, there remains a problem with a lack of governmental restraint. . . . While it might be fair to apply revisions retrospectively where they are triggered only by continued criminal conduct, doing so still runs up against the Clause's concern with governmental restraint."); *id.* ("The Clause restrains the legislature from increasing the punishment for a particular offense after that offense is completed. The hallmark of such unconstitutional action is typically a lack of notice. However, the focus on notice, what the individual was warned of and when, threatens to convert the Ex Post Facto Clause into a right to warning enjoyed by the individual, rather than a limit on action suffered by the government."). *Id.*

24. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011) (explaining the contours of the "one-book rule"). *See infra* Part V.

25. *See* Ferranti, *supra* note 23, at 1031. Ferranti continues by arguing that "the focus on notice, what the individual was warned of and when, threatens to convert the Ex Post Facto Clause into a right to warning enjoyed by the individual, rather than a limit on action suffered by the government. Although this concern of the Clause is not typically analyzed separately from the fair warning concern, the *Miller* Court

The question remains: restraint from doing what exactly? Justice Chase's opinion in *Calder* recognized that the Ex Post Facto as a bar on retroactivity itself, without regard for the substance of any law:

> The prohibition against [the federal government] making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties . . . . Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed, at other times, they violated the rules of evidence (to supply a deficiency of legal proof) . . . at other times they inflicted punishments where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offense . . . . With very few exceptions, the advocates of such laws 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.[26]

Thus, the only restraint at issue is the ban on retroactivity itself.[27] Any assertion that "[t]he *Ex Post Facto* Clause is a substantive restraint on government action"[28] is incorrect.[29] The Clause and the courts interpreting it are wholly unconcerned with the kinds of actions punished or the manner of punishment, but rather with *when* criminality or the "quantum" of punishment is enacted. [30] As such, the Clause acts as a particular variety of "procedural" due process, empty of any substantive prohibition.[31]

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did reject Florida's attempt to reshape the Clause in this way." *Id.* at 1031–32. *Miller* involved the Supreme Court's as applied rejection of a Florida statute asserting simply that the legal consequences of certain actions *may* change in the future, without providing notice of the content of those changes. Miller v. Florida, 482 U.S. 423, 431 (1987) ("The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed."). As such, the statute provided notice of nothing at all, and *Miller* remains a case focused solely on that lack of notice. *See id*.

26. Calder v. Bull, 3 U.S. 386, 389 (1798).

27. As discussed below, *infra* Part VI, retroactivity is necessary, but may not be sufficient to invalidate the application of a law to a particular defendant. In certain circumstances where courts apply a plainly retroactive law to prior conduct, the Ex Post Facto Clause will only provide relief in the event that the retroactive application poses a "significant risk" of increasing the punishment.

28. Ferranti, *supra* note 23, at 1031.

29. *But see* Broughton, *supra* note 7, at 757 (arguing that the prevention of arbitrary and vindictive legislation is a purpose of the Ex Post Facto Clause with independent content).

30. *See* Miller v. Florida, 482 U.S. 423, 433–34 (1987).

31. The opening arguments of Professor William J. Stuntz's recent book on American criminal justice provide the history and reasoning behind the Founders' preeminent concern with criminal procedure rather than with limitations on substantive criminal law. Reviewing the Fourth, Fifth, Sixth, and Eighth Amendments, Prof. Stuntz notes that "[p]rocedure dominates these texts. Save for the First Amendment's protection of speech and religion, nothing in the Bill of Rights limits legislators' ability to

Based on its text and the overriding concern for prospective, fair notice of criminal sanctions, the application of the Constitution's proscription is straight-forward in paradigmatic cases: if smoking cigarettes is permissible today, I may not be punished for smoking today under an anti-smoking law passed tomorrow; if anti-smoking laws impose a $500 penalty for violations today, I may not be punished for smoking today with a $1,000 penalty enacted tomorrow.

That much is clear, but the application of the Ex Post Facto Clause is more complicated with respect to two different, recurring situations. First, judges continue to struggle with the question of just which laws actually implicate the Ex Post Facto Clause, and particularly with the question of whether sentencing procedures rise to the level of "laws" to which the Ex Post Facto Clause may apply. Second, both of the paradigmatic cases assume that the person protected by the Ex Post Facto Clause has stopped smoking before the legislature enacts the new prohibition or heightened penalty. Courts have struggled to apply the Ex Post Facto Clause where criminal conduct continues past, or "straddles," the enactment of new or heightened penalties.[32] In Justice Chase's words, this second question requires a court to determine when an action is finally "done."[33]

III. Application of the Ex Post Facto Clause to Procedural Rules

As in the case of straddle offenses, the application of the Ex Post Facto Clause becomes complicated by punishments derived from some source other than a formal statute aimed directly at defining crimes or prescribing specific types of durations of punishment. Laws that are not facially "penal" but that carry punitive consequences, rules that redefine the procedures governing prosecutions or trial, and procedures for determining or adjusting sentences all raise the question of the Ex Post Facto Clause's applicability.

Judges are generally not formalists in assessing whether a law, rule, or regulation amounts to a punishment sufficient to offend the Ex Post Facto Clause.

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, *the circumstances attending and the causes of*

criminalize whatever they wish. Save for the mild constraints of the Eighth Amendment, nothing in the Bill limits the severity of criminal punishment. . . . Along with the similar language that appears in state constitutions, these texts place substantive criminal law in the hands of politicians." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 75–76 (2011). Although he does not specifically address the Ex Post Facto Clause in this argument, the procedural concerns motivating Madison's Constitution, catalogued by Prof. Stuntz, are equally apparent in Justice Chase's opinion in *Calder*. The Ex Post Facto Clause itself fits the pattern of the Constitution's criminal justice provisions: it is a procedural safeguard, not a substantive proscription.

32. Broughton, *supra* note 7, at 721–24.

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

> *the deprivation determining this fact*. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.[34]

The traditional understanding of the Ex Post Facto Clause plainly bars even those retroactive laws that may be described as "procedural" rather than substantive. Thus, the Ex Post Facto Clause prohibits "[e]very 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."[35] Certainly, the removal of "any defense available according to law at the time when the act was committed, is prohibited as ex post facto."[36]

This bar on disadvantageous changes has extended beyond the deprivation of particular defenses and into areas even less easily distinguished as "procedural" or "substantive." For example, a retroactive change to the number of jurors, or the unanimity of a verdict, has been held to constitute a law subject to ex post facto prohibition.[37] On the other hand, a range of retroactive, disadvantageous procedural rules have been litigated and held to be permissible under the Ex Post Facto Clause. For example, the reshuffling of courts or judges who may preside over a criminal trial does not offend the Ex Post Facto Clause.[38] Courts have upheld, against ex post facto challenges, laws that expand the class of permissible trial witnesses, even if enacted following the crime on trial;[39] laws changing the rules of evidence

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34. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866) (emphasis added).

35. *Calder*, 3 U.S. at 390.

36. Beazell v. Ohio, 269 U.S. 167, 169–70 (1925); *see also* Thompson v. Missouri, 171 U.S. 380, 383–84 (1898) ("A careful examination of the opinion in *Kring v. Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree—the accused being charged with murder in the first degree—was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for murder in the first degree which was given him at the time of the commission of the offense. The right to such protection was deemed a substantial one—indeed, it constituted a complete *defence* against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation."); Kring v. Missouri, 107 U.S. 221, 225 (1883) ("The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*.").

37. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 355 (1898) ("In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.").

38. *See, e.g.*, Duncan v. State, 152 U.S. 377, 383 (1894) (stating, in dicta, that "the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition").

39. Hopt v. Utah, 110 U.S. 574, 588–90 (1884).

so as to make admissible evidence previously held inadmissible;[40] and laws changing the place of trial.[41]

A. The Ex Post Facto Implications of Sentencing Rules

Rules for determining an appropriate sentence length, whether by a court at sentencing or by parole officials after sentencing, have been the subject of an ongoing debate over the Ex Post Facto Clause's application to the non-statutory laws for decades. The cases addressing these rules provide the context for current debates among the circuit courts of appeals concerning the ex post facto implications of the Sentencing Guidelines.

1. *California Department of Corrections v. Morales*

The first case for consideration dealt with rules for adjusting a sentence within California's parole system. In *California Department of Corrections v. Morales*, the Supreme Court reviewed a change to the procedures used by the California Board of Prison Terms permitting the Board to delay an inmate's parole rehearing so long as the inmate had been convicted of multiple homicides.[42] At the time that Morales had committed the crime for which he was convicted—the murder of an elderly woman whom Morales had married following his release from a previous incarceration for murder[43]—he was entitled to an initial parole hearing, followed by subsequent hearings on an annual basis in the event the Board denied him release.[44] After Morales's crime, however, the California Legislature authorized the Board to defer subsequent parole hearings "for up to three years if the prisoner ha[d] been convicted of 'more than one offense which involve[d] the taking of a life' and if the Board '[found] that it [was] not reasonable to expect that parole would be granted at a hearing during the following years . . . ."[45] The Board denied Morales parole at his initial hearing in 1989 and determined that it was not reasonable to expect that he would be suitable for parole in 1990 or 1991.[46] Morales was therefore scheduled for a subsequent parole hearing in 1992.[47]

Morales filed a federal habeas petition asserting that, as applied to his incarceration, the amended parole procedures constituted an ex post facto law.[48] As the amended law provided no new definition of a crime, the relevant question was whether the amended parole procedures retroactively

40. Thompson v. Missouri, 171 U.S. 380, 387 (1898).
41. Gut v. Minnesota, 76 U.S. 35, 36–37 (1869).
42. 514 U.S. 499, 503 (1995).
43. *Id*. at 502.
44. *Id.* at 502–03 (citing Cal. Penal Code Ann. § 3041 (West 1982)).
45. *Id.* at 503 (citing Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).
46. *Id*. at 503.
47. *Id*.
48. *Id*. at 504.

increased the punishment attached to Morales's second homicide.[49]

In a split decision, the Supreme Court held that the change to California's parole procedures did not violate the Ex Post Facto Clause.[50] The Court reaffirmed its rulings in two earlier decisions that the Ex Post Facto Clause "forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range."[51] The Court rejected Morales's claim that the California parole procedure amendments had effected such a change to his sentencing "formula":

> Both before and after the 1981 amendment, California punished the offense of second-degree murder with an indeterminate sentence of 'confinement in the state prison for a term of 15 years to life.' The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range . . . . The amendment had no effect on the standards for fixing a prisoner's initial date of 'eligibility' for parole, or for determining his 'suitability' for parole and setting his release date.[52]

In order to avoid reading the Ex Post Facto Clause to encompass mundane adjustments to parole procedures—for example, the replacement of particular parole officials[53]—the Court provided that the Ex Post Facto Clause applies only to those legislative adjustments that "produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes."[54] The Court declined to define "sufficient" in *Morales*, but held, on the basis of a detailed analysis of the mechanics and applicability of the amended California parole procedures, that "the amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause."[55]

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49. *Id.* at 505.

