Constitutional Uncertainty in Federal Sentencing After *Johnson* and *Beckles*

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Is possession of a sawed-off shotgun a violent crime? This seemingly straightforward question has led to two major upheavals in constitutional criminal law in the past few years. First, in 2015, the Supreme Court held in Johnson v. United States *that part of the statutory definition of a "crime of violence" in the Armed Career Criminal Act was unconstitutionally vague, leading to the resentencing of hundreds of convicts. Then, in 2017, the Court held in* Beckles v. United States *that the exact same definition in the Federal Sentencing Guidelines was not unconstitutional because the Sentencing Guidelines are immune to void-for-vagueness challenges. This Note examines the aftereffects of these cases. In particular, this Note focuses on the constitutional status of the Sentencing Guidelines. It argues that* Beckles *has opened a Pandora's Box of uncertainty concerning the applicability of different constitutional principles to the Guidelines and that it undermines the established rights of criminal defendants. This Note concludes by providing a novel and comprehensible legal proposal that would provide some clarification to these issues while still being consistent with the holdings in both* Johnson *and* Beckles*.*

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Introduction

"[O]r otherwise involves conduct that presents a serious potential risk of physical injury to another."[1] Until recently, this short phrase appeared in two identical definitions of a "crime of violence" that were integral to federal prosecutions—one found in the Armed Career Criminal Act, the other in the Federal Sentencing Guidelines.[2] The former was declared unconstitutional by the Supreme Court, while the latter was upheld.[3]

To understand this paradoxical result, one must first make sense of the unique position the Federal Sentencing Guidelines hold in constitutional criminal law. The Guidelines have been in place for over thirty years, providing instruction to federal district court judges on how to sentence criminal defendants consistently within the wide ranges available under most criminal statutes.[4] Over that time, the Guidelines have gone from a mandatory regime that judges must follow to an advisory mechanism that judges must consider, but from which they are free to deviate.[5]

This advisory-only feature of the Guidelines was crucial to the Supreme Court's recent decision in *Beckles v. United States*.[6] In that case, the Court distinguished the above-quoted "residual clause" of the Sentencing Guidelines from its twin in the Armed Career Criminal Act that was declared

1. 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015).
2. *See infra* subpart I(B).
3. *See infra* subpart I(B).
4. *See infra* subpart I(A).
5. *See infra* subpart I(A).
6. 137 S. Ct. 886, 895 (2017).

invalid two years prior in *Johnson v. United States*.[7] Despite the previous holding that the residual clause was unconstitutionally vague, the Court upheld the clause in the Guidelines by immunizing the Guidelines from void-for-vagueness challenges completely.[8]

The holding in *Beckles* opens a can of worms with regard to the Constitution and the Guidelines. How far does this holding apply? Are there other constitutional protections that are inapplicable to the Guidelines? Are there any circumstances in which an unclear provision of the Guidelines would be invalid? These questions have no clear answer, and in the meantime, the rights of criminal defendants are put in jeopardy by the uncertainty that *Beckles* has created.

This Note proceeds in three Parts. Part I provides the legal and historical background needed to understand *Johnson* and *Beckles*. It describes the Guidelines, how they came about, and how they came to be advisory. It also provides an explanation of the void-for-vagueness doctrine and the Court's varied approach to applying that doctrine in recent cases. Part II explores the theoretical implications of *Beckles*, with a particular emphasis on understanding the reach of the Court's constitutional holding. It examines the case's effect on the void-for-vagueness doctrine, the possibility that the Guidelines are immune to challenges on other constitutional grounds, and the significance of the case to defendants' right to trial by jury. Finally, Part III proposes a new legal lens through which to consider the Guidelines by drawing upon Eighth Amendment precedents. This proposal will provide clarity to the issues described in Part II while remaining faithful to the Court's holdings in *Johnson* and *Beckles*.

I. Federal Sentencing Guidelines and Void-for-Vagueness

This Part provides the background of the state of the law as it stands today. Subpart A examines the creation of the Federal Sentencing Guidelines and early case law shaping their significance. Subpart B discusses the void-for-vagueness doctrine and the Supreme Court's recent refusal to apply that doctrine to the Guidelines.

A. Sentencing Guidelines from Mistretta *to* Booker

Prior to the advent of the Guidelines, federal judges were given almost unfettered leeway in criminal sentencing, so long as the imposed sentences were within the statutorily mandated minimum (if any) and maximum.[9] This system was widely criticized.[10] Congress ultimately responded by passing the

7. *Id.* at 892; Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

8. *Beckles*, 137 S. Ct. at 897.

9. *See* Emily Saxe Nydam & Michele Brown Piccirilli, *Sentencing*, 75 GEO. L.J. 1129, 1129 (1987) (identifying pre-Guidelines law as "delegat[ing] broad discretion to the judge in setting an appropriate sentence within the statutory limits for each offense").

10. *See* S. REP. NO. 98-225, at 38 (1983) (observing that judges' "unfettered discretion" had led

Sentencing Reform Act of 1984.[11] The Act was revolutionary in reshaping the way in which federal defendants are sentenced. Most notably, it established the U.S. Sentencing Commission, an independent agency located within the judicial branch.[12] The role of the Sentencing Commission was (and still is) to promulgate the Federal Sentencing Guidelines.[13]

As originally conceived, the Guidelines were meant to bind sentencing judges to a narrow range of permissible punishments based on the underlying offense and a number of other facts, thereby drastically reducing the wide sentencing disparities from one judge to another.[14] The new sentencing scheme was immediately challenged as an unconstitutional delegation of legislative power and a violation of separation of powers, but the Supreme Court rejected both assertions in *Mistretta v. United States*.[15] In so doing, the Court validated the Guidelines and put to rest the idea that it would strike them down in their entirety for over a decade.[16]

The mechanics of the Guidelines operate much in the same way today as they did when they first took effect in 1987. As an illustration, suppose a defendant is convicted by a jury for robbery in violation of the Hobbs Act.[17] The "base offense level" for robbery is twenty,[18] meaning that under the most favorable circumstances, a defendant would be subject to a sentencing range

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to wide sentencing disparities); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 231 (1993) (recalling that many reform advocates suspected racial discrimination in sentencing); William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 311 (1993) (identifying a perceived lack of proportionality between sentencing for conduct of different severity as a motivating factor for reform).

11. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C. (1988)).

12. Jordan Fried, *The Constitutionality of the U.S. Sentencing Commission: An Analysis of the Role of the Judiciary*, 57 GEO. WASH. L. REV. 704, 705, 707–08 (1989); *see also* 28 U.S.C. § 991(a) (2012) (setting forth the composition of the Sentencing Commission).

13. Fried, *supra* note 12, at 708; *see also* 28 U.S.C. § 991(b) (setting forth the purpose of the Sentencing Commission).

