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Criminal Law—The Federal Sentencing Guidelines: Examining the Physical Restraint Sentencing Enhancement

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CRIMINAL LAW—THE FEDERAL SENTENCING GUIDELINES: EXAMINING THE PHYSICAL RESTRAINT SENTENCING ENHANCEMENT

I. INTRODUCTION

Under the Federal Sentencing Guidelines Manual ("Guidelines"), "physically restrained" is defined as "the forcible restraint of the victim such as being tied, bound, or locked up."[1] For many years, this broad definition[2] has been a headache to apply when a defendant is convicted of Hobbs Act robbery under 18 U.S.C. § 1951.[3] This is because Chapter Two of the Guidelines allows prosecutors to increase[4] the convicted defendant's "base offense level"[5] by two points if the defendant had physically restrained a victim to "facilitate [the] commission of the offense or to facilitate escape."[6] While the Guidelines themselves do not limit the issue of physical restraint at sentencing to robbery cases, this Note narrows its focus to the physical

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1. U.S. SENT'G GUIDELINES MANUAL § 1B1.1, cmt. 1(L) (U.S. SENT'G COMM'N 2021).

2. *See* United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997) ("[T]he application note unhelpfully states that 'physical restraint' means 'forcible restraint.' Yet, as we have said, restraint itself includes the use of force. Thus, the application note would appear to refer to the *forcible use of force, which redundancy does not advance matters much*.") (emphases added).

3. *See*, *e.g.*, United States v. Herman, 930 F.3d 872, 875–76 (7th Cir. 2019). Also, note that the Guidelines do not limit the issue of physical restraint at sentencing to robbery cases. *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.3 (U.S. SENT'G COMM'N 2021). However, this Note narrows its focus to the issue of physical restraint as it relates to robbery sentencing under Chapter Two of the Guidelines. *See* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT'G COMM'N 2021).

4. This increase is known as a "sentencing enhancement." They are applicable "only if the defendant has already committed some other underlying crime[,] . . . the prosecutor elects to charge it[,] and . . . the sentencing enhancement has not been incorporated into the Guidelines calculation for the underlying crime." Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 329 (2009). When they are applied, they "often generate sentences far different from the otherwise applicable Guidelines sentences." *Id.* at 330.

5. The base offense level is a general measurement of the severity of the crime. *See* U. S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf. The United States Sentencing Commission assigns each federal criminal offense a "base offense level:" the lowest is (1); the highest is (43). U.S. SENT'G COMM'N GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021). Understandably, crimes with greater base offense levels are subjected to more serious punishment and lengthier periods of incarceration than crimes with lower base offense levels. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS, 22–25 (2020).

6. U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT'G COMM'N 2021).

restraint enhancement used in robbery cases under Chapter Two of the Guidelines.[7]

Like many issues of interpretation, the problem with this enhancement relates to its scope and application.[8] The question that arises most often is whether the physical restraint enhancement applies if the defendant brandished a weapon during the commission of a robbery, aimed it towards a victim, and commanded him to remain immobile—"Don't move," "Get on the floor," "Stay put"—but never made actual physical contact with a person either through force or confinement. In the last quarter-century, all but one of the federal circuits have answered this question.[9] Among these courts there is considerable disagreement about the proper scope and application of the physical restraint enhancement.[10] Despite the longevity of this circuit split, the search for the proper interpretation of U.S.S.G. § 2B3.1(b)(4)(B) has attracted the attention of commentators only recently. [11]

Within this small group, there is near-unanimous support for a more limited definition—one that preserves the rule's narrow focus and prevents it from transforming into a universal sentencing enhancement applicable in most robberies tried in federal court.[12] This Note joins those commentators who have argued in favor of a strict interpretation of U.S.S.G. § 2B3.1(b)(4)(B). However, it proposes an alternative course of resolution.[13] Currently, the leading paper on this issue calls for the United States Sentencing Commission ("Commission") to revise the physical restraint enhancement in order to make its application consistent and to eliminate the circuit split.[14] This is a reasonable solution. After all, the Commission not only has the authority, but the duty, to "periodically . . . review and revise" the Guidelines in order to ensure their consistent application.[15] Furthermore, in *Braxton v. United States*, the Supreme Court held that Congress intended the

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7. *Id.* § 3A1.3 (U.S. SENT'G COMM'N 2021) (felonies); *Id.* § 2B3.1(b)(4)(B) (S. SENT'G COMM'N 2021) (robberies).

8. *See infra* Section II.

9. *See infra* Section III.

10. *See infra* Section II.

11. *See*, *e.g.*, Julia Knitter, Comment, *"Don't Move": Redefining "Physical Restraint" in Light of A United States Circuit Court Divide*, 44 SEATTLE U. L. REV. 205, 215–16 (2020); Devin Thomas Slaugenhaupt, Note, *Resolving Division Among The U.S. Courts Of Appeals: What Constitutes A Physical Restraint?*, 82 U. PITT. L. REV. 489, 497 (2020); Madeline C. VerHey, Comment, *Restrain Your Enthusiasm:* United States v. Taylor *and Robbery Enhancement for Restraint of a Victim*, 62 B.C. L. REV., 226, 233–35 (2021).

12. *See* United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) ("[T]he defendants did not do anything with their firearms that goes beyond what would normally occur during an armed robbery.").

13. *See infra* Section III.

14. Knitter, *supra* note 11, at 208.

15. 28 U.S.C. § 994(o).

Commission to be *principally* responsible for resolving circuit conflict through its amendment process.[16]

However, the conflict has festered for nearly three decades[17] because the Commission has refused to amend its robbery guideline.[18] The Commission's failure to amend the physical restraint enhancement has led to unnecessarily punitive sentences, unwarranted sentencing disparities, and the inconsistent application of federal law.[19] Accordingly, this Note argues that the conflicting interpretations of the physical restraint enhancement provide the Supreme Court with the appropriate vehicle to reconsider its hands-off approach articulated in *Braxton v. United States*.[20] Specifically, this Note argues that the Court should abandon the passive role it designated for itself and should interpret the sentencing enhancement narrowly in order to provide a uniform definition for the hopelessly divided federal circuits.[21]

Because this argument is best understood with some context of the evolution of federal sentencing law, this Note unfolds as follows: Section II highlights the development of federal sentencing law, spanning from the pre-Guidelines era until today.[22] Then, Section III examines the competing interpretations of U.S.S.G. § 2B3.1(b)(4)(B) and the surrounding circuit conflict.[23] Last, Section IV argues that the Supreme Court should take a more active role in the shaping of federal sentencing policy by interpreting the specific provisions of the Guidelines.[24] In doing so, the Court should interpret U.S.S.G. § 2B3.1(b)(4)(B) and provide a definition that resolves the circuit conflict in favor of a strict interpretation that preserves the physical restraint enhancement's narrow purpose.

II. BACKGROUND

A. Sentencing Without Guardrails: The Era of Indeterminate Sentencing

From the 1930s until the 1980s, federal sentencing was "indeterminate."[25] Judges sentenced convicted defendants, usually to a term of years in

16. Braxton v. United States, 500 U.S. 344, 348–49 (1991).
17. *See infra* Section II.
18. *See* U.S. SENT'G GUIDELINES MANUAL § 2B3.1 (U.S. SENT'G COMM'N 2021).
19. *See infra* Section III.
20. *See infra* Section IV; *Braxton*, 500 U.S. at 348–49.
21. *See infra* Section III.
22. *See infra* Section II.
23. *See infra* Section III.
24. *See infra* Section IV.
25. Mistretta v. United States, 488 U.S. 361, 363–64 (1989) (discussing the history of pre-guidelines sentencing); U. S. SENT'G COMM'N, *supra* note 5, at 2; Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 141–43 (2013) (discussing the history of indeterminate sentencing from 1930-1970).

prison, and then the United States Parole Commission determined how much of the sentence the defendant actually served.[26] The Parole Commission had the authority to release an inmate before he or she served the full duration of the sentence upon a finding of rehabilitation.[27] The judiciary's and the Parole Commission's shared authority made sentencing truly "indeterminate" because it was difficult to predict how long the convicted defendant would remain incarcerated.[28] As then Chief-Judge Stephen Breyer explained, "a judge might sentence an offender to twelve years, but the Parole Commission could release him after four."[29] In practice, this was common, as most inmates served only a fraction of the sentence the court imposed.[30]

During this era, federal sentencing was not only indeterminate but also largely dependent upon the discretion of individual judges.[31] Judges wielded essentially unbridled discretion to impose any sentence below the given criminal statute's maximum punishment.[32] Moreover, there were no restrictions on the type of information judges could consider at sentencing,[33]

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26. *See* 18 U.S.C. § 4163 (prisoner discharged at expiration of term of sentence less good conduct credits), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027; *Id.*§ 4164 (prisoner released on good conduct considered on parole until expiration of sentence term), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027; *Id.* § 4205 (eligible for parole after serving one-third of court imposed sentence), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027.

27. *See id.* § 4163 (prisoner discharged at expiration of term of sentence less good conduct credits), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027; *Id.*§ 4164 (prisoner released on good conduct considered on parole until expiration of sentence term), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027; *Id.* § 4205 (eligible for parole after serving one-third of court imposed sentence), *repealed by* Sentencing Reform Act of 1984, tit. II, ch. II §218(a)(4), 98 Stat. 2027.

28. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990).

29. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

30. Nagel, *supra* note 28, at 884 ("[S]entences pronounced by the court were, with rare exception, never served: twelve years meant four, eighteen meant six, thirty meant ten.").

