Due Process Clause — Federal Sentencing Guidelines — Beckles v. United States

The vagueness doctrine takes at least two forms: one based in the Due Process Clause[1] and one based in the Eighth Amendment. Under the due process version, the Supreme Court held in 2015 that statutory language setting an enhanced sentence on the basis of previous criminal offenses "involv[ing] conduct that presents a serious potential risk of physical injury to another"[2] was unconstitutional.[3] Last Term, however, in *Beckles v. United States*,[4] the Court held that identical language in the Federal Sentencing Guidelines[5] (Guidelines) was not void for vagueness because vagueness review under the Due Process Clause cannot apply to the Guidelines at all.[6] Opinions by most members of the *Beckles* Court, even beyond the majority, presented contrasting visions of the Guidelines but accepted that pure judicial discretion cannot be challenged as vague. Justice Kennedy's concurrence, meanwhile, suggested that, while the Guidelines cannot be challenged for due process vagueness, a broader conception of vagueness could be extended to engage the unstructured elements of judicial discretion involved in criminal sentencing. An innovation like this, whereby vagueness could apply not just to statutes defining crimes and setting maximum sentences, but also to the process by which sentencing judges exercise their wide discretion, would be a significant change from current U.S. sentencing law. Such a change would require much more initial detail in sentencing decisions and fundamentally alter the scope of appellate review of those decisions.

Travis Beckles was convicted of possession of a firearm by a felon.[7] On the basis of the then-operative 2006 Guidelines, a district judge found that Beckles qualified as a career offender, which raised his sentencing range.[8] The critical portions of the Guidelines categorized an individual as a career offender if, among other criteria such as past convictions, which Beckles met, the current crime was a "crime of violence."[9] That phrase, in turn, was defined according to a list of offenses

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[1] U.S. CONST. amend. XIV, § 1.

[2] 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

[3] Johnson v. United States, 135 S. Ct. 2551, 2555, 2563 (2015).

[4] 137 S. Ct. 886 (2017).

[5] The Guidelines provide a baseline sentence range for any person convicted of a federal offense based on a number of factors related to the crime and the person's history. *See* 28 U.S.C. § 994 (2012). Sentencing judges are required to consider, but not necessarily adhere to, the Guidelines. *See* 18 U.S.C. § 3553(a)(4).

[6] *Beckles*, 137 S. Ct. at 890.

[7] *Id.*; *see* Verdict, United States v. Beckles, No. 07-20305-CR (S.D. Fla. Aug. 2, 2007), 2007 WL 6857224 (jury verdict).

[8] *Beckles*, 137 S. Ct. at 890–91.

[9] *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2006) [hereinafter GUIDELINES]).

and elements including a residual clause bringing in activity that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[10] The commentary to this portion of the Guidelines provided that possession of a sawed-off shotgun, Beckles's offense, was a crime of violence.[11] The Supreme Court subsequently found, in *Johnson v. United States*,[12] that a clause in the Armed Career Criminal Act[13] (ACCA) worded identically to the residual clause in the Guidelines was void for vagueness under the Due Process Clause because it required sentencing judges to envision a type of crime in the abstract, to assess how much risk of injury that abstract conduct might create, and to determine whether that risk is enough to qualify conduct as a "violent felony."[14]

Beckles's initial appeal of his sentence to the Supreme Court resulted in a remand for further consideration in light of *Johnson*.[15] In a brief opinion, the Court of Appeals for the Eleventh Circuit upheld Beckles's sentence, finding that *Johnson*'s holding about language in the ACCA did not control a sentence determined by the Guidelines when the Guidelines commentary explicitly listed the crime at issue as a crime of violence.[16] On appeal to the Supreme Court, Beckles argued that the portion of the Guidelines under which his sentence was enhanced was unconstitutionally vague, just as the same language was found to be in *Johnson*.[17]

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[10] GUIDELINES, *supra* note 9, § 4B1.2(a)(2).

[11] *Id.* § 4B1.2 cmt. application note 1.