14. *See* Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89–90 (1988) (lamenting that the Act "requires the sentence to be within a narrow range of months determined by mathematical formula . . ."). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (explaining the newly created Guidelines).

15. 488 U.S. 361, 412 (1989).

16. *See* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 420 (2010) ("[A]fter the Supreme Court upheld the Guidelines' constitutionality in *Mistretta* in 1989, judges learned to live with them."); *cf.* John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 573 (2005) (explaining that the *Booker* Court did not overturn the holding of *Mistretta* but instead considered other issues).

17. 18 U.S.C. § 1951(a) (2012) (creating the offense of robbery).

18. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(a) (U.S. SENTENCING COMM'N 2016) [hereinafter GUIDELINES].

of thirty-three to forty-one months under the Guidelines.[19] Now suppose that the same defendant had robbed a bank, and that the amount stolen was $1,000,000. These two factors increase the offense level by two and three levels, respectively.[20] Suppose that the defendant carried and discharged a firearm in the commission of the robbery, but that nobody was injured. This increases the offense level by another seven levels.[21] Now the defendant's offense level is thirty-two. Also suppose that the defendant had previously been convicted of an unrelated misdemeanor for which he had been sentenced to ninety days' imprisonment. This changes the defendant's criminal history category from category I (no prior criminal history) to category II.[22] Now the Guidelines state that the appropriate sentencing range for this hypothetical bank robber is between 135 and 168 months' imprisonment,[23] which is much closer to, but still within, the twenty-year statutory maximum.[24]

Importantly, the additional circumstances described in this hypothetical are determined by the sentencing judge in a post-trial sentencing hearing by a preponderance of the evidence, without a jury or evidentiary safeguards.[25] There may be a genuine question of fact, for example, as to whether the defendant actually discharged his firearm during the robbery. Nevertheless, the judge will make a determination on his or her own, even if there is no trial (because of a guilty plea).[26] Prior to 2000, the Supreme Court made no indication that such determinations were impermissible.[27]

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19. *See id.* ch. 5, pt. A (prescribing thirty-three to forty-one months for offense level twenty and category I criminal history). It bears noting that, if the judge determines that the defendant "clearly demonstrates acceptance of responsibility for his offense," he or she may reduce the offense level by two levels (even below the base level). *Id.* § 3E1.1(a).

20. *See id.* § 2B3.1(b)(1) (adding two levels for robbery of a financial institution); *id.* § 2B3.1(b)(7) (adding three levels if the amount of loss is between $500,000 and $1,500,000); *see also* 18 U.S.C. § 2113(a) (2012) (creating the offense of bank robbery).

21. GUIDELINES, *supra* note 18, § 2B3.1(b)(2)(A).

22. *See id.* § 4A1.1(b) (adding two criminal history points for each prior sentence between sixty days and thirteen months); *id.* ch. 5, pt. A (classifying two criminal history points as category II in the sentencing table).

23. *See id.* ch. 5, pt. A (prescribing 135 to 168 months for offense level thirty-two and category II criminal history).

24. *See* 18 U.S.C. §§ 1951(a), 2113(a) (2012) (setting the maximum sentence for both robbery and bank robbery, respectively, at twenty years).

25. *See* GUIDELINES, *supra* note 18, § 6A1.3(a) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial . . . ."); *id.* § 6A1.3(a) cmt. ("[A] preponderance of the evidence standard is appropriate to meet due process requirements . . . ."); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 51 (2005) (decrying these features of the Guidelines).

26. *See* Wes Reber Porter, *Threaten Sentencing Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea*, 3 TEX. A&M L. REV. 261, 274 (2015) (remarking that the judge makes relevant factual determinations for sentencing after either a guilty plea or a guilty verdict).

27. *See* McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986) (holding that due process does not forbid sentencing judges from considering facts not determined by a jury); United States v.

The Supreme Court breathed new life into the possibility of a constitutional defect in the Guidelines with its decision in *Apprendi v. New Jersey*.[28] *Apprendi* was a constitutional challenge to a criminal sentence in state court in which the trial judge imposed a higher sentence after determining by a preponderance of the evidence that the defendant's crime was committed with a racially biased purpose.[29] The Supreme Court reversed the conviction on the ground that the Sixth Amendment right to a jury trial requires that this sort of fact be submitted to a jury and proven beyond a reasonable doubt if that fact will increase the maximum penalty for a crime.[30] Although *Apprendi* did not involve the Federal Sentencing Guidelines, the Court's reasoning signaled a potential Sixth Amendment problem with the federal scheme.[31]

The Supreme Court inevitably revisited the Guidelines in the 2005 case *United States v. Booker*.[32] The defendant in *Booker* was convicted by a federal jury for possession of at least fifty grams of crack cocaine with intent to distribute, but the judge determined post-verdict that Booker actually possessed over 600 grams of crack and that he had obstructed justice.[33] These additional factors increased Booker's Guidelines range from between 210 and 262 months' imprisonment to between thirty years and life imprisonment.[34] The judge sentenced Booker to thirty years.[35] Booker appealed that this application of the Guidelines violated the Sixth Amendment principle established in *Apprendi*.[36] The Supreme Court, in two famously disjointed majority opinions,[37] held that the Guidelines were

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Watts, 519 U.S. 148, 156–57 (1997) (extending *McMillan* to facts for which a defendant had been *acquitted* by a jury). *But see* Jones v. United States, 526 U.S. 227, 243 (1999) (signaling that characterizing "elements" as "sentencing factors" violates the Sixth Amendment).

28. 530 U.S. 466 (2000).

29. *Id.* at 471.

30. *Id.* at 490; *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

31. *See* Daniel K. Brough, *Breaking Down the Misprision Walls: Looking Back on the Federal Sentencing Guidelines, After* Booker*, Through a Bloomian Lens*, 82 N.D. L. REV. 413, 441 (2006) (proclaiming that "[t]he Guidelines commenced their slow and painful demise in 2000" with the decision in *Apprendi*); *see also* Blakely v. Washington, 542 U.S. 296, 305 (2004) (invalidating a state sentencing provision based on judicially determined aggravating factors); Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 780 (2014) (highlighting the parallels between Washington's sentencing provision in *Blakely* and the federal Guidelines).

32. 543 U.S. 220 (2005).

33. *Id.* at 227.

34. *Id.*

35. *Id.*

36. *Id.* at 226.

