Articles

Why March To A Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing

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I. INTRODUCTION

This Article fills a gap in current scholarship concerning the Federal Sentencing Guidelines ("Guidelines") by bringing together many sentencing concerns and refocusing them on the Guidelines themselves. Since *United States v. Booker*,[1] in which the Supreme Court demoted the Guidelines from mandatory to advisory status and imposed reasonableness as the appellate standard of review, several scholars have written about the new, advisory Guidelines scheme. Some have focused on the constitutional problems that *Booker* failed to settle.[2] Others have argued against a presumption of reasonableness for within-Guidelines sentences.[3] For some scholars, the biggest issues with the advisory Guidelines regime are the lack of any guiding punishment policy for sentencing courts, and the lack of emphasis on district courts' reasons for imposing a sentence.[4] While this Article draws on some of the ideas presented in prior scholarship, its main objective is to bring all of these concerns together by focusing on problems within the Guidelines, advisory or not.

Rather than focusing exclusively on how appellate courts should review sentences, or how district courts should impose sentences, this Article focuses on why courts on every level should be skeptical of the Guidelines and should, therefore, give less credence to them as providing proper sentencing "guidance." Some of these arguments were made when the Guidelines were first developed. Now, though, over twenty years later, there is data to back up these early concerns. For the purposes of this Article, the term "bias" means any factor outside of the sentencing statute that influences a judge's decision-making and leads to disparate sentencing. This can include characteristics of the defendant

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[1] 543 U.S. 220, 245 (2005).

[2] *See, e.g.*, James L. Fant, Comment, *Is Substantive Review Reasonable? An Analysis of Federal Sentencing In Light of Rita and Gall*, 4 SETON HALL CIR. REV. 447, 471 (2008) (explaining that "[t]he presumption of reasonableness insulates within-Guidelines sentences to create a de facto mandatory guidelines system"); David Holman, Note, *Death By A Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 271 (2008) (arguing that Supreme Court sentencing decisions perpetuated the Sentencing Guidelines' Sixth Amendment violations); John Playforth, *The Veil of Vagueness: Reasonableness Review in* Rita v. United States, *127 S. Ct. 2456 (2007)*, 31 HARV. J.L. & PUB. POL'Y 841, 851–53 (2008) (arguing that *Rita* failed to resolve the constitutional problem with the Guidelines and to uphold the legislative goal of sentencing uniformity).

[3] *See, e.g.*, Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 FED. SENT'G REP. 170, 170 (2006) (discussing several reasons why the presumption of reasonableness is problematic); Jason Hernandez, *Presumptions of Reasonableness For Guideline Sentences After* Booker, 18 FED. SENT'G REP. 252, 252–53 (2006) (arguing that the presumption of reasonableness undermines the holdings of both majority opinions in *Booker*).

[4] *See, e.g.*, Fant, *supra* note 2, at 477 (arguing that reliance on the Guidelines-centric system erroneously "assumes . . . Guidelines actually achieve the goals set forth by Congress under § 3553(a) and that sentencing judges independently determined sentences within Congress's framework."); Anna Elizabeth Papa, Note, *A New Era of Federal Sentencing: The Guidelines Provide District Court Judges a Cloak, But Is* Gall *Their Dagger?*, 43 GA. L. REV. 263, 266 (2008) (indicating that district judges lack guidance on how to weigh the factors of § 3553(a)).

(such as race, age, gender, and socioeconomic status) or characteristics of the sentencing judge (such as political ideology, mood, and sentencing philosophy). As this Article will discuss, the Guidelines are imbedded with biases that encourage—or at least do not adequately diminish—disparities and hide judges' reasons for imposing sentences.

