



# OVER RULED

*D. Brock Hornby*

**U**NCHECKED, JUDGES AND LAWYERS tend to craft or perpetuate rules – often convoluted rules – at every opportunity, even when the occasion doesn’t demand it. No, I am not talking about Sentencing Guidelines. Three other examples make the point and prompt this cry for restraint.

1.

## FEDERAL RULES OF CRIMINAL PROCEDURE 11, 5, AND 58

**H**ave you ever wondered whom the flight attendants are addressing when they explain how to fasten and unfasten a seatbelt? In response to that pointless information, do you largely tune out the rest of their safety presentation?

We face a comparable risk in initial appearance and guilty plea warnings. In 2013, the Federal Rules of Criminal Procedure were amended to require District Judges at guilty pleas to tell every defendant, citizen or not, “that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.”<sup>1</sup> Educational perhaps, but a mandatory warning for every defendant in every District?

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*D. Brock Hornby is a District Judge on the U.S. District Court for the District of Maine.*

<sup>1</sup> Fed. R. Crim. P. 11 (b)(1)(O).

The Rules Committees write rules that apply to all federal courts nationwide. According to Sentencing Commission data, 27,698 non-citizens pleaded guilty to federal offenses during federal fiscal year 2016 while 37,670 U.S. citizens did so – in California Southern, 1,305 vs. 1,470; in Texas Western, 1,869 vs. 4,291; in Arizona, 1,323 vs. 4,400.<sup>2</sup> Apparently earlier comparable numbers led Rules drafters to amplify and mandate nationally what had previously been a discretionary warning.<sup>3</sup>

But national numbers hide tremendous variations district to district. In Maine that same fiscal year, only 13 non-citizens pleaded guilty while 180 citizens did so; in Montana, 11 vs. 287; in Mississippi Northern, 9 vs. 156; in Connecticut, 15 vs. 282.<sup>4</sup> Given such variations, why a *national* requirement? In many districts, bewildered looks from most defendants are the result. We are provoking, I fear, the airplane response: treating *all* the advice as bureaucratic gobbledygook.

The Supreme Court didn't require this new warning. No, the Supreme Court "held that a *defense attorney's* failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment."<sup>5</sup> Defense attorneys can determine their clients' citizenship. Nevertheless, "[t]he [Advisory] Committee [on Criminal Rules] concluded that the most effective

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<sup>2</sup> U.S. Sentencing Comm'n, 2016 Datafile, USSCFY16 (2016) (about 42% non-citizen guilty pleas and 58% citizen guilty pleas); for 2015, 28,807 non-citizens and 39,335 citizens. U.S. Sentencing Comm'n, 2015 Datafile, USSCFY15 (2015). The Commission provided in table form the data I use; its website provides the raw data, which can be viewed via a statistical analysis software package. Fiscal 2017 data were not available as of press time.

<sup>3</sup> Advisory Committee on Criminal Rules, Report to the Standing Committee 2-5 (May 2012). Before *Padilla v. Kentucky*, 559 U.S. 356 (2010), and the Rule change, the Benchbook recommended: "If the defendant is not a citizen of the United States, ask: Do you understand that your plea of guilty may affect your residency or your status with the immigration authorities?" Fed. Judicial Ctr., Benchbook for U.S. District Court Judges 75 (5th ed. 2007).

<sup>4</sup> U.S. Sentencing Comm'n, 2016 Datafile, USSCFY16 (2016).

<sup>5</sup> Fed. R. Crim. P. 11(b)(1)(O) Advisory Committee's note to 2013 amendment (emphasis added) (citing *Padilla*, 559 U.S. at 374-75). I recognize that the Supreme Court approves proposed Rules amendments before Congress reviews them. But although it can make changes, "more often it approves the proposal as written." 1 Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure: Criminal* § 2 (4th ed. 2008).

