CRIMINAL LAW — FEDERAL SENTENCING — NINTH CIRCUIT AFFIRMS 262-MONTH SENTENCE BASED ON UNCHARGED MURDER. — *United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011).

In *United States v. Booker*,[1] the Supreme Court rendered the Federal Sentencing Guidelines advisory in order to remedy the scheme's infringement of the jury trial right.[2] Yet the extent to which judicial factfinding may still implicate the Sixth Amendment after *Booker* remains unclear.[3] The question carries particular salience when sentencing judges rely on uncharged criminal conduct to dictate the length of sentences. Recently, in *United States v. Fitch*,[4] the Ninth Circuit affirmed a 262-month fraud sentence that was driven by the sentencing judge's finding that the defendant murdered his wife. *Fitch* adds to a growing catalogue of appellate cases summarily rejecting the availability of as-applied Sixth Amendment challenges to post-*Booker* sentences.[5] However, the diminishment of the jury trial right in *Fitch* aptly illustrates why courts ought to consider such challenges.

In April 1999, David Kent Fitch married Maria Bozi despite being romantically involved with another woman, Patricia Molano Gutierrez (Molano).[6] Several months later, Bozi and Fitch moved into a mobile home, which Bozi, purchased in Nevada.[7] On September 4, 1999, Bozi told a friend that she was going on a "mini trip" with Fitch.[8] Over the next several weeks, Fitch withdrew thousands of dollars from Bozi's bank account, at least once while disguised, and gave inconsistent answers when asked about Bozi's location.[9] On October 1, 1999, park rangers saw Fitch discarding several items into a dumpster, including a receipt showing a purchase of chloroform by a "Dr. David."[10] Suspicious, the rangers sealed the mobile home, which Fitch subsequently abandoned.[11] Using a fraudulent passport, Fitch then traveled to London, where he married Molano under an assumed identity.[12] On February 7, 2000, Fitch returned to the United States; he was arrested the

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[1] 543 U.S. 220 (2005).

[2] *See id.* at 246 (Stevens, J., delivering the opinion of the Court in part).

[3] *See* Douglas A. Berman, Rita*, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 9 (2007) ("[L]ower courts have struggled to figure out if the Sixth Amendment is to have real substantive bite or is only to be given lip-service in . . . an advisory guideline system.").

[4] 659 F.3d 788 (9th Cir. 2011).

[5] *See, e.g.*, United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008); United States v. Redcorn, 528 F.3d 727, 745–46 (10th Cir. 2008).

[6] *Fitch*, 659 F.3d at 791.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 791–92.

[10] *Id.* at 792.

[11] *See id.*

[12] *Id.*

next day when, after a routine traffic stop, a license plate search revealed outstanding warrants against him.[13] Bozi was never found.[14]

In June 2004, the government indicted Fitch on various counts of bank fraud, fraudulent use of an access device, and attempted fraudulent use of an access device; superseding indictments charged Fitch with additional counts of laundering monetary instruments and money laundering.[15] In June 2007, a jury convicted Fitch on all counts.[16] The applicable Sentencing Guidelines range for Fitch's conviction was 41 to 51 months.[17] At sentencing, the government sought a substantial upward departure, asking the district court to sentence Fitch to thirty years in prison — the statutory maximum for bank fraud[18] — on the theory that Fitch had murdered Bozi to effectuate his scheme.[19] Relying on six factual findings,[20] the district court found by clear and convincing evidence that Fitch had murdered Bozi and that her death was the means by which he had committed his crimes.[21] Applying section 5K2.1 of the Guidelines, which addresses death as a grounds for departure, and noting that "first degree murder . . . is a very serious offense," the district court decided on a fifteen-level upward departure, yielding a sentencing range of 210 to 262 months.[22] The district court then sentenced Fitch to 262 months in prison.[23]

The Ninth Circuit affirmed the sentence.[24] Writing for the majority, Judge Block[25] held that Fitch's sentence of nearly twenty-two years

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[13] *Id.* After Fitch's arrest, the FBI seized Bozi's passport, five firearms, Fitch's fraudulent identification documents, and a library of incriminating literature ranging from *How to Make a Silencer for a .45* to *Kill Without Joy! The Complete How to Kill Book*. *Id.* at 792–93 & n.4.