31. *See, e.g.*, Nancy Gertner, *A Century of Criminal Justice: Crimes and Punishments: A Short History of American Sentencing: Too Little Law, Too Much Law, Or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010) ("A trial judge's authority to sentence was virtually unquestioned.").

32. Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995) ("Subject only to statutory maximums and the occasional minimums, judges had the authority to sentence convicted defendants . . . ."); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) ("The great majority of federal criminal statutes have stated only a maximum term of years . . . .").

33. 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

and "[t]hey were not required to explain their reasons for the sentence imposed."[34] Additionally, the sentence was, for all practical purposes, unreviewable on appeal.[35] Without appellate review, the federal system never developed a substantive common law of sentencing, unlike many other western democracies.[36] Consequently, unburdened with legislative oversight or judicial review, the sentencing judge was entrenched in a position of significant authority, left alone to punish according to his or her own conceptions of justice and fairness.[37]

The immense discretion afforded to district court judges was purportedly justified by the rehabilitative penal theory.[38] At the time, crime was widely understood to be a moral disease[39] that could be "treated" by incarceration.[40] As such, "the judge's role was essentially therapeutic, much like a physician."[41] The judge was to "individualize" the punishment according to the nature of the offense and the characteristics of the offender, much like a medical doctor prescribes treatment according to the nature of the symp-

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United States may receive and consider for the purpose of imposing an appropriate sentence.").

34. UNITED STATES SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv (2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING].

35. Koon v. United States, 518 U.S. 81, 96 (1996) (citing United States v. Tucker, 404 U.S. 443, 447 (1972); *see, e.g.,* United States v. Brenneman, 918 F.2d 745, 746 (8th Cir. 1990) ("If the sentence imposed is within the applicable statutory limits, the sentence is generally not subject to review on appeal."); Gilles R. Bissonnette, Comment, *"Consulting" the Federal Sentencing Guidelines After* Booker, 53 UCLA L. REV. 1497, 1502 (2006) ("So long as the sentence was below the statutory maximum allowed by Congress, it was treated with 'virtually unconditional deference on appeal.'").

36. Gertner, *supra* note 31, at 695–96.

37. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

38. *E.g.*, Stith & Koh, *supra* note 32, at 227 ("The motivating rationale for . . . indeterminacy . . . was the rehabilitation of prisoners.").

39. Nagel, *supra* note 28, at 893 ("[Crime is] a moral disease, of which punishment is the remedy. . . . The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering." (quoting AMERICAN CORRECTIONAL ASSOCIATION, TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE (1870))); 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, 370 (2010) ("[C]riminal practice was dominated by a model of punishment that emphasized individualized sentences, rehabilitation of offenders, and judicial and administrative discretion.").

40. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321 (2005).

41. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005) [hereinafter *When Everyone Behaves Badly*].

toms and the characteristics of the patient.[42] Accordingly, to interfere with a judge's discretion at sentencing was no less unthinkable "than to limit the information available to a medical doctor in determining a diagnosis."[43]

Naturally, in a system dependent upon the discretion of individual judges, there was little uniformity in punishment.[44] Defendants convicted of similar crimes with similar criminal backgrounds seldom received equal, or even proportional, punishments.[45] At the time, "[r]esearch demonstrated that philosophical differences among judges affected the sentences they imposed"; that some judges were too severe, others too lenient; and that judges typically varied in their approaches to particular criminal offenses.[46] By the 1970s, however, there was considerable enthusiasm on both the political left and right to reform the indeterminate system by reigning in judicial discretion.[47] By the mid-1980s, the indeterminate regime was replaced with a strict, detailed, mandatory sentencing guideline system that survived until 2005.

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42. PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 11 (State Univ. N.Y. Press 1991) (noting that "[a] medical analogue was frequently invoked"); *e.g.,* Burns v. United States, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").

43. Gertner, *supra* note 31, at 695; *see also Burns*, 287 U.S. at 220.

44. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 635–38 (2008) ("[U]nlimited discretion . . . resulted, over time, in increasingly observed disparities and inconsistencies in sentences."). However, many scholars note that Congress overestimated the problem of sentencing discrepancies. *See, e.g.*, KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS, 104–42 (Univ. Chi. Press 1998) (noting that inter-judge disparity was not as rampant or as "shameful" as congress believed when it enacted the SRA.); Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 300 (2013) ("The reformers did not actually know very much about inter-judge disparity. They argued that such disparity was so great as to be 'shameful,' but the evidence did not support this claim. At most, there were modest disparities.").

45. *See generally* FRANKEL, *supra* note 37, at 5.

46. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 34, at x.

47. *See generally* Stith & Koh, *supra* note 32, at 227–28; *see also* James M. Anderson et al., *Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 272 (1999) ("Liberals expressed particular concern that permitting the exercise of discretion compromised the ideal of equal treatment under the law, while conservatives were concerned as well with perceived undue leniency in sentencing.").

B. The Sentencing Reform Act of 1984: The Sentencing Commission, and Mandatory Guidelines

After a decade of trying,[48] Congress passed the Sentencing Reform Act of 1984 (SRA).[49] The SRA had far-reaching effects.[50] Through it, Congress aimed to eradicate the sentencing disparities that plagued the indeterminate regime,[51] as well as to introduce "consistency, coherence, and accountability to a federal sentencing process that was deficient in [those] respects."[52] To achieve those goals, Congress tipped federal sentencing practice on its head in a dramatic way—a 180-degree reversal of the status quo—by overhauling the indeterminate regime and replacing it with a strict, mandatory guideline system.[53]

The SRA instituted three key reforms. First, retribution replaced rehabilitation as the primary purpose of criminal sentencing.[54] To give the philosophical shift practical effect, Congress abolished the Parole Commission—no longer would an inmate's sentence be reduced upon a finding of rehabili-

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48. *See* Stith & Koh, *supra* note 32, for a thorough discussion on the legislative history of the Sentencing Reform Act of 1984.

49. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C §§ 3551 *et seq*; 28 U.S.C. §§ 991–98).

50. Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 679–80 (1996) ("[T]he Guidelines system is probably the most significant development in 'judging' in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure; no one can pretend to understand the work of federal judges today without some appreciation of the Guidelines system and what it has done to the courts and what it has done to the work of judges, prosecutors, defense lawyers and others who work in the federal judicial system.").

51. 28 U.S.C. § 991(b)(1)(B) ("The purposes of the United States Sentencing Commission are to . . . avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."); *see also* U. S. SENT'G COMM'N, *supra* note 5, at 2–3; Breyer, *supra* note 29, at 4 (explaining the purposes of the Sentencing Reform Act).

52. Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1247 (1997). This has also been referred to as "honesty in sentencing." *See* Breyer, *supra* note 29, at 4.

53. *See* Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 84–88 (1988) (discussing the dramatic changes implemented by the SRA).

54. *See* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the *inappropriateness* of imposing a sentence to a term of imprisonment for the purpose of *rehabilitating* the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.") (emphases added); *see also* U.S.C. § 944(t) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.").

tation.[55] Second, Congress authorized appellate review of sentences for the first time in American history.[56] Third, and most importantly, Congress established the United States Sentencing Commission, an independent administrative agency housed in the judicial branch,[57] to promulgate uniform rules of sentencing in the form of guidelines, to "periodically . . . review and revise" the guidelines, and to collect data on their implementation.[58]

With the admission of a new institutional player into the criminal justice system, Congress attempted to guarantee to the public that the Commission was independent and comprised of sentencing experts.[59] Accordingly, it attempted to politically isolate the Commission by requiring its members to undergo Senate confirmation, by requiring that no more than four of the seven members be of the same political party, and by requiring at least three members to be federal judges.[60]

But Congress's vision of a politically independent Commission comprised of neutral sentencing experts was never realized.[61] Rather, the Commission was political from its inception.[62] Moreover, not one of its original members had experience in the day-to-day sentencing of convicted defendants.[63] As the Commission drafted the first edition of the Guidelines, it "dis-

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55. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 10 (2018).

56. 18 U.S.C. § 3742, *invalidated in part by* Pepper v. United States, 562 U.S. 476, 481 (2011); *see also* United States v. Rivera, 994 F.2d 942, 949–50 (1st Cir. 1993) ("[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.").

57. 28 U.S.C. § 991(a).

58. *Id.* § 994(o).

59. *See id.* § 991(a); *see also* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1636 (2012) ("Congress lacked the expertise and political neutrality required for this task, and chose instead to delegate the job to a sentencing commission.").

60. *See* 28 U.S.C. § 991(a).

61. *See* Baron-Evans & Stith, *supra* note 59, at 1660–64.

62. *See id.* at 1640; *see also* Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 236 (2005) ("[T]he architects of the [SRA] miscalculated and created a sentencing structure almost perfectly designed for capture and manipulation by the political branches."); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 765 (2005) ("[T]he Sentencing Commission was a highly politicized agency from the outset. Then-Judge Stephen Breyer, one of the initial members of the Commission, wrote that the Commission reached certain compromises in its initial set of guidelines because 'the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a "political" body.'") (quoting Breyer, *supra* note 29, at 8).

63. Gertner, *supra* note 31, at 700; *see* Stith & Koh, *supra* note 32, at 282–83 ("Many of these critics, especially those who were in the vanguard of the sentencing guidelines movement, have directed their criticisms not at the Sentencing Reform Act of 1984 but at the

played a pro-prosecution bias, and its members viewed . . . the most law-and-order members of Congress as their primary political constituency."[64] Unsurprisingly, by the time the draft was complete, the Commission had simply taken existing punishment ranges and severely increased them—sometimes beyond even the statutory maximums established by Congress.[65]

The first Commission often frustrated the purposes of the SRA by consistently defying Congress's intent. For example, Congress intended to allow probation for first-time offenders convicted of nonviolent crimes (often drug charges), yet the Commission ignored the legislature and proceeded to impose imprisonment in the vast majority of cases.[66] Additionally, at the time, it was unclear whether the first edition of the Guidelines would carry the full force of law—that is, whether they would be mandatory or advisory.[67] Yet, in lockstep with the Reagan administration,[68] the Commission proceeded on the assumption that the Guidelines were mandatory and chose to restrict judicial discretion as forcefully as possible.[69]

Commission—as if to say that the problem is not the *idea* of sentencing guidelines, but the *people* who implemented the idea.").