37. *See* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 387 (2006) (calling *Booker* a "two-headed monster and a conceptual monstrosity"); Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 541–42 (2009) (reporting that the Court "essentially split the baby" with one "merits" opinion and one "remedial" opinion).

indistinguishable from the sentencing provision in *Apprendi*, but that they could be upheld by severing and striking down just the section that made the Guidelines ranges mandatory.[38] The upshot of these holdings was that the Guidelines would continue to operate as usual, but instead of binding district court judges, the prescribed ranges would be "effectively advisory."[39]

B. Void-for-Vagueness from Johnson *to* Beckles

The Fifth Amendment of the Constitution states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[40] The Supreme Court has long held that due process forbids the government from imposing criminal punishments under a statute that is overly vague. As early as 1926, the Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[41] Every penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[42] In addition to guaranteeing notice to citizens, the void-for-vagueness doctrine reduces the risk of "arbitrary and discriminatory enforcement."[43]

The Supreme Court invigorated the void-for-vagueness doctrine with its 2015 decision in *Johnson v. United States*.[44] Johnson was arrested and pleaded guilty to violating 18 U.S.C. § 922(g), which prohibits convicted felons from possessing a firearm.[45] The maximum punishment for violating this section is ten years' imprisonment.[46] The district court judge, however,

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38. *Booker*, 543 U.S. at 243–45.

39. *See id.* at 245 (clarifying that, although the sentencing judge is required to consider the Guidelines ranges, they are now "effectively advisory"). The Court would later expound upon what it means to be "advisory." *See* Rita v. United States, 551 U.S. 338, 347 (2007) (allowing courts to apply a "presumption of reasonableness" on appeal for sentences within the Guidelines range); Gall v. United States, 552 U.S. 38, 41 (2007) (holding that appellate review of the reasonableness of a sentence outside the prescribed range must be conducted under an abuse-of-discretion standard); Kimbrough v. United States, 552 U.S. 85, 91 (2007) (allowing sentencing judges to depart from the Guidelines based on policy disagreement); *see also* United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (indicating that, in extraordinary circumstances, a sentence within the Guidelines' prescribed range may be unreasonable).

40. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

41. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

42. *Id.*

43. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); *see also* United States v. Batchelder, 442 U.S. 114, 123 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.").

44. 135 S. Ct. 2551, 2555 (2015). *Johnson* is often referred to as "*Johnson II*" based on the defendant's previous visit to the Supreme Court in *Johnson v. United States*, 559 U.S. 133 (2010). *See, e.g.*, United States v. Jones, 878 F.3d 10, 14 (2d Cir. 2017) (referring to "*Johnson II*"). For simplicity, this Note uses the short-form "*Johnson*" to refer to the 2015 case.

45. *Johnson*, 135 S. Ct. at 2556.

46. *Id.* at 2555 (citing 18 U.S.C. § 924(a)(2) (2012)).

granted an enhanced sentence under 18 U.S.C. § 924(e), also known as the Armed Career Criminal Act (ACCA), which carried a minimum sentence of fifteen years and a maximum of life imprisonment.[47] To be eligible for ACCA enhancement, a defendant must have had three prior convictions for a "violent felony" or a "serious drug offense."[48] Section 924(e)(2)(B) defined "violent felony" as any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or that "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*."[49] *Johnson* was initially a statutory challenge that one of the defendant's three prior convictions (unlawful possession of a short-barreled shotgun in violation of Minnesota law) did not satisfy the last part of § 924(e)(2)(B), referred to as the "residual clause."[50] The Court, however, took the opportunity to declare the residual clause unconstitutionally vague.[51]

Johnson raised a new question as to whether a crucial part of the Sentencing Guidelines would remain intact.[52] The Supreme Court took up this issue in *Beckles v. United States*,[53] decided in March 2017. Like the defendant in *Johnson*, Beckles was convicted under 18 U.S.C. § 922(g) for being a felon in possession of a firearm, in this case a sawed-off shotgun.[54] Beckles had multiple prior drug-related felony convictions.[55] The sentencing judge therefore determined that he was subject to the "career offender" section of the Guidelines.[56] Under § 4B1.1(a) of the Guidelines, an adult defendant is subject to higher penalties if he or she has two prior felony convictions for "either a crime of violence or a controlled substance offense" and the instant offense is also "either a crime of violence or a controlled substance offense."[57] At the time of his sentencing, § 4B1.2(a) of the Guidelines defined the term "crime of violence" in *exactly* the same manner

47. *Id.* at 2555–56.

48. *Id.* at 2555.

49. *Id.* at 2555–56 (emphasis in original) (quoting 18 U.S.C. § 924(e)(2)(B) (2012)).

50. *Id.* at 2556.

51. *Id.* at 2556, 2563; *see also id.* at 2573 (Alito, J., dissenting) ("The Court is tired of the [ACCA] and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done.").

52. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 62–63 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf [https://perma.cc/46EY-CTQN] (discussing *Johnson* and its potential impact on the Sentencing Guidelines).

53. 137 S. Ct. 886 (2017).

54. *Id.* at 890. In a case of life imitating art, the defendant's full name, Travis Beckles, is strikingly similar to that of another controversial firearm wielder: Travis Bickle from the 1976 film *Taxi Driver*.

55. *Id.* at 891.

56. *Id.* at 890.

57. GUIDELINES, *supra* note 18, § 4B1.1(a).

as the ACCA, residual clause and all.[58] The sentencing judge determined that possessing a sawed-off shotgun was a crime of violence under the residual clause of the Guidelines, thus increasing Beckles's sentence.[59]

Beckles challenged his conviction on the grounds that § 4B1.2(a) was unconstitutionally vague after *Johnson*.[60] The Court, however, distinguished *Johnson* and upheld the Guidelines.[61] Key to the Court's reasoning was the advisory nature of the Guidelines after *Booker*.[62] Per Justice Thomas, "The advisory Guidelines . . . do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement."[63] The possibility of an upward or downward departure means that no amount of clarity in the Guidelines can provide precise notice to a potential offender, according to the Court.[64] Nor can the Guidelines be arbitrarily enforced, the Court explained, because they do not set minimum or maximum penalties in the same way as a binding statute; the Guidelines are merely a tool for judges and are not meant to "regulate" the conduct of the public.[65] The Court therefore declared the Guidelines immune from any void-for-vagueness challenge.[66]

II. Constitutional Problems After *Beckles*

The Supreme Court's decision in *Beckles* was probably motivated more by practical concerns than it was by a desire for doctrinal consistency. After *Johnson*, many inmates convicted under the ACCA were able to request resentencing,[67] and numerous lawsuits were filed challenging the constitutionality of other statutes, including several federal statutes with

58. *Beckles*, 137 S. Ct. at 890–91 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2006)). This section of the Guidelines has since been amended. *See* GUIDELINES, *supra* note 18, § 4B1.2(a) (containing no residual clause); GUIDELINES, *supra* note 18, supp. app. C, amend. 798 (amending § 4B1.2(a) effective Aug. 1, 2016); *cf.* Veronica Saltzman, *Redefining Violence in the Federal Sentencing Guidelines*, 55 HARV. J. ON LEGIS. 525, 540 (2018) (recommending that the entire definition of "crime of violence" in the Guidelines be replaced with enumerated offenses).

59. *Beckles*, 137 S. Ct. at 891.