[14] *Id.* at 793.

[15] *Id.* Prior to this indictment, Fitch had been charged in February 2000 with various nonviolent crimes, and, after pleading guilty, was sentenced to 97 months in prison. *Id.*

[16] *Id.*

[17] *Id.* at 790.

[18] *See* 18 U.S.C. § 1344 (2006).

[19] *See* Reporter's Transcript of Proceedings at 40, 43, United States v. Fitch, No. 2:04-CR-0262-JCM-PAL (D. Nev. Oct. 19, 2007) [hereinafter Reporter's Transcript].

[20] The court found that: (1) Fitch never reported Bozi's disappearance; (2) he "told various stories concerning her whereabouts"; (3) he tried to sell Bozi's personal possessions; (4) "he remarried shortly after her disappearance without first seeking a divorce"; (5) he was in possession of items such as Bozi's checkbook and credit card, which anyone "would have on their person"; and (6) he "raided [Bozi's] accounts and credit cards by deception." *Fitch*, 659 F.3d at 794 (quoting Reporter's Transcript, *supra* note 19, at 77–78).

[21] *Id.* at 790.

[22] *Id.* at 794; *see* U.S. SENTENCING GUIDELINES MANUAL § 5K2.1 (2011). "Departures" may be warranted under various circumstances that the United States Sentencing Commission "may have not adequately taken into consideration in determining the applicable guideline range." *Id.* § 5K2.0(a)(2).

[23] *See Fitch*, 659 F.3d at 794.

[24] *Id.* at 790.

[25] Judge Block, Senior United States District Judge for the Eastern District of New York, sat by designation. He was joined by Judge N. Randy Smith.

was procedurally and substantively reasonable.[26] Though the court recognized the case as "a stark example of the diminishment of the role of the jury that can result" after *Booker*,[27] it felt "constrained to affirm."[28]

The court began its analysis by reviewing modern sentencing doctrine, noting that the sentencing judge possesses "extraordinarily broad powers to find the facts that will drive the sentence."[29] In the watershed case of *Apprendi v. New Jersey*,[30] the Supreme Court held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the *prescribed statutory maximum*" must be proved to a jury beyond a reasonable doubt.[31] Applying *Apprendi*, the *Booker* Court then invalidated the Federal Sentencing Guidelines because the binding Guidelines set functional "statutory maximums" and directed judges to impose sentences above those maximums on the basis of offense-related factors found at sentencing.[32] The Court's remedy, however, was to render the scheme advisory, such that the Guidelines no longer set functional statutory maximums and judicial factfinding could continue largely undisturbed.[33] According to the Ninth Circuit, since Fitch's 262-month sentence was within the 360-*year* "statutory maximum" for the crimes of conviction,[34] the district court's finding that Fitch had killed Bozi did not increase his sentence in violation of the *Apprendi* rule.[35] The panel acknowledged but rejected Justice Scalia's view[36] that substantive reasonableness review of sentences places a constraint on judicial discretion that causes some sentences to run afoul of *Apprendi*.[37] Citing Supreme Court precedent, the court further observed that sentencing enhancements based on uncharged conduct "do not punish a defendant for crimes of which he was not

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[26] *See Fitch*, 659 F.3d at 796–99.

[27] *Id.* at 794.

[28] *Id.* at 790.

[29] *Id.* at 794.

[30] 530 U.S. 466 (2000).

[31] *Id.* at 490 (emphasis added).

[32] United States v. Booker, 543 U.S. 220, 233–35 (2005) (Stevens, J., delivering the opinion of the Court in part).