64. Adelman, *supra* note 44, at 302; *see also* Barkow, *supra* note 62, at 763 (discussing the overrepresentation of law enforcement interests among the original commissioners); Stith & Koh, *supra* note 32, at 285 ("[T]o the extent that ideological and political objectives did significantly affect outcomes in both Congress and the Sentencing Commission in the 1980's, it is not surprising that 'law-and-order' concerns dominated.").

65. Adelman, *supra* note 44, at 302; Baron-Evans & Stith, *supra* note 59, at 1648–49 (noting that the Commission chose to use mandatory minimum sentences as the base levels for the Guidelines, in effect requiring sentences even above the levels that Congress had set); *When Everyone Behaves Badly*, *supra* note 41, at 575 ("The Commission simply calculated the average length of sentences in the United States—and then increased them."); Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums*, *Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 650 (2016) ("The average prison time served by federal defendants more than doubled after the Guidelines became effective. . . . The federal prison population grew 400%.").

66. Baron-Evans & Stith, *supra* note 59, at 1662.

67. *See* Stith & Koh, *supra* note 32, at 244 ("Critics of the idea of an administrative sentencing commission expressed the fear that its sentencing guidelines might unduly limit the discretion of the sentencing court, so that the commission's 'guideline' sentences 'might in effect become mandatory sentences.' As if to respond to this concern, the measure approved by the Senate Judiciary Committee in late 1977 deliberately granted the sentencing judge significant discretion to depart from the relevant guideline sentence for the case at hand—as long as the sentence imposed was not 'clearly unreasonable' and the sentencing judge explained in writing the reasons for departure from the guideline sentence."); Gertner, *supra* note 31, at 698–99.

68. *See* Baron-Evans & Stith, *supra* note 59, at 1662.

69. Catharine M. Goodwin, *Background of the AO Memorandum Opinion on the 25% Rule*, 8 FED. SENT'G REP. 109, 109 (1995); *see* Stith & Cabranes, *supra* note 52, at 1254; *see also* Baron-Evans & Stith, *supra* note 59, at 1641 ("The Commission acted forcefully to prevent judicial departures and judicial scrutiny of the guidelines even before, and repeatedly after, the guidelines went into effect.").

As mentioned above, the SRA's goal was to eliminate unwarranted sentencing disparities.[70] It intended to do so by structuring judicial decision-making with uniform factors and considerations.[71] Yet, the Commission went far beyond structured guidance. It essentially strangled judicial discretion, abandoning the individualization of criminal sentences with predetermined judgments ready to be applied equally in classes of similar cases.[72] This paradigm shift ultimately produced a federal criminal system that was more punitive than ever before.[73] And by 1989, district court judges could do nothing about the severity of the Guidelines, because in *Mistretta v. United States*, the Supreme Court held that the Guidelines were mandatory and binding on district courts.[74] As a result, over the span of just a few years, federal judges lost the discretion they once enjoyed as they watched sentencing transition from a purely judicial craft into a mathematical, bureaucratic procedure.[75]

Under the Guidelines, judges had little opportunity to consider the culpability of the convicted defendant before them.[76] In many instances, the Commission made that determination in advance.[77] In this system, the judge's principal role is to calculate the defendant's sentence by using a predetermined equation.[78] This equation has three components.[79] First, the court determines the "base offense level" for the crime of which the defendant was convicted.[80] The base offense level is a score that represents the severity of the crime.[81] More serious crimes have higher base offense levels, and in turn, higher base offense levels result in harsher sentences.[82] Second, the court considers the convicted defendant's "actual conduct," that is, what

70. U. S. SENT'G COMM'N, *supra* note 5, at 2–3.
71. *Id*.
72. *See id*.
73. Gertner, *supra* note 31, at 701.
74. *See* Mistretta v. United States, 488 U.S. 361, 364–67 (1989).
75. *See* Gertner, *supra* note 31, at 695–99; Stith & Cabranes, *supra* note 52, at 1254 ("In place of moral judgment, the Guidelines have substituted bureaucratic penalization. The judge on the elevated bench remains a visible symbol of society's moral authority, but the substance and meaning of this ancient staging is gone in most cases.").
76. Stith & Cabranes, *supra* note 52, at 1254 ("The Guidelines themselves determine not only which factors are relevant (and irrelevant) to criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor.").
77. *See id*. at 1254–56.
78. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2021) (sentencing calculation instructions).
79. *See id.*
80. *Id*. § 1B1.1(a)(2).
81. *See* Bowman, *supra* note 50, at 698.
82. *See id.*

the offender really did.[83] At this point, the court determines whether any sentencing enhancements or deviations apply in adjusting the base offense level.[84] Third, the judge determines the defendant's "criminal history score,"[85] which is a calculation designed to predict the convicted defendant's propensity to break the law.[86] Like the base offense level, the higher the criminal history score, the harsher the sentence.[87] Once this formula is completed, the court references the calculations with the Guidelines' Sentencing Table to determine the sentencing range.[88]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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83. *See, e.g.,* U.S. SENT'G COMM'N GUIDELINES MANUAL § 3B1.2, cmt. 3(B) (U.S. SENT'G COMM'N 2021).

84. *See* Bowman, *supra* note 50, at 699; *see also* U.S. SENT'G COMM'N GUIDELINES MANUAL § 1B1.1(a)(3)–(5) (U.S. SENT'G COMM'N 2021).

85. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL § 1B1.1(a)(6)–(7) (U.S. SENT'G COMM'N 2021).

86. Bowman, *supra* note 50, at 695. ("The criminal history calculation is a rough effort to determine the defendant's disposition to criminality, as reflected in his prior contacts with the criminal law.").

87. *Id.*

88. *Id*. at 700.

89. U.S. SENT'G COMM'N GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021) [hereinafter Sentencing Table]. The "base offense level" is represented in the Y-axis. The "criminal history score" is represented in the X-axis. *See supra* text accompanying notes 79–88.

If the district court misapplies the Guidelines, the sentence can be vacated on appeal.[90] Here, reversal may go one of two ways. The defendant can appeal when the sentence imposed exceeded the applicable Guideline range or when a specific Guideline provision was incorrectly applied in his or her case.[91] Similarly, the Government can appeal when the sentence falls below the applicable Guideline range.[92] When the sentence is appealed, the appellate court often must interpret a specific Guideline provision. Here, the court interprets the language of the Guideline just as it does any other federal law.[93]

Under the mandatory guidelines regime, appeals happened regularly. This is partly because the Guidelines are notoriously complicated.[94] Many of its provisions are vague, confusing, or "exceedingly technical."[95] Naturally, with such a complicated body of law, appellate courts often disagree about the meaning and scope of a specific provision.[96] Consequently, with the introduction of appellate review to the sentencing regime, inter-circuit conflict is largely inevitable.[97]

When conflicting interpretations of the Guidelines are left unresolved, the primary purpose of the SRA—eliminating unwarranted sentencing dis-

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90. 18 U.S.C. § 3742(a)–(b).

91. *Id.* § 3742(a); *see also* Berry III, *supra* note 44, at 640–41 (discussing the appellate review process).

92. 18 U.S.C. § 3742(b).

93. *See, e.g.,* United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) (defining the scope of the U.S. Sentencing Commissions Guidelines Manual § 2B3.1(b)(4)(B), the "physical restraint" sentencing enhancement).

94. *See* Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 FED. SENT'G REP. 142, 142 (1994).

95. *See* Stith & Cabranes, *supra* note 52, at 1266–69 (discussing U.S.S.G. § 3B1.2: "The Guidelines provide that the defendant's [base] offense level should be reduced by two points if [he or she] was only a 'minor' participant in the offense, but by four points if [he or she] was a 'minimal' participant."); *see also* United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997) (discussing Guidelines § 2B3.1(b)(4)(B): "Anything that happens in the concrete world can be said to be physical. Moreover, the application note unhelpfully states that 'physical restraint' means 'forcible restraint.' Yet, as we have said, restraint itself includes the use of force. Thus, the application note would appear to refer to *the forcible use of force*, which redundancy does not advance matters much." (emphasis added)).

96. Berman, *supra* note 94, at 142 ("Given the scope and complexity of the sentencing guidelines, it is inevitable, no matter how carefully the Commission chooses words . . ., that courts will differ sometimes in their reading of guideline provisions and in their application of those provisions to the facts of varying cases." (quoting William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 74–75 (1993)).