50. *Id*. at 514.

51. *Id.* at 505 (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937), Miller v. Florida, 482 U.S. 423, 429 (1987), and Weaver v. Graham, 450 U.S. 24, 24 (1981)).

52. *Morales*, 514 U.S. at 507 (internal citations omitted).

53. *Id.* at 509. The Court describes as "innocuous" certain procedural adjustments, such as:

> [C]hanges to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Id.

54. *Id.*

55. *Id.* Although the Court was divided on the outcome of *Morales*, both the majority and the

2. *Garner v. Jones*

Garner v. Jones,[56] another recent Supreme Court case to grapple with legislative changes to the determination or adjustment of sentences, considered the ex post facto implications of changes to Georgia's parole procedures substantially similar to those reviewed in *Morales*. In *Garner* the Court provided a two-step framework for analyzing an ex post facto claim, and included a critical discussion of the importance of official discretion in assessing whether a rule is comprehended by the Ex Post Facto Clause.[57]

Garner's analysis began with a reassertion of the "sufficient risk" language from *Morales* and then quickly catalogued the factors from the earlier case that weighed against a finding of a sufficient risk of retroactive increased punishment: the amendment at issue did not change the basic structure of California's parole law; it did not prohibit requests for earlier reconsideration of parole; and it was unlikely, given the empirical evidence of low rates of parole for offenders in Morales's situation, that the change would actually effect anyone to whom it applied.[58] The Court then acknowledged, and immediately minimized the importance of, several differences between the California and Georgia rules: the span of time between parole reconsiderations; the broader category of prisoners covered by the Georgia rule; and Georgia's lack of "formal hearings in which counsel [could] be present."[59] The Court stated that none of these differences was dispositive, and tweaked the *Morales* standard by stating, "[t]he question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration."[60]

The Court then articulated a two-pronged inquiry for determining whether a rule violates the Ex Post Facto Clause.[61] The first prong of the *Garner* inquiry requires a court to determine whether "the operation of the [challenged rule] within the whole context" of the system in which the rule operates (in *Morales* and *Garner*, the state parole systems) creates a significant risk of retroactively prolonging incarceration.[62] This inquiry requires a court to consider the entirety of the mechanics of a system of

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dissent appear to accept the majority's requirement that a challenged law attain some threshold level of "sufficient risk" of imposing increased punishment before that law, though retroactive, can be found to contravene the Ex Post Facto Clause. Both opinions engage in an examination of the mechanics and application of the law, but differ on the applicable standard of review, *see id.* at 522 (Stevens, J., dissenting), and on which party should bear the burden of persuasion in the event that a law's effects are "speculative." *Compare id.* at 510 n.6, *with id.* at 526 (Stevens, J., dissenting).

56. 529 U.S. 244 (2000).

57. *See id*. at 250–54.

58. *Id.* at 250–51.

59. *Id.* at 251.

60. *Id.*

61. *Id.*; *see also* James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033, 1065 (2008).

62. *See Garner*, 529 U.S. at 251.

punishment when judging whether a specific amendment will have any significant impact on sentencing.

In *Garner*, the Court considered the means of reaching parole determinations available to and adopted by the Georgia parole board, noting that the amended rules had set eight years as a *maximum* span between considerations and that the parole board was empowered to expedite reviews in the event of changed circumstances "or where the Board receives new information that would warrant a sooner review."[63] In preparing the reader for understanding the import of these factors, the Court made a remarkable logical move. The foundation for the Court's consideration of the "whole context" of the Georgia parole system was the wide discretion granted to the parole board by the Georgia legislature.[64] On one reading, the import of this passage is that, because Jones was on notice before committing his crime that his parole could be withheld without notice, there could be nothing retroactive about that withholding. Indeed, the Court seemed to advance that reading just a few paragraphs later: "The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience."[65] On this reading, a grant of discretion by the legislature to another branch—in *Garner*, the executive branch's parole board—could potentially insulate against even egregious retroactive changes in punishment.[66]

Such a reading has obvious and regrettable implications, and the Court specifically disavowed it. The Court was careful to state that "[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause . . . ."[67] Nevertheless, lingering in the background of *Garner* is the notion that retroactive changes to parole procedures are "inherently" beyond the scope of the Ex Post Facto Clause because the "whole context" of the parole system is discretionary.[68] As discussed below, this idea apparently motivated the Seventh Circuit's determination that the advisory Guidelines are beyond the Ex Post Facto Clause's purview,[69] and the same concern is echoed in the *Kumar* dissent, as well.[70]

Garner's second prong requires the challenger to demonstrate that "the rule's practical implementation" will result in a significant risk of increasing the individual litigant's incarceration—a kind of redoubled "as applied" analysis.[71] In almost every paradigmatic ex post facto case, the challenge will be advanced as an "as applied" constitutional challenge.[72] Few

63. *Id.* at 254 (quotation marks omitted).

64. *Id.* at 252–53.

65. *Id.* at 253.

66. *See id.* at 252.

67. *Id.*

68. *See id*.

69. *See infra*, Part III.B.1.

70. *See infra* Part IV.B.

71. *Id.* at 255.

72. An "as applied challenge" requires a litigant to demonstrate that the application of a law to his or her particular circumstances results in a violation of the Constitution. A successful "as applied"

criminal laws apply expressly and only to conduct that happened in the past. Instead, particular litigants will challenge the application of an otherwise prospective, and therefore constitutional, law to their conviction.[73] But in the paradigmatic case, the law or rule under review obviously disadvantages the challenger. *Garner*, because it addresses rules that arguably do not prejudice the challenger, requires not only that a challenger demonstrate that a law applies retroactively in his case, but that the particular retroactive application increases the risk to that challenger of more severe punishment as a result of some particular interaction of the rule and the individual's circumstances.[74,75]

B. The Circuit Split on the Ex Post Facto Implications of the Sentencing Guidelines

The question of whether a rule governing the length of a sentence creates a "significant risk" of increased punishment has lately arisen in the context of the Federal Sentencing Guidelines. The United States Sentencing Guidelines are the product of the U.S. Sentencing Commission, an agency created by Congress through the Sentencing Reform Act of 1984.[76] The

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challenge leaves the law in place, but limits the set of situations in which the law may constitutionally apply. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986) ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."). By contrast, a "facial challenge" to a statute asserts that the statute is unconstitutional under any set of circumstances. United States v. Salerno, 481 U.S. 739, 745 (1987). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Id.*

73. Only a particularly vindictive or inept legislator would draft a facially retroactive criminal punishment in light of the Constitution's prohibition. However, such laws have occasionally emerged. *See, e.g.*, Cummings v. Missouri, 71 U.S. 277 (1866).

74. *Garner*, 529 U.S. at 255–56. How a litigant might go about demonstrating that he, individually, would be retroactively disadvantaged by the operation of an otherwise acceptable rule was not addressed by *Garner*: the Court remanded on that point. *Id.* at 256–57. One unspoken difference between *Garner* and *Morales* is evident in the fact of the *Garner* Court's remand. *Garner* remanded because "[w]ithout knowledge of whether retroactive application of the amendment to Rule 475-3-.05(2) increases, to a significant degree, the likelihood or probability of prolonging respondent's incarceration, his claim rests upon speculation." *Id.* at 256. Speculation was at the heart of *Morales* too, but the Court did not believe that speculation warranted a remand and found, rather, that it weighed against the defendant. *Morales*, 514 U.S. at 509 (1995). *Garner*, on the other hand, suggests that such speculation may actually sustain a claim until it is dispelled one way or the other.

75. *Garner*'s second prong analysis seemed to collapse into the first prong review of the "context" of the rule when the Court corrected the circuit court's failure to consider the parole board's internal policy statements when determining whether "in fact" the amendment created a significant risk of increased punishment, despite the rule's lack of "inherent" risk in that regard. *See Garner*, 529 U.S. at 256. After having come dangerously close to promoting discretion as an ex post facto cure-all, the Court decided to hold the Georgia parole board to its word: "At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment." *Id.* Thus, policy statements and actual practice are required factors for consideration when assessing a changed rule "in its operation" upon a particular individual.

76. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

Commission operates as an agency of the Judicial Branch and has, as its most prominent role, the task of preparing recommended sentencing guidelines, with the goal of promoting "fairness through the establishment of sanctions proportionate to the severity of the crime and the avoidance of unwarranted disparity by setting similar penalties for similarly situated offenders."[77] The original Sentencing Guidelines were submitted to Congress and became effective in 1987.[78] The Commission continually reviews and amends the Guidelines, often in response to commands from Congress,[79] and publishes a new version of the Guidelines every year.[80]

Upon their original promulgation, the Guidelines were essentially mandatory:

> [The Sentencing Reform Act] makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or

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77. U.S. SENTENCING COMMISSION ANNUAL. REPORT 1 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap1.pdf. The Supreme Court has also examined the role of the Sentencing Commission:

> Helpful in our consideration and analysis of the statute is the Senate Report on the 1984 legislation. The Report referred to the 'outmoded rehabilitation model' for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed. It observed that the indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.

United States v. Mistretta, 488 U.S. 361, 366 (1989) (internal citations omitted).

The Court further stated that in addition to the duty the Commission has to promulgate determinative-sentence guidelines, it is under an obligation periodically to "review and revise" the guidelines. § 994(o). It is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid*. It must report to Congress "any amendments of the guidelines." § 994(p). It is to make recommendations to Congress whether the grades or maximum penalties should be modified. § 994(r). It must submit to Congress at least annually an analysis of the operation of the guidelines. § 994(w). It is to issue "general policy statements" regarding their application. § 994(a)(2). And it has the power to "establish general policies . . . as are necessary to carry out the purposes" of the legislation, § 995(a)(1); to "monitor the performance of probation officers" with respect to the guidelines, § 995(a)(9); to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others, § 995(a)(18); and to "perform such other functions as are required to permit Federal courts to meet their responsibilities" as to sentencing, § 995(a)(22). *Mistretta*, 488 U.S. at 369.