[33] *Fitch*, 659 F.3d at 795 (citing *Booker*, 543 U.S. at 233).

[34] As the court explained, the "total statutory maximum" sentence for Fitch's crimes was 360 years, since judges may, with no Sixth Amendment implications, sentence defendants consecutively on each count of conviction. *See id.* at 795 & n.6 (citing Oregon v. Ice, 129 S. Ct. 711, 719 (2009)).

[35] *See id.* at 796 ("[T]he sentencing judge has the power to sentence a defendant based upon facts not found by a jury up to the statutory maximum . . . .").

[36] *See, e.g.*, Rita v. United States, 551 U.S. 338, 370–71 (2007) (Scalia, J., concurring in part and concurring in the judgment).

[37] *See Fitch*, 659 F.3d at 796; *accord* United States v. Treadwell, 593 F.3d 990, 1017 (9th Cir. 2010) (rejecting Justice Scalia's argument as "too creative for the law as it stands" (quoting United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008)) (internal quotation mark omitted)).

convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."[38]

The Ninth Circuit rejected each of Fitch's procedural challenges.[39] In particular, the court upheld the district court's factual findings and found that the inference that Fitch had killed Bozi in order to commit fraud was "eminently reasonable."[40] The court then turned to substantive reasonableness review, in which federal appellate courts are required to "take into account the totality of the circumstances" while considering the reasonableness of the sentence imposed.[41] The panel held that it "was not unreasonable" for the district court to give "great weight" to its finding that Fitch killed Bozi and "substantially increase" his sentence accordingly.[42] The court also observed that Fitch's 262-month sentence was "well short of the Guidelines range for both first-degree murder (life) and second-degree murder (324–405 months) for someone in Fitch's criminal history category."[43]

Judge Goodwin dissented. While conceding that the evidence of Fitch's involvement in Bozi's disappearance would support a substantial upward departure, Judge Goodwin disputed that there was "clear and convincing evidence" that Fitch had committed premeditated murder.[44] Reluctant to affirm an upward departure "simply because the defendant deserves it,"[45] Judge Goodwin noted that the district court had not cited evidence that Bozi was dead or of how she died, meaning that Fitch's conduct could not be evaluated under section 5K2.1.[46] Thus, in the dissent's view, the departure was an abuse of discretion.[47]

Fitch demonstrates the ease with which prosecutors can take advantage of high statutory maximums to achieve backdoor convictions at sentencing. Though it waxed regretful, the court believed this tactic was constitutionally unassailable because Fitch's sentence was below the statutory maximum for his crimes and therefore did not violate the Sixth Amendment.[48] However, because substantive reasonableness re-

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[38] *Fitch*, 659 F.3d at 795 (quoting United States v. Watts, 519 U.S. 148, 154 (1997) (per curiam)) (internal quotation marks omitted); *see also* Witte v. United States, 515 U.S. 389, 401–02 (1995) (noting that uncharged drug transactions were properly considered at sentencing).

[39] *See Fitch*, 659 F.3d at 796–98.

[40] *Id.* at 797. The court also rejected Fitch's arguments that the district court failed to explain its sentence adequately and that it treated the Guidelines as mandatory. *See id.* at 797–98.

[41] Gall v. United States, 128 S. Ct. 586, 597 (2007).

[42] *Fitch*, 659 F.3d at 798.

[43] *Id.* at 799.

[44] *Id.* (Goodwin, J., dissenting).

[45] *Id.* at 800.

[46] *See id.*

[47] *Id.* at 800–01.

[48] The Ninth Circuit's holding in *United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010), would have restrained the *Fitch* court from accepting such a challenge if Fitch had brought one, but *Fitch* exemplifies the difficulties inherent in a rule requiring such rejection.

view may produce sentences that would not be upheld as reasonable but for judge-found facts, it implicates the *Apprendi* rule — and defendants should be able to bring as-applied Sixth Amendment challenges raising this very claim. Allowing such challenges in a narrow form would promote doctrinal coherence, revive the principles underlying *Apprendi*, and prevent degradations of constitutional protections.