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and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship."<sup>6</sup>

Really? If the Supreme Court says defense counsel must advise *non-citizen* defendants of deportation risks, and the Justice Department adopts a policy that such language should be included in plea agreements,<sup>7</sup> why must District Judges warn every defendant, citizen or not? Our Rule 11 script is already long in its required judicial warnings of guilty plea consequences. But those consequences are mostly things that happen to defendants *in court*, not actions by another governmental agency.<sup>8</sup> Deportation can be critical to a non-citizen; other collateral consequences are critical to those who'll remain.<sup>9</sup> We don't warn defendants pleading guilty that they may lose their right to vote, to be a juror, to possess a firearm, to obtain professional licenses, student loans, or future employment opportunities.<sup>10</sup>

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<sup>6</sup> Fed. R. Crim. P. 11(b)(1)(O) Advisory Committee's note to 2013 amendment.

<sup>7</sup> The Justice Department instructs its prosecutors to include the warning language in plea agreements. See Advisory Committee on Criminal Rules, Meeting Minutes 5 (Apr. 2012). Probation Officers ask defendants' citizenship in preparing the presentence reports judges see before sentencing. See 8 Guide to Judiciary Policy, pt. D, ch. 3, § 325.60, at 8 (2010).

<sup>8</sup> Rule 11(b)(1) requires judges to advise defendants if they're under oath that the government can use what they say in a later perjury prosecution. The remaining warnings concern what happens to defendants in court depending on whether they choose trial or guilty plea, and the court-imposed penalties that follow conviction. *Id.* The warnings began multiplying in 1975 and increased with Guidelines sentencing and supervised release. It may be time for the Rules Committees to consider lessons from attention economics and attention management before adding to Rule 11. Some will respond that Rule 11 colloquies aren't decision-making time for defendants, just a judicial record that defendants and counsel previously considered the listed items. If that's all the colloquies are, the information could more easily be provided and acknowledged in writing.

<sup>9</sup> The Committee describes deportation as a consequence that is "qualitatively different" from other conviction consequences, quoting *Padilla's* reference to its importance to a non-citizen defendant, 559 U.S. at 364. Advisory Committee on Criminal Rules, Report to the Standing Committee 2-4 (May 2012). What *Padilla* said is that deportation is "sometimes the most important part – of the penalty that may be imposed on *noncitizen defendants* who plead guilty to specified crimes." 559 U.S. at 364 (emphasis added; footnote omitted). *Padilla* didn't say what is most important for citizens. Recent research suggests a variety of collateral consequences often substantially motivate plea bargaining, especially in lower level prosecutions such as misdemeanors. See, e.g., Thea Johnson, *Measuring the Creative Plea Bargain*, 92 Ind. L.J. 901, 927-29 (2017).

<sup>10</sup> See CSG Justice Center, *National Inventory of the Collateral Consequences of Convictions*,

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If the goal is to avoid later plea challenges, or make sure defendants' lawyers advise defendants appropriately, this measure won't do the job. The Supreme Court held recently that a district judge's warning (before the new Rule even required it) doesn't overcome counsel's bad advice.<sup>11</sup>

Likewise, the Rule's vague pronouncement (the Advisory Committee calls it "generic") won't help defendants evaluate deportation risks. The Advisory Committee disclaimed that goal, saying such advice was too complicated for judges to explain.<sup>12</sup>

Like the Supreme Court, we should have left this one to the lawyers. It's an example of a maybe-good-for-some-situations idea being turned unnecessarily into a country-wide rule. Districts with substantial numbers of non-citizen defendants should be allowed to use the warning, as they did before the Rules Committee mandated it nationally.<sup>13</sup> But not everywhere in every case.<sup>14</sup>

If Rule 11's unwise universal deportation warning weren't overreach enough, a 2014 amendment to Rules 5 and 58 now requires a magistrate judge to tell all defendants at initial appearance:

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niccc.csgjusticecenter.org (last visited Aug. 23, 2017); Margaret Colgate Love et al., *Collateral Consequences of Criminal Convictions: Law, Policy & Practice* §§ 2:1-79 (2016) (among others, loss of civil and political rights, employment restrictions, government procurement, access to public housing and rental subsidies, welfare and veterans' benefits, government pensions, student financial aid, drivers' licenses, parental rights, and firearms privileges).