The Supreme Court emphasizes uniformity as its reason for continuing to instruct district courts to begin their sentencing determination with a Guidelines calculation. Uniformity means that punishment is based on an offender's real conduct and that similar offenders who have committed similar conduct receive the same punishment.[5] However, as this Article demonstrates, the Supreme Court's singular focus on uniformity is neither based on statutory construction nor on Congress's own articulated sentencing policy, which includes honesty and proportionality as well.[6] Honesty refers to "avoiding the confusion and implicit deception that arose out of the [indeterminate] pre-guidelines sentencing system."[7] While a portion of the honesty goal was achieved with the abolition of federal parole, honesty also referred to being transparent about the sources and reasons dictating the sentences imposed.[8] Although honesty and proportionality can inform uniformity, each sentencing goal requires different considerations. The Supreme Court's approach obstructs any meaningful progress toward accomplishing the uniformity, honesty, and proportionality in sentencing that Congress charged the Sentencing Commission to achieve.

Part II of this Article gives a brief history of federal sentencing discretion. It moves through the pre-Guidelines era, to the mandatory

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[5] *Booker*, 543 U.S. at 250 ("Congress' basic statutory goal—a system that diminishes sentencing disparity-depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction."); *see* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2009) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.").

[6] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[7] *Id.*

[8] Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors, 16 Fed. Sent. R. 12, (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (last visited April 11, 2010) ("[T]he Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity"); *see also* Evan W. Bolla, *An Unwarranted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895, 910 (2006) ("These Sentencing Guidelines issued by the Commission attempt to narrow the disparity between sentences for similar offenses committed by similar offenders, while providing different punishments for offenses of different severity, in what they thought to be an honest and transparent manner."); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departures*, 27 HAMLINE L. REV. 357 (recognizing transparency as a goal of the Federal Sentencing Guidelines); Sandra Guerra Thompson, *The Booker Project: The Future of Federal Sentencing*, 43 HOUS. L. REV. 269, 270-71 (2006) ("They were originally intended to reduce disparity by creating a system of uniform sentences for like offenses, promote transparency and honesty in sentencing, and create a body of sentencing law that would provide for appellate review.").

Guidelines years, to the current advisory Guidelines period. In doing so, Part II reveals the longstanding concern with individualized sentencing as a basis for justice and fairness and the tension between that concern and the threat of judicial bias plaguing discretionary sentencing.

Part III focuses on the development of the Guidelines themselves by explaining the early criticism of the Guidelines and the concerns that continue to this day. The purpose of Part III is to reveal the imprudence of relying on the Guidelines as a sound resource based in studied sentencing policy. Instead, as Part III reveals, the Guidelines still have work to do in providing guidance toward reasonable sentences.

Part IV explains that instructing sentencing courts to begin their sentencing determination with a Guidelines calculation is not statutorily mandated and is, in fact, contrary to statutory construction. Part IV also investigates what is lost by removing the Guidelines calculation as a starting point, focusing on the Supreme Court's concern about sentencing uniformity. Part IV ends by emphasizing that uniformity is but one goal of sentencing, and that it should not be saved when it means sacrificing substantive sentencing reasonableness.

Part V explores what role uniformity, honesty, and proportionality can and should play in the sentencing process once the Guidelines are removed from their current place of prominence. Part V ends with the proposal that reviewing courts should step in as the facilitators of sentencing uniformity, not by enforcing the Guidelines, but by beginning to police the meanings given by lower courts to the § 3553(a) sentencing factors. This more reasoned approach better protects the uniformity, honesty, and proportionality in sentencing that Congress sought by directing the Sentencing Commission to develop the Guidelines. It would be a new and improved tune for federal sentencing.

II. A PROGRESSION THROUGH FEDERAL SENTENCING REFORMS

Federal sentencing has moved through varying levels of discretion for district courts. For approximately two centuries before the Guidelines were developed, federal judges had nearly unfettered discretion in sentencing.[9] Generally, so long as a sentence did not exceed statutory limits, it would survive appellate review.[10] The rationale behind allowing such power to be in the hands of sentencing judges was a commitment to the ideal of individualized sentencing as a

[9] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998); MICHAEL TONRY, SENTENCING MATTERS 6 (1996) ("For all practical purposes, appellate review of sentences . . . was nonexistent."); Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 67–70 (2007).