60. *Id.*

61. *Id.* at 892.

62. *Id.* at 890, 894.

63. *Id.* at 894.

64. *Id.*

65. *Id.* at 894–95.

66. *Id.* at 894.

67. *See* Ann E. Marimow, *One of Scalia's Final Opinions Will Shorten Some Federal Prison Sentences*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302_story.html [https://perma.cc/28Z9-MXUY] (reporting that the Fourth and Eighth Circuits received 500 and 350 filings for rehearings, respectively, and estimating as many as 6,000 inmates total may be eligible for reduced sentence after *Johnson*). The Supreme Court made *Johnson* retroactive to other ACCA convicts in 2016. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

similarly worded residual clauses.[68] During the two-year period between *Johnson* and *Beckles*, every circuit except the Eleventh assumed that *Johnson* also invalidated the residual clause of the Guidelines, and defendants in those circuits received significantly shorter punishments on resentencing.[69] There was a real concern that *Johnson* would lead to chaos in criminal prosecutions, and if nothing else, *Beckles* did quell some of those fears.[70]

Whatever the Court's intentions, *Beckles* creates more constitutional questions than it does answers. In his majority opinion, Justice Thomas attempted to assuage some of these concerns. "Our holding today does not render the advisory Guidelines immune from constitutional scrutiny."[71] Given the Court's reasoning, however, one might wonder just how true this reassurance is. If void-for-vagueness doctrine is "the first essential of due process of law"[72] and the Guidelines are immune to challenges on that ground, it is worth asking which other constitutional principles do and do not apply.

To be sure, some of these questions will be easy to answer. If, for instance, the Guidelines were amended to provide that defendants of a particular race should receive harsher punishment, nobody would seriously argue that that does not violate equal protection.[73] Other questions will be more difficult. This Part explores some of the potential sticking points. Subpart A discusses *Beckles*'s implications for the void-for-vagueness

68. *See* Caryn Devins, *Lessons Learned from Retroactive Resentencing After* Johnson *and Amendment 782*, 10 FED. CTS. L. REV. 39, 58 n.90 (2018) (providing examples of other federal statutes that might now be considered unconstitutionally vague); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 746–47 (2017) (same); Alexandra N. Phillips, *Vagueness Doctrine and 18 U.S.C. § 16(b): The Fifth Circuit's Decision in* United States v. Gonzalez-Longoria, 91 TUL. L. REV. 843, 847 (2017) (describing a circuit split over the constitutionality of 18 U.S.C. § 16(b) after *Johnson*). The Supreme Court resolved the circuit split over § 16(b) in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (declaring § 16(b) unconstitutionally vague).

69. *See* Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. PA. L. REV. ONLINE 33, 38–39 (2016) (chronicling those cases in which defendants were resentenced). *Compare, e.g.*, United States v. Hurlburt, 835 F.3d 715, 725 (7th Cir. 2016) (en banc) (extending *Johnson* to the Guidelines and enumerating similar holdings in other circuits), *with* United States v. Matchett, 802 F.3d 1185, 1194–95 (11th Cir. 2015) (declining to extend *Johnson*).

70. *See* Matthew Gibbons, Sessions v. Dimaya*: Vagueness Doctrine & Deportation Statutes*, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 5 (2017) ("*Beckles* demonstrates *Johnson*'s holding that the ACCA residual clause was unconstitutionally vague does not necessarily extend to other instances of even the same text."); Nora Demleitner, *Opinion Analysis: Court Immunizes Advisory Sentencing Guidelines Against Vagueness Challenges*, SCOTUSBLOG (Mar. 7, 2017), http://www.scotusblog.com/2017/03/opinion-analysis-court-immunizes-advisory-sentencing-guidelines-vagueness-challenges [https://perma.cc/BM69-LA4V] (remarking that *Beckles* staves off challenges to equally vague sentencing factors of 18 U.S.C. § 3553).

71. *Beckles*, 137 S. Ct. at 895.

72. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

73. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment).

doctrine. Subpart B considers constitutional principles extrinsic to the specific holding of *Beckles*. Subpart C describes how *Beckles* further complicates the Sixth Amendment problem that *Booker* left only half-heartedly resolved.

A. Void-for-Vagueness Redux

Beckles rationalizes that the Guidelines cannot be unconstitutionally vague because the two primary concerns of vagueness—notice and arbitrary enforcement—are not applicable to advisory Guidelines.[74] These are not foregone conclusions, however.[75] As to notice, the majority noted that sentencing judges have the discretion to deviate from the Guidelines as they see fit.[76] The reality is not so simple.[77] District judges rarely invoke the power to deviate from the Guidelines, perhaps for fear of reversal.[78] Judges stay within the prescribed ranges in over 80% of cases in which the government does not request a lesser sentence,[79] and downward departures often only grant the defendant a few extra months of freedom.[80] Even the sentencing judge in Beckles's case specifically stated that she "would not have imprisoned Beckles to 360 months" had she not determined that the career offender Guideline applied.[81] In a very real sense, the Guidelines do in fact determine the punishment, at least for most defendants. This is precisely the reason why, in another case, the Court called the Guidelines the "lodestar" of the federal sentencing system.[82] As such, it would seem as though the need

74. *Beckles*, 137 S. Ct. at 894.

75. *Id.* at 900 (Sotomayor, J., concurring in the judgment) ("Contrary to the majority's conclusion, an inscrutably vague Guideline implicates both of the concerns animating the prohibition on vagueness."); *see* Kelsey McCowan Heilman, *Why Vague Sentencing Guidelines Violate the Due Process Clause*, 95 OR. L. REV. 53, 92 (2016) (observing that "immunizing the Guidelines from vagueness challenges . . . leave[s] courts with no choice but to issue arbitrary decisions" and arguing that "defendants have a constitutional right to notice of the Guidelines that will apply in a given case").

76. *Beckles*, 137 S. Ct. at 894.

77. *See* Leah Litman, Beckles v. US *as Anti-Canon*, TAKE CARE (June 18, 2018), https://takecareblog.com/blog/beckles-v-us-as-anti-canon [https://perma.cc/Q6AQ-ERV4] (concluding that, although a "purely advisory Sentencing Guidelines system might very well not be subject to vagueness challenges[,] . . . that's not the Sentencing Guidelines system that we have").

78. *See* Rita v. United States, 551 U.S. 338, 347 (2007) (allowing courts to apply a "presumption of reasonableness" on appeal for sentences within the Guidelines range). Additionally, 18 U.S.C. § 3553(c)(2) requires the judge to provide reasons "with specificity" for any sentence outside the prescribed range.

79. *Beckles*, 137 S. Ct. at 900 (Sotomayor, J., concurring in the judgment) (citing to a report by the Sentencing Commission).

80. *Id.* at 901 ("He may ask for a month here or a month there, but he is negotiating from a baseline he cannot control or predict.").