<sup>11</sup> *Lee v. United States*, 137 S. Ct. 1958, 1967-69 (2017). The Court said "[t]here has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel," *id.*, and that counsel actually "undermin[ed] the judge's warnings." *Id.* at 1968 n.4. In *Lee*, the defendant's lawyer "assured him that the judge's statement was a 'standard warning.'" *Id.* at 1968. Judges know such minimization of warnings is all too frequent as defendants turn to their lawyers for a signal on what answer to give during Rule 11 colloquies.

<sup>12</sup> Advisory Committee on Criminal Rules, Report to the Standing Committee 3 (May 2012).

<sup>13</sup> Other metrics might usefully guide judges' discretionary choice. For example, "the overwhelming majority (91.2%) of immigration offenses were committed by non-citizens;" "97.4 percent of crack cocaine offenders were United States citizens, while only 43.7 percent of marijuana offenders were citizens." U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2016 at 6, 8 (May 2017).

<sup>14</sup> If deportation warnings are required at guilty pleas, what about defendants going to trial who forgo any opportunity to negotiate a plea's terms or the crime charged (which may affect deportation risks)? Will warnings at trial outset be the next Rules drafters' project?

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that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested – but that even without the defendant's request, a treaty or other international agreement may require consular notification.<sup>15</sup>

Whew. I barely understand that advice myself. I wonder what it sounds like in translation. If I were a non-citizen (I used to be), I've no idea what I'd do with the second part about what might happen *without* my request. The Rule doesn't even tell judges what to do if defendants make the request. This addition aims at honoring Article 36 of the Vienna Convention on Consular Relations, ratified by the Senate in 1969, but apparently chronically under-observed thereafter.<sup>16</sup> Since law enforcement officers make arrests, it's an easy fifth addition to their four *Miranda* warnings.<sup>17</sup> But the Justice Department, at the State Department's urging, wanted *judges* also to give the advice, because court transcripts furnish a superior treaty-compliance record.<sup>18</sup> The Advisory Committee recognized that it's "unresolved" whether Article 36 even "creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36;" that "arresting officers are primarily responsible for providing this advice;"<sup>19</sup> and that the judge-provided advice is a "fail-

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<sup>15</sup> Fed. R. Crim. P. 5(d)(1)(F) (felony initial appearances) & 58(b)(2)(H) (misdemeanor and petty offense initial appearances).

<sup>16</sup> See, e.g., Heather M. Heath, *Non-Compliance with the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. Int'l L. Rev. 1 (2004).

<sup>17</sup> The Justice Department requires the notice to be given upon arrest, 28 C.F.R. § 50.5; Homeland Security requires notice to every detained alien, 8 C.F.R. § 236.1(e). But in both cases notice is required only for foreign nationals.

<sup>18</sup> Committee on Rules of Practice and Procedure, Report to the Judicial Conference 26 (Sept. 2013) ("[Justice], at the urging of the State Department, proposed amendments . . . ."); Advisory Committee on Criminal Rules, Meeting Minutes 14 (Apr. 2013) ("[Justice] . . . noted that there is often no record[;] . . . providing the warning at the initial appearance would create a record of compliance.")

<sup>19</sup> Fed. R. Crim. P. 5(d)(1)(F) & 58(b)(2)(H) Advisory Committee's notes to 2014 amendments. The State Department publishes a pamphlet, *Consular Notification and Access* (4th ed. 2016). It asks only that judicial officials "inquire . . . whether consular notification procedures have been followed." *Id.* at 15.

safe.”<sup>20</sup> Executive agencies require only that non-citizens receive the advice. Nevertheless, for courts “[t]he Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant’s citizenship,”<sup>21</sup> and therefore mandated it for everyone.

Why not leave this treaty obligation to the Executive Branch?<sup>22</sup> Since when are treaty-compliance-recordkeeping and “failsafe” the role of federal judges? This cumbersome advice delivered at initial appearances willy-nilly to citizens and non-citizens alike risks diminishing – for many – attention to the seriousness of the other initial appearance warnings.