[12] 135 S. Ct. 2551 (2015).

[13] 18 U.S.C. § 924(e)(2)(B) (2012).

[14] *Johnson*, 135 S. Ct. at 2557–58. *See generally The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 181, 301–10 (2015). Effective August 2016, this residual clause was removed from the Guidelines as a matter of policy following *Johnson*. U.S. SENTENCING COMM'N, ANNUAL REPORT: FISCAL YEAR 2016, at A-7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/2016-Annual-Report.pdf [https://perma.cc/X7MU-W4G3].

[15] Beckles v. United States, 135 S. Ct. 2928 (2015) (mem.). Beckles had initially appealed on the basis that his crime was not a "crime of violence" under the Guidelines. *See* United States v. Beckles, 565 F.3d 832, 841–42 (11th Cir.), *cert. denied*, 558 U.S. 906 (2009). He also raised the issues of whether his waiver of *Miranda* rights was valid, whether there was sufficient evidence to support his knowing possession of a firearm, and whether his sentence of 360 months was reasonable. *Id.* at 836. The Eleventh Circuit later denied post-conviction relief on the basis that possession of a sawed-off shotgun constitutes a "crime of violence" because the Guidelines commentary is authoritative unless it is inconsistent with the Constitution, another law, or the text of the Guidelines. Beckles v. United States, 579 F. App'x 833, 834 (11th Cir. 2014) (per curiam) (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)).

[16] Beckles v. United States, 616 F. App'x 415, 416 (11th Cir. 2015) (per curiam). The panel deciding the case consisted of Judge Wilson and Senior Judges Anderson and Edmondson.

[17] *Beckles*, 137 S. Ct. at 890. The respondent U.S. government and Beckles agreed that the Guidelines are at least subject to vagueness challenges, so the Court appointed an advocate to argue that the Guidelines are not subject to such challenges. *Id.* at 892.

The Supreme Court affirmed the judgment of the Eleventh Circuit.[18] Writing for the Court, Justice Thomas[19] held that the Guidelines are not subject to vagueness challenges because, although they are a key starting point for sentencing determinations, they do not set mandatory minimum and maximum sentences but are rather one of a set of factors that judges consider when exercising their permissibly wide discretion in sentencing.[20] Justice Thomas categorized the Court's existing vagueness jurisprudence as reaching two types of criminal laws: those that define crimes and those that fix permissible sentence ranges for crimes.[21] The ACCA clause found unconstitutional in *Johnson* fell into the second of these categories, but the Guidelines provisions fall into neither.[22] The nonmandatory nature of the Guidelines meant that they were not subject to the concerns that the vagueness doctrine, according to Justice Thomas, is meant to address: notice and arbitrary enforcement.[23] Even extremely precise sentencing guidelines would not provide perfect notice because judges can deviate from them.[24] Sentencing judges are not enforcing the Guidelines but rather enforcing underlying laws providing permissible ranges of criminal penalties — since the Guidelines are not "enforced" at all, they cannot be enforced arbitrarily.[25]

Tracing the history of criminal sentencing, Justice Thomas noted that lower courts traditionally had extremely broad discretion to fix sentences within wide statutory ranges, and that the constitutionality of this practice has never been seriously questioned.[26] If a system in which judges choose sentences within a large statutory range without any guidelines at all is not subject to vagueness challenges, then the addition of a nonmandatory guide for that discretion cannot possibly introduce vagueness concerns, regardless of what the advisory guidelines might say.[27] Although a capital sentence is unconstitutional under the Eighth Amendment when a district court relies on a "vague sentencing factor,"[28]

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[18] *Id.* at 897.

[19] Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. Justice Kagan took no part in the consideration or decision of the case.

[20] *Beckles*, 137 S. Ct. at 892–94.

[21] *Id.* at 892.

[22] *Id.*

[23] *See id.* at 894.