78. U.S. SENTENCING COMMISSION ANNUAL REPORT 1 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap1.pdf.

79. *See, e.g.*, Notice of Temporary Amendment to Methamphetamine and Club Drug Anti-Proliferation Act of 2000, 65 Fed. Reg. 80474 (Dec. 21, 2000).

80. *See* U.S. SENTENCING COMMISSION, *Data and Statistics* http://www.ussc.gov/Data_and_Statistics/index.cfm (last visited Mar. 1, 2012) (including an archive of annual reports from years 1995–2010).

> mitigating factor present that the Commission did not adequately consider when formulating guidelines. [28 U.S.C.] §§ 3553(a) and (b). The Act also requires the court to state its reasons for the sentence imposed and to give 'the specific reason' for imposing a sentence different from that described in the guideline. § 3553(c).[81]

The mandatory nature of the original Guidelines was successfully challenged in *United States v. Booker*.[82] *Booker* held that the mandatory use of the Guidelines in fixing enhanced sentences violated the Sixth Amendment's requirement that all facts supporting an enhanced sentence be found by juries rather than judges.[83] In order to remedy the Sixth Amendment violation, the Court severed the portion of the Sentencing Reform Act that made the Guidelines binding on district court judges, as well as a related appellate review provision.[84]

Despite the excision of those provisions that had rendered the Guidelines mandatory, the Court noted the continued influence that the Guidelines would exert over sentencing decisions:

> Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims.[85]

The remedy was expressly designed to respect Congress's "basic statutory goal—a system that diminishes sentencing disparity."[86] Moreover, the Supreme Court, subsequent to *Booker*, has emphasized the Guidelines' continued and proper influence over judges' sentencing decisions, despite their now-advisory status. In *Rita v. United States*,[87] the Court held that the courts of appeals may apply a presumption of reasonableness when asked to review a within-Guidelines sentence imposed by a district court.[88] And in

81. *Mistretta*, 488 U.S. at 367–68.

82. 543 U.S. 220 (2005).

83. *Id.* at 233–38.

84. *Id.* at 259–60 (opinion of Breyer, J.).

85. *Id.* (internal citations omitted).

86. *Id.* at 250.

87. 551 U.S. 338 (2007).

88. *Id*. at 347 ("[T]he presumption reflects the fact that, 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,[89] the Court reiterated that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" for every sentence.[90]

Prior to *Booker*, the Supreme Court had never addressed the application of the Ex Post Facto Clause to the Federal Sentencing Guidelines, but it held in 1987 that a substantially similar regime of mandatory sentencing guidelines in effect in Florida were comprehended by the Ex Post Facto Clause.[91] Relying on that decision prior to *Booker*, the courts of appeals uniformly held that the Ex Post Facto Clause applied to the retroactive application of an increased sentencing range under the Guidelines.[92] Post-*Booker*, however, whether the Ex Post Facto Clause continues to apply to retroactively applied versions of the Guidelines is a question that has split the circuits.

1. *United States v. Demaree*: Rejecting the Ex Post Facto Clause's Application to the Advisory Guidelines

The first post-*Booker* court of appeals case to address this issue was the Seventh Circuit's decision in *United States v. Demaree*.[93] The Seventh Circuit, though acknowledging that "[t]he applicable guideline nudges [the sentencing judge] toward the sentencing range," found that "his freedom to impose a reasonable sentence outside the range is unfettered."[94] *Demaree* rejected any reliance on the "significant risk" standard of *Garner* by offering a series of examples of other non-binding congressional actions (joint resolutions, statutes requiring the introduction of victim impact statements, etc.) in order to cast the application of the Ex Post Facto Clause to the advisory Guidelines as absurd.[95]

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89. 552 U.S. 38 (2007).

90. *Id*. at 49.

91. *See* Miller v. Florida, 482 U.S. 423 (1987).

92. *See, e.g.*, United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991); United States v. Morrow, 925 F.2d 779, 782–83 (4th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021–22 (5th Cir. 1990); United States v. Nagi, 947 F.2d 211, 213 n.1 (6th Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1386 (7th Cir. 1994); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); United States v. Lam Kwong-Wah, 924 F.2d 298, 304–05 (D.C. Cir. 1991).

93. 459 F.3d 791 (7th Cir. 2006).

94. *Id.* at 795.

95. *Id.* at 794; *see also* United States v. Favara, 615 F.3d 824, 829 (7th Cir. 2010) (internal citation omitted) ("In *Demaree*, we held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend *ex post facto*. We find no reason to abandon that conclusion today."); United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006) (addressing the issue of whether the *Booker* decision itself could be applied retroactively).

In *Barton*, though in dicta, the Sixth Circuit stated that "[n]ow that the Guidelines are advisory, the Guidelines calculation provides no such 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." *Id.* at 655 n.4. Having found the Ex Post Facto Clause to be irrelevant, and the

2. The Majority Position: Circuits Disagreeing with *Demaree*

The majority of circuits, however, have either explicitly rejected the reasoning of *Demaree* or ruled in such a way as to signal that the advisory nature of the Guidelines is not dispositive of the applicability of the Ex Post Facto Clause. In finding the advisory Guidelines subject to the Ex Post Facto Clause, these circuits have split into two camps. The first camp has held that, as a blanket rule, the application of post-conduct Guidelines manuals is a violation of the Ex Post Facto Clause when the more recent sentencing manual recommends a higher sentence. For example, the Third Circuit has "consistently held as improper the direct application of an amended guideline to conduct that occurred *prior* to the amendment."[96]

The second camp accepts that the retroactive application of even an advisory Guideline may violate the Ex Post Facto Clause, but assesses such application on a case-by-case basis using *Garner*'s "significant risk" standard. The D.C. Circuit was the first to adopt this "as applied" standard in *United States v. Turner*.[97] In rejecting *Demaree*, the D.C. Circuit relied in large part on the empirical fact that "most federal sentences fall within

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Due Process Clause to be the correct basis for constitutional evaluation of the advisory Guidelines, the court found that the Due Process Clause concerns itself only with "insuring that defendants have sufficient notice of illegal activity," but not with notice of the possibility of enhanced punishment. *Id.* This dictum is riddled with problems. There is no discussion in *Barton* of the fact that the Guidelines are actually applied through a *legislative* mechanism, namely 18 U.S.C. § 3553(a)(4), which requires a sentencing court to consider "the kinds of sentence and the sentencing range established for" a particular crime. Nor is there much discussion of whether the Due Process Clause, even if it were the correct constitutional basis for evaluation of the application of retroactive Guidelines, protects a defendant's notice of the possibility of enhanced punishment, rather than notice of criminalization.

In any case, subsequent cases from the Sixth Circuit rejected the claim that *Barton* is binding with respect to the question of whether retroactive application of the advisory Guidelines may violate the Ex Post Facto Clause. *See, e.g.*, United States v. Duane, 533 F.3d 441, 446 (6th Cir. 2008) ("Although we recognize that some language from the above quoted *Barton* footnote could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read Barton as announcing such a broad rule."). The Circuit has recently held that the advisory Guidelines are susceptible to ex post facto challenges. United States v. Lanham, 617 F.3d 873, 890 (6th Cir. 2010) (citations omitted) ("Only when the Guidelines range is unable to meet the goals of the Sentencing Guidelines is a sentencing court expected to vary from the Guidelines sentence. As a result, the advisory nature of Guidelines does not completely eliminate Ex Post Facto concerns.").

96. United States v. Larkin, 629 F.3d 177, 194 (3d Cir. 2010); *see* United States v. Saferstein, No. 10-4092, slip op. at 14 (3d Cir. Jan. 24, 2012) ("[W]e have held that the ex post facto clause requires that a sentencing court apply the Guidelines Manual in effect at the time the offense was committed if retroactive application of the later Manual would result in harsher penalties."); The Eighth, Ninth, and Tenth Circuits have acted consistently with the Third Circuit's blanket approach. *See, e.g.*, United States v. Carter, 490 F.3d 641, 643 (8th Cir. 2007) (acknowledging *Demaree* but applying the Ex Post Facto Clause to a post-*Booker* Guidelines challenge); United States v. Rising Sun, 522 F.3d 989, 997 (9th Cir. 2008) ("[T]he district court abused its discretion in applying the two-level 'obstruction of justice' enhancement solely on the basis of actions that Rising Sun took before an investigation had begun."); United States v. Thompson, 518 F.3d 832, 870 (10th Cir. 2008) (assessing a post-*Booker* Guidelines application under the Ex Post Facto Clause without reference to the circuit split on this issue); United States v. Montoya, No. 10-1285, 2011 WL 2279726, at *3–*4 (10th Cir. Jun. 10, 2011) (same).

97. 548 F.3d 1094, 1100 (2008) ("The proper approach is therefore to conduct an 'as applied' constitutional analysis, see *Mille*r, 482 U.S. at 435, not the sort of facial analysis conducted in *Demaree*.").

Guidelines ranges even after *Booker*—indeed, the actual impact of *Booker* on sentencing has been minor."[98] Rather than holding that any retroactive application of an increased Guidelines range violates the Ex Post Facto Clause, however, the D.C. Circuit asked whether such an application created a substantial risk of the imposition of a more severe sentence, citing *Garner* in support.[99] The circuit noted that it was "obvious that the court decided to sentence Turner at the low end of the 2006 Guideline sentencing range" and "[h]ad the court used the 2000 Guidelines, Turner's sentencing range would have been 21–27 months, *and it is likely* that Turner's sentence would have been less than 33 months."[100] The remaining two circuits, the First and the Fifth, have yet to adopt a position on this issue.[101]

The import and effect of *Turner*'s standard is relatively clear in the context of appellate review. The standard acts as a type of "harmless error" review of ex post facto sentencing challenges by the court of appeals. Less straightforward is its application by sentencing courts in the first instance. A

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98. *Id.* at 1099 (citing U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006)).

99. *Id.* at 1100.