## 2.

### MCDONNELL DOUGLAS

In Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, Congress prohibited employment discrimination based on race, color, religion, sex, or national origin. At that time, bench trials were the vehicle

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<sup>20</sup> Advisory Committee on Criminal Rules, Report to the Standing Committee 3 (May 2011).

<sup>21</sup> Fed. R. Crim. P. 5(d)(1)(F) Advisory Committee’s note to 2014 amendment. The Committee reached this conclusion because of self-incrimination concerns if judges inquired about citizenship. Committee on Rules of Practice and Procedure, Report to the Judicial Conference 27 (Sept. 2013). The Supreme Court had sent a previous version back to the Committee. The Advisory Committee on Criminal Rules’ chair then “identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.” Advisory Committee on Criminal Rules, Meeting Minutes 3 (Apr. 2012). Justice then consulted with State for amending language, and the Committee deleted language saying government officials *would do* certain things, in favor of language that defendants could *request* certain things or a treaty may require certain things without request. Advisory Committee on Criminal Rules, Report to the Standing Committee 10-16 (May 2012). As modified, the amendment was adopted.

<sup>22</sup> That critique was leveled during the Committee’s initial consideration. Fed. Mag. J. Ass’n Rules Committee, Comments on Proposed Changes to Fed. R. Crim. P. 5(d)(1)(F) & 58(b)(2)(H) at 2 (Feb. 2011); see Fed. R. Crim. P. 5(d)(1)(F) Advisory Committee’s note to 2014 amendment (summarizing public comments). Earlier, Justice *opposed* amending Rule 5 to require consular notification advice. Advisory Committee on Criminal Rules, Meeting Minutes 18 (Oct. 2005).

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for resolving discrimination claims. In 1973, in *McDonnell Douglas Corp. v. Green*, the Supreme Court laid out detailed rules for “the order and allocation of proof” in Title VII bench trials.<sup>23</sup> No one’s quite sure why.<sup>24</sup> There was no foundation for these specific requirements in either the statute or previous case law. District Judges thereafter had to use the rules in their trials, findings of fact, and conclusions of law.

Here are the *McDonnell Douglas* rules. “[I]n a Title VII trial,” the plaintiff “must carry the initial burden . . . of establishing a prima facie case of racial discrimination.”

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

That’s step one. For step two, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” (Later the Court clarified that burden as one of production, not just articulation.<sup>25</sup>) For step three, the plaintiff “must . . . be afforded a fair opportunity to show that [the employer’s] stated reason for . . . rejection was in fact pretext,” or that the reason was discriminatorily applied.<sup>26</sup>

The *McDonnell Douglas* rules apply to cases where plaintiffs claim that employers’ proffered reasons were pretextual, hiding an actual discrimina-

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<sup>23</sup> 411 U.S. 792, 798, 800 (1973).

<sup>24</sup> See Mark A. Schuman, *The Politics of Presumption: St. Mary’s Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 St. John’s J. Legal Comment. 67, 70 (1993); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 118 (2011) (“*McDonnell Douglas* offers a classic example of how appellate courts resolve nonexistent problems. The three-part framework is complicated in both its substance and in its odd burden-shifting procedures. One might think that a terrible confusion must have existed in the lower courts to justify the imposition of such a complex framework. But the district court in *McDonnell Douglas* had no problems analyzing the case before it . . .”).

<sup>25</sup> *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-57 & n.9 (1981).

<sup>26</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802-06. The Court says these rules set evidentiary standards, not pleading requirements. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

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tory reason.<sup>27</sup> They need not be used when plaintiffs have “direct evidence” of discrimination.<sup>28</sup> Courts use the *McDonnell Douglas* approach for most federal discrimination statutes,<sup>29</sup> and for many similar state laws. But some states are starting to discard the rules,<sup>30</sup> some federal judges roundly criticize them,<sup>31</sup> and academic commentary is almost uniformly negative.<sup>32</sup>

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<sup>27</sup> *Morrison v. City of Bainbridge*, 432 F. App'x 877, 880-81 (11th Cir. 2011). *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), held direct evidence isn't required for mixed motive cases. Despite ensuing academic debate over whether “the *McDonnell Douglas* framework was dead,” William R. Corbett, *Mike Zimmer, McDonnell Douglas and “A Gift That Keeps Giving”*, 20 Employee Rts. & Emp. Pol'y J. 303, 310 (2016), the Supreme Court continues to use it. See, e.g., *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1353-55 (2015).