[10] STITH & CABRANES, *supra* note 9, at 9; *see also* Dorszynski v. United States, 418 U.S. 424, 432–43 (1974) (citing Gurera v. United States, 40 F.2d 338, 340–41 (8th Cir. 1930) ("the appellate court has no control over a sentence which is within the limits allowed by a statute.")).

means of attaining fairness and justice. In 1932, the Supreme Court explained the connection between individualized sentencing, notions of fairness, and judicial discretion in *Burns v. United States*, stating, "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."[11] Five years later, the Supreme Court reiterated these sentiments in *Pennsylvania ex rel. Sullivan v. Ashe*:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.[12]

Perhaps the idea that fairness and justice require sentencing tailored to the specific defendant was best articulated in the 1949 case, *Williams v. New York*. Expressing a dislike for rigid sentencing, the Supreme Court explained, "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[13]

The *Williams* Court characterized individualized sentencing as a change in sentencing practices, saying, "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[14] According to the Court, this was a move from retribution to a reformation and rehabilitation of offenders as the primary purpose of sentencing.[15] Despite the Court's belief that the sentencing focus had shifted, the Court recognized that judicial discretion in federal sentencing has always been a feature of American jurisprudence.[16] Over time, as the pendulum swung from retributivist theories of punishment to utilitarian theories and back again, the sense that sentencing must fit the offender and not simply the offense has persisted in American jurisprudence.

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[11] 287 U.S. 216, 220 (1932).

[12] 302 U.S. 51, 61 (1937).

[13] Williams v. New York, 337 U.S. 241, 247 (1949).

[14] *Id.*

[15] *Id.* at 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

[16] *Id.* at 246 ("[B]efore and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

Before the era of the Guidelines, it was believed that broad judicial discretion was the best method of achieving these individualized sentences. But such discretion was thought to produce great disparities in sentencing within and across districts.

In order to investigate allegations of sentencing disparity, Congress created the National Commission on Reform of the Federal Criminal Laws, known as the "Brown Commission" in 1966.[17] In 1971, the Brown Commission reported that "sentencing disparities were large and pervasive."[18] Numerous studies and reports confirmed these disparities.[19] Congress responded to the Brown Commission's findings by, among other things, enacting Senate Bill 2699 introduced by Senator Edward Kennedy in 1975.[20] That legislation, which set out the framework for what would become the Federal Sentencing Guidelines, was based largely on the sentencing scheme envisioned by then-District Judge Marvin Frankel.[21] Judge Frankel was deeply critical of unchecked judicial discretion in sentencing, and he called the sentencing power of judges during his day "terrifying and intolerable for a society that professes a devotion to the rule of law."[22] Judge Frankel pictured a structured sentencing system in which a "Commission on Sentencing" would create "binding" guidelines.[23] In Judge Frankel's ideal sentencing scheme, the Commission would be a politically insulated body composed of "lawyers, judges, penologists, and criminologists," as well as

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[17] *See* LISA M. SEGHETTI & ALISON M. SMITH, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS CRS–11 n.58 (June 30, 2007), *available at* http://www.fas.org/sgp/crs/misc/RL32766.pdf..

[18] Joseph F. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1340 (1999).

[19] *See, e.g.*, Federal Sentencing Reporter, *25% Rule Exhibits*, 8 FED. SENT'G REP. 189 (1995) (discussing a 1974 Second Circuit Sentencing Study conducted by the Federal Judicial Center in which twenty identical files from actual cases were presented to fifty federal district court judges who were asked to indicate the sentence that they would impose, and reporting the great range of sentences that resulted) (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES 1-3 (1974)); Kevin Clancy et al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975); Marvin E. Frankel, *The Sentencing Morass and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967); Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982); Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 167 (1973) ("The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia Circuit. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit."). *But see*, STITH & CABRANES, *supra* note 9, at 106–12 (questioning the validity and thoroughness of pre-Guidelines sentences and finding sentencing disparities).