[24] *See id.*

[25] *See id.* at 894–95. Justice Thomas distinguished the vagueness doctrine from constitutional ex post facto inquiries; unlike the former, the latter come into play when the risk of a higher sentence is significantly increased retroactively. *Id.* at 895. He also noted that nonvagueness due process challenges can still apply to sentencing procedures. *Id.* at 896 (citing Townsend v. Burke, 334 U.S. 736, 741 (1948), for the proposition "that due process is violated when a court relies on 'extensively and materially false' evidence to impose a sentence on an uncounseled defendant").

[26] *Id.* at 892–93.

[27] *See id.* at 894.

[28] *Id.* at 895 (citing Espinosa v. Florida, 505 U.S. 1079, 1082 (1992) (per curiam)).

Justice Thomas stated that vagueness analysis under the Due Process Clause is distinct from Eighth Amendment jurisprudence.[29] Lastly, Justice Thomas argued that holding the Guidelines subject to vagueness challenges would jeopardize other factors that sentencing judges are statutorily required to consider, many of which are significantly more vague than the Guidelines, such as the consideration of whether a sentence would "promote respect for the law."[30]

Justice Ginsburg concurred in the judgment. She would have ruled against Beckles on the narrower ground that the commentary to the Guidelines specified his offense as a "crime of violence," rendering the Guidelines not vague as applied to Beckles and thus making him ineligible to bring a facial challenge.[31] She encouraged waiting to rule on the question of whether the Guidelines can ever be open to a vagueness challenge until a future case presented the issue more directly.[32]

Justice Sotomayor also concurred in the judgment. She agreed with Justice Ginsburg that the commentary to the Guidelines provision applicable to Beckles rendered that provision not vague.[33] However, she went on to disagree with the Court's conclusion that the Guidelines as a whole cannot be void for vagueness, focusing on the practical reality that the Guidelines do in fact play a determinative role in the ultimate sentencing decision in a large majority of cases.[34] Judges are required by law to calculate the Guidelines range in every case and explain any variance outside of that range, such that the Guidelines set a baseline and make it difficult for a judge to impose, or a defendant to argue for, any sentence outside of the Guidelines range.[35] Therefore, she argued, "[n]othing of substance . . . distinguishes the Guidelines from the kind of laws we held susceptible to vagueness challenges in *Johnson*; both law and Guideline alike operate to extend the time a person spends in prison."[36] For her, because the Guidelines play a central role in the determination of sentences, they implicate both key due process concerns: notice and arbitrary enforcement.[37]

Justice Sotomayor further disagreed with Justice Thomas as to the applicability of the Court's Eighth Amendment precedent, which she

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[29] *Id.* at 895–96 (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988)).

[30] *Id.* at 896–97 (quoting 18 U.S.C. § 3553(a)(2)(A) (2012)).

[31] *Id.* at 897–98 (Ginsburg, J., concurring in the judgment).

[32] *Id.* at 898.

[33] *Id.* (Sotomayor, J., concurring in the judgment).

[34] *See id.* at 899–900.

[35] *See id.*

[36] *Id.* at 902.

[37] *Id.* at 900–01 (arguing that notice issues are raised when a sentencing court relies upon a Guidelines provision that is incomprehensible to an ordinary person and arbitrary enforcement is implicated when sentences are functionally anchored to a rule that judges cannot interpret without using instinct and guesswork).

viewed as establishing the proposition that advisory sentencing factors can create the kind of potential for arbitrariness that opens them to constitutional challenge.[38] She also argued that, while the pure exercise of discretion by judges cannot be found unconstitutionally vague, a rule setting a baseline for their decisions can be.[39] And she dismissed the majority's concerns about other general sentencing factors being at risk if the Guidelines were subject to vagueness challenges, drawing a distinction between general standards that judges apply to particular conduct, which cannot be void for vagueness, and rules that require judges to conceive of an abstract or ordinary instance of crime, which can be.[40]