<sup>28</sup> *Swierkiewicz*, 534 U.S. at 511-12. The Seventh Circuit dislikes the direct/indirect distinction. *Ortiz v. Werner Enters, Inc.*, 834 F.3d 760, 765-66 (7th Cir. 2016). But there's no escaping the Supreme Court's 2015 pronouncement that *McDonnell Douglas* applies in “all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence.” *Young*, 135 S. Ct. at 1344.

<sup>29</sup> The Americans with Disabilities Act, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Family and Medical Leave Act, Title IX of the Education Amendments of 1972, 42 U.S.C. § 1981, section 510 of the Employee Retirement Income Security Act of 1974, and the First Amendment. Bloomberg BNA, *Employment Discrimination Law* § 2.II.A.1 (5th ed. 2012).

<sup>30</sup> Several have rejected it for retaliation claims. *Brady v. Cumberland Cty.*, 2015 ME 143, ¶ 39, 126 A.3d 1145, 1158 (Me. 2015); *Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 26 (Tenn. 2011); *Clemons v. Mech. Devices Co.*, 704 N.E.2d 403, 407-08 (Ill. 1998); *Jordan v. Clay's Rest Home, Inc.*, 483 S.E.2d 203, 207 (Va. 1997).

<sup>31</sup> *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) (“snarls and knots” inflicted by *McDonnell Douglas*); *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 n.1 (D.C. Cir. 2008) (Kavanaugh, J.) (“Disagreement and uncertainty over the content, meaning, and purpose of the *McDonnell Douglas* prima facie factors have led to a plethora of problems [but the factors are] usually irrelevant.”); *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately) (“The . . . framework only creates confusion and distracts courts from ‘the ultimate question of discrimination *vel non*’” and “should be abandoned”); *Lapsley v. Columbia Univ.-College of Physicians*, 999 F. Supp. 506, 513 (S.D.N.Y. 1998) (Chin, J.) (“at times . . . confusing and unworkable. The criticisms of this cumbersome burden-shifting mechanism are legion, and courts and commentators have characterized it as a ‘yo-yo rule,’ ‘befuddl[ing],’ ‘replete with confusion,’ and ‘incomprehensible.’” (citations omitted)).

<sup>32</sup> “It is difficult to find more than a handful of writers who defend the framework.” Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 Notre Dame L. Rev. 109, 113 n.14 (2007). Yet in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), Justice Powell described *McDonnell Douglas* as bringing the parties and the court “expeditiously

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Nevertheless, their cumbersome analytical sequence is repeated thousands of times each year across the country.

Unlike in 1964 and 1973, employment discrimination trials nowadays generally occur before juries.<sup>33</sup> Most circuits discourage using *McDonnell Douglas* in instructing juries, saying for example that the rules “may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.”<sup>34</sup> Instead, summary judgment is where *McDonnell Douglas* rules have bite.

But if the rules aren’t apt for juries, why must they govern judges at summary judgment? Judges routinely deal with evidentiary questions, direct and circumstantial, and instruct juries how to treat evidence.<sup>35</sup> According to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when “there is no genuine dispute as to any material fact.” Judges don’t need *McDonnell Douglas* to determine whether there’s a jury-worthy question of discriminatory intent.