81. *Id.*

82. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016) ("[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."); *see also* Peugh v. United States, 569 U.S. 530, 544 (2013) (calling the Guidelines the "lodestone" of federal sentencing).

for notice has just as much weight in this realm as it does for statutes that set the maximum or minimum penalty.

As to arbitrary and discriminatory enforcement, the majority's reasoning is again shaky. As Justice Sotomayor stated, "[A] district court's reliance on a vague Guideline creates a serious risk of 'arbitrary enforcement.'"[83] In fact, it does something much worse: it provides plausible deniability. If a sentencing judge has an improper motive for imposing a particular sentence (racial animus, for example), he need only fit the defendant's conduct into a vaguely worded sentencing enhancement before he can say that the Guidelines *made* him impose such a harsh punishment. This is the sort of arbitrary enforcement of criminal law that vagueness doctrine is supposed to avoid.

For the time being, *Beckles* has settled the vagueness question—the Guidelines are not subject to any challenge on that ground.[84] However, it is worth noting that the Court has a history of shaping the legal status of the Guidelines through case law (e.g., *Booker* and its progeny).[85] It is not inconceivable that the Court will, in the future, issue a ruling that alters the weight of the Guidelines, either pushing them further towards a truly discretionary model or closer to binding law as they were before *Booker*. Should such an event come to pass, the due process vagueness question should be revisited and reconsidered with an eye towards the practical application of the Guidelines.

B. Other Constitutional Considerations

Beckles was specifically a case about vagueness doctrine. Although it did not directly address the applicability of other constitutional principles to the Guidelines, the Court's reasoning may have implications for these other issues. This subpart explores three: ex post facto sentencing, bills of attainder, and overbreadth doctrine.

1. Ex Post Facto Sentencing.—The Constitution expressly prohibits ex post facto laws.[86] An ex post facto law is "[a] statute that criminalizes an action and simultaneously provides for punishment of those who took the action before it had legally become a crime . . . ."[87] The idea is that it is unfair for the government to retroactively punish someone for their actions because citizens would have no way of knowing what conduct would land them in

83. *Beckles*, 137 S. Ct. at 901 (Sotomayor, J., concurring in the judgment) (quoting Johnson v. United States, 135 S. Ct. 2551, 2556 (2015)).

84. *Id.* at 890 (majority opinion).

85. *See supra* note 39.

86. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

87. *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

jail. The Supreme Court held in *Peugh v. United States*[88] that the Ex Post Facto Clause does apply to the Sentencing Guidelines.[89] The *Peugh* Court stated that, if a defendant commits an offense and the Guidelines are subsequently amended in such a way that the applicable sentencing range for that offense is raised, he cannot be sentenced using the new Guidelines without violating the Constitution.[90]

Justice Thomas briefly acknowledged *Peugh* in his majority opinion in *Beckles*.[91] The Court distinguished, though not very persuasively, ex post facto laws from vague laws by stating that inquiry into the former is concerned with whether the law creates a significant risk of a higher sentence, whereas inquiry into the latter is concerned only with notice and arbitrary enforcement.[92] However, as Justice Sotomayor pointed out, the problem with ex post facto laws is also that they do not provide "fair warning"[93]—that is, they do not provide notice. Indeed, the Seventh Circuit stated directly in its pre-*Beckles* case, "We see no principled way to distinguish *Peugh* on doctrinal grounds: The two constitutional protections [vagueness and the Ex Post Facto Clause] share the same underlying concerns about fair notice and arbitrary governmental action."[94]

With such an obvious tension between *Beckles* and *Peugh*, one might wonder how long *Peugh* will remain good law. If notice is of no concern to the Guidelines under *Beckles*, surely that undermines the rationale of *Peugh*. Given that *Peugh* was a five-to-four case, with Justice Kennedy only joining parts of the majority opinion,[95] the applicability of the Ex Post Facto Clause to the Guidelines may not be tenable long-term.

2. Bills of Attainder.—As with ex post facto laws, the Constitution is unequivocal in forbidding bills of attainder.[96] A bill of attainder is "[a] special legislative act prescribing punishment, without a trial, for a specific person or group."[97] Basically, this means that Congress cannot pass a law that says "John Smith is guilty of espionage and shall be sentenced to twenty years'

88. 569 U.S. 530 (2013).

89. *Id.* at 533.

90. *Id.* For a detailed discussion foreshadowing the result in *Peugh*, see 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, 1094 (2008) (arguing that the Ex Post Facto Clause should apply to the Guidelines).

91. Beckles v. United States, 137 S. Ct. 886, 895 (2017).

92. *Id.*

93. *Id.* at 903 (Sotomayor, J., concurring in the judgment) (citing *Peugh*, 569 U.S. at 544).

94. United States v. Hurlburt, 835 F.3d 715, 724 (7th Cir. 2016) (en banc).

95. *Peugh*, 569 U.S. at 532 (indicating that Justice Kennedy, the fifth vote, did not join Part III-C of the opinion).

96. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."); *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . .").

97. *Bill of Attainder*, BLACK'S LAW DICTIONARY (10th ed. 2014).

imprisonment." That would be unconstitutional.

What if Congress (or the Sentencing Commission) instead amended the Guidelines to say that "John Smith's offense level shall be increased by five levels"? That would have a similar effect, but under the *Booker*/*Beckles* conception of the Guidelines, it could at least plausibly pass constitutional muster. The principle concern of the Bill of Attainder Clause is separation of powers—the role of carrying out due process, including trying and sentencing criminal defendants, belongs to the courts and not the legislature.[98] However, in the scenario just described, this concern is lessened by two factors. First, the Sentencing Commission is situated within the judicial branch,[99] so any amendment it makes to the Guidelines is, in a sense at least, not an instance of one branch invading the province of another.[100] Second and more importantly, the Guidelines are only advisory. As *Beckles* pointed out, sentencing judges are free to deviate from the Guidelines.[101] Thus, a judge could theoretically ignore direction from the Guidelines to give a particular defendant a harsher sentence or reach the same (harsher) conclusion without such direction. If this reasoning is strong enough to overcome a vagueness challenge, then it is not much of a logical leap for it to overcome a challenge under the Bill of Attainder Clause as well.

3. Overbreadth Doctrine.—The Supreme Court has repeatedly recognized that the First Amendment[102] requires special analysis to ensure that overly broad laws do not infringe freedom of speech.[103] "[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech . . . ."[104] Consider a law that makes it a crime to mail any literature containing the word "bomb." This law would criminalize some behavior that is not protected by the First Amendment (for example, mailing a bomb threat or instructions for a terrorist plot),[105] but it

98. *See* United States v. Brown, 381 U.S. 437, 442 (1965) ("[T]he Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.").

99. 28 U.S.C. § 991(a) (2012) ("There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission . . . .").