97. *See* Elliot Edwards, *Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-Booker Guidelines*, 92 IND. L.J. 817, 824–26 (2017).

parities—is undermined because, when the sentencing rules vary from circuit to circuit, defendants are at a heightened risk of receiving disproportionate punishments for the same or similar crimes.[98] The question thus becomes, *Which institution is responsible for resolving circuit conflicts*?[99] In theory, there are two institutions capable of resolving conflicting interpretations of specific Guidelines provisions: (1) the Commission, which can resolve the conflict by revising a given provision through the amendment process;[100] and (2) the United States Supreme Court, upon a petition for a writ of certiorari.[101]

In practice, however, the burden of eliminating circuit splits rests entirely upon the Commission.[102] In *Braxton v. United States*, the Supreme Court declared its reluctance to resolve conflicting interpretations of specific Guidelines provisions, because Congress entrusted the Commission to ensure consistent application of the law it creates through its amendment process.[103] The Court reasoned that the Commission is *principally* responsible for resolving circuit splits because 28 U.S.C. § 944(o) commands the Commission to "periodically review and revise" the Guidelines.[104] Therefore, even though a "principal purpose" of the Supreme Court's certiorari jurisdiction is to resolve conflicts concerning the interpretation of federal law,[105] the Court in *Braxton* allowed the Commission to perform "essentially the same role" with respect to the interpretation of other federal laws through its amendment process.[106] The result of the Court's decision has been truly unique in American administrative law, as the Commission now operates as its own "Guidelines Supreme Court." According to Supreme Court Justice Samuel Alito, no other federal agency has "ever performed a role anything like it."[107]

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98. *See* United States v. Banuelos-Rodriguez, 215 F.3d 969, 979 (9th Cir. 2000) (Pregerson, J., dissenting) ("[I]ntracircuit sentencing disparities . . . defeat the fundamental purpose of the Sentencing Guidelines: 'reasonable uniformity in sentencing'. . . .").

99. *Compare* Knitter, *supra* note 11, at 214–19 (calling for the Commission to redefine the physical restraint sentencing enhancement), *with* Slaugenhaupt, *supra* note 11, at 491 (calling for the Supreme Court to define "physical restraint" in order to resolve the circuit split.).

100. 28 U.S.C. § 994(o)–(p).

101. *See* Slaugenhaupt, *supra* note 11, at 491.

102. *See* Braxton v. United States, 500 U.S. 344, 347–48 (1991).

103. *Id*. at 348.

104. *Id*.

105. *Id*. at 347–48.

106. Samuel Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 FED. SENT'G REP. 166, 168 (1992).

107. *Id*.

C. *United States v. Booker*: The "Effectively Advisory" Guidelines

The Guidelines were binding until 2005, when the Supreme Court excised the two provisions of the SRA that made them mandatory.[108] In *United States v. Booker*, the Court held that mandatory Guidelines violate the Sixth Amendment because they require judges to find facts preordained by the Commission that increase sentences beyond the range required by the jury or a guilty plea.[109] To replace the mandatory Guidelines, the Court made the factors in 18 U.S.C. § 3553(a)[110] the ultimate law of sentencing and established a "reasonableness" standard of review for sentencing determinations on appeal.[111] However, the Supreme Court did not eliminate the Guidelines from federal sentencing procedure. Instead, it reduced their status to effectively advisory.[112]

This does not mean that the Guidelines are toothless. Since *Booker*, the Supreme Court has emphasized that the Guidelines must be the "starting point" and "initial benchmark" at sentencing.[113] In other words, the sentencing court must first calculate the sentencing range by consulting the Guidelines before it decides whether to depart from the Guidelines range, but the sentencing judge now has a greater opportunity to depart from the recommended range.[114] However, the reform has only recently begun to make a difference in sentencing practice because in the years following *Booker*, many federal judges continued to treat the Guidelines as "virtually mandatory."[115] The continued reliance on the Guidelines is likely because many fed-

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108. United States v. Booker, 543 U.S. 220, 258–59 (2005) (holding that 18 U.S.C. § 3553(b)(1), the provision that had confined departures to specified, limited circumstances, and 18 U.S.C. § 3742(e), the standard of review under which courts of appeals had enforced those limitations, were unconstitutional).

109. *Id.* at 243–44; *see also* Gertner, *supra* note 31, at 705.

110. The factors considered include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; . . . (6) the need to avoid unwarranted sentenc[ing] disparities . . . ; and (7) the need to provide restitution to any victims of the offense.

18 U.S.C § 3553(a)(1)–(3), (6), (7).

111. Baron-Evans & Stith, *supra* note 59, at 1632.

112. *Id.* at 1633.

113. Gall v. United States, 552 U.S. 38, 49, 128 (2007); *see also* Kimbrough v. United States, 552 U.S 85, 91 (2007).

114. U. S. SENT'G COMM'N, *supra* note 5, at 17–18.

115. Baron-Evans & Stith, *supra* note 59, at 1633. *See* Rita v. United States, 551 U.S. 338, 360–62 (2007) (Stephens, J., concurring).

eral judges who had grown accustomed to the Guidelines are now understandably hesitant to return to indeterminate sentencing.[116] And, as the "initial benchmark" and "starting point" of all federal sentences, the Guidelines continue to substantially shape the federal sentencing system.[117]

III. INTERPRETATIONS OF THE "PHYSICAL RESTRAINT" SENTENCING ENHANCEMENT

The physical restraint enhancement is located in Chapter Two of the Federal Sentencing Guidelines.[118] Under U.S.S.G. § 2B3.1(b)(4)(B), the government may enhance the convicted defendant's base offense level by two points when the defendant "physically restrained" "any person . . . to facilitate commission of the offense or to facilitate escape."[119] The definition of "physically restrained" is located in Chapter One of the Guidelines.[120] Under U.S.S.G. § 1.B1, "physically restrained" is the "forcible restraint of the victim such as being tied, bound, or locked up."[121] The base offense level for the crime of robbery is twenty.[122] Depending on the defendant's criminal history score, the sentencing range might fall anywhere between thirty-three and eighty-seven months.[123] When the physical restraint enhancement applies, it raises the base offense level from twenty to twenty-two.[124] This two-level adjustment increases the defendant's sentencing range, depending on his or her criminal history, from anywhere between forty-one and 105 months.[125]

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116. Hofer, *supra* note 65, at 677 ("Another reason why so many defendants continue to be sentenced within the Guidelines might be called fear of discretion. If the fairness and effectiveness of the Guidelines recommendations are doubted, judges can feel at a loss for objective standards and principles to help them determine the right sentence. There is concern that unguided discretion will lead to disparity."); Gertner, *supra* note 31, at 706 ("Even after the Supreme Court declared mandatory application of the Guidelines to be unconstitutional, many judges continued to believe in the ideology of the Guidelines and urged continued deference. Many judges seemed to be uncomfortable exercising the discretion they now had. Many continued to use the numbers in the Guideline framework as a point of reference, illustrating the phenomenon known to cognitive researchers as anchoring.").

117. *See* U. S. SENT'G COMM'N, *supra* note 5, at 42 n. 31 ("75.0% of all sentences were within the guidelines system, including 51.4% that fell within the applicable guideline range.").

118. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL § 2B3.1 (U.S. SENT'G COMM'N 2021) (the Robbery Guideline).

119. *Id.* § 2B3.1(b)(4)(B).

120. *Id.* § 1B1.

121. *Id.*.

122. *Id.* § 2B3.1(a).

123. *See* Sentencing Table, *supra* note 89.

124. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL §§ 2B3.1(a), (b)(4)(B) (U.S. SENT'G COMM'N 2021).

125. *See* Sentencing Table, *supra* note 89.

In the last twenty-five years, a deep split of authority has developed regarding the application of the physical restraint enhancement.[126] Particularly, the circuits are divided as to whether the enhancement applies when the defendant verbally commands a bystander to remain immobile (usually at gunpoint) but does not actually "tie, bind, or lock away" the person to facilitate the commission of the offense.[127] The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits strictly construe the enhancement; they require something more than brandishing a weapon and ordering the victim to "get down."[128] Conversely, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits are more flexible in their interpretation; they allow it to be applied when the defendant orders the victim to remain immobile at gunpoint.[129] In the following paragraphs, this Section details the competing interpretations of the physical restraint sentencing enhancement—U.S.S.G. § 2B3.1(b)(4)(B).

A. The Strict Interpretation

The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits have adopted a stricter, more literal construction of U.S.S.G. § 2B3.1(b)(4)(B) in comparison to their sister circuits. While there is some nuance that distinguishes their individual approaches, they all ground their analyses in the plain language of the Guidelines' definition of "physically restrained."[130]

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126. *See infra* Sections III.A–B.

127. *Compare* United States v. Jones, 32 F.3d 1512, 1519 (11th Cir. 1994) ("[A] defendant physically restrains his victims if he 'creates circumstances allowing the persons no alternative but compliance.'" (quoting United States v. Kirtley, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam))) *with* United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) ("Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts.").

128. *See, e.g.,* United States v. Herman, 930 F.3d 872, 875–76 (7th Cir. 2019).

129. *See, e.g.,* United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008).