[20] S. 2699, 94th Cong.

[21] AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 124–44 (1971); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter CRIMINAL SENTENCES]. Several other scholars also called for sentencing guidelines or some means of restraining judicial discretion in sentencing. *See, e.g.*, ALAN M. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1973);.

[22] CRIMINAL SENTENCES, *supra* note 22, at 5.

[23] *Id.* at 119, 123.

"sociologists, psychologists, business people, artists, and . . . former or present prison inmates."[24] Nearly a decade later, Congress passed the Sentencing Reform Act of 1984 (SRA), and in 1987 the Guidelines were born.

A. Chaining the Melody: The Mandatory Sentencing Guidelines and the Shackling of Discretion

According to the U.S. Sentencing Guidelines Manual, in imposing the Guidelines, Congress originally sought to achieve three goals: (1) "*honesty* in sentencing"; (2) "*uniformity* in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"; and (3) "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[25] To attain these Congressional sentencing policies, the SRA abolished federal parole and directed the Sentencing Commission to create categories of offense behavior and offender characteristics and to use the combination of such categories to prescribe ranges of appropriate sentences for each class of convicted persons.[26] These sentencing ranges were almost entirely binding on sentencing judges; for nearly twenty years, judges under this mandatory Guidelines regime had very limited discretion to sentence defendants within a narrow sentencing range.[27]

Further, in the PROTECT Act of 2003, Congress made it clear that it wanted to severely limit judicial authority to depart from the applicable Guidelines ranges.[28] However, even though the Guidelines were developed to limit judicial bias and the disparate sentences that could come with individualized, discretionary sentencing, the Guidelines themselves reflect a glimmer of individualized sentencing.[29] Rather than

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[24] *Id.* at 119–20.

[25] U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, introductory cmt. 3 (2009).

[26] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 217(a), 235(b)(1), 98 Stat. 1987, 2020, 2032.

[27] *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 531 (2007) (explaining how the Guidelines slid from advisory to mandatory through judicial enforcement). In addition, the Supreme Court recognized the Guidelines as mandatory in *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and *Stinson v. United States*, 508 U.S. 36, 42 (1993). *See also* United States v. Booker, 543 U.S. 220, 233–34 (2005).

[28] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 is aimed at preventing child abuse. But the Feeney Amendment, slipped into the PROTECT Act, limited the ability of judges to depart from sentencing guidelines in specific cases. It also required the U.S. Sentencing Commission to amend the Guidelines to substantially reduce downward departures. PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670 (2003) (codified as amended at 18 U.S.C. § 3742(e) (2006)).

[29] *See* 18 U.S.C. § 3661 (1982) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.").

being based solely on offense conduct, the Guidelines' 258-box grid takes into account the offender's past criminal record. Even within the offense-level determination, the Guidelines call for certain aspects of the offender's behavior—in carrying out the crime and in helping or hindering the prosecution of that crime—to be a part of the sentencing calculation.[30] Nevertheless, the more central goal of the Guidelines was to eliminate sentencing procedures that cultivated judicial bias and led to unwarranted disparity.[31] Although there were many critics of this new system, it eventually became well settled that the Guidelines would withstand constitutional challenges.[32] That is, until *Booker* took the stage.[33]

B. *Booker* and the Same Old Song

In *United States v. Booker*, the Supreme Court addressed the issue

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[30] These "Offense Adjustment" factors range from an upward adjustment for a defendant who has played a major role in an offense to a downward adjustment for defendants who have accepted responsibility for the crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2009) (authorizing the increase of the Offense Level for a defendant who was the leader or organizer of criminal activity); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2009) (authorizing a two-point decrease of the Offense Level for the acceptance of responsibility).

[31] The term "unwarranted disparity" is used to refer to the situation in which similar criminal conduct by similar offenders is punished differently. Of course this definition needs refinement. For instance, how does one determine when offenses and defendants are similar? This question is beyond the scope of this Article. However, recognition of this difficulty further highlights the shortcomings of the Guidelines in serving ill-defined sentencing purposes.