The rejection of as-applied challenges rests on the assumption that, when *Booker* rendered the Guidelines advisory, it reset the statutory maximums for *Apprendi* purposes to those absolute limits prescribed by Congress.[49] That interpretation of *Booker* is certainly viable, and finds support in dicta,[50] but it is far from inevitable. *Booker*'s key doctrinal move (which originated in *Blakely v. Washington*[51]) was to understand the relevant *Apprendi* maximum not as the upper limit prescribed by the legislature, but rather as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[52] While *Booker* made clear that advisory Guidelines no longer set functional *Apprendi* maximums, it did not foreclose the possibility that other standards or rules could do just that. Indeed, in interpreting the Sentencing Reform Act[53] to require appellate review for reasonableness, the *Booker* Court implicated the rule it had just applied to invalidate the mandatory Guidelines.[54] To wit, "if reasonableness review is more than just an empty exercise," then sentencing judges *do not* have absolute discretion to sentence at will within the statutory maximums set by Congress,[55] which in turn suggests that, at least in some cases, the maximum sentence allowed under *Apprendi* registers below the absolute statutory maximum.

In constraining sentencing judges' discretion in this manner, substantive reasonableness review ensures that some sentences will be up-

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[49] *See id.* at 1017 ("In *Booker*, the Supreme Court rendered the Guidelines advisory, permitting a district court to impose a sentence anywhere within the range established by the statute of conviction without violating the Sixth Amendment."); United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009); United States v. White, 551 F.3d 381, 384 (6th Cir. 2008) (en banc).

[50] *See* United States v. Booker, 543 U.S. 220, 233 (2005) (Stevens, J., delivering the opinion of the Court in part) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." (citing Apprendi v. New Jersey, 530 U.S. 466, 481 (2000); Williams v. New York, 337 U.S. 241, 246 (1949))).

[51] 542 U.S. 296 (2004).

[52] *Booker*, 543 U.S. at 232 (Stevens, J., delivering the opinion of the Court in part) (quoting *Blakely*, 542 U.S. at 303) (internal quotation marks omitted).

[53] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified in scattered sections of 18 and 28 U.S.C.).

[54] *See Booker*, 543 U.S. at 245, 261–62 (Breyer, J., delivering the opinion of the Court in part).

[55] Cunningham v. California, 549 U.S. 270, 309 n.11 (2007) (Alito, J., dissenting); *cf.* United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009) (Cabranes, J.) (explaining that substantive reasonableness review "provide[s] a backstop" against sentences that are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law"). For an example of the Second Circuit overturning a sentence on these grounds, see *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010).

held only on the basis of judge-found facts: that is, for some sentences, a judge-found fact will be precisely what justifies that sentence as reasonable. Concurring in *Rita v. United States*,[56] Justice Scalia argued that such sentences necessarily exceed the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, in violation of the *Apprendi* rule.[57] According to Justice Scalia, the relevant *Apprendi* maximum post-*Booker* is not the absolute statutory maximum prescribed by Congress, as appellate courts rejecting as-applied challenges have intoned, but rather the "maximum sentence *that will be upheld as reasonable* based only on the facts found by the jury or admitted by the defendant."[58] To illustrate this argument, suppose that the district court in *Fitch* did not make any findings regarding Fitch's involvement in Bozi's death but imposed a 262-month sentence nonetheless. Under substantive reasonableness review, that sentence may very well have been struck down as overly harsh; what makes Fitch's actual sentence clearly reasonable is the district court's murder finding.[59] To the extent that the "fact" of the murder was necessary to uphold Fitch's 262-month sentence as reasonable, Fitch was entitled to have that fact submitted to a jury and proved beyond a reasonable doubt in accordance with *Apprendi*. *Fitch*, then, presents the prototypical set of facts for which an as-applied challenge might be necessary to avoid a Sixth Amendment violation. The Supreme Court has not foreclosed the availability of as-applied challenges,[60] and courts should not disregard what, in some cases, may be the doctrinally coherent outcome.[61]

Though not foreclosed, as-applied challenges are desirable only to the extent that courts could cabin their reach and thereby leave judi-

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[56] 551 U.S. 338 (2007).