130. United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) ("'[P]hysical' is an adjective which modifies (and hence limits) the noun 'restraint.' . . . '[R]estraint' is a condition capable of being brought about by a number of forces—physical, mental, moral, singly or in combination . . . . Clearly the Sentencing Commission intended a more precise concept . . . [by including the word physical]."); United States v. Bell, 947 F.3d 49, 57 (3rd. Cir. 2020) ("We discern a common thread in these cases regarding the meaning of 'physical' in the definition of physical restraint: the need for the restraint to be something more than a psychological restraint."); United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) ("[W]e have little doubt that at least one of the employees felt restrained when the barrel of a gun touched the back of his neck. Still, this employee and his coworkers were not subjected to the type of *physical* restraint that victims experience when they are tied, bound, or locked up."); United States v. Herman, 930 F.3d 872, 876 (7th Cir. 2019) ("Words should mean something, and . . . the fact that the Guidelines call for *physical* restraint tells us that not all restraints warrant the two-level enhancement.") (emphasis added); United States v. Parker, 241 F.3d 1114,

For example, in *United States v. Anglin*, a Second Circuit case, the defendant had been convicted of robbing a bank.[131] When he entered the bank, he aimed his weapon at two bank tellers and instructed them to get on the floor.[132] He did not tie, bind, or lock up the victims; yet, upon conviction, the district court had adjusted his base offense level by two points by applying the physical restraint enhancement.[133]

On appeal, the Second Circuit vacated the sentence, noting that the district court had essentially disregarded the plain meaning of the word in question: "physical."[134] The unanimous court reasoned that "'physical' is an adjective which modifies (and hence limits) the noun 'restraint.'"[135] Therefore, in the absence of any *actual* physical contact or restraint, the enhancement was inapplicable because the Commission "intended a more precise concept" when it limited the definition to an illustrative list of actions involving contact.[136] The court explained that while the bank tellers likely felt restrained, the enhancement was inapplicable because the defendant's conduct was not of the same nature as the examples enumerated in the Guidelines' definition.[137] As a result, the court held that brandishing a weapon and ordering the victim to remain immobile, "without more," cannot trigger U.S.S.G. § 2B3.1(b)(4)(B).[138]

Many of these strict-interpretation circuits have noted that the Guidelines' examples are not exhaustive but rather illustrative of the type of conduct punishable under the physical restraint enhancement.[139] In practice, however, these circuits have been reluctant to expand their application beyond the Guidelines' enumerated examples.[140] For example, in *United States v. Harris*, the D.C. Circuit found that confining someone for seven days was sufficient for physical restraint under the guidelines.[141] Building upon this holding, in *United States v. Drew* the D.C. Circuit held that the two-level

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1118–19 (9th Cir. 2001) United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) ("[T]he phrase 'being tied, bound, or locked up' indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way.").

131. 169 F.3d at 156.

132. *Id.* at 157.

133. *Id.* at 156–57.

134. *Id.* at 164–65.

135. *Id.* at 164.

136. *Id*.

137. *Anglin*, 169 F.3d at 164–65.

138. *Id*. at 164.

139. *See, e.g.,* United States v. Bell, 947 F.3d 49, 55 (3rd Cir. 2020) ("[W]e, along with many of our sister circuits, have held that the three examples provided in the definition of physically restrained are not an exhaustive list, but rather only examples of the types of conduct that fall within the meaning of the term.").

140. *See* United States v. Taylor, 961 F.3d 68, 79–81 (2d Cir. 2020).

141. United States v. Harris, 959 F.2d 246, 265 (D.C. Cir. 1992).

upward adjustment does not apply unless the defendant either (1) "restrain[s] the victim through bodily contact or [(2)] . . . confine[s] the victim in some way."[142] In *Drew*, the D.C. Circuit refused to uphold Wilbert Drew's enhanced sentence after he broke into his estranged wife's house, located her, aimed a shotgun at her, and ordered her to move from one room of the home into another.[143] The court reasoned that this conduct was materially different from the Guidelines' examples because the victim was not subjected to the type of physical restraint enumerated in the Guidelines' definition; thus, the district court had incorrectly adjusted Drew's sentence as a matter of law.[144]

These circuits justify their textual analyses by considering the purpose of sentencing enhancements, generally[145]—that is, to punish specific conduct that *aggravates* the underlying criminal offense.[146] Accordingly, the strict approach adopted by these circuits reflects a collective effort to preserve the enhancement's limited purpose.[147] This hesitancy is rooted not only in the justifications supporting certain punishments but in fear of creating an overly punitive analysis for its application.[148] In other words, these circuits are unwilling to shape the application of the enhancement in a way that creates additional punishment for conduct that actually constitutes the underlying criminal offense itself.[149] To illustrate, one expects an armed robber to brandish a weapon and then say, "Don't move!"[150] As the *Anglin* Court pointed out, it would be rather strange for a robber to withdraw a weapon and then say, "[T]his is a holdup, but feel free to move about . . . ."[151] Therefore, courts adopting a narrow interpretation hesitate to apply the enhancement in these instances because to hold otherwise would punish conduct that occurs in virtually every armed robbery, which would have the

142. 200 F.3d 871, 880 (D.C. Cir. 2000) (citing *Harris*, 959 F.2d at 265)). Note that this case was not a robbery case, but an attempted murder case. *Id.* at 875–77. Accordingly, the enhancement that was applied was U.S.S.G. § 3A1.3, not § 2B3.1(b)(4)(B). *Id.* at 876. However, the definition discussed here is controlling for each provision.

143. *Id.* at 875, 880.

144. *Id.* at 880 ("[The victim] was 'not subject to physical restraint, as we interpret the Guideline's use of that phrase.'" (quoting United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 1999)).

145. *See* United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999).

146. *See id.*

147. *See, e.g.,* United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001)

148. *See* United States v. Paul, 904 F.3d 200, 204 (2d. Cir. 2018).

149. *Id.* ("Adding the enhancement in this case would simply add punishment to conduct that is typical of most store robberies."); United States v. Rosario, 7 F.3d 319, 321 (2d. Cir. 1993) ("Application of the enhancement for physical restraint is proper as long as restraint is not an element of the primary offense for which the defendant is being sentenced, and it therefore does not result in double counting offense conduct toward sentencing.").

150. *See, e.g.,* United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017)

151. *Anglin*, 169 F.3d at 165.

effect of automatically raising the base offense level from twenty to twenty-two.[152]

In tethering the enhancement's application to the Guidelines' definition and examples, these circuits distinguish binding, tying, and locking up from the understandably frightening experience of being told to "get down" at gunpoint.[153] They do so for three reasons: First, while the Guidelines' examples effectively secure the victim's immobilization, a verbal order to "get down" might have no effect on the "bold []or foolhardy."[154] For example, in *United States v. Wallace*, an armed robber entered a gun store, aimed his weapon at the store clerk, and said, "Don't move."[155] Despite the threatening order, the clerk instinctively bolted and attempted to run out the door.[156] Thus, the strict-interpretation circuits point out that the Guidelines' examples are dependent upon *the defendant's action* and not the victim's reaction.[157] As the Seventh Circuit explained in *Herman v. United States*:

> [T]he victim's reaction does not determine whether there is or is not physical restraint. If the defendant waives a gun around and barks out a command to stay still and the victim obeys, it makes no sense to say that the recipient of the order was *physically* restrained. Whatever restraint occurred came about from the way the victim decided to respond to the order. She might obey; she might ignore it; or she might attempt to flee. Her physical response to the defendant's attempt to coerce, however, is not something that logically belongs within the scope of the physical-restraint guideline.[158]

Second, these circuits reason that if the Commission intended to punish every conceivable form of restraint, it would not have qualified its application to those that are only physical.[159] Because the Guidelines' definition illustrates what physical restraint means through the examples of binding,

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152. *Id.*

153. *Id.* at 164–65 ("[T]he restraint must be 'physical'; and while we do not doubt that the City College Branch robber's conduct caused the City College tellers to feel restraint, they were not subjected to physical restraint, as we interpret the Guideline's use of that phrase."); United States v. Herman, 930 F.3d 872, 876–77 (7th Cir. 2019) ("A verbal order issued by a person with a threatening appearance might terrify a bank teller . . . . And that terrified person will often yield to the threats. Yet that does not make the restraint a physical one.").

154. *Anglin*, 169 F.3d at 164–65.

155. 461 F.3d 15, 20 (1st Cir. 2006).

156. *Id*.

157. United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) ("[W]e have little doubt that at least one of the employees felt restrained when the barrel of a gun touched the back of his neck. Still, this employee and his coworkers were not subjected to the type of *physical* restraint that victims experience when they are tied, bound, or locked up.").

158. *Herman*, 930 F.3d at 876.

159. *See, e.g., id.* at 876; *Anglin*, 169 F.3d at 164.

tying, or locking up, these courts reason that the form of restraint that occurs from an order to remain immobile is qualitatively different from what the Commission intended to punish.[160] Third, there are alternative, more appropriate sentencing enhancements and procedures available for prosecutors and judges to punish defendants who engage in only threatening conduct. For example, the judge may consider psychological coercion as a part of the "nature and circumstances of the offense" under 18 U.S.C. § 3553(a)(1),[161] and the prosecutor may seek an upward adjustment for a number of aggravating circumstances relating to using a weapon during the commission of the robbery.[162] Therefore, the existence of alternative sentencing mechanisms militates against the expansion of the physical restraint enhancement's application to include conduct that is materially different from the Guidelines' examples.

Individually, these circuits incorporate the previously discussed principles and arguments into similar, although distinct, analyses of their own. For example, the Second Circuit uses a three-factor test to determine when the enhancement should be applied.[163] First, the restraint must *actually* be physical.[164] Second, the restraint must be something more than mere physical contact.[165] Third, the restraint must "facilitate" rather than "constitute" the offense.[166] Under the Second Circuit's approach, brandishing a weapon and verbally ordering the victim to remain immobile: (1) is not a physical, but a psychological, restraint; (2) does not include physical contact; and (3) is typical in most robberies; therefore, the physical restraint enhancement is inapplicable in this instances.[167]

The Third Circuit adopted a similar, yet looser, balancing test of its own. The test includes five factors.[168] In determining whether the enhancement applies, courts in the Third Circuit balance the factors without giving dispositive weight to any single one.[169] However, this typically proves to be a difficult undertaking, as a number of factors pull in opposite directions.

160. United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001); United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000).

161. *Herman*, 930 F.3d at 877.