Justice Kennedy, who joined Justice Thomas's majority opinion, also concurred separately. In a very brief opinion, he indicated that, while advisory guidelines are not open to challenge under the traditional vagueness doctrine, a constitutional challenge based on some different conception of vagueness that is applied to the exercise of discretion itself might be successful.[41] He suggested that "cases may arise in which the formulation of a sentencing provision leads to a sentence, or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns," elaborating that "a litigant might use the word vague in a general sense — that is to say, imprecise or unclear — in trying to establish that the sentencing decision was flawed," but that "[t]he existing principles for defining vagueness cannot be transported uncritically to the realm of judicial discretion in sentencing."[42]

Taking Justice Kennedy's brief and cryptic suggestion to its logical conclusion produces a new vagueness doctrine, applicable to the process of judicial discretion in sentencing, which would require more explicit reasoning from sentencing judges and a wider scope for appellate review. Although Justice Kennedy rejected the extension of traditional conceptual underpinnings, he created an opening for a different type of vagueness review focused on the process of sentencing and the connections between judges' reasoning and sentencing outcomes. Many sentencing judges provide little explicit reasoning for their decisions, and the scope of appellate review of sentencing is tightly limited. This situation, in itself, seems to lead to sentencing procedures that meet Justice Kennedy's definition of vague. A doctrine of more stringent requirements for the content and amount of reasoning provided by sentencing

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[38] *Id.* at 902. She also argued that precedent holding the Guidelines open to challenge under the Ex Post Facto Clause established that the Guidelines in particular are "lawlike enough," *id.* at 903, that they are subject to constitutional scrutiny, and that such precedent is especially relevant because the Ex Post Facto Clause, like the Due Process Clause, is grounded in principles of notice and fairness. *Id.* at 902–03.

[39] *Id.* at 903–04.

[40] *Id.* at 904–05. According to Justice Sotomayor, the Court had already drawn this distinction and rejected the contrary argument in *Johnson*. *Id.* at 904 (citing Johnson v. United States, 135 S. Ct. 2551, 2561 (2015)).

[41] *Id.* at 897 (Kennedy, J., concurring).

[42] *Id.*

judges would fill a gap suggested by the other opinions and produce a number of changes in the practice of sentencing and appellate review.

In his concurrence, Justice Kennedy rejected traditional vagueness principles but thereby opened the way for others. Without directly explaining why, he eliminated "fair warning to a transgressor, [and] . . . preventing arbitrary enforcement" as underpinnings for a new vagueness doctrine in sentencing discretion, suggesting that "it seems most unlikely that the definitional structure used to explain vagueness in [these] contexts . . . is, by automatic transference, applicable to the subject of sentencing where judicial discretion is involved as distinct from a statutory command."[43] Justice Thomas's majority opinion, which Justice Kennedy joined, explained why this is the case: discretionary sentencing cannot be void for vagueness in the traditional sense because anything other than fixed ranges cannot provide notice and nonmandatory ranges cannot, by definition, be enforced.[44]

One of Justice Kennedy's few hints as to what new considerations could counterbalance this unreviewability suggests a possible avenue for developing his doctrine. He stated that unacceptable sentencing would be "so arbitrary that it implicates constitutional concerns."[45] Professor Peter Low and Joel Johnson propose two conceptual factors that could be used to clarify whether arbitrariness in the statutory context rises to the level of unconstitutional vagueness in cases of particular criminal laws: first, that all definitions of crime should be based on conduct (rather than, say, status or prediction) and second, that there must be "a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied."[46] These principles could similarly be applied to judicial sentencing discretion: all aspects of a sentencing decision should be based on some concrete factor related to the defendant's conduct — whether before, during, or after the crime — and should relate to that conduct in some defensible and reasonably predictable way.[47] Under this doctrine, outcomes need not

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[43] *Id.*

[44] *See id.* at 894–95 (majority opinion). By implication, concerns related to Eighth Amendment vagueness seem inapplicable as well. Eighth Amendment vagueness jurisprudence is based on concerns about the existence of too much discretion in death penalty decisions; to survive Eighth Amendment vagueness review a statute governing capital punishment must sufficiently cabin the discretion of judges and juries. *See* Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988). What Justice Kennedy seems to suggest is different: a form of vagueness review that applies to discretion itself.