The Supreme Court knows how to discard a procedural tool that turns out ineffective. In *Pearson v. Callahan*, the Supreme Court rescinded a requirement it had imposed eight years earlier that “mandated a two-step sequence for resolving government officials’ qualified immunity claims,” because experience showed the earlier approach to be inflexible and the object of much criticism. *Pearson* restored discretion to district and circuit courts on how to proceed, reasoning that principles of stare decisis were weaker “where, as here, a departure would not upset expectations, the

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and fairly to this ultimate question” of intentional discrimination. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989), Justice O’Connor called it a “careful framework,” and Justice Kennedy called for its retention. Despite their lofty source, these comments seem to have no empirical support. Justice Kennedy recognized that “[l]ower courts long have had difficulty applying” the rules, *id.* at 286-91.

<sup>33</sup> See 42 U.S.C. § 1981a(c).

<sup>34</sup> *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979). See Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 Berkeley J. Emp. & Lab. L. 257, 262 & n.38 (2013) (collecting cases).

<sup>35</sup> See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (in employment discrimination cases “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence,” and “juries are routinely instructed that [t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence” (internal citations and quotation marks omitted)).

precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."<sup>36</sup>

All those factors, except recency, apply to *McDonnell Douglas*. It does "not affect the way in which parties order their affairs"; abandoning it "would not upset settled expectations on anyone's part" (and as the Court explained in *St. Mary's Honor Center v. Hicks*, it is "a procedural device, designed only to establish an order of proof and production."<sup>37</sup>). The *McDonnell Douglas* rules are "judge made and implicate[] an important matter involving internal Judicial Branch operations." They can be removed by the Supreme Court and need not await Congress.<sup>38</sup> Their age tells us the time is now.

Employers' lawyers will resist abandoning *McDonnell Douglas*. Several reasons: (1) the rules' complexities justify extensive discovery and long, fee-generating, legal memoranda to courts at all levels; (2) the resulting expense to plaintiffs at summary judgment reduces settlement demands; (3) the rules' focus on the components leads judges to emphasize the rules at the expense of less tangible elements of what inferences can be drawn.<sup>39</sup> Indeed, empirical evidence suggests *McDonnell Douglas* unfairly favors employers.<sup>40</sup>

These are reasons to abandon the *McDonnell Douglas* rules. But still we have them. Why?

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<sup>36</sup> 555 U.S. 223, 232-35 (2009), overruling *Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>37</sup> 509 U.S. 502, 521 (1993) (emphasis in original).

<sup>38</sup> *Pearson*, 555 U.S. at 233-35.

<sup>39</sup> *Lapsley*, 999 F. Supp. at 514 ("[T]he framework can focus a court's or jury's attention inordinately on whether each stage has been satisfied and away from the existence or non-existence of evidence of discrimination in the record."); accord *Sperino*, *supra* note 34, at 269 ("Courts are often so enamored with the procedure and substance of the framework that they forget the ultimate question at issue: whether the employer illegally treated the employee differently because of a protected trait.").

<sup>40</sup> See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 128 (2009); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 17-18, available at [ssrn.com/abstract=1138373](http://ssrn.com/abstract=1138373) (May 28, 2008); see also Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. Sch. L. Rev. 671, 672-73 (2013) (collecting empirical studies of summary judgment in these cases generally).

### 3. FEDERAL CRIMINAL RULE 32(H)

I don't expect my arguments about Rules 5, 11, and 58 to sway the Rules Committees or my voice, added to the chorus of *McDonnell Douglas* criticism, to hasten the demise of the *McDonnell Douglas* rules. Rules are like entitlement programs: once in place, you can't get rid of them. Here's another example.

When Sentencing Guidelines were mandatory, the Supreme Court held that Criminal Rule 32 required judges to give advance notice if they were considering a sua sponte upward departure from the Guideline range. The Court in *Burns v. United States* said a different reading of Rule 32 would "have to confront the serious question whether notice in this setting is mandated by the Due Process Clause."<sup>41</sup> In 2002, the Advisory Committee amended Rule 32 to make *Burns*' notice requirement explicit in new subsection (h).