162. U.S. SENT'G COMM'N GUIDELINES MANUAL § 2B3.1(b)(2)(B) (U.S. SENT'G COMM'N 2021) ("[I]f a firearm was . . . used [but not discharged], increase by 6 levels[.]"); *id* § 2B3.1(b)(2)(C) ("[I]f a firearm was brandished or possessed, increase by 5 levels[.]"); *id* § 2B3.1(b)(2)(E) ("[I]f a dangerous weapon was brandished or possessed, increase by 3 levels[.]").

163. *See* United States v. Taylor, 961 F.3d 68, 78–80 (2d Cir. 2020).

164. *Id.* at 78.

165. *Id.* at 78–79.

166. *Id.* at 79.

167. *See* United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018).

168. *See* United States v. Bell, 947 F.3d 49, 56 (3d Cir. 2020).

169. *Id.*

Under this test, a court considers whether the convicted defendant: (1) "use[d] . . . physical force"; (2) "exert[ed] control over the victim"; (3) "provid[ed] the victim with no alternative but compliance"; (4) "focus[ed] on the victim for some period of time"; and (5) placed the victim "in a confined space."[170]

For its third factor, the Third Circuit borrows from the Eighth and Eleventh Circuits, which sit on the opposite side of this split of authority.[171] As a result, although it has yet to happen, the physical restraint enhancement might apply when the robber brandishes a weapon and orders the victim to remain immobile so long as that order leaves the victim with no alternative but to comply.[172]

The Ninth Circuit also follows a "sustained focus" standard.[173] Under this analysis, the enhancement may be triggered if the offender places a "sustained focus" on the victim "that lasts long enough for the robber to direct the victim into a room or order the victim to walk somewhere."[174] However, simply ordering the victim to "get down," without more, fails to amount to a "sustained focus."[175]

The Fifth and D.C. Circuits, like the Second Circuit, forbid courts from even considering whether the victim was physically restrained through psychological coercion.[176] Unlike the Third, Seventh, and Ninth Circuits, which provide the possibility for application of the physical restraint enhancement when the victim was left with "no alternative but compliance" or when the offender placed a "sustained focus" on the victim, the Second, Fifth, and D.C. Circuits do not consider the victims' reactions to the threat.[177]

For example, in *United States v. Garcia*, the defendant entered a gun store, aimed a handgun at an employee's head, and ordered the other employee to "get down on the floor."[178] The Fifth Circuit held that the physical restraint enhancement was inapplicable because "[s]uch conduct does not differentiate . . . in any meaningful way from a typical armed robbery."[179] Like the Second Circuit in *United States v. Taylor*, and the D.C. Circuit in *United States v. Drew*, the court arrived at its conclusion without consider-

170. *Id.*
171. *Id.* at 57–58.
172. *See id.* at 59.
173. *See, e.g.,* United States v. Nelson, 137 F.3d 1094, 1112 (9th Cir. 1998).
174. *See* United States v. Parker, 241 F.3d. 1114, 1118 (9th Cir. 2001).
175. *Id.*
176. *See* United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000); *see also* United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017).
177. *Compare* United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) (requiring "sustained focus" on a victim over a period of time) *with* United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018).
178. *Garcia*, 857 F.3d at 710.
179. *Id.* at 713.

ing whether the victim felt like he had no meaningful alternative to comply or that the offender's sustained focus on him amounted to a physical restraint.[180]

In sum, these circuits vary in their approaches; however, they consistently hold that brandishing a weapon and ordering a robbery victim to remain immobile, without more, is insufficient to trigger the physical restraint enhancement. These circuits routinely reach their conclusions by considering the plain language of the enhancement's definition, the purpose of the enhancement, and the consequences of expanding the analysis to include conduct typical of most armed robberies.

B. The Expansive Interpretation

The First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have adopted an expansive interpretation of the physical restraint enhancement. Like the circuits on the opposite side of the conflict, they understand the Guidelines' examples of physical restraint to be illustrative, as opposed to an exclusive list of punishable conduct.[181] However, the distinction is that these circuits do not consider the examples to be a clue of the Commission's intended scope.[182] As a result, whether the offender's conduct was "nearly identical"—or even similar—to the Guidelines' examples is irrelevant.[183] Rather, the dispositive factor is whether the offender deprived the victim of physical movement somehow.[184] Therefore, when the offender aims a weapon at a robbery victim and orders the person to remain immobile, the physical restraint enhancement applies.[185]

The expansive-interpretation circuits place less emphasis on the examples of binding, tying, and locking up, and more emphasis on a term the

180. *Id.*; *see also Drew*, 200 F.3d at 880; United States v. Taylor, 961 F.3d 68, 81 (2d Cir. 2020).

181. *See, e.g.,* United States v. Jones, 32 F.3d 1512, 1518 (11th Cir. 1994) ("[T]he use of the modifier 'such as' in the definition indicates that the illustrations of physical restraint 'are listed by way of example rather than limitation.'" (quoting United States v. Rosario, 7 F.3d 319, 320–21 (2d Cir. 1993)); United States v. Ossai, 485 F.3d 25, 32 (1st Cir. 2007) ("Of course, these enumerated examples of 'physical restraint' are merely illustrative, rather than exhaustive."); *see also* United States v. Bell, 947 F.3d 49, 55 (3d. Cir. 2020)

182. *See, e.g.,* United States v. Dimache, 665 F.3d 603, 609 (4th Cir. 2011).

183. *See, e.g., id.* ("Because the intended scope of the . . . enhancement goes well beyond the examples listed in [the Guidelines' definition] . . . it makes little sense to tie the enhancement to conduct nearly identical to such examples either under the authority of *Begay* or the *Parker*, *Drew*, and *Anglin* line of authority.").

184. *See* United States v. DeLuca, 137 F.3d 24, 39 (1st Cir. 1998).

185. *See, e.g.,* United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997) ("[P]hysical restraint occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime.").

Guidelines leave undefined: restraint.[186] In the absence of a restraint definition from the Commission, the courts created their own.[187] One commonly used definition is articulated in *United States v. Coleman*.[188] There, the Sixth Circuit defined restraint as "the act of holding back from some activity or . . . by means of force, an act that checks free activity or otherwise controls."[189] With this definition in mind, coupled with the illustrative nature of the Guidelines' examples, these circuits often justify an expansive interpretation of the physical restraint enhancement by reasoning that "[*k*]*eeping someone from doing something* is inherent within the concept of restraint."[190] Therefore, because this conduct is a check on free activity, the physical restraint enhancement applies.[191]

Unlike the strict interpretation, once any form of restraint is established, this approach is largely unconcerned with the means by which the restraint occurred.[192] For example, in *United States v. Wallace*, a man entered a gun store posing as a patron, approached the front counter, and requested to see certain ammunition clips for a handgun.[193] When the clerk turned to retrieve the clips, an accomplice entered the store and brandished a semi-automatic rifle, and shouted, "Don't move."[194] There was no physical contact between the defendants and the victim.[195] The defendants did not confine the victim into an enclosed space in order to prevent her movement.[196] Yet, the First Circuit held that there was "no doubt that the victims

186. *See Ossai*, 485 F.3d at 32.

187. The Guidelines define "physically restrained" as the "forcible restraint of the victim such as by being tied, bound, or locked up." U.S. SENT'G COMM'N GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2021). However, the Guidelines fail to articulate what it means to be *restrained*—whether that restraint is physical, psychological, or otherwise. *See id.*; *see, e.g.,* United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 1999).

188. United States v. Coleman, 664 F.3d 1047, 1049 (6th Cir. 2012).

189. *Id.* (quoting United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997).

190. *Fisher*, 132 F.3d at 1330 ("*Keeping someone from doing something* is inherent within the concept of restraint, and in this case one coconspirator deliberately kept the security guard at bay by pointing a gun directly at his head while two others looted the teller counter."). This quotation has been repeated in numerous cases. *See, e.g.,* United States v. Wallace, 461 F.3d 15, 34 (1st Cir. 2006); United States v. Dimache, 665 F.3d 603, 607 (4th Cir. 2011); United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008).

191. *See, e.g.,* United States v. Jones, 32 F.3d 1512, 1519 (11th Cir. 1994) ("[T]he obvious presence of handguns ensured the victims' compliance and effectively prevented them from leaving the room . . . .").

192. *See Fisher*, 132 F.3d at 1329 ("Physical restraint is not limited to physical touching of the victim.").

193. 461 F.3d 15, 20 (1st Cir. 2006).

194. *Id.*

195. *Id.* at 34.