[32] There are several cases in which the Supreme Court rejected constitutional challenges to the Guidelines. *See, e.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (holding that a sentencing court may consider the acquitted conduct of a defendant that has been proved by preponderance of evidence); Witte v. United States, 515 U.S. 389, 406 (1995) (rejecting constitutionality concerns regarding sentence enhancements and double jeopardy); United States v. Dunnigan, 507 U.S. 87, 98 (1993) (concluding that the obstruction of justice sentence enhancement did not undermine the defendant's right to testify); Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that the Guidelines were constitutional and amounted to neither excessive delegation of legislative power nor violation of the separation of powers principle).

[33] The Guidelines did in fact withstand constitutional scrutiny for twelve years before a line of cases began to unravel confidence in their constitutionality. This line of cases began with *Jones v. United States*, 526 U.S. 227 (1999), in which the Supreme Court held that provisions of the federal carjacking statute that imposed higher penalties for serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations. *Id.* at 229, 251–52. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that other than fact of prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This reasoning was based on an understanding that the "historical foundation" for the criminal law in this country recognizes a need to "guard against a spirit of oppression and tyranny on the part of rulers" by requiring that "'*the truth of every accusation* . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *Id.* at 477 (Quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). Two years later, the Supreme Court advanced this line of thinking in *Ring v. Arizona* by holding that a "trial judge, sitting alone" is prohibited from determining the existence of the aggravating or mitigating factors required for the imposition of the death penalty under Arizona law. 536 U.S. 584, 588, 609 (2002). In *Ring*, the Court specifically dispelled any argument that sentencing factors should be treated differently than elements of a crime when it comes to whether a judge or jury has the authority to decide certain facts that increase a defendant's authorized punishment (the highest sentence based on the facts admitted to or found by the jury). *Id.* at 609.

of whether the Federal Sentencing Guidelines, in their mandatory form, violated the Sixth Amendment.[34] The Court reaffirmed the principle that the Sixth Amendment "protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"[35] However, the Supreme Court determined that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[36] Therefore, the Court ultimately decided that there would be no Sixth Amendment violation if the Guidelines were not binding on judges.[37] In order to remedy the constitutional problem that the Court identified as resulting from the mandatory nature of the Guidelines, the Supreme Court decided to excise only the provisions that made the Guidelines mandatory.[38] As a result, the Court held that sentencing courts are required to consider Guideline ranges, but must ultimately tailor the sentence imposed in light of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a).[39] Pursuant to § 3553(a), sentencing courts shall consider: (1) nature and circumstances of the offense and history and characteristics of defendant; (2) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for the offense; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities, and (7) need to provide restitution to victims.[40] The Court also determined that the appropriate standard of appellate review would be a "review for

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[34] 543 U.S. 220, 226 (2005).

[35] *Id.* at 230 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

[36] *Id.* at 233.

[37] *Id.* Justice Stevens delivered the portion of the opinion of the Court that revealed the constitutional problem with mandatory Guidelines, in which Justices Scalia, Souter, Thomas, and Ginsburg joined. *Id.* at 226, 244. Justice Breyer delivered the remedy portion of the opinion, in which Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Ginsburg joined. *Id.* at 244–45. Justice Stevens dissented in part, in which Justice Souter joined, and in which Justice Scalia partially joined. *Id.* at 272. Justices Scalia and Thomas filed opinions dissenting in part. *Id.* at 303, 313. And Justice Breyer filed an opinion dissenting in part, in which Chief Justice Rehnquist and Justices O'Connor and Kennedy joined. *Id.* at 326.