[57] *See id.* at 371 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he notion of excessive sentences within the statutory range, and the ability of appellate courts to reverse such sentences, inexorably produces, in violation of the Sixth Amendment, sentences whose legality is premised on a judge's finding some fact . . . ."); *see also* Marlowe v. United States, 129 S. Ct. 450, 450–51 (2008) (Scalia, J., dissenting from denial of certiorari) (arguing that a life sentence based on the factual finding of a sentencing judge violated *Booker*).

[58] *Rita*, 551 U.S. at 372 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

[59] This conclusion is bolstered by the panel's focus in its reasonableness analysis on the appropriateness of giving Fitch's involvement in Bozi's death "great weight," *Fitch*, 659 F.3d at 798, despite the "unusually weighty" effect of the uncharged conduct on Fitch's sentence, *id.* at 799.

[60] *See* Gall v. United States, 128 S. Ct. 586, 602–03 (2007) (Scalia, J., concurring) (stating that the "door . . . remains open" for defendants to bring as-applied Sixth Amendment challenges). *Rita* held that an appellate court's presumption of reasonableness for within-Guidelines sentences did not violate the Sixth Amendment. *Rita*, 551 U.S. at 341. The Court was thus not compelled to reach the question of whether substantive reasonableness review implicates the Sixth Amendment and instead dismissed Justice Scalia's argument as hypothetical. *Id.* at 353.

[61] *See* Steven F. Hubachek, *The Undiscovered* Apprendi *Revolution: The Sixth Amendment Consequences of an Ascendant Parsimony Provision*, 33 AM. J. TRIAL ADVOC. 521, 527–32 (2010).

cial factfinding largely undisturbed — lest the cure for extraordinary cases such as *Fitch* be worse than the disease. An aggressive application of the rule would compel judges to contemplate, in each case, the maximum substantively reasonable sentence authorized by the jury verdict or guilty plea.[62] The inquiry, were it to become ubiquitous, would be difficult to administer and potentially destabilizing. Strict enforcement would also cast doubt on the constitutionality of conventional judicial factfinding — for example, findings related to the defendant's criminal leadership role or the pecuniary loss caused by the defendant[63] — which, in ordinary cases, furthers the goal of individualized punishment without significantly undermining the jury trial right.

Courts can adopt a far narrower approach to as-applied challenges, however, which would rejuvenate the substantive principles underlying the Court's modern sentencing law without implicating judicial factfinding in mine-run cases. Appellate courts could recognize that the maximum reasonable sentence authorized by a jury verdict or guilty plea will in most cases be quite high,[64] such that sentencing judges need not impose sentences in constant fear of reversal. Based on this starting premise, appellate courts could judiciously employ Justice Scalia's doctrinal argument as a tool to overturn sentences in those rare cases in which judicial factfinding is so determinative that it becomes "a tail which wags the dog of the substantive offense."[65] This familiar pre-*Apprendi* standard, though mocked by Justice Scalia in *Blakely*,[66] would be a useful proxy for determining when a sentence could not be upheld as reasonable but for a judge-found fact — as might often be the case where the defendant is punished for more serious criminal conduct than the crime of conviction. Allowing as-applied challenges in this limited way would inject some much-needed functionalism into a doctrine that has seen its application come unmoored from its rationale[67] — the "need to give intelligible content to

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62 For an example of a district court attempting this approach, see United States v. Griffin, 494 F. Supp. 2d 1, 19–21 (D. Mass. 2007), *vacated on other grounds*, 524 F.3d 71 (1st Cir. 2008).