100. *Cf.* Mistretta v. United States, 488 U.S. 361, 396–97, 412 (1989) (holding that the Sentencing Commission does not violate separation of powers).

101. Beckles v. United States, 137 S. Ct. 886, 894 (2017).

102. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

103. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 482 (2010) (striking down a federal criminal anti-crush video statute as unconstitutionally overbroad); Ashcroft v. Free Speech Coal., 535 U.S. 234, 256, 258 (2002) (striking down two sections of the Child Pornography Prevention Act of 1996 as unconstitutionally overbroad).

104. United States v. Williams, 553 U.S. 285, 292 (2008).

105. "True threats" are not protected speech. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (explaining that the First Amendment permits the government to ban "true threats"). Speech that materially supports a terrorist plan or organization is also not protected. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) (upholding a material-support statute against a

might also include behavior that is protected, to include mailing many news journals. To avoid discouraging constitutionally protected behavior, a law like this would almost certainly be invalidated under the First Amendment. Importantly, overbreadth doctrine allows defendants to challenge the constitutionality of a statute on its face, even if their conduct would not otherwise receive constitutional protection.[106]

Conceivably, issues of overbreadth could arise in the Sentencing Guidelines. If, for example, the Guidelines included a sentencing enhancement in the section on mail fraud stating that any use of literature containing the word "bomb" should result in an increase of eight offense levels, that could raise overbreadth concerns.[107] Fraud on its own is not constitutionally protected,[108] but that should not be the end of the matter. The Supreme Court held in *R.A.V. v. City of St. Paul*[109] that the government cannot infuse laws banning unprotected speech with further restrictions on speech that are unrelated to the harm that makes the speech unprotected in the first place.[110] Because the harm from fraud is unrelated to the harm from bomb threats or terrorist plots, the constitutional problem remains.

Beckles potentially cuts through this problem completely. Overbreadth and vagueness are closely related doctrines[111]—defendants will often argue that a statute is both unconstitutionally vague and overbroad.[112] Since the Guidelines are immune to vagueness challenges, perhaps they are immune to attacks on overbreadth grounds, too. Such a result might weaken defendants' First Amendment rights, but it would hardly be surprising after *Beckles*.

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free speech challenge).

106. *See Stevens*, 559 U.S. at 473, 482 (explaining that facial challenges to a statute can succeed in First Amendment cases if the statute is "substantially overbroad").

107. Mail fraud is made illegal under 18 U.S.C. § 1341 (2012) ("Whoever, having devised . . . any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever . . . shall be fined under this title or imprisoned not more than 20 years, or both."). For sentencing related to mail fraud, see GUIDELINES, *supra* note 18, § 2B1.1 (providing base offense level and offense characteristics for, among other offenses, fraud). *See also* Miriam H. Baer, *Unsophisticated Sentencing*, 61 WAYNE L. REV. 61, 84 (2015) (referring to the language in one of the § 2B1.1 enhancements as "vague").

108. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to [a] few historic and traditional categories . . . . Among these categories [is] . . . fraud . . . ." (internal quotation marks omitted)).

109. 505 U.S. 377 (1992).

110. *Id.* at 383–84 ("[T]hese areas of [unprotected] speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . [but they are not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." (emphasis omitted)).

111. *See* Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 904 (1991) ("[T]he First Amendment overbreadth and vagueness doctrines have common rationales.").

112. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 19–20 (2010) (observing that the Ninth Circuit combined its analysis of vagueness and overbreadth).

C. *Right to Jury Trial*

Finally, the decision in *Beckles* fails to properly respect the Sixth Amendment right defined in *Apprendi*.[113] This is a problem that was first created by the Court in *Booker*, when the remedial majority "fixed" the problem identified by the merits majority in a rather cursory manner.[114] *Beckles* serves to compound this problem.

Recall the hypothetical bank robber from Part I.[115] Even under the post-*Booker* Guidelines, the sentencing judge in that case must determine by a preponderance of the evidence whether or not the defendant discharged his firearm during the robbery, even if that issue was never presented to a jury.[116] Assuming this determination is made in the affirmative, the judge is then free to disregard the heightened sentencing range urged by the Guidelines. However, as noted above, this sort of downward departure is fairly uncommon, especially given the decreased risk of reversal (from the judge's perspective) of staying within the Guidelines range.[117]

Beckles gives even more power to sentencing judges (and not juries) by allowing them to decide questions of fact on vague legal standards. Suppose the Guidelines section on robbery included another sentencing enhancement for when the defendant "carried a firearm in such a way that might have been frightening to others." As a statute, this standard would probably be deemed unconstitutionally vague, but as a Guideline, this is fine. However, it also pushes a great deal of factfinding onto the judge. Not only does the judge need to determine if the defendant carried a firearm in a particular manner, but she must also determine which manners might be "frightening to others," all without the assistance of a jury. *Apprendi* was meant to affirm the right to have a jury determine factual questions that raise the stakes of a criminal sentence. *Booker*, and now also *Beckles*, shifts questions like this back to the judge, sidestepping the Sixth Amendment in the process.

III. A Clearer Path

The preceding Part illustrated some of the theoretical constitutional

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113. *See supra* subpart I(A).

114. *See* United States v. Booker, 543 U.S. 220, 302 (2005) (Stevens, J., dissenting in part) ("[T]he Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate."); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1480 (2008) ("[T]he regime created by the *Booker* remedy decision in many respects resembles the regime that the *Booker* merits decision held unconstitutional . . . .").

115. *See supra* subpart I(A).

116. These determinations are required in "real offense sentencing" (as opposed to "charge offense sentencing"). For an explanation of these concepts, see GUIDELINES, *supra* note 18, ch. 1, pt. A(1)(4)(a). *See also* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 526–27 (1993) (providing a working definition of real offense sentencing). For arguments in support of real offense sentencing, see Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1347 (1997).

117. *See supra* subpart II(A).

flashpoints that might arise from the decision in *Beckles*. At the very least, *Beckles* brings more uncertainty into an already uncertain area of law. When it comes to criminal law, policymakers should avoid creating uncertainty if at all possible.[118] Criminal defendants deserve a justice system that is consistent and provides them with fair warning of the legal standards that will be imposed on them in court.[119] Because the Sentencing Guidelines are so central to federal criminal law, some of these issues will undoubtedly make their way back to the Supreme Court sooner or later.

This Part provides a legal framework that will give some clarity to these issues. First, subpart A briefly discusses, but ultimately rejects, the proposal suggested by Justice Kennedy in his *Beckles* concurrence. Then, subpart B proposes a solution that draws upon capital punishment case law to resolve these issues.