100. *Id.* (emphasis added). The D.C. Circuit's case-by-case "substantial risk" standard has been applied by the Second, Fourth, and Eleventh Circuits. *See, e.g.*, United States v. Ortiz, 621 F.3d 82, 87 (2d Cir. 2010) ("[The 'substantial risk'] standard does not invalidate every sentence imposed after a Guidelines range has been increased after the date of the offense, but, unlike the approach of the Seventh Circuit, which rejects an *Ex Post Facto* challenge to any non-Guidelines sentence, it recognizes that there may be circumstances where an amended Guidelines range can influence a sentence that violates the *Ex Post Facto* Clause."); United States v. Lewis, 606 F.3d 193, 203 (4th Cir. 2010) ("[G]iven the importance our precedent places on the proper calculation of the advisory Guidelines range, the retroactive application of an upwardly amended advisory sentencing range poses a significant risk of an increased sentence. And Lewis was not required to 'show definitively' that he would have received a higher sentence had the sentencing court utilized the amended 2008 Guidelines edition. It was sufficient that he show that application of the 2008 edition 'created a substantial risk' that his sentence would be more severe.") (citing United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008)); United States v. Wetherald, 636 F.3d 1315, 1321 (11th Cir. 2011) ("Because it is consistent both with our interpretation of Supreme Court precedent and this circuit's jurisprudence, we find the approach taken by the D.C. Circuit more compelling than that of the Seventh Circuit.").

101. *See* United States v. Rodriguez, 630 F.3d 39, 41 (1st Cir. 2010); United States v. Marban-Calderon, 631 F.3d 210, 211–12 (5th Cir. 2011).

Finally, the Sixth Circuit and the district courts within it appear to be in some doubt as to whether that circuit has addressed the issue or not. *Compare* United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006), *and* Amundson v. United States, Nos. 1:10–CV–165, 1:07–CR–141–01, 2011 WL 1630905, at *4 (W.D. Mich., Apr. 29, 2011) (internal quotation marks omitted) (internal citations omitted) ("The Court recognizes that most circuits have continued, post-*Booker*, to analyze whether applying revised Guidelines retroactively violates the *Ex Post Facto* Clause, but agrees with the reasoning and holding of *Demaree*, and the dicta of *Barton*."), *with* United States v. Goff, 400 F. App'x 1, 26 n.4 (6th Cir. 2010) (internal citations omitted) ("[I]n *Duane*, we refused to hold that such claims are no longer cognizable, noting that we have continued to consider such claims post-*Booker*; that, in an analogous context, discretionary parole guidelines can give rise to *Ex Post Facto* claims; and that a number of other circuits have continued to analyze such claims post-*Booker*. We find the Government's argument unpersuasive. Although Goff's *Ex Post Facto* claim fails, we continue to recognize the viability of such claims in the Guidelines context."), *and* United States v. Duane, 533 F.3d 441, 446, n.1 (6th Cir. 2008) ("Although we recognize that some language from the above quoted *Barton* footnote could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read *Barton* as announcing such a broad rule.").

district court attempting to apply the *Turner* standard in the face of a potential ex post facto problem will need to determine first whether an actual ex post facto problem exists and, second, whether its consideration of the amended version of the Guidelines would pose a "substantial risk" of influencing its ultimate sentence. The sentencing court must perform this second step while recognizing that if it chooses to apply the post-amendment version, then the court *must* consider that version of the Guidelines when arriving at its sentence pursuant to 18 U.S.C. § 3553(a).[102]

Prior to actually conducting its § 3553(a) analysis, only those district court judges who are perfectly certain that they will ultimately impose a non-Guidelines sentence due to the overwhelming influence of § 3553(a) factors–other than the Guidelines factors–would be able to make the determination that the post-amendment version of the Guidelines poses no "substantial risk" of influencing their sentencing determination under § 3553(a). Yet, relying on such certainty would cause the district court to violate *Gall* and § 3553(a) through a failure, or a refusal, to consider the Guidelines as a basis for sentencing.[103] In practice, it appears likely that, in cases before the district courts of even those circuits adopting the *Turner* approach, a district court will be obligated to apply a pre-amendment version of the Guidelines whenever a post-amendment Guideline would increase the recommended sentence.[104]

Although the merits of the various positions as to the applicability of the Ex Post Facto Clause to the post-*Booker* Guidelines are beyond the scope of this Article, commentators have split along the same lines as the courts.[105]

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102. *See* Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

103. *See id*.

104. In one case applying the *Turner* standard as adopted by the Second Circuit in *Ortiz*, a district court reviewed an increase to the Guidelines range for counts of bank and wire fraud. *See* United States v. Peters, No. 03-CR-211S, 2011 WL 280988 (W.D.N.Y. Jan. 26, 2011). The application of the current version of the Guidelines to Peters's crimes would have resulted in a recommended range of 188–235 months (my calculation), while the 2000 version resulted in a recommended range of 135–168. *Id.* at *2. The district court held, with essentially no discussion of the "substantial risk" standard—and reflexively in the face of a meritorious claim of a retroactively enhanced sentencing recommendation—that the application of a pre-amendment Guidelines version was required under *Ortiz*. *Id.* at *2 ("Here, due to amendments to the Guidelines Manual since 2000, Peters undoubtedly faces a substantial risk of a more severe sentence, because the advisory guideline range has increased."); *see also* Comment, *Second Circuit Holds That Imposing Below-Guidelines Sentence Using Retroactive Guidelines Range Increase Does Not Violate Ex Post Facto Clause*, 124 HARV. L. REV. 2091, 2091 (2011) ("A better approach [for *Ortiz*] would have been to recognize that increasing the Guidelines range presumptively creates a significant risk of increasing a defendant's sentence, and therefore that retroactive application of such a range usually violates the Ex Post Facto Clause.").

105. *Compare* Daniel M. Levy, Note, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control over the Federal Sentencing Guidelines After* Booker, 77 FORDHAM L. REV. 2623 (2009), *and* Benjamin Holley, *The Constitutionality of Post-Crime Guidelines Sentencing*, 37 WM. MITCHELL L. REV. 533 (2011) (arguing that neither the requirement that district courts consult the Guidelines nor empirical evidence of district court adherence to Guidelines sentencing supports the application of the Ex Post Facto Clause to post-*Booker* Guidelines), *with* James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033 (2008).

For present purposes, the difficulty in settling the question demonstrates the courts' continued difficulty in grappling with sentencing rules that may seem more procedural than traditional "laws" retroactively imposing an enhanced sentence. Moreover, that the majority of the circuits requires an ex post facto analysis of the post-*Booker* Guidelines—and that three of those circuits do so on a case-by-case basis—emphasizes the continued relevance of the problems of a variation on ex post facto jurisprudence posed by offenses that span a period of time encompassing two different versions of the Guidelines. This problem is treated in the following section, which discusses the courts' application of the Ex Post Facto Clause in the case of straddle offenses.

IV. The Ex Post Facto Clause and "Straddle" Offenses

For discretionary or procedural rules, especially the now-advisory Federal Sentencing Guidelines, the application of the Ex Post Facto Clause has also been hotly disputed in the case of "straddle" offenses.

A. Defining "Straddle" Offenses

A straddle offense is a single crime, the elements of which occur both before and after a change in law that either criminalizes the combination of elements or increases the punishment for their completion.[106] Take, for example, a criminal racketeering enterprise. In order to establish the existence of such an enterprise, the Government must prove a pattern of racketeering consisting of at least two racketeering acts.[107] Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO") in 1970.[108] If a defendant committed one racketeering act in 1969 and a second in 1971, would prosecution under RICO violate the Ex Post Facto Clause?

Or consider a business, begun in 2008, to distribute caffeinated alcoholic beverages. In 2009, public outrage at the over-caffeinated drunken destruction of public property prompted state legislatures to ban the drinks' production, as well as any conspiracy to engage in such production. Assume further that New York requires proof of an overt act in order to convict a defendant for conspiracy, that the business continues to produce its product through 2010, and that the employees of the business are eventually prosecuted on the basis of a conspiracy–the overt acts of which span from 2008 through 2010. May the state prosecute based on overt acts occurring prior to the enactment of the ban? May they prosecute for a conspiracy with

106. *See* Broughton, *supra* note 6, at 720 (defining straddle crimes as "those offenses for which the defendant satisfies one or more elements of the crime before the date of enactment, and yet the crime is not fully completed—that is, all of the elements are not satisfied—until after the date of enactment").

107. *See* 18 U.S.C. § 1962 (2006); United States v. Delatorre, 581 F. Supp. 2d 986, 976–77 (N.D. Ill. 2008) (holding that "the government need only prove that the defendant . . . [conspired to] commit two or more predicate acts of racketeering").

108. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2006)).

an origin predating the ban?

The answer in each case is "yes"; courts consistently hold that the Ex Post Facto Clause does not bar prosecution of straddle crimes, regardless of the timing of a given element of that crime.[109] Thus, in the first example, the commission of one element prior to the criminalization of the crime as a whole is not a bar to prosecution under the new law, assuming that the defendant completes some second element after the law's enactment. Courts have consistently reached this conclusion with respect to prosecutions under RICO[110] and federal mail and wire fraud statutes,[111] in each case permitting the conviction of a defendant under a law enacted after the completion of one discrete and necessary element of the newly enacted crime.

In cases resembling the second example, in which conduct continues over a period during which that conduct is criminalized, courts essentially moot any ex post facto challenge by viewing the crime as occurring after, as well as before, the relevant criminalization.[112] Conspiracy cases are the classic example. A conspiracy to distribute ecstasy that began in 2009 and continued through 2011 does not end or change in any material respect simply because a new law criminalizing the conspiracy is passed in 2010: in 2011, a member of the conspiracy continues to commit acts sufficient to satisfy each element of the crime, just as he had been doing in 2009. Conceptually, the crime does not actually straddle the criminalizing law at all, but continues to be constantly or repeatedly committed unless and until a defendant withdraws from the conspiracy.[113]

In the case of conspiracies or other crimes with elements that continue past the enactment of a new criminal law, it may be said that all of the relevant conduct actually occurs after the new law comes into effect, and therefore no ex post facto problem actually exists.[114] The justification is different for those decisions permitting prosecutions in the scenarios presenting discrete, non-continuing elements that straddle a criminal

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109. *See* United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002) (noting the well established rule that there is no ex post facto violation when a defendant is charged with conspiracy that continues after the effective date of a new criminal law).

110. *E.g.*, United States v. Torres, 901 F.2d 205, 226 (2d Cir. 1990); United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (per curiam); United States v. Brown, 555 F.2d 407 (5th Cir. 1977); United States v. Boffa, 688 F.2d 919 (3d Cir. 1982).

111. *E.g.*, United States v. Manges, 110 F.3d 1162 (5th Cir. 1997); United States v. Alkins, 925 F.2d 541 (2d Cir. 1991).

112. *See, e.g.,* United States v. Harris, 79 F.3d 223, 229 (2d Cir. 1996) ("It is well-settled that when a statute is concerned with a continuing offense, 'the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of [the statute].' (quoting United States v. Torres, 901 F.2d 205, 226 (2d Cir. 1990)).