In 2005, however, the Supreme Court declared in *United States v. Booker*<sup>42</sup> that the Guidelines were no longer mandatory but advisory, and directed district courts to consult a list of criteria in 18 U.S.C. § 3553(a) – a list in which the Guideline range is only one factor in determining the appropriate sentence. As a result, a Criminal Rules Advisory Committee subcommittee "discussed whether it might be advisable to delete Rule 32(h) in its entirety."<sup>43</sup> But instead it proposed an amendment to *extend* the advance notice requirement to judges contemplating a variant sentence, i.e., a sentence outside the Guideline range based on the § 3553(a) factors. The proposal was controversial and the Standing Committee sent it back for reconsideration.<sup>44</sup> The Advisory Committee postponed considering it while awaiting pending Supreme Court decisions.

Then in 2008, the Supreme Court said in *Irizarry v. United States* that after *Booker*, "neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special

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<sup>41</sup> 501 U.S. 129, 138 (1991).

<sup>42</sup> 543 U.S. 220 (2005).

<sup>43</sup> Advisory Committee on Criminal Rules, Meeting Minutes 5 (Apr. 2005).

<sup>44</sup> Standing Committee on Rules of Practice and Procedure, Meeting Minutes 25-27 (June 2006); Advisory Committee on Criminal Rules, Report to the Standing Committee 2-3 (Dec. 2006).

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need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness.” Accordingly, the Court held that Rule 32(h)’s prior notice requirement doesn’t apply to variant sentences outside the Guidelines based on the 3553(a) factors, and stated that “*the justification for our decision in Burns no longer exists.*”<sup>45</sup>

End of Rule 32(h)? Sorry. After *Irizarry*, the Advisory Committee discussed the Rule for a time, some members wanting to apply the prior notice requirement to variant sentences notwithstanding *Irizarry* and others wanting to repeal the requirement altogether.<sup>46</sup> The latest discussion I’ve found is the Advisory Committee’s December 2009 report, in which it relayed its decision that any amendment “should again be deferred to await further development in sentencing law.”<sup>47</sup>

It’s now 2017. What’s the Advisory Committee waiting for? The Sentencing Commission’s Primer on Departures and Variances declares that a court must give reasonable advance notice of a sua sponte departure, but that “[a]dvance notice of a variance is not required by rule.”<sup>48</sup> The circuit courts are unhappy with that distinction. The Fourth Circuit says “the boundary between departures and variances is often murky,” and “the practical effects of applying either a departure or variance are the same.” The Seventh Circuit is blunter, declaring “the notice requirement imposed by Federal Rule of Criminal Procedure 32(h) for upward departures is obsolete.” The First Circuit says “Rule 32(h) as it presently stands serves no substantive purpose at all,” is “a vestigial rule,” and “polices only a sentencing court’s choice of labels.”<sup>49</sup>

But still we have it. The proper *principle* – not a Rule – is expressed in *Irizarry*:

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<sup>45</sup> 553 U.S. 708, 713-16 (2008) (citations omitted) (emphasis added).

<sup>46</sup> Advisory Committee on Criminal Rules, Meeting Minutes 5-7 (Oct. 2008).

<sup>47</sup> Advisory Committee on Criminal Rules, Report to the Standing Committee 9 (Dec. 2009).

<sup>48</sup> U.S. Sentencing Comm’n, Primer on Departures and Variances 2-3 (June 2016), available at [www.ussc.gov/sites/default/files/pdf/training/primers/2016\\_Primer\\_Departure\\_Variance.pdf](http://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Departure_Variance.pdf).

<sup>49</sup> *United States v. Spencer*, 848 F.3d 324, 327-28 (4th Cir. 2017) (quoting *United States v. Diosdado-Star*, 630 F.3d 359, 365 (4th Cir. 2011)); *United States v. Hayden*, 775 F.3d 847, 851 (7th Cir. 2014); *United States v. Santini-Santiago*, 846 F.3d 487, 490 (1st Cir. 2017).

## *Over Ruled*

Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is . . . to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial.<sup>50</sup>

Enough said.

### CONCLUSION

The rules I've discussed, whether made by judges or committee, were all well-motivated. But they're confusing, cumbersome, and just unnecessary. We'd be better off without them. And we judges and lawyers should rein in our rule-making impulses.

*GB*

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<sup>50</sup> 553 U.S. at 715-16.