[45] *Beckles*, 137 S. Ct. at 897 (Kennedy, J., concurring).

[46] Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053 (2015).

[47] Illegitimate considerations, such as racial bias, would presumably not meet a standard of "defensible," and would in fact be unconstitutional for other reasons. *Cf.* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW.

be held constant, but some aspects of sentencing judges' decision processes would need to be. As long as judges have discretion in sentencing they can at least potentially use it arbitrarily.[48] Arbitrariness, however, can be measured in more ways than one. The kind of arbitrariness that Justice Kennedy seeks to combat cannot be that of similarly situated defendants receiving different sentences — otherwise, the solution would be to eliminate discretion, which the *Beckles* majority explicitly rejects.[49] Instead, it must be that the process of imposing a discretionary sentence can be more or less arbitrary.[50]

In the trenches of the criminal courts, however, violations of Justice Kennedy's hypothetical doctrine might occur less often in the form of judges providing nonsensical reasons for their sentencing decisions than in their providing minimal reasons or no reasons at all. Currently, federal law requires that district judges state in open court their reasons for choosing to impose a particular sentence in any case in which the prescribed term of imprisonment exceeds two years, even when the sentence is within the Guidelines.[51] The requirement is more stringent when they deviate from the Guidelines: judges are then required to issue a form stating the reason for deviation "with specificity."[52] Particularly when a sentence is within the Guidelines range, however, these requirements are often met simply by a judge acknowledging a defendant's arguments regarding his or her sentence, without providing any detailed or explicit reasons why those arguments may have been rejected.[53] Or — as happened in *United States v. Beuschel*,[54] a recent case in the Southern District of Florida, where Beckles was originally sentenced — the judge might hear lengthy arguments on factual issues that could impact the calculation of the Guidelines range, but, when actually imposing a prison term, state only that he has considered "statements by all parties

U. L. REV. 1441, 1443 (1997) (noting the constitutional concerns that led to appellate reviews of sentencing decisions in the pre-Guidelines era).

48 *Cf.* Low & Johnson, *supra* note 46, at 2053 (arguing that any criminal law "'encourages' arbitrariness to some extent because" of the discretion it affords to police and prosecutors).

49 Other Supreme Court precedent rejects this too: it is not automatically unconstitutional or contrary to sentencing law for a sentencing judge to depart consistently from the Guidelines due to a policy disagreement with a specific provision of the Guidelines. *See* Spears v. United States, 555 U.S. 261, 265–66 (2009) (per curiam) (clarifying the holding of Kimbrough v. United States, 552 U.S. 85 (2007)).

50 *Cf. The Supreme Court, 2005 Term — Leading Cases*, 120 HARV. L. REV. 125, 141–42 (2006) (discussing, in the Eighth Amendment context, the difference between invalidating a system of determining which defendants are sentenced to death because of the presence of some randomness in each case and monitoring the extent to which all defendants in the system are exposed to the same amount of randomness as each other during the sentencing process).

51 18 U.S.C. § 3553(c)(1) (2012).

52 *Id.* § 3553(c)(2). The only exception is for cases in which the district court relies on statements received in camera, in which case the court must state that it relied on such statements. *Id.*

53 *See* Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 469 (2009).

54 No. 15-60029-CR (S.D. Fla. Aug. 19, 2015).

and a complete review of the entire revised presentence report which contains the advisory guideline computation and range" and "all of the statutory factors as set forth in 18 U.S.C. Section 3553(a)," and then simply announce a sentence length without providing further rationale.[55]