113. *See* Broughton, *supra* note 6, at 732–38 (providing examples); *see also* United States v. Harris, 79 F.3d 223, 229 (2d Cir. 1996) (holding that a series of criminal violations did not violate the Ex Post Facto Clause).

114. *See id.*, *supra* note 6, at 737 ("If we view the pre-enactment conduct as continuing, it is fair to conclude that each day thereafter, it is as if the conduct begins afresh. The continuing-offense doctrine essentially turns a straddle offense into one that does not straddle; all of the relevant conduct can now be said to occur post enactment, even if, in reality, it began beforehand.").

enactment: in each instance, the criminal was on notice that an act committed after the criminalization of that act, either in itself or as one element in a criminalized series of acts, would incur criminal consequences.[115]

B. Justifying Punishment for Straddle Crimes: Notice and Recidivism.

Heightened punishment imposed on the basis of activity that predates the enactment of the heightened punishment may operate in the same manner as the straddle crimes described above. For example, RICO may be amended to include a higher statutory maximum punishment at a time falling between two predicate racketeering acts.[116] Litigants have often raised challenges to a particular variant of such punishment enhancing laws, namely those that increase punishment for the commission of a second crime on the basis of a prior conviction for a first crime.

Courts have upheld prior-conviction enhancements for over a century. These courts often assert that prior-conviction enhancements merely reflect the heightened culpability inherent in the subsequent crime. For example, in *Gryger v. Burke*,[117] the Supreme Court found no ex post facto or double-jeopardy issues raised by a prior-conviction enhancement:

> Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.[118]

That the stiffened penalty may have been applied at the time of the subsequent crime, or that it was purportedly applied to the subsequent crime, did not alter the fact that *Gryger* contemplated—in fact, relied upon—the defendant's pre-enactment conduct. The actual justification for the constitutionality of these enhancements is that the offender was on notice of the consequences of committing the second offense, though the consequences are designed to punish the cumulative wrongdoing of both the earlier and subsequent offenses. This reasoning is explicit in the earlier cases on which

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115. *See, e.g.*, United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (per curiam) ("[A]ppellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed.").

116. *See, e.g.,* 18 U.S.C. § 1963(m) (2007).

117. 334 U.S 728, 732 (1948).

118. *Id.*

Gryger relied.[119]

Gryger, which directly addresses the Ex Post Facto Clause, relies in large part on prior cases addressing challenges brought under the Double Jeopardy Clause.[120] For example, in *State v. Moore*, the Supreme Court of Missouri upheld a mandatory sentence of life imprisonment based on the defendant's prior conviction for grand larceny.[121] The defendant challenged his conviction and sentence as violations of the Double Jeopardy Clause[122] and the Cruel and Unusual Punishment Clause[123] of the Constitution.[124] The law in question did not appear to raise ex post facto concerns as there is no indication in *Moore* that the prior-conviction enhancement came into effect after the defendant's commission of his first offense. Nevertheless, the Missouri Supreme Court relied on the defendant's notice of the consequences of his subsequent offense—having already been convicted of a prior offense—in rejecting his challenges. First, the court held that "[t]he increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense," thereby neutralizing Moore's double jeopardy challenge.[125] The court further stated that Moore's conviction and sentence were not cruel or unusual insofar as he was on notice of the consequences of his latter crime: "the law . . . imposes the increased punishment *being presumed to be known by all persons and to deter those so inclined from the further commission of crime*."[126] This passage, and its focus on notice, was quoted by the United States Supreme Court in its opinion affirming *Moore*.[127]

Both the Missouri Supreme Court and United States Supreme Court in the *Moore* case relied on prior state court cases similarly based on the concept of notice to the defendant as nullifying any constitutional challenge to a sentencing enhancement premised on prior convictions. The Missouri Supreme Court relied on *Rand v. Commonwealth*, an old case even at the time *Moore* was decided.[128] The Supreme Court of Virginia decided *Rand* under the Ex Post Facto Clause, rather than under the Double Jeopardy or Cruel and

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119. *Id.* (citing Carlesi v. New York, 223 U.S. 51, 57–58 (1911); Moore v. Missouri, 159 U.S. 673 (1895); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912); Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937)).

120. *Id*.

121. 26 S.W. 345 (Mo. 1894).

122. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

123. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

124. *Moore*, 26 S.W. at 346.

125. *Id.*

126. *Id.* (emphasis added).

127. Moore v. Missouri, 159 U.S. 673, 676–77 (1895).

128. *See* State v. Moore, 26 S.W. at 346 (citing Rand v. Commonwealth, 9 Gratt. 738 (Va. 1852)); *see also* Moore v. Missouri, 159 U.S. at 677 (same).

Unusual Punishment Clauses.[129] The *Rand* court also relied on the notice given to the defendant as to the consequences of committing his second crime by the enactment of the enhanced punishment law:

> The first conviction . . . was had in 1843, and the second offence is alleged and found to have been committed in 1852; whilst the law under consideration was passed in 1848 and reenacted in 1849 . . . . One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. *He knew or is presumed to have known, before the commission of the second offence, all the penalties denounced against it*; and if in some sense the additional punishment may be said to be a consequence of the first offence, (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction,) still it is not a necessary consequence; but one which could only arise on the conviction for the second offence, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid.[130]

In cases not explicitly invoking notice as the constitutional salve for prior-conviction enhancements, courts have invoked the directly related concept of avoidance. That is, a defendant whose sentence is enhanced as a result of a prior conviction could have avoided the enhancement by refraining from committing the subsequent crime, just as the defendant could have avoided *any* criminal repercussions attached to that subsequent crime. The passage from *Rand* quoted above relies on both notice and avoidance as grounds for upholding the enhancement in light of an ex post facto challenge, and indeed the two are actually different ways of explaining the importance of notice to potential defendants.[131] The connection between notice and avoidance is plain in *Blackburn v. State*, cited by the United States Supreme Court in *Moore*:

> Had he abandoned his evil practices after his first imprisonment, or even after his second term had ended, the consequences of which he now complains would not have followed. This he did not do, but instead chose to commit a third offense, and that, too, with his eyes wide open; for he knew, or was bound to know, when he committed this last offense, that he had become one of a class against whom severer measures had been declared to be necessary if he should again be convicted.[132]

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129. *Rand*, 9 Gratt. at 743, 755.

130. *Id*. at 743 (emphasis added).

131. Blackburn v. State, 36 N.E. 18, 21 (Ohio 1893).

132. *Id*. (cited in *Moore*, 159 U.S. at 677); *see also* People v. Stanley, 47 Cal. 113, 116 (1873) (citing, *inter alia*, *Rand*, 9 Gratt. at 743); *In re* Ross, 2 Pick. 165, 170 (Mass. 1824) ("A party ought to know, at the time of committing the offence, the whole extent of the punishment; for it may sometimes be a matter of calculation, whether he will commit the offence, considering the severity of the punishment.").

From *Rand* to *Moore* to *Gryger*, courts have relied on the notice provided to a recidivist offender to justify punishment for the subsequent offense, even though that punishment is increased on the basis of prior actions. These cases continue to support the constitutionality of prior-conviction enhancements and recidivist punishments. In every modern case to consider ex post facto challenges to such laws, often by express reliance on the principle of notice, and always in reliance on the premise that the punishment is heightened because the subsequent offense is rendered more culpable as a result of recidivism, rather than because of the commission of the first crime in itself—despite the logical overlap between those two concepts.[133]

V. The One-Book Rule: Merging Sentencing Rules and Straddle Crimes

All of the foregoing ex post facto difficulties—its application to discretionary sentencing procedures and to straddle crimes—converge in the application of a particular provision of the Sentencing Guidelines: the one-book rule.[134] The Guidelines provide that "[t]he [sentencing] court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."[135] The Guidelines also provide that "[i]f the court determines that the use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."[136] In the event that a court is contemplating the application of two different versions of the Guidelines, it is instructed that it should choose one manual, to be applied "in its entirety."[137] The Guidelines further instruct that, in the event that "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

133. *See, e.g.,* Weaver v. Graham, 450 U.S. 24, 28–29 (1981) ("Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."); *see also* United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997) ("The three-strikes law was enacted before Washington committed the bank robberies, so he had fair warning of the consequences attached to new violent offenses."); United States v. Patterson, 820 F.2d 1524, 1527 (9th Cir. 1987); United States v. Ahumada-Avalos, 875 F.2d 681, 684 (9th Cir. 1989) (per curiam) (upholding a repeat offender statute); United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) (en banc) (alteration in original) (internal quotation marks omitted) ("The Supreme Court and this court uniformly have held that recidivist statutes do not violate the Ex Post Facto Clause if they are on the books at the time the [present] offense was committed."); United States v. Rosario-Delgado, 198 F.3d 1354, 1356 (11th Cir. 1999); United States v. Rasco, 123 F.3d 222, 227 (5th Cir. 1997); United States v. Farmer, 73 F.3d 836, 841 (8th Cir. 1996).

134. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011).

135. *Id.* § 1B1.11(a).

136. *Id.* § 1B1.11(b)(1).

137. *Id.* § 1B1.11(b)(2).

offenses."[138] In the background commentary to this provision, the Commission relies on the logic of *Gryger* in asserting that the Ex Post Facto Clause is not a bar to the application of the later Guideline version in the event of crimes that straddle the publication of an amended (and harsher) Guideline manual: "Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines."[139] Indeed, the Commission cites a case expressly addressed to recidivist statutes in support of its position.[140] Finally, the Commission has taken the position that subsection (b)(3)—the "one-book rule"—"should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under § 3D1.2(d) [as, *inter alia*, a continuing offense]" because "[t]he ex post facto clause does not distinguish between groupable and nongroupable offenses."[141]

The effect of the one-book rule may be to require the application of a heightened punishment to a crime committed prior to the publication of that amended punishment. The courts have split in three directions over the constitutionality of the one-book rule and the Commission's application instructions in light of the Ex Post Facto Clause.

A. Circuits Barring Retroactive Application of the One-Book Rule

The Ninth Circuit has held the one-book rule to violate the Ex Post Facto Clause in every circumstance in which it would apply a heightened Guideline range to a crime committed prior to that increase in punishment. In *United States v. Ortland*, the Ninth Circuit found each separate count of mail fraud to be a "completed offense" and concluded that the "[a]pplication of the [one-book rule] in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline."[142] The Ninth Circuit criticized the Commission's reasoning with respect to the one-book rule, stating that "[t]he

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138. *Id*. § 1B1.11(b)(3).

139. *Id*. § 1B1.11(b)(3), cmt.