196. *See id.*

were 'physically restrained'" within the meaning of U.S.S.G. § 2B3.1(b)(4)(B).[197]

Similarly, in *United States v. Miera*, the defendant and his brother robbed a bank in Utah.[198] When they entered the bank, one of the men stood near the door, waved his gun in the air, and demanded that the bank's patrons "don't move" "in a loud, strong voice."[199] The defendant never aimed the weapon at a specific individual, yet the Tenth Circuit held that such conduct, "in all likelihood . . . had the effect of physically restraining everyone in his presence."[200] Further justifying the expansive application, the court reasoned that the defendant "specifically sought to hinder the occupants' movement"; therefore, he had "physically restrained" them.[201]

Given that such conduct qualifies as physical restraint, these circuits often struggle to articulate a limiting principle for the sentencing enhancement. For example, in *United States v. DeLuca*, the First Circuit circularly held that physical restriction of a victim's freedom of movement was sufficient to constitute physical restraint.[202] Similarly, in *United States v. Pearson*, the Tenth Circuit held that "something more must be done with [a] gun to physically restrain" an individual than merely displaying or brandishing the gun.[203] Yet, in *Miera*, after citing this rule, the Tenth Circuit held that the enhancement applied because the defendant brandished his weapon during a bank robbery—even though he did not aim it at anyone, make physical contact with a victim, or confine any victims into a closed space.[204]

Other courts have had placed greater limitations on the enhancement. The Eighth Circuit has held that the enhancement applies when the offender leaves the victim with no alternative but to comply with the coercion.[205] These courts essentially reason that a coercive threat at gunpoint can have the same effect as a physical restraint through binding, tying, or locking away; therefore, when it does, the enhancement ought to apply.[206] For example, in *United States v. Stevens*, the defendants robbed a bank, ushered the employees into the vault at gunpoint, and then closed the door while the employees were trapped inside.[207] The Court held that the defendant's con-

197. *Id.* at 34–35.
198. 539 F.3d 1232, 1233 (10th Cir. 2008).
199. *Id.*
200. *Id.* at 1235.
201. *Id.*
202. 137 F.3d 24, 38–39 (1st Cir. 1998).
203. 211 F.3d 524, 526–27 (10th Cir. 2000).
204. *Miera*, 539 F.3d at 1234–35.
205. *See* United States v. Kirtley, 986 F.2d 285, 286 (8th Cir. 1993).
206. *Id.*
207. 580 F.3d 718, 719 (8th Cir. 2009).

duct warranted application of the physical restraint enhancement because his actions gave the employees no meaningful alternative but to comply.[208]

In sum, these circuits hold that brandishing a weapon and ordering a robbery victim to remain immobile can trigger the physical restraint enhancement. In doing so, these courts tend to focus on the presence of restraint and do not consider U.S.S.G. § 2B3.1(b)(4)(B) to apply only to truly "physical" restraints, unlike the circuits on the opposite side of the conflict. Under this approach, the Guidelines' examples of binding, tying, and locking away are not exhaustive examples of punishable conduct. Ultimately, as long as the defendant is restrained somehow, the enhancement applies.

IV. ARGUMENT

The physical restraint enhancement needs a uniform standard of application. In the last twenty-five years, the federal circuits have distorted its proper meaning and scope by entrenching themselves along opposite lines of authority.[209] Six circuits prefer a strict interpretation; five circuits prefer an expansive one.[210] The Commission has never amended its robbery Guideline to resolve the conflict.[211] Such inaction is incompatible with the goals of federal sentencing, as similarly situated offenders convicted of robbery in different circuits face a heightened risk of receiving unjustifiably disproportionate punishments.[212] Therefore, the disparities must be addressed and resolved.

The longevity of the conflict, coupled with the likelihood of the Commission's continued inaction, should inspire the Supreme Court to reconsider the limited role it imposed on itself in the interpretation of specific guideline provisions. The circuit split surrounding the interpretation of the physical restraint enhancement is an appropriate vehicle for the Court to revisit its decision in *Braxton v. United States*. Therefore, this Note argues that the Court—not the Commission—should resolve the conflict among the circuits by adopting the strict interpretation adopted by the majority of federal circuits. The following paragraphs first explain why the Court should abandon

208. *Id.* at 721.

209. *See supra* Section II.

210. *See supra* Section II.

211. *See generally* Knitter, *supra* note 11, at 224–27 (arguing that the Commission should adopt a definition for physical restraint).

212. *Compare* United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997) ("[P]hysical restraint occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime.") *with* United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) ("Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts.").

Braxton.[213] Then follows the argument that the Court should resolve the conflict by prescribing a definitive interpretation of the scope and application of the physical restraint enhancement.[214]

A. *Braxton v. United States*: Abandoning the Supreme Court's "Restrained" Role in Guideline Interpretation

In *Braxton v. United States*, the Supreme Court held that Congress intended for the Commission to be principally responsible for resolving conflicting interpretations of specific guideline provisions.[215] However, since that decision the Court has taken the position that the Commission is *exclusively* responsible for resolving such conflicts.[216] The practical effect of the Court's reluctance to intervene has been to absolve itself of any responsibility in the shaping of the specific rules used as "the starting point and the initial benchmark" of every federal criminal sentence.[217]

The Supreme Court should abandon the limited role it prescribed for itself for three reasons. First, there is no language in the Sentencing Reform Act of 1984 to suggest that the Commission is solely responsible for resolving conflicting interpretations of specific guideline provisions.[218] Moreover, there is no evidence in the SRA's legislative history to suggest that Congress intended the Commission to assume such a responsibility.[219] Second, the Court's decision to categorically exclude cases in which it would be tasked with interpreting specific guideline provisions is rooted in an overextension of *Braxton*'s holding.[220] The Court's continued reliance on it is not only misguided but also inconsistent with its traditional institutional responsibilities.[221] Third, the Commission cannot practicably resolve all conflicting interpretations of the law it creates on its own.[222] The following paragraphs address each argument in turn.

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213. *See infra* Section IV.A.

214. *See infra* Section IV.B.

215. 500 U.S. 344, 348 (1991).

216. Berman, *supra* note 94, at 142 ("When an intercircuit conflict concerns differences in interpretation of guidelines provisions that do not reach constitutional issues, the Supreme Court has indicated that the Commission has the initial and primary task of addressing and resolving the conflict." (quoting 1993 U.S. SENT'G COMM'N, ANN. REP. 14 (1994))).

217. Gall v. United States, 552 U.S. 38, 49 (2007); *see* Kimbrough v. United States, 552 U.S 85, 91 (2007).

218. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C §§ 3551 *et seq*; 28 U.S.C. §§ 991–98).

219. *See generally* Stith & Koh, *supra* note 32, at 284.

220. *See infra* text accompanying notes 231–36.

221. *See infra* text accompanying notes 226–30.

222. *See infra* text accompanying notes 237–46.

First, Congress never intended for the Commission to shoulder the burden of resolving conflicting interpretations of specific guideline provisions by itself. As the *Braxton* Court noted, Congress certainly intended the Commission to play an important role in resolving circuit conflict.[223] Otherwise, it would not have granted the Commission both the power and responsibility to "periodically review and revise . . . the guidelines" or to decide which amendments are to be given retroactive effect.[224] But this language cannot be fairly read to suggest that Congress expected the Commission to have the exclusive responsibility of correcting the misapplication of the law it creates. Nor does any evidence in the SRA's legislative history support such a proposition.[225] Ultimately, if Congress expected the Supreme Court to abandon perhaps its most important and traditional institutional responsibility, then one might expect the legislature to make that point clear. In the SRA, it did not.

Moreover, it is unlikely that Congress intended for the Supreme Court to abdicate its interpretative responsibility in light of the fact that the Commission's duty to review and revise the law it promulgates is unremarkable in American administrative law.[226] Numerous federal agencies share with the Commission the same or similar responsibilities, with respect to the regulations they promulgate.[227] However, the Supreme Court has often resolved conflicting interpretations of other federal regulations.[228] It is only the Guidelines that are categorically exempt from Supreme Court review. As Supreme Court Justice Samuel Alito explained regarding the Commission, "no other federal agency . . . has ever performed a role anything like it."[229]

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223. Braxton v. United States, 500 U.S. 344, 348–50 (1991).

224. 28 U.S.C. § 944(o)–(p).

225. DAWINDER S. SIDHU, SENTENCING GUIDELINES ABSTENTION 33 (2021), https://ssrn.com/abstract=3950703 ("Moreover, there is simply nothing in the legislative history or the SRA to suggest that Congress intended for the Court to completely surrender its traditional role to the Commission, or for the Court to do anything different than it does for Congress or agencies in the context of relevant splits.").

226. *See id*. at 35–40.

227. *Id*.

228. *See, e.g.,* Rust v. Sullivan, 500 U.S. 173, 177 (1991) (resolving a circuit split over a Health and Human Services regulation); N.L.R.B v. Wyman-Gordon Co., 394 U.S. 759, 762 (1969) (resolving a circuit split over a National Labor and Relations Board regulation); Mass. Trs. of E. Gas & Fuel Assocs. v. United States, 377 U.S. 235, 237 (1964) (resolving a circuit split over a Maritime regulation); United States v. Correll, 389 U.S. 299, 301 (1967) (resolving a circuit split over an IRS regulation); Fulman v. United States, 434 U.S. 528, 529–30 (1978) (resolving a circuit split over a Department of Treasury regulation); Ehlert v. United States, 402 U.S. 99, 101 (1971) (resolving a circuit split over a Selective Service regulation); Fed. Power Comm'n v. Texaco, Inc., 377 U.S. 33, 37 (1964) (resolving a circuit split over Federal Power Commission regulation); Household Credit Servs. v. Pfenning, 541 U.S. 232, 235 (2004) (resolving a circuit split over a Federal Reserve Board regulation).

229. Alito*, supra* note 106, at 168.

Therefore, in light of the Supreme Court's role with respect to other federal agencies with similar authority, it is unlikely that Congress intended the Commission to become the "Guidelines Supreme Court"[230] or for the actual Supreme Court to abandon its role in clarifying and improving federal sentencing law.

Second, the Court's practice of categorically refusing to interpret specific guideline provisions is rooted in an overexpansion of *Braxton*'s holding. In *Braxton*, the Court held that the Commission was principally responsible for resolving circuit conflicts.[231] The Court did not hold that the Commission was *exclusively* responsible for maintaining the consistent application of the law it creates.[232] Yet, since *Braxton*, the Supreme Court has not taken a single case involving a disputed guideline provision. Additionally, the practice of declining review for disputed guideline provisions takes *Braxton* out of context. In *Braxton*, the Court declined to resolve a circuit split surrounding a specific guideline provision principally because the Commission had already begun amending the specific provision in dispute.[233] However, that decision has somehow "morphed . . . into the broad position that the Court always decline to address circuit court conflicts concerning the Guidelines regardless of whether the Commission is addressing the same issue."[234]

The Court's position regarding guideline interpretation conflicts not only with its treatment of other federal regulations but also with its own institutional responsibilities. As the Court in *Braxton* noted, a "principal purpose" of the Court's certiorari jurisdiction is to resolve conflicting interpretations of federal law.[235] Yet, the Guidelines are the only exception.[236] Given their importance as the "starting point and the initial benchmark" of every federal criminal sentence, the Supreme Court should be involved in shaping their development.[237] In other words, the Guidelines should not be treated as a separate class of federal law that is categorically exempt from Supreme Court review.