[38] *Id.* at 233–35, 259–60. The *Booker* remedy was reached by excising 18 U.S.C. § 3553(b)(1), the provision making it mandatory for sentencing courts to impose a sentence within the applicable Guidelines range absent circumstances justifying a departure, and § 3742(e), the provision setting forth the standards for appellate review. *Booker*, 534 U.S. at 245. The Court struck § 3742(e), not because it disagreed with the standard of review set forth by the Guidelines, but because § 3742(e) contained cross-references to the excised § 3553(b)(1). *Booker*, 543 U.S. at 260. Section 3742(e) instructed circuit courts to review sentences to determine whether they were (1) in violation of law; (2) resulting from an incorrect application of the Guidelines; or (3) outside of the applicable Guidelines range; and whether the district court failed to provide a written statement of reasons, or the sentence departed from the Guidelines range based on an improper factor or in contradiction to the facts. 18 U.S.C. § 3742(e) (2000 & Supp. V 2005).

[39] *Booker*, 543 U.S. at 259–60.

[40] 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

'unreasonable[ness].'"[41]

In changing the Guidelines from mandatory to advisory, the Court moved from making a constitutional determination to thinking about sentencing policy. The Court explained that "Congress sought to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities ... [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'"[42] Without much explanation, the Court concluded, "The [Guidelines] system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives."[43] Although the Court recognized that the purpose of the Guidelines was to achieve uniformity, honesty, and proportionality in sentencing, it never mentioned sentencing honesty or proportionality in *Booker* at any other point.[44] The uniformity goal, on the other hand, is mentioned by the Court numerous times in *Booker*, and it is quite clear that uniformity was the driving force in the Court's decision to change the Guidelines from a mandatory to an advisory system rather than to invalidate them altogether.[45] Professing to resolve the constitutional problem posed by mandatory guidelines, the Supreme Court apparently attempted to preserve uniformity in sentencing by requiring judges to consider both the Guidelines and statutory sentencing factors. Thus, the Court increased judicial discretion to sentence defendants outside of the Guidelines range, but it did so without giving much thought to what it meant to have honesty or proportionality in sentencing.[46]

In sum, over a span of several decades, the discretion of sentencing judges moved from virtually unrestrained, to nearly completely bound, to something seemingly in between the two. A series of Supreme Court

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[41] *Booker*, 543 U.S. at 261 (alteration in original) (citing 18 U.S.C. § 3742(e)(3) (1994 ed.)).

[42] *Id.* at 264.

[43] *Id.*

[44] *Id.* The court explained, "Finally, the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent. Congress sought to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'" In support of this position, the Court cited to 28 U.S.C § 991(b)(1)(B) and U.S. SENTENCING GUIDELINES §1A1.1, application note.

[45] *Id.* at 253–54 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute—a uniformity consistent with the dissenters' remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance and that Justice Stevens' approach would undermine. . . . In significant part, it is the weakening of this real-conduct/uniformity-in-sentencing relationship . . . that leads us to conclude that Congress would have preferred *no* mandatory system to the system the dissenters envisage." (internal citation omitted)).

[46] The importance of the balance between uniformity and discretion to the Court was reiterated by Justice Breyer in the *Gall* oral argument. Justice Breyer asked: "I want to know your view of it, too, because what I want to figure out here by the end of today is what are the words that should be written in your opinion by this Court that will lead to considerable discretion on part of the district judge but not totally, not to the point where the uniformity goal is easily destroyed." Transcript of Oral Argument at 22, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949).

decisions following *Booker* purported to clarify the status of judicial sentencing discretion in the advisory Guidelines era. The first opinion was *Rita v. United States*, which held on appeal that a rebuttable presumption of reasonableness can be applied to a sentence within a properly calculated Guidelines range.[47] This is because a sentencing court is presumed to have taken into account the § 3553(a) sentencing factors and exercised its discretion to impose a sentence within the same range that the Commission has found acceptable.[48] Once the Court set forth the permissible methods of dealing with within-Guidelines sentences, it turned to the many questions surrounding the appropriate manner of assessing the reasonableness of sentences that fell outside of the applicable Guidelines ranges. Two years after *Booker*, the Supreme Court sought to clarify reasonableness review further in two opinions issued on the same day: *Gall v. United States*[49] and *Kimbrough v. United States*.[50] In *Gall*, the Court clarified that reasonableness review is a deferential abuse of discretion standard, which applies to all sentences regardless of their distance from the applicable Guidelines range.[51] Further, the Court explained that reasonableness review has both a substantive and procedural component. The Court described procedural reasonableness as follows:

> [Circuit courts] must first ensure that the district court committed no significant procedural error, such as failing to calculate, or improperly calculating, the Guidelines range, treating the Guidelines as mandatory, or failing to consider the statutory factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.[52]

Once procedural reasonableness has been determined, substantive reasonableness can be considered.[53] Substantive reasonableness review is a "totality of the circumstances" abuse of discretion standard, under which a court of appeals should give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the variance."[54] *Kimbrough* complemented *Gall* in clarifying the scope and breadth of reasonableness review. In *Kimbrough*, the Supreme Court held that the then-existing 100-to-1, crack-to-powder cocaine sentencing

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[47] Rita v. United States 551 U.S. 338 (2007).

[48] *Id.* at 347–49 (2007). However, as discussed in Part III, this reasoning is faulty because the Sentencing Commission itself has admitted that it did not take the § 3553(a) factors into account in determining the Guidelines ranges.

[49] Gall v. United States, 552 U.S. 38 (2007).

[50] Kimbrough v. United States, 552 U.S. 85 (2007).

[51] *Gall*, 552 U.S. at 51.

[52] *Id.*

[53] *Id.*

[54] *Id.*

disparity in the Sentencing Guidelines was advisory only.[55] As such, a sentencing judge is permitted to consider the disparity and find that, because of it, a within-Guidelines sentence would be "'greater than necessary' to serve the objectives of sentencing."[56] Therefore, the Court ultimately found that "while [§ 3553(a)] still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'"[57]

Finally, the Court continued this line of cases in June 2008 with *Irizarry v. United States*.[58] *Irizarry* held that district courts do not have to give parties notice when contemplating a variance from the recommended Guidelines range.[59] The Court reasoned that the Guidelines should remain the initial benchmark in sentencing decisions, but because the Guidelines are now advisory, "neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy'" that was the basis for the notice requirement under the mandatory Guidelines regime.[60] Similar to the approach in *Gall* and *Kimbrough*, in *Irizarry* the Supreme Court placed the Guidelines center-stage in sentencing determinations, while also directing district courts to look away from the spotlighted attraction.

Taken together, *Booker*, *Rita*, *Gall*, *Kimbrough*, and *Irizarry* solidify the following proposition: Post-*Booker* judicial discretion falls somewhere between pre-Guidelines unfettered discretion and the straightjacket situation that sentencing judges found themselves in during the years of mandatory Guidelines. *Booker* demoted the Guidelines to advisory status; *Rita* allowed the Guidelines to serve as evidence of the reasonableness of a district court's sentencing determination; *Gall* defined reasonableness review in terms of sentencing-court discretion; *Kimbrough* clarified the strength of the deferential nature of sentencing review; and *Irizarry* proclaimed that the expectancy associated with mandatory Guidelines no longer applies. In these cases, the Supreme Court clung to the Guidelines while still maintaining the importance of judicial sentencing discretion.[61] With all of these explanations, the Supreme Court has left one aspect of sentencing very clear—district courts should begin the sentencing process by properly calculating and considering the Guidelines.[62] According to the Court, this role of the

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[55] *Kimbrough*, 552 U.S. at 91.

[56] *Id.* (quoting 18 U.S.C. § 3553(a) (Supp. V 2000)).

[57] *Id.* at 101 (quoting United States v. Booker, 543 U.S. 220, 245–46 (2005)).

[58] 128 S. Ct. 2198 (2008).

[59] *Id.*

[60] *Id.* at 2202–03.