140. *Id.* (citing United States v. Ykema, 887 F. 2d 697 (9th Cir. 1989)); *see also Ykema*, 887 F.2d at 700 (citing Gryger v. Burke, 334 U.S 728(1948)).

141. *Id*. § 3D1.2 states:

> All counts involving substantially the same harm shall be grouped together into a single Group [for purposes of determining an applicable offense level and Guideline range]. Counts involve substantially the same harm within the meaning of this rule . . . (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, o*r if the offense behavior is ongoing or continuous in nature* and the offense guideline is written to cover such behavior.

142. 109 F.3d 539, 547 (9th Cir. 1997). The one-book rule's effect and its constitutionality are identical after *Booker* in those Circuits that acknowledge the ex post facto implications of the now-advisory Guidelines. In the Seventh Circuit, the issue is moot in light of *Demaree*.

harm caused by the earlier offenses *can* be counted in sentencing the later one[, but] [t]hat does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be."[143]

The position of the court in *Ortland* rests, of course, on the court's belief that the result of the one-book rule's application is a heightened punishment for conduct that occurred prior to the harsher Guidelines manual's publication; and at first blush that appears to be correct. After all, in calculating the Guidelines' recommended sentencing range—at least when the Guidelines' "grouping" rules are not applicable[144]—a district court does indeed calculate a separate offense level and sentencing range for each offense. Moreover, at the sentencing itself, a district court will pronounce a sentence for each offense separately, even if the court ultimately rules that the sentences shall run concurrently.[145] Each of these factors would, on their face, suggest that the *Ortland* position is correct.

Nevertheless, *Ortland*'s outcome is counter to the long history of cases upholding the application of heightened punishment that depends on the existence of a past offense, but is only triggered by the commission of a post-enactment offense.[146] Defendants are on notice of the consequences of their actions, even if those consequences include punishment "for" prior offenses, as is the case with the one-book rule. That a district court must calculate an offense level and sentencing range and pronounce a sentence specifically for the pre-amendment crime does not alter the fact that the post-amendment crime is the sole and necessary action that brings that consequence to bear.

The procedures for calculating a separate sentence for each offense suggests an intent that sentencing ranges under the Guidelines be considered separately for pre- and post-amendment offenses, as the *Ortland* court held. There is, however, no constitutional relevance in the fact that the Guidelines may be intended to calculate a separate sentence level for each individual crime. The intent and purpose underpinning a given rule is as irrelevant to the issue of whether a defendant was on notice of the rule's effects as it is to the issue of whether the rule actually results in higher punishment.[147] Thus,

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143. *Id*. at 547 (citations omitted). The Ninth Circuit also provided an example of a situation that it believed demonstrated the perversity of the one-book rule: "were the later count to fall at some time [after appeal or pardon] after sentencing, all that would remain would be the earlier sentences, which would be too long." *Id.*

144. *See infra* Part III.

145. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(c) ("If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.").

146. *See infra* Part IV.

147. *See* Lynce v. Mathis, 519 U.S. 433, 443–44 (1997) (internal quotation marks omitted) (citations omitted) ("Our determination that the new guideline was more onerous than the prior law rested entirely on an objective appraisal of the impact of the change on the length of the offender's presumptive sentence.").

Although *Lynce* holds that legislative purpose is irrelevant to the issue of whether a rule in fact

the procedures for calculating an offense level and the intent to assign each offense with a sentencing range are irrelevant under the Ex Post Facto Clause, although the issue of the Guidelines' intents and purposes still poses significant problems for the application of the Ex Post Facto Clause, constitutional or not.[148]

B. Circuits Permitting Application of the One-Book Rule to "Groupable" Offenses

The second position taken on the one-book rule among the circuits holds that the Ex Post Facto Clause is not offended by application of the one-book rule, "at least as applied . . . to a series of similar offenses."[149] Thus, the Seventh Circuit in *Vivit*, a pre-*Booker* opinion, held that the one-book rule, *in combination with* the grouping rules, provided adequate notice to defendants of the consequences of their subsequent offenses sufficient to satisfy the requirements of the Ex Post Facto Clause.[150]

This holding is, in fact, an attempt to rewrite the one-book rule so as to avoid the implications of the Ex Post Facto Clause altogether. Just as "continuing" straddle crimes do not actually involve any retroactive application of increased punishments because the elements of the crime occur *after* the enactment of the heightened punishment, these circuits attempt to cabin the one-book rule to situations in which there is arguably no retroactive application at all.[151] This position has become the majority position among the circuits.[152]

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increases punishment, courts have routinely looked to legislative intent and purpose in ruling on a separate question relating to ex post facto challenges, namely the issue of whether a law is "punitive," a necessary precedent to the application of the Ex Post Facto Clause. Seling v. Young, 531 U.S. 250, 261 (2001) ("A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."). However (and unsurprisingly), there appears to be no example of a court applying a similar legislative intent analysis to the issue of notice or to whether punishment has in fact increased.

148. *See infra* Part III.

149. United States v. Santopietro, 166 F.3d 88, 96 (2d Cir. 1999) (declining to rule on the issue, but noting the position of other circuits).

150. United States v. Vivit, 214 F.3d 908, 919 (7th Cir. 2000) ("[W]e believe that the enactment of the grouping rules provides fair notice such that the application of §§ 1B1.11(b)(3) and 3D1.2 does not violate the Ex Post Facto Clause. To violate the Ex Post Facto Clause, the application of amended Guidelines must disadvantage the defendant without providing the defendant with prior notice."); *see also* United States v. Cooper, 35 F.3d 1248, 1250 (8th Cir. 1994) ("In our view, Cooper had fair warning that commission of the January 23, 1992, firearm crime was governed by the 1991 amendments that provided for increased offense levels *and new grouping rules* that considered the aggregate amount of harm. Utilizing the *Miller* analysis, it was not the amendments to the Sentencing Guidelines that disadvantaged Cooper, it was his election to continue his criminal activity after the 1991 amendments became effective.") (emphasis added).

151. *See infra* Part III.A.

152. In addition to the Seventh and Eighth Circuits, see United States v. Saferstein, No. 10-4092, slip op. at 5 (3d Cir. Jan. 24, 2012) ("Even [t]he fact that various counts of an indictment are grouped cannot override ex post facto concerns, although our ex post facto concerns are assuaged when counts are properly grouped under § 3D1.2(d) as 'continuing, related conduct' and the sentencing court applies the

This attempt to quietly avoid ex post facto problems under the one-book rule is less than satisfying. First, *Vivit*'s reliance on the grouping rules does not really extinguish ex post facto concerns in the way that "continuing" straddle crimes normally would. A single crime of conspiracy that carries over the enactment of heightened punishment for that conspiracy involves a single, unified criminal activity that is completed after the enactment of heightened punishment. The grouping rules, on the other hand, do not necessarily involve such a conceptually neat arrangement of criminal conduct. For example, the grouping rules may apply to "all counts involving substantially the same harm."[153] "Substantially the same harm" is a defined term meaning, in part, a situation where:

> the offense level [for a set of crimes] is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, *or* if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.[154]

Note that under this definition, offenses may be wholly unconnected by a common criminal purpose or a common victim; widely disparate counts of fraud ("total amount of harm or loss") or drug offenses ("the quantity of a substance involved") may be grouped under this rule.[155] Some circuits attempt to ease this difficulty with the grouping rules by expressly or impliedly requiring that offense conduct be linked by a common scheme or be part of a unified series of offenses.[156] Neither approach—reliance on the grouping rules or reliance on a series of similar offenses—satisfactorily addresses the situation in which the one-book rule is applied as written and

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Guidelines Manual relevant to the latest count.")(citations ommited)(internal quotation marks); United States v. Siddons, 660 F.3d 699, 707 (3d Cir. 2011) ("Due to the grouping rules at § 3D1.2(d) and the one-book rule at § 1B1.11, Siddons was on constructive notice that the November 1, 2003 enhancement could apply to his entire scheme, should he continue the conduct after the date of enactment."); United States v. Bailey, 123 F.3d 1381, 1404–05 (11th Cir. 1997) ("[T]he one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses committed in a series will be sentenced together under the . . . Manual in effect at the end of the series."); United States v. Sullivan, 255 F.3d 1256, 1262-63 (10th Cir. 2001); United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000) (finding no ex post facto violation in the application of a later-enacted Guidelines Manual to a series of similar tax evasions, and relying on *Vivit* and similar opinions, though not discussing the relevance of the grouping rules); United States v. Kimler, 167 F.3d 889, 893–95 (5th Cir. 1999) ("Simply put, Kimler had adequate notice at the time he committed the counterfeiting offense in 1990 that his mail fraud offenses would be grouped with the counterfeiting offense and therefore that the 1990 guidelines would apply.").

153. U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2011)

154. *Id*. § 3D1.2(d) (emphasis added).

155. *Id.*

156. *See* United States v. Bailey, 123 F.3d 1381, 1404–05 (11th Cir. 1997) ("[T]he one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses *committed in a series* will be sentenced together under the . . . Manual in effect at the end of the series.") (emphasis added); *see also* United States v. Santopietro, 166 F.3d 88, 96 (2d Cir. 1999) (a pre-*Kumar* opinion noting that several circuits had upheld the application of the one-book rule in circumstances involving a "series of similar offenses," but declining to rule on the issue of the one-book rule's constitutionality).

to offenses that raise a true possibility for retroactive punishment.

C. *United States v. Kumar:* The Second Circuit's Blanket Approval of the One-Book Rule

The third and final approach to evaluating the one-book rule was announced by the Second Circuit's decision in *Kumar*.[157] *Kumar* arose from the Securities and Exchange Commission ("SEC") and Department of Justice ("DOJ") investigations of fraudulent accounting practices at Computer Associates ("CA").[158] Defendant Sanjay Kumar joined CA in 1987, became CEO in 2000, and head of the Board of Directors in 2002; defendant Stephen Richards joined CA in 1988 and became Head of North American sales in 1999.[159] From the beginning of their tenure through 2000,[160] the two defendants continued an already-existing accounting practice known as the "35-day month, whereby CA backdated contracts executed in the first few days of a financial quarter to recognize that revenue in the prior quarter."[161] The SEC/DOJ investigation began in 2002, and the agencies subpoenaed the defendants for interviews in 2003.[162] "On September 22, 2004, CA entered into a deferred prosecution agreement with the United States Attorney's Office ("USAO") and a civil settlement with the SEC."[163] The next day, an indictment was unsealed charging Kumar and Richards.[164] A superseding indictment followed on May 17, 2005, charging Richards with conspiracy to commit, and substantive counts of, securities and wire fraud; filing false public statements with the SEC and perjury; and with obstruction of justice arising out of false exculpatory statements to CA's counsel and the SEC.[165] Kumar was charged with the same offenses, although his obstruction offense was premised on different actions, with "the government alleg[ing] that Kumar, in an effort to cover up the existence of the 35-day month practice, lied to CA's outside counsel, instructed CA's general counsel to coach CA employees to lie, authorized CA's general counsel to pay a $3.7 million bribe to an individual to procure his silence, and lied to FBI agents and others during his interview at the USAO's office."[166]

In the case of each defendant, the underlying fraud was completed in 2000, but the obstruction of the government's investigation began in 2002

157. United States v. Kumar, 617 F.3d 612, 617 (2d Cir. 2010).

158. *Id.*

159. *Id.*

160. *Id*. at 618 n.2 (noting—and the Government appears to have accepted—that the accounting practices underlying the investigation and indictments concluded in 2000).