Third, the Commission cannot practicably ensure consistent and accurate application of the law it creates by itself. Under the SRA, the Commission requires a quorum to take action.[238] The Commission is supposed to

230. Berman, *supra* note 94, at 142.
231. 500 U.S. 344, 347–49 (1991).
232. *See id.*
233. *Id.*
234. SIDHU, *supra* note 225, at 23.
235. *Braxton*, 500 U.S. at 347.
236. *See* Alito, *supra* note 106, at 168; Gall v. United States, 552 U.S. 38, 49 (2007).
237. *Gall*, 552 U.S. at 49.
238. 28 U.S.C. § 994(a).

have seven voting members; therefore, at least four members are needed.[239] However, the Commission has lacked a quorum for nearly three years, leaving it powerless to amend the Guidelines.[240] As of the writing of this Note, six of the seven possible seats on the Commission are vacant.[241] Therefore, it makes little sense for the Supreme Court to provide such extreme deference to the Commission while it is inoperative.

Even when the Commission has had a quorum, it has been slow to act.[242] Perhaps the most obvious example here is that it has failed to revise the robbery Guideline in the last twenty-five years, notwithstanding a deep circuit split over the interpretation of the physical restraint enhancement.[243] And when the Commission does amend the Guidelines, the process is cumbersome and time-consuming, often taking years.[244]

Despite its unresponsiveness, proponents of the Commission's primacy with respect to the resolution of circuit conflict often tout the Commission's purported efficiency.[245] The reasoning follows that the Commission is better suited to resolve circuit conflict because it is an independent agency comprised of sentencing experts; thus, it ought to be more efficient because it operates outside the political influences[246] of Congress and is unconstrained by the sluggishness of the judiciary. Yet, as of writing this Note, the Com-

239. *Id.* § 991(a).

240. Dawinder S. Sidhu, *The Supreme Court's Criminal Justice Blind Spot*, HILL, (Dec. 1, 2021, 7:00 AM), https://thehill.com/opinion/judiciary/583467-the-supreme-courts-criminal-justice-blind-spot?rl=1.

241. *See Organization*, UNITED STATES SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/organization; Madison Alder, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERG LAW (June 28, 2021, 3:46 AM), https://news.bloomberglaw.com/us-law-week/near-vacant-sentencing-panel-gives-biden-chance-for-fresh-start; Nate Raymond, *U.S. Sentencing Panel's Last Member Breyer Urges Biden to Revive Commission*, REUTERS (Nov. 11, 2021, 7:27 PM), https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/.

242. *See generally* Stith & Koh, *supra* note 32.

243. *See supra* Section III.

244. *See* U. S. SENT'G COMM'N, *supra* note 5, at 36 ("By statute, no later than May 1st, the Commission must submit the amendments it has voted to promulgate along with 'reasons for amendment' (contained in Appendix C to the *Guidelines Manual*) to Congress, which has 180 days to decide whether to modify or disapprove them. If Congress does not pass legislation (signed by the President) modifying or disapproving amendments by November 1st, the amendments become effective on that date. On rare occasions, Congress authorizes the Commission to promulgate 'emergency amendments' which can be passed on an expedited basis outside of the regular amendment cycle.").

245. *See*, *e.g.,* Edwards, *supra* note 97, at 838–41.

246. Arguments favoring Commission primacy in resolving circuit splits often suffer the taint of a mistakenly rosy understanding of the Commission's political insulation. *See, e.g.*, Bowman, *supra* note 62, at 236 ("[T]he architects of the [SRA] miscalculated and created a sentencing structure almost perfectly designed for capture and manipulation by the political branches.").

mission has been powerless—literally incapable of fulfilling its statutory duties—for the third straight year.[247]

The Supreme Court can no longer afford to provide such extreme deference to the Commission. The time has come for it to reexamine its hands-off policy with respect to the interpretation of specific guideline provisions. The Court should do so because its deference to the Commission is required by neither the SRA nor a fair reading of *Braxton*, and the Commission is incapable of practicably fulfilling its duties.[248] By taking a more active role in shaping the rules that affect every federal criminal sentence, the Supreme Court would not only begin to carve an appropriate role for itself in guidelines interpretation but also would work to further the goals of federal sentencing by eliminating unwarranted sentencing disparities. Ultimately, the resolution of the conflict surrounding the scope and application of the physical restraint sentencing enhancement provides an appropriate vehicle for the Court to reconsider its role in guideline interpretation.

B. Resolving the Circuit Split in Favor of a Narrow Interpretation

The Supreme Court should resolve the circuit conflict surrounding the interpretation of the physical restraint enhancement in favor of a narrow construction. Specifically, the Court should adopt the strict textual interpretation used by the majority of the circuits.[249] It should do so for three reasons. First, the narrow interpretation is more consistent with the plain language of U.S.S.G. § 2B3.1(b)(4)(B) and its accompanying definition. Second, the narrow interpretation more accurately reflects the purpose of enhanced punishment and the seriousness of the offense. Third, the expansive interpretation is unnecessarily punitive.

First, the narrow interpretation is more consistent with the plain language of U.S.S.G. § 2B3.1(b)(4)(B) and its accompanying definition. The Commission's use of the modifier "physical," as well as the examples of binding, tying, and locking up, illustrate that the rule intended to punish offenders who restrict their victims' freedom of movement through physical contact or some form of physical confinement.[250] Because the Guidelines' examples are best understood as illustrations of the type of conduct punishable under the physical restraint enhancement, it is apparent the type of restraint that occurs when an offender commands the victim to "get down" is qualitatively distinct from what the Commission sought to punish.[251] There-

247. *See supra* note 241 and accompanying text.
248. *See supra* text accompanying note 233.
249. *See* Section III.A.
250. *See* United States v. Harris, 959 F.2d 246, 265 (D.C. Cir. 1992).
251. *See, e.g.,* United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001).

fore, the act of brandishing a weapon and ordering the victim to "get down," without more, should not trigger the enhancement.

Second, the narrow interpretation more accurately reflects the purpose of enhanced punishment and the seriousness of the offense. Sentencing enhancements are designed to provide additional punishment for conduct that aggravates, rather than constitutes, the underlying criminal offense.[252] Here, the Guidelines' examples are wholly independent of the baseline offense of robbery. However, when the physical restraint enhancement is understood to include conduct that is typical of most robberies, the rule loses its narrow purpose and begins to swallow the underlying elements of the offense itself.[253] In other words, one can expect an armed robber to brandish a weapon and then say, "Put your hands up," or "Don't move." As the Second Circuit explained in *Anglin*, "[i]t would require a quixotic robber to display his gun, and then say to the tellers or bank customers, 'this is a holdup, but feel free to move about the bank, and if any of you have to leave for an appointment elsewhere, that's fine.'"[254]

Similarly, the narrow interpretation more accurately reflects the seriousness of the offense. This is because the physical restraint enhancement is designed to punish specific aggravating conduct not typical of most robberies. However, when it is interpreted expansively, it is at risk of no longer operating as a sentencing enhancement but instead as a potentially automatic increase of the defendant's base offense level from twenty to twenty-two.[255] This is because most armed robberies involve the offender threatening or coercing the victim into moving to a specific location, such as lying down on the floor. Accordingly, unless the robbery occurred in a vacant structure, it is difficult to imagine when the enhancement would not apply under an expansive interpretation.[256]

Third, under the expansive interpretation, when U.S.S.G. § 2B3.1(b)(4)(B) is applied to conduct typical of most robberies, it is unnecessarily punitive. In these instances, the defendant receives additional punishment not only for conduct beyond the scope of the rule but also for conduct that, in effect, constitutes the underlying crime of armed robbery.[257] While the two-level upward adjustment sounds relatively mild, it has significant consequences for the defendant, who is subjected to additional months—often years—of incarceration because of its application. Moreover, it is im-

252. *See* United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999).

253. *E.g., Parker*, 241 F.3d at 1118–19.

254. *Anglin*, 169 F.3d at 165.

255. *Id.* ("If the government's interpretation was correct, virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises.").

256. *See id.*

257. *See id.*

portant to realize that the upward adjustment is only rarely applied in isolation. Typically, it is applied in tandem with other related sentencing enhancements, such as the five-point upward adjustment for brandishing a weapon during the commission of the offense. In these situations, the defendant is not only additionally punished for conduct typical of most robberies but also punished twice for it.[258]

V. CONCLUSION

The physical restraint enhancement has long needed a uniform standard of application. The Commission's failure to ensure a uniform standard has undermined the purposes and goals of federal sentencing. Accordingly, the Supreme Court should take a more active role in the shaping of federal sentencing policy by interpreting specific guideline provisions. In doing so, the Court should interpret U.S.S.G. § 2B3.1(b)(4)(B) narrowly in order to resolve the long-standing circuit split. This interpretation would not only preserve the sentencing enhancement's narrow purpose but would prevent unnecessarily punitive sentences, unwarranted sentencing disparities, and the inconsistent application of federal law.

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258. *See, e.g.,* United States v. Rosario, 7 F.3d 319, 321 (2d Cir. 1993).

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