Appellate review is similarly limited. Appellate courts are permitted to review sentences only on the basis of a limited set of factors, including whether a sentence is "in violation of the law";[56] whether the judge calculated the Guidelines range correctly;[57] and whether, if the sentence is outside of the Guidelines range, the district court provided the required statement of reasons and used appropriate and reasonable factors as a basis for the deviation from the range.[58] A failure to provide the requisite explanation for a deviation from the Guidelines constitutes a procedural error that can provide grounds for vacating the sentence.[59] Returning to the example, *Beuschel*'s judge was not required to provide a statement of reasons because the sentence was within the Guidelines range[60] and was thus also unlikely to be found obviously "in violation of the law" such that it would be overturned on appeal. Shortly after the Supreme Court rendered the Guidelines nonmandatory,[61] circuit courts experimented with the requirement that a sentencing judge address explicitly any reasonable arguments made by a defendant regarding his or her sentence.[62] Under such a rule, *Beuschel*'s sentencing judge would have needed to respond to the defendant's attorney's extensive arguments about Beuschel's character and future potential[63] with some-

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[55] Transcript of Sentencing Hearing at 52, *Beuschel*, No. 15-60029-CR, ECF No. 83 [hereinafter *Beuschel* Transcript]. Access to the original sentencing transcript from *Beckles* is restricted. *See* Telephone Conversation between Author and the Records Office, District Court for the S. Dist. of Fla. (June 1, 2017). *Beuschel* was randomly selected from among recent cases in *Beckles*'s district. It is far from unique, however, as an example of a sentencing decision with little explicit reasoning provided, whether in that district, *see, e.g.*, Transcript of Sentencing Hearing at 6, United States v. Telfort, No. 16-20457-CR-WMS (S.D. Fla. Nov. 15, 2016), ECF No. 74, or others, *see, e.g.*, Transcript of Sentencing Hearing at 11, United States v. Funches, No. 1:15-CR-10145-RGS (D. Mass. May 26, 2016), ECF No. 408. Unfortunately, there is little research to date on the broader empirics of how much reasoning sentencing judges explicitly provide with their decisions.

[56] 18 U.S.C. § 3742(e)(1).

[57] *Id.* § 3742(e)(2).

[58] *Id.* § 3742(e)(3).

[59] *Id.* § 3742(f)(2); *see* Gall v. United States, 552 U.S. 38, 51 (2007). Substantively, whether a sentence is inside or outside the Guidelines range, appellate courts apply an abuse-of-discretion standard. *Id.* at 51.

[60] *See Beuschel* Transcript, *supra* note 55, at 52, 55 (sentencing Beuschel to a prison term of sixty-three months for trafficking in counterfeit drugs, and noting that "[t]he sentence is within the advisory guideline range," *id.* at 55).

[61] United States v. Booker, 543 U.S. 220, 227 (2005).

[62] O'Hear, *supra* note 53, at 465 (discussing a set of cases that began with United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005)).

[63] *See Beuschel* Transcript, *supra* note 55, at 45–48.

thing more detailed than a plain statement that "the Court finds no reason to depart or vary from the sentence called for by the guidelines."[64] The Supreme Court, however, rolled back this requirement by holding that district judges can rely on implicit reasoning in making their sentencing decisions.[65]

In all, then, sentencing courts are not functionally required to provide even minimally detailed sets of reasons for their decisions, especially if the sentences they impose are within the Guidelines — which implicates Justice Kennedy's concerns. In a case like *Beuschel*, where the judge conclusorily states that he has considered the necessary factors and found no reason to deviate from the Guidelines range, not only would appellate review be difficult, but the defendant would likely leave his or her sentencing hearing with no firm idea of why the court settled upon the exact length of jail time that it did. It is exactly this type of exercise of discretion that fits Justice Kennedy's description of vague sentencing as "imprecise or unclear."[66] And the set of laws that allows for the unopposed lack of public reasoning by judges exercising their sentencing discretion may be what Justice Kennedy described as a "formulation of a sentencing provision [that] leads to a sentence, or a pattern of sentencing, [that could be] challenged as so arbitrary that it implicates constitutional concerns."[67]

Justice Kennedy's alternate form of vagueness review addresses a logical question suggested by both Justice Thomas's majority opinion and Justice Sotomayor's concurrence in *Beckles*. The two main, opposing opinions present agreement on a key point: that laws that fix sentences are reviewable for vagueness, but the pure exercise of discretion — perhaps the most significant variable in sentencing — is not.[68] Though he agreed with the majority's restrictive characterization of due process vagueness, Justice Kennedy pushed back on this seeming inconsistency by suggesting a way in which pure discretion could be reviewed after all. Even under the *Beckles* precedent, whereby guidelines for the exercise of judicial discretion cannot be void for vagueness, appeals courts could require a process in which judges provide a higher standard of reasoning at sentencing and invalidate sentences that are vague in the sense that the process did not allow defendants, appellate courts, and observers to understand the reasoning behind a sentence.