A. Justice Kennedy's "Other Explication"

In his short concurring opinion in *Beckles*, Justice Kennedy agreed that traditional constitutional vagueness analysis should not be applied to the Guidelines, thereby distinguishing *Johnson*.[120] He did, however, acknowledge that there might be some extreme cases in which a sentencing decision is based on such an unclear and arbitrary standard as to raise constitutional concerns.[121] He summarized by stating that "[t]he existing principles for defining vagueness cannot be transported uncritically to the realm of judicial discretion in sentencing. Some other explication of constitutional limitations likely would be required."[122] Justice Kennedy seems to imply that a new conception of vagueness—perhaps under a different name, but certainly weaker than statutory vagueness analysis—could be developed to apply to the Guidelines.[123] His opinion appears to suggest that because the advisory Guidelines are not binding law (a sort of quasi-law), they warrant only watered-down constitutional protections ("Constitution Lite," perhaps).

On some level, this approach has a certain appeal. It would allow the judiciary to avoid some of the practical consequences from dramatic cases like *Johnson* while still providing some protection to defendants against egregiously arbitrary sentencing enforcement. The problem with this approach is that it still does not address the lack of clarity in the law. While the suggestion is focused specifically towards the problem of vagueness, it

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118. *Cf.* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) ("[T]he residual clause leaves grave uncertainty about how to estimate the risk posed by a crime.").

119. *Cf. id.* ("[T]he indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.").

120. Beckles v. United States, 137 S. Ct. 886, 897 (2017) (Kennedy, J., concurring).

121. *Id.*

122. *Id.*

123. *See The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 223, 297 (2017) [hereinafter *Leading Cases*] (underscoring the importance of judicial explanations for sentencing to Justice Kennedy's "cryptic" new suggestion).

ignores the other constitutional holes that have been opened up by the *Beckles* majority. In fact, this approach may make matters worse. By providing lower courts with free rein to develop new constitutional doctrines applicable only to review of the Guidelines, such an invitation would create a flurry of circuit splits and novel rulings on important questions. Instead, a more well-defined solution is needed to provide certainty to this area of law.

B. Importation of Eighth Amendment Vagueness

Assuming the Supreme Court has an opportunity to revisit vagueness in the Sentencing Guidelines, it can and should clarify the law by drawing upon its own Eighth Amendment jurisprudence. Importing void-for-vagueness case law from the Court's Eighth Amendment jurisprudence into the Sentencing Guidelines would be consistent with the results of both *Johnson* and *Beckles* and would have several advantages over the current state of the law.

1. Eighth Amendment Vagueness.—Over the years, the Court has developed a unique application of vagueness doctrine specifically for capital punishment cases, which are analyzed under the Eighth Amendment.[124] The Court first recognized this split analysis in *Maynard v. Cartwright*.[125] "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment . . . ."[126] Such claims "characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*."[127] This is contrasted with claims of due process vagueness, which are focused more on "lack of notice."[128] Applying the Eighth Amendment standard, the *Maynard* Court invalidated a jury instruction providing that capital punishment could be imposed upon a finding that a murder was "especially heinous, atrocious, or cruel."[129]

The Supreme Court again explored the principle of Eighth Amendment

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124. *See* Kenneth S. Gallant, *Ex Post Facto Judicial Clarification of a Vague Aggravating Circumstance in a Capital Punishment Statute*, 59 UMKC L. REV. 125, 132–33 (1990) (comparing the two types of vagueness challenges); *see also* U.S. CONST. amend. VIII ("[No] cruel and unusual punishments [shall be] inflicted.").

125. 486 U.S. 356 (1988).

126. *Id.* at 361.

127. *Id.* at 361–62 (citing Furman v. Georgia, 408 U.S. 238 (1972)).

128. *Id.* at 361.

129. *Id.* at 363–64; *see also* Stringer v. Black, 503 U.S. 222, 235–36 (1992) (invalidating a multi-factor weighing process that involved the same vague factor); Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing–Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1368–69 (1995) (providing an in-depth analysis of *Stringer*'s vagueness discussion).

vagueness in *Espinosa v. Florida*.[130] Under the Florida death penalty statute applicable at the time, a jury made a recommendation based on numerous aggravating circumstances as to whether or not death should be imposed.[131] The judge then independently sentenced the defendant to death or imprisonment notwithstanding the jury's recommendation.[132] The Supreme Court determined that one of the aggravating circumstances charged to the jury—whether the murder was "wicked, evil, atrocious or cruel"—was vague in violation of the Eighth Amendment under controlling case law like *Maynard*.[133] "[I]n a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment."[134] The Court further held that the Florida scheme could not be saved by the fact that the judge was free to ignore the jury's recommendation.[135]

2. Importation to the Sentencing Guidelines.—The Supreme Court can use this line of cases to give definition to constitutional limitations in the Sentencing Guidelines. These cases already establish the boundaries and rationale for a void-for-vagueness doctrine, wholly distinct from due process vagueness, as applied to a particular kind of sentencing. If the Court has an opportunity to re-address these issues, it could import wholesale Eighth Amendment vagueness doctrine into the Guidelines. In other words, the Court could say in a later case that the Guidelines *are* subject to vagueness scrutiny, but that it is *Eighth Amendment vagueness*, rather than due process vagueness, that applies.

This approach would be entirely consistent with the results in both *Beckles* and *Johnson*. The *Johnson* Court held that the ACCA residual clause was vague under the Fifth Amendment.[136] The *Beckles* Court held that identical language in the Guidelines' residual clause was not vague because Fifth Amendment vagueness does not apply to the Guidelines.[137] The Court can still explain, however, that the reason for these different results is that Eighth Amendment vagueness, which has a different underlying focus, can lead to a different outcome on vagueness determinations even for identical phrases. Indeed, the Court in *Beckles* even stated explicitly that due process vagueness is not interchangeable with the Eighth Amendment analysis of *Maynard* and *Espinosa*.[138] The Court did call the *Espinosa* rule "inapposite"

130. 505 U.S. 1079 (1992) (per curiam).
131. *Id.* at 1080.
132. *Id.*
133. *Id.* at 1081.
134. *Id.*
135. *Id.* at 1082.
136. *See supra* subpart I(B).
137. *See supra* subpart I(B).
138. Beckles v. United States, 137 S. Ct. 886, 895–96 (2017).

to the Guidelines,[139] but only because *Beckles* was always a case about due process vagueness following *Johnson*.[140] The Court did not consider the possibility that Eighth Amendment vagueness might apply, even though such a possibility could still allow the residual clause to be upheld under this separate analysis.

This proposed approach has four significant advantages. First, it maintains the pragmatism of the *Beckles* result by preventing the need to resentence hundreds or thousands of inmates sentenced under the residual clause.[141] The career offender Guideline is an especially common enhancement that applies to any predicate crime, and the residual clause in particular had been used in many prosecutions prior to *Beckles*.[142] *Beckles* avoided disrupting these sentences,[143] and the proposed approach maintains this result. Because the career offender Guideline could be upheld under Eighth Amendment vagueness analysis, there would be no need to resentence this large segment of the federal prison population.