63 *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2011) (directing up to a four-level increase to the offense level based on defendant's leadership role); *id.* § 2B1.1(b)(1) (increasing offense level for financial crimes in accordance with pecuniary loss caused or intended by defendant).

64 *Cf. Rita*, 551 U.S. at 376–77 (Scalia, J., concurring in part and concurring in the judgment) ("If appellate courts will uphold, based only on the facts found by the jury, a district court's decision to impose all but the lengthiest sentences, then the number of sentences that are legally dependent on judge-found facts will be quite small.").

65 Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)) (internal quotation marks omitted).

66 *See* Blakely v. Washington, 542 U.S. 296, 311 n.13 (2004) ("Its precise effect . . . is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail.").

67 *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677 (2006) (arguing that *Booker*'s remedy "bears no logical relation to the constitutional violation").

the right of jury trial."[68] This argument for as-applied challenges concededly trades on the same formalistic interpretation of "statutory maximum" that facilitated the paradoxical *Booker* remedy, but it does so in a way that would allow courts to prevent the most flagrant diminishments of the jury trial right without upsetting *Booker*'s intent to preserve judicial factfinding.

Perhaps the most compelling argument for allowing as-applied Sixth Amendment challenges is the perverse incentive created by *Fitch* itself. *Fitch* illustrates how the consideration of relevant conduct, when combined with high statutory maximums, can trivialize the jury trial right to the point of near irrelevance. In *Fitch*, the government was openly motivated by its theory that Fitch murdered his wife.[69] Yet the prosecution charged Fitch with more easily proved, comparatively minor offenses to achieve an indirect conviction for murder at the sentencing hearing,[70] where Fitch lacked the procedural protections of trial. Consideration of as-applied Sixth Amendment challenges could prevent the degradation of constitutional rights that characterizes the sentencing phase of pretextual prosecutions[71] and would discourage prosecutors from employing high statutory maximums to execute end runs around constitutional safeguards.[72]

Contrary to *Fitch*'s suggestion, appellate courts are not bound to shrug at the disturbing marginalization of the jury trial right that can occur in extreme cases. Rather, as both a doctrinal and a normative matter, courts should give serious consideration to allowing as-applied Sixth Amendment challenges to sentences.

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[68] *Blakely*, 542 U.S. at 305. Hence the profound irony of the *Booker* remedy: a doctrinal revolution predicated on protecting the jury trial right culminated not in empowerment of the jury, but in enhanced judicial discretion. *See* Stephanos Bibas, Rita v. United States *Leaves More Open than It Answers*, 20 FED. SENT'G REP. 28, 32 (2007).

[69] In arguing for a thirty-year sentence, the government stated: "Your Honor, it's important to remember what this case is about. The primary victim in this case is Maria Bozi." Reporter's Transcript, *supra* note 19, at 37–38.

[70] The government admitted as much at oral argument. When asked, "[Y]ou couldn't get him for murder directly, so in effect you got him indirectly for murder, right?" the government responded: "We certainly did." Recording of Oral Argument at 22:42, *Fitch*, 659 F.3d 788 (No. 07-10607), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007289.

[71] *Cf.* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 585–87 (2005) (arguing that there is a "strong social interest" in charging defendants with the crimes that actually motivate prosecution, *id.* at 585 (emphasis omitted)); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. (forthcoming 2012) (manuscript at 68), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912518 (identifying the emergence of "ad hoc instrumentalism" by which officials "view all substantive laws and all enforcement regimes . . . as tools to [be] employed strategically, as the circumstances demand"). *But see* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1182 (2004) (concluding that pretextual prosecutions are "generally justified").

[72] *Cf.* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 140 (1998) (identifying the incentive to charge an easily proved count and then "convict" on further "counts" at sentencing).