161. *Id*. at 617.

162. *Id*.

163. *Id.*

164. *Id.*

165. *Id*.

166. *Id.* at 618.

and continued through the time of the superseding indictment.[167] In April of 2006, they each pled guilty to the indictment and were sentenced under the then-current 2005 version of the Guidelines Manual.[168] The defendants objected to the use of the 2005 Manual on the grounds that changes made to the Guidelines in 2001, 2002, and 2003[169] resulted in a 20-point increase in their offense levels in comparison to their offense levels under the 1998 Manual, which was in force at the time the 35-day month scheme ended in 2000.[170] The Government contended that the one-book rule obviated any ex post facto problems in the application of the later Manual because the defendants' obstruction offenses had been committed after the publication of the increased offense levels.[171]

The Second Circuit began its analysis by describing the two positions of its sister circuits, as outlined above.[172] The court then focused squarely on the Ex Post Facto Clause's overriding concern: notice to the defendant of the consequences of his actions. The court found that the one-book rule—regardless of the applicability of the grouping rules or the similarity of the crimes at issue—had been in force prior to the defendants' obstruction offenses and, therefore, had placed them on notice of the applicability of the later Guidelines Manual to both their pre- and post-amendment offenses.[173] The Second Circuit's explanation echoed the justifications long articulated with respect to other straddle offenses:

> As to notice, we observe that prior to the commission of their obstruction offenses the defendants could have altered their conduct so as to avoid any heightened punishment imposed on the basis of the one-book rule by choosing not to obstruct the government's investigation of their prior fraud.[174]

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167. *See id.* at 641 ("Beginning in September 2002 and continuing until April 2004, the defendants engaged in various acts designed to cover up their previously committed conspiracy and fraud. In a 2005 superseding indictment—the original indictment had been handed down in 2004—the defendants were charged with committing fraud and conspiracy . . . .") (internal citation omitted).

168. *Id.*

169. *See id*. at 624, 625 n.10. No further, relevant increases to offense levels existed as between the 2003 and 2005 Manuals. Thus, the district court and Second Circuit considered the 2005 Manual's application—as the then-current Manual—rather than the application of the 2003 Manual. *Id*.

170. *Id.* at 618 n.2.

171. *Id.* at 625.

172. *Id*. at 626–27; *see infra* Part V.A.–B.

173. *Id*. at 628.

174. *Id. See supra* Part IV.B; *see also* Moore v. Missouri, 159 U.S. 673, 676–77 ("[T]he law . . . imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime."); Rand v. Commonwealth, 9 Gratt. 738, 743 (Va. 1852) ("One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew or is presumed to have known, before the commission of the second offence, all the penalties denounced against it; and if in some sense the additional punishment may be said to be a consequence of the first offence, (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence; but one which could only arise on the conviction for the second offence, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid [it].").

The Second Circuit also relied on an analogy between the one-book rule's effect and the effect of recidivist statutes that increase punishments for subsequent crimes on the basis of former crimes.[175] The court rejected the relevance of any contention that recidivist statutes merely increase punishment of the subsequent offense because that offense is more culpable than prior offenses:

> It might also be argued that the recidivist statutes impose punishment upon only a single crime, the prior offenses having already been committed and for which the defendant had been sentenced . . . . [This] distinction between the recidivist statutes and the one-book rule makes neither a practical nor a logical difference for purposes of an analysis under the *Ex Post Facto* clause. In both cases, prior conduct becomes the basis for imposing a heightened sentence only upon conviction for a later criminal act.[176]

Judge Sack authored a dissent to the *Kumar* opinion's ex post facto holding. The core of his objection was that, although the defendants were provided constructive notice of the consequences of their subsequent crimes, such notice was not "fair."[177] The dissent contended that "the notice that the defendants received here was notice as to punishment for the wrong crime: not as to the fraud and conspiracy crimes for which punishment was revised markedly upward, but the subsequent obstruction offenses for which the Guidelines have not changed."[178] Judge Sack found this notice "inconsequential" because "the defendants were not subjected to an increased sentence for obstruction; they were subjected to an increased sentence for already completed frauds."[179] The dissent, therefore, attempted to freeze the punishment for an earlier crime regardless of the then-extant consequences of that defendant's subsequent acts. Responding to Judge Sack's dissent, the majority repeated its rejection of this attempt to render subsequent acts irrelevant to the ex post facto analysis, noting that the dissent "fails to acknowledge that the stiffer penalty is imposed only because the defendant committed earlier crimes."[180]

The *Kumar* analysis varies from those of other circuits upholding the

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175. *Kumar*, 617 F.3d at 630.

176. *Id.* at 629–630.

177. *Id*. at 646 (Sack, J., dissenting).

178. *Id.* at 643 (Sack, J., dissenting).

179. *Id.* As previously mentioned, *see supra* note 175, Judge Sack's concerns were also motivated in part by his concern that the defendants had essentially been notified that their punishments may be retroactively increased. *Kumar*, 617 F.3d at 648 (Sack, J., dissenting). The majority's response demonstrated its understanding that the consequences of the defendants' second offenses were not ambiguous in the way the dissent implied. *Id.* at 629 n.15.

180. *Id.* at 630 n.16.

application of the one-book rule to straddle crimes in that it rejects any reliance on the grouping rules of the Guidelines or the similarity of the offenses. "[T]he government's assertion that the sentences do not violate the *Ex Post Facto* clause because the[] counts were properly grouped pursuant to § 3D1.2 is misplaced. If the sentences do not offend the *Ex Post Facto* clause, it is only because the application of the one-book rule is not retrospective."[181] This conclusion is the logical result of the justifications underpinning the court's maintenance of heightened punishments in cases of straddle crimes. The relevant question for purposes of establishing constitutionality under the Ex Post Facto Clause is whether the defendant had notice of the consequences of his actions; what those actions are, or what the consequences may be, are irrelevant to an ex post facto analysis. The issue of "when" predominates the separate issue of "what."

The Second Circuit's holding in *Kumar* was correct as an application of the Ex Post Facto Clause. It will be interesting to see whether those circuits that have upheld the one-book rule with respect to groupable offenses will adopt the *Kumar* approach when ultimately faced with the one-book rule's application to offenses not susceptible to grouping.[182]

VI. The *Kumar* Problem

Though *Kumar* may be correct as an application of the Ex Post Facto Clause, the application of heightened punishment to previous conduct—despite the triggering event of a subsequent offense—is nevertheless problematic and even unfair. Contrary to the assertions of the *Kumar* dissent, however, the unfairness of the one-book rule's application to straddle offenses does not inhere in any notion of retroactivity, as the *Kumar* majority rightly contended. Rather, the application of the one-book rule to offenses straddling an amendment to the Guidelines contravenes the central justification for enacting the Guidelines themselves: uniformity of punishment for defendants convicted of similar actions. Unlike the *Kumar* dissent or the decisions of the Third and Ninth Circuits, however, the incongruity of the one-book rule's application is a function of its treatment of the *post-amendment* crime, rather than the pre-amendment crime. As such, this problem does not raise an ex post facto concern, but rather a concern with the purported rationality and fairness of the Guidelines as policy.

The Guidelines were originally enacted to combat the problem of widely disparate and, therefore, seemingly arbitrary treatment of similar

181. *Id*. at 625–26 n.11 (internal quotation and citation omitted).

182. *Kumar* briefly addresses, and dismisses, the hypothetical raised in *Ortland* in which the post-amendment offense is somehow dropped or expunged after a sentence is imposed. *See supra* note 143; *Kumar*, 617 F.3d at 631. Although *Kumar* does not address the hypothetical in any substantive way, presumably a circuit governed by the *Kumar* rule would expect that in the event the one-book rule triggering offense were overturned (for example, on appeal, on collateral review, or by pardon), the sentence for the remaining pre-amendment crime would be reassessed by the reviewing court or official.

crimes by different defendants.[183] "Reduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984."[184] In order to provide for a more fair and rational system of punishment, the Sentencing Commission originally undertook the task of creating the Guidelines to provide similar punishments for similar acts. "The guidelines are intended to promote fairness through the establishment of sanctions proportionate to the severity of the crime and the avoidance of unwarranted disparity by setting similar penalties for similarly situated offenders."[185] Commensurate with the goal of uniformity, the Guidelines were originally mandatory, and even after *Booker*, the Commission continues to gauge its own success in part on the district courts' reliance on the uniformity of sentencing ranges recommended by the now-advisory Guidelines.[186]

The application of the one-book rule in situations where two offenses straddle an increase in punishment for the first offense contravenes the Guidelines' goal of uniformity. As a result of the Ex Post Facto Clause's operation, the punishment for a crime is frozen at the time of commission.[187] Every circuit to consider the issue, with the single exception of the Seventh Circuit in *Demaree*, has concluded that application of a Guidelines Manual to offenses completed prior to that Manual's publication at least poses a risk of unconstitutionally retroactive punishment.[188] This ex post facto implication of the Guidelines, coupled with the Commission's stated goal of uniformity, implies that the concept of uniformity must have a temporal element in the context of assessing punishments under the Guidelines.

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183. *See*, *e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1255 (2011) ("The Guidelines are to further the statutes' basic objective, namely greater sentencing uniformity, while also taking account of special individual circumstances, primarily by permitting the sentencing court to depart in nontypical cases."); *see also* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (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.").

184. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 104 (1998); *see also id.* ("Congress's concern with reducing perceived or assumed disparities in federal sentencing is reflected in the debates leading up to the Act's passage, in the Senate report accompanying it, and in the text of the Act itself. Indeed, the virtue of reducing sentencing disparity stemming from the exercise of judicial discretion was one thing that both conservatives and liberals in Congress could readily agree on, if for different reasons.") (internal citations omitted).

185. U.S. SENTENCING COMMISSION ANNUAL. REP. at 1 (2010); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A.1(3) (2010) ("After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system."). *See also* Blakely v. Washington, 542 U.S. 296, 316 (2004) (O'Connor, J., dissenting) ("[L]awmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise labyrinthine sentencing and corrections system that lacked any principle except unguided discretion.") (internal quotation marks and alterations omitted).

186. *See* U.S. SENTENCING.GUIDELINES MANUAL § 1A2 (2010) ("[T]he guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.").

187. *See supra* note 97 and accompanying text.

188. *See supra* Part II.B.

Indeed, the Guidelines themselves recognize as much and instruct district courts not to apply a more severe version of the Guidelines to offenses completed prior to that version's publication in situations not involving the one-book rule.[189]

Thus, the Commission's concern for uniform treatment of similar actions necessarily implies a concern for uniform treatment of similar actions committed *in the same relevant timeframe*. Necessarily, the Ex Post Facto Clause bars uniformity of treatment of any single offense across Guidelines versions differing in severity; the virtues of consistent sentencing are simply prohibited from trumping the constitutional ban on ex post facto increases to punishment. The Commission's instruction for district courts regarding retroactive application of the Guidelines may be understood as the Commission's endorsement of this understanding of uniformity. As a constitutional matter, the Guidelines may not attempt to impose uniformity of treatment as between defendants each committing the same crime, one in 1990 and one in 2000, if the punishment for that crime was increased under the Guidelines regime in 1995.

Because the punishment for the first crime is frozen in time, the application of heightened punishment under the one-book rule necessarily increases the punishment for the commission of the post-amendment offense. After all, this is the standard justification for upholding increased punishments in the case of straddle crimes. The *Kumar* dissent identifies this fact as a source of unfairness, claiming that it undermines the quality or substance of any notice with respect to the punishments applicable to the pre-amendment crime.[190] Nevertheless, as explained above, *Kumar* correctly holds that the one-book rule immunizes the application of an amended Guidelines Manual from an ex post facto challenge.[191] The punishment punishes the second offense more severely than it otherwise would, even as it relies on the fact of a prior offense—just as every recidivist statute relies on the fact of prior offenses.

This formulation, so often repeated in the ex post facto analyses of courts reviewing recidivist statutes,[192] demonstrates that the disuniformity created by the one-book rule is actually the punishment applied *to the second offense*. Taking an example structured like the situation in *Kumar*, this disuniformity becomes clear. Assume that a defendant commits tax fraud in 1990 at a time when the penalty under the Guidelines is one to five years of

189. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2010) ("If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.").

190. United States v. Kumar, 617 F.3d 612, 638–50 (2d Cir. 2010) (Sack, J., concurring in part and dissenting in part).

191. *Id*. at 612.

192. *See, e.g.*, State v. Moore, 26 S.W. 345, 346 (Mo. 1894) ("The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense.").

imprisonment. In 1995, the Guidelines are amended to provide that tax fraud of the same nature and degree is punishable by six to ten years of imprisonment. In 1996, an investigation begins and the defendant endeavors to obstruct its progress, an offense that, alone, would carry a penalty under the Guidelines of one to five years. If convicted for either of the crimes alone, the defendant would face one to five years of imprisonment for a maximum of ten years total (assuming that the offenses were not grouped and that the sentences would run consecutively). However, under the one-book rule, the defendant faces a maximum of fifteen years imprisonment. Because our understanding of the Ex Post Facto Clause requires a court to attribute that added five years to the second crime, the one-book rule increases the punishment for that second crime.

The *Kumar* dissent argues that the majority's reliance on recidivist statutes to justify its understanding of the historical application of the Ex Post Facto Clause is misplaced precisely because the statutes at issue in those cases were meant to increase the punishment for the second crime, rather than justify an increased penalty for the first.[193] The dissent's point is irrelevant to the Ex Post Facto Clause analysis, but it does identify why the disuniformity at work in the *Kumar* situation is troublesome. Namely, the Guidelines do not intend, through the mechanism of the one-book rule, to increase the punishment of subsequent offenses on the basis of past criminality. Indeed, the Guidelines' calculation of ranges of punishment already takes into account past criminal behavior in the form of the Criminal History Category.[194]

This tension between the effect of the one-book rule and the Guidelines' overarching concern with uniformity and rationality is troublesome in two respects. First, it may result in a kind of "double counting" for recidivism that the Guidelines do not purport to condone. By increasing punishment for later sentences under both the one-book rule and via the Criminal History Category calculations, the Guidelines seem to unintentionally increase punishment without any justification corresponding to their stated goals of honesty, uniformity, equity, or proportionality.[195] Second, this tension serves to weaken the concept of constructive notice that otherwise supports the constitutionality of the one-book rule under the Ex Post Facto Clause. Although very little in the way of actual notification is required to satisfy the requirements of "fair" or "constructive" notice,[196] for

193. *Kumar*, 617 F.3d at 648–49 (Sack, J., dissenting).

194. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2010) ("A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

195. U.S. SENTENCING GUIDELINES MANUAL § 1A.1(3) (2010).

196. Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 255 (1982) ("Under an ancient Anglo-American common-law doctrine, a law may take effect from the moment it is signed, or an administrative rule may penalize conduct immediately after it is voted on, with no obligation on the lawmakers to publicize or promulgate their enactments. If a citizen acts in unavoidable ignorance of such an unpublicized enactment and runs afoul of the new law, his ignorance

the Guidelines to contradict themselves in such a basic way certainly frays any thread of constructive notice that might otherwise support the application of the Guidelines under fundamental principles of legality.[197]

VII. Conclusion: Solving the *Kumar* Problem

The problem posed by the one-book rule has at least two possible solutions, both of which would resolve the disuniformity in punishment promoted by the one-book rule's application in the *Kumar* situation. First, district courts, faced with the application of an amended Guidelines manual to a pre-amendment crime as a result of the one-book rule's application, could simply refuse to accept the Commission's instruction to apply the amended version. This would be an exercise of the district court's enhanced discretion, post-*Booker*, to vary from the instructions of the Guidelines on the basis of a policy disagreement or finding that the Guidelines themselves fail to reflect the broader sentencing concerns of § 3553(a).[198] Pursuant to § 3553(a)(4), a district court must consider "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that . . . are in effect on the date the defendant is sentenced . . . ."[199] Despite that direction, a district court adopting the reasons for jettisoning the one-book rule could ignore this requirement without risking a remand for resentencing so long as its reasoning clarified that it would have, in furtherance of § 3553(a)(6),[200] entirely discounted any Guidelines calculation relying on the one-book rule's application.[201] Once the district court settles on the application of two separate sentencing manuals, it would need to calculate a sentencing range

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may offer him no legal defense.") (footnotes omitted).

197. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189–90 (1985) ("The principle of legality, or *nulla poena sine lege*, condemns judicial crime creation. . . . [A] fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.") (footnotes omitted).

198. *Cf.* Spears v. United States, 555 U.S. 261, 264 (2009) ("That was indeed the point of *Kimbrough:* a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." (emphasis in original)); Kimbrough v. United States, 552 U.S. 85, 101 (2007) ("The Government acknowledges that the Guidelines are now advisory and that, as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.") (alteration in original) (internal quotation marks omitted); Rita v. United States, 551 U.S. 338, 351 (2007) (district courts may determine that a "Guidelines sentence itself fails properly to reflect § 3553(a) considerations").

199. 18 U.S.C. § 3553(a)(4) (2010).

200. "The court, in determining the particular sentence to be imposed, shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C § 3553(a)(6) (2010).

201. The fact that the one-book range was calculated at all would not, of course, open the district court's sentence to attack under the Ex Post Facto Clause. First, as described above, the one-book rule poses no ex post facto problem. And second, the one-book range would be expressly disclaimed, removing any risk, much less a "significant risk," that such calculation would affect the defendant's ultimate sentence.

for each and synthesize those ranges into a coherent sentence, just as it would in any situation involving non-groupable offenses.

For cases involving the one-book rule's application to a series of similar offenses,[202] district courts would be in a position to gauge whether the normal policy justifications for heightened punishment of subsequent crimes (i.e., greater culpability evidenced by recidivism) should apply so as to require a higher punishment than would be recommended by a calculation involving both a pre- and post-amendment Guidelines manual. In such cases, the criminal history category calculations may—and likely would—already capture a reasonable degree of heightened punishment. But a reasoned, categorical rejection of the one-book rule's application to straddle offenses would place district courts in a better position to grapple with these issues than the current Guidelines regime provides.

A second approach would involve an amendment to the Guidelines by the Sentencing Commission. Specifically, the Commission should revise § 1B1.11(3) to read:

> If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, *and the revised edition would result in a higher guideline range for the first offense than would be the case under the edition in force at the time of the first offense, the court shall apply the revised edition only to the second offense*.

This approach would remedy the effective double-counting of recidivism under both the one-book rule and the Criminal History Category calculations. It would also bring the Guidelines into closer conformity with their stated goal of uniformity, and would avoid the need for district courts to perform the logical acrobatics required to comply with § 3553(a) in their determination of a reasonable sentence.

The courts are still in the process of developing a standard application of the Ex Post Facto Clause to the Sentencing Guidelines in general and the one-book rule in particular. For the time being, the Supreme Court has declined to offer a ruling specifically addressing either issue.[203] In the meantime, the lower courts and the Sentencing Commission have an opportunity to develop an approach to sentencing multiple offenses that will respect the constitutional prohibition of the Ex Post Fact Clause, lend substance to the post-*Booker* grant of rational discretion to the lower courts,

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202. *See supra* note 150.

203. *See, e.g.*, United States v. Kumar, 617 F.3d 612 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2931 (2011); United States v. Favara, 615 F.3d 824 (7th Cir. 2010) (reaffirming the Seventh Circuit's prior holding in *Demaree*), *cert. denied sub nom.* Custable v. United States, 131 S. Ct. 1812 (2011). At the time of this Article's publication, the petition for certiorari in *Gabayzadeh v. United States*, seeking review of a sentence imposed pursuant to the Second Circuit's decision in *Kumar*, is pending before the Court. Gabayzadeh v. United States, Petition for Certiorari, No. 11-1034 (petition filed Mar. 13, 2012).

and advance the Guidelines' predominant goals.