Second, this approach provides defendants with some constitutional protection against vague sentencing enhancements (albeit not exactly the same level of protection that *Johnson* contemplated). As the law currently stands, there is no constitutional protection against even the most egregiously undefined sentencing enhancement under the Guidelines. A hypothetical factor that increased the sentencing range for "especially heinous, atrocious, or cruel" mail fraud, for example, would be perfectly permissible so long as a judge can, in theory, depart downward from that prescribed range. In fact, such a system may be worse than having no Guidelines at all, since it could influence sentencing judges into believing that a defendant is more deserving of harsher punishment.[144] The approach proposed by this Note would not allow this kind of enhancement in the Guidelines. *Maynard* explicitly invalidated the "especially heinous, atrocious, or cruel" language in the death penalty context,[145] so importing that case and its brethren into the Sentencing Guidelines context would protect defendants from particularly open-ended sentencing enhancements.

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139. *See id.* at 896 ("Our decision in *Espinosa* is thus inapposite, as it did not involve advisory Sentencing Guidelines or the Due Process Clause.").

140. *See generally* Petition for Writ of Certiorari, *Beckles*, 137 S. Ct. 886 (No. 15-8544) (making no mention of the Eighth Amendment).

141. *See supra* Part II.

142. *See* Litman & Beasley, *supra* note 69, at 38–39 (identifying defendants sentenced under the residual clause).

143. *See* Joshua Rothenberg, *Criminal Certification: Restoring Comity in the Categorical Approach*, 51 U. MICH. J.L. REFORM 241, 263 n.130 (2017) ("The Career Offender Guidelines will not face the same type of overwhelming flood following [*Johnson*] because no part of the definition has been struck down.").

144. *Cf.* Stringer v. Black, 503 U.S. 222, 235 (1992) ("A vague aggravating factor . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.").

145. *See supra* section III(B)(1).

Third, this approach would stave off many of the aforementioned constitutional concerns about inapplicability of other principles to the Guidelines. The Court would be able to explain that one of the primary reasons for the Guidelines' immunity to due process vagueness is that they are already subject to a different sort of vagueness challenge. Since other constitutional principles (e.g., the Ex Post Facto Clause and the Bill of Attainder Clause)[146] are unlikely to have a sentencing-specific counterpart, they can continue to apply in full force to the Guidelines and need not be called into question. This would better explain the discrepancy between *Beckles* and *Peugh*,[147] and it would prevent the sort of unsavory possibilities—like sentencing factors that single out specific defendants by name[148]—that *Beckles* currently might allow.

Fourth, this approach would avoid the kind of uncertainty that an entirely new principle of law would create. Since Eighth Amendment vagueness has already been defined in a number of cases in another context, lower courts would be more constrained to follow these controlling precedents with consistency. For example, any hypothetical Guideline that uses the phrase "especially heinous, atrocious, or cruel" or something similar would be invalid under *Maynard*.[149] Likewise, a Guideline defined by the phrase "outrageously or wantonly vile, horrible or inhuman," without a further narrowing principle, would be unconstitutional under existing Supreme Court precedent.[150] On the other hand, the phrase "conduct that presents a serious potential risk of injury to another"—the problematic language from *Johnson*[151]—would be acceptable because that language implicates due process vagueness, not Eighth Amendment vagueness. Of course, not every questionable phrase will have been settled under either doctrine, but this approach at least provides some guideposts for lower courts, and in that sense it affords more clarity to this area of law than the undefined "other explication" from Justice Kennedy's concurrence.[152]

Obviously, the biggest obstacle to this proposed approach is that Eighth Amendment vagueness has so far been confined to capital punishment cases. However, the Sentencing Guidelines are a completely appropriate vehicle for expanding this doctrine.[153] The Guidelines, like most death penalty statutes, are based on a system of aggravating factors. *Maynard* instructed that a vague

146. *See supra* subpart II(B).

147. *See supra* section II(B)(1).

148. *See supra* section II(B)(2).

149. *See supra* section III(B)(1).

150. *See* Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (plurality opinion) (invalidating a death penalty factor with this language as too vague under the Eighth Amendment).

151. *See supra* subpart I(B).

152. *See supra* subpart III(A).

153. *Cf.* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1197 (2009) (advocating for a general convergence of constitutional protections for capital and noncapital defendants).

aggravating factor is problematic because it gives the sentencing authority too much open-ended discretion, leading to punishments that are arbitrary and capricious.[154] As this Note has shown, these same concerns apply to the Guidelines.[155] Furthermore, as shown in *Espinosa*, Eighth Amendment vagueness applies even in circumstances where the final sentencing authority can choose to ignore sentencing advice that is based on a vague aggravating factor.[156] This is the exact scenario with the post-*Booker* advisory Guidelines, so Eighth Amendment vagueness would be a natural fit.

Indeed, this proposed approach addresses the concerns of vagueness in criminal sentencing head on. As observed in a recent case comment, Justice Kennedy's alternative approach does not seem to be concerned with the traditional problems of vagueness in sentencing, but rather suggests "a form of vagueness review that applies to discretion itself."[157] As such, Justice Kennedy's approach has an entirely different focus from that of Eighth Amendment vagueness.[158] Yet the problems identified in the Eighth Amendment cases are precisely at issue with vague Sentencing Guidelines. When a sentencing provision "fails adequately to inform" the sentencing authority of what she "must find to impose" a particular punishment, the resulting "open-ended discretion" leads to arbitrary enforcement of the sort the Constitution forbids.[159] Eighth Amendment case law has dealt with this problem, and this Note has demonstrated how the Sentencing Guidelines would benefit from importation of those cases.

Conclusion

Over the thirty-plus years that the Federal Sentencing Guidelines have been in effect, they have generated an overwhelming amount of case law, including some perplexing constitutional holdings. The Supreme Court's recent decision in *Beckles* adds to this confusion. Not only does the decision leave the void-for-vagueness doctrine in a precarious position, but it also invites inquiry into the Guidelines' immunity from constitutional scrutiny on other grounds. Federal sentencing is now in dire need of clarification in order to protect the rights of criminal defendants. By looking to its own precedent in a parallel sentencing context, the Court can provide this clarification and avoid the constitutional quagmire in which it may soon find itself.

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154. Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988).

155. *See supra* subparts II(A), (C).

156. Espinosa v. Florida, 505 U.S. 1079, 1082 (1992) (per curiam).

157. *Leading Cases*, *supra* note 123, at 298 n.44; *see id.* at 299 (observing that the problem Justice Kennedy envisions is judges providing no explanation at all for their discretionary decisions, rather than explanations that are arbitrary or nonsensical).

158. *Id.* at 298 n.44.

159. *Maynard*, 486 U.S. at 361–62.