Adopting Justice Kennedy's doctrine could result in substantial changes in the way sentences are given. A primary reason for the short-

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[64] *Id.* at 55.

[65] *See* Rita v. United States, 551 U.S. 338, 356–57 (2007) (justifying this conclusion in particular when the sentence imposed is within the Guidelines range); O'Hear, *supra* note 53, at 468–69.

[66] *Beckles*, 137 S. Ct. at 897 (Kennedy, J., concurring).

[67] *Id.*

[68] *See id.* at 892–93 (majority opinion); *id.* at 903–04 (Sotomayor, J., concurring in the judgment).

lived circuit doctrine requiring explanation, according to proponents, was ease of appellate review.[69] Then again, it is unclear whether requiring district courts to provide more detailed reasons for their sentences would ultimately lead to a higher rate of successful appeals by defendants — after all, sentencing judges could likely think of any number of facially acceptable reasons for any given sentence. But this may not be the point; a system in which sentencing judges are required to provide more detailed explanations for their decisions could have benefits including reducing judges' cognitive biases toward following the Sentencing Guidelines without further consideration, communicating respect for defendants and their participation in the criminal justice process, and contributing to the improvement of the Guidelines in the future.[70] Models for such a raised standard of judicial explanation exist already: for example, in American immigration courts[71] and in criminal courts in most of continental Europe.[72] Any or all of these possibilities may be reasons that Justice Kennedy had in mind when he suggested a new vagueness doctrine, though he has yet to elaborate upon the possible constitutional foundations of such a doctrine.

Judicial discretion in sentencing is a key feature of our criminal justice system; indeed, despite their widely differing views on related points, no party in *Beckles* argued that judicial discretion is itself unconstitutional.[73] While the majority opinion and primary concurrence in *Beckles* debated the nature of vagueness review under the Due Process Clause, Justice Kennedy used his concurring opinion to briefly allude to another possible type of vagueness review altogether, one that could be applied to the reasoning used by sentencing judges in the exercise of their discretion — and that could substantially change the way sentencing is conducted.

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[69] O'Hear, *supra* note 53, at 465.

[70] *Id.* at 472; *see also* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 504–25 (2015) (providing participation, accountability, and accuracy as justifications for judicial reason-giving, *id.* at 504–13, but going on to argue that reason-giving can actually worsen cognitive bias and have negative institutional and efficiency effects, *id.* at 514–25).

[71] In removal proceedings, immigration judges determining the credibility of a foreign national are required to "provide 'specific [and] cogent reason[s]' in support of an adverse . . . determination." Malkandi v. Holder, 576 F.3d 906, 917 (9th Cir. 2009) (quoting He v. Ashcroft, 328 F.3d 593, 595 (9th Cir. 2003)). Another related area of American law, more akin to current sentencing law, is the doctrine on preemptive strikes in jury selection. At one point a circuit court had required prosecutors striking jurors of the defendant's racial group, when challenged, to provide a race-neutral reason for the strike related to the individual's ability to serve as a juror, Elem v. Purkett, 25 F.3d 679, 683 (8th Cir. 1994); however, the Supreme Court overruled, finding that any race-neutral reason is acceptable, *see* Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam).

[72] Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS. 161, 183–84 (2013) (noting that in most continental European countries, sentencing judges are required to provide reasons for their decisions and appellate courts review a wider set of issues in sentencing than their American counterparts do).

[73] *Beckles*, 137 S. Ct. at 893.