[61] *See, e.g.*, *Kimbrough*, 552 U.S. at 109 (reiterating the position that the Court held since *Booker*—that it is the sentencing judge who has "'greater familiarity with . . . the individual case and the individual defendant'" (quoting Rita v. United States, 551 U.S. at 357–58 (2007)). The sentencing judge is "therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case." (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

[62] For example, even while the Supreme Court recognized the Guidelines' deficiencies in *Kimbrough*, it still returned to the position that the Guidelines should serve as the "'starting point and the initial benchmark'" for a district court's sentencing decision. *Id.* at 108 (quoting Gall v.

Guidelines preserves the sentencing uniformity sought by mandatory guidelines.[63] Again, however, honesty and proportionality have been overlooked. Apparently, the Supreme Court is holding to its longtime position that the Guidelines achieve the sentencing purposes set forth by Congress, and that its proposed ranges are meaningful. A closer look at the development of the Guidelines casts this position in a very questionable light.

III. BREAKING AWAY FROM THE THREE-PART HARMONY: WHAT HAPPENED TO THE SENTENCING POLICIES?

In the *Booker* line of cases, the Supreme Court made it clear that it believes the Sentencing Guidelines provide valuable information to sentencing courts. This was evident in *Booker* when the Court stated "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[64] In *Rita*, the Court upheld the presumption of reasonableness for Guidelines-based sentences, reasoning, "The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate."[65] In *Gall*, the Supreme Court reiterated, "[E]ven though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[66] Finally, in *Kimbrough*, even though the Court acknowledged the faultiness of the Commission's crack cocaine sentencing ranges, the Court allowed for "a key role for the Sentencing Commission."[67] The Court held that the Sentencing Commission has the capability to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."[68] While purportedly downgrading the Guidelines to advisory status, the Supreme Court seems to ultimately maintain its confidence in the Guidelines.

Despite the Court's confidence, the Guidelines were not created in

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United States, 552 U.S. at 49 (2007)). *See also Irizarry*, 128 S. Ct. at 2202 ("the Guidelines, as the 'starting point and the initial benchmark,' continue to play a role in the sentencing determination").

[63] *Gall*, 552 U.S. at 49 (2007) (explaining that the purpose of beginning with the Guidelines calculation is "to secure nationwide consistency").

[64] United States v. Booker, 543 U.S. 220, 264 (2005).

[65] Rita v. United States, 551 U.S. 338, 349 (2007).

[66] *Gall*, 552 U.S. at 46.

[67] *Kimbrough*, 552 U.S. at 108.

[68] *Id.* at 109 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007)).

a manner that warrants such deference. Prior to the development of the Guidelines, criticism of disparate sentences for similarly situated offenders was widespread.[69] As Judge Frankel pointed out, allowing judges to sentence without guidance led to "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[70] Judge Frankel highlighted the need for "meaningful criteria" for assigning a sentence to a particular case.[71]

A. Politics as Muse: How the Guidelines Came to Be

Congress created the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[72] Additionally, with the establishment of the Sentencing Guidelines, Congress sought to achieve honesty, uniformity, and proportionality in sentencing.[73] However, the Sentencing Commission has fallen short of meeting its responsibilities. Contrary to Judge Frankel's vision for a politically insulated Sentencing Commission, Congress directed the development of guidelines that would reflect the "tough on crime" approach of Congress in the 1980s.[74] As one scholar stated, "Designed for an era of technocratic and rationalistic policymaking, [the Sentencing Commission] operated in an

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[69] *See, e.g.*, Federal Sentencing Reporter, *25% Rule Exhibits*, 8 Fed. Sent. R. 189 (1995) (discussing a 1974 Second Circuit Sentencing Study conducted by the Federal Judicial Center in which twenty identical files from actual cases were presented to fifty federal district court judges who were asked to indicate the sentence that they would impose, and reporting the great range of sentences that resulted) (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES 1–3 (1974)); Kevin Clancy et. al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Shari Diamond & Hand Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975); Marvin Frankel, *The Sentencing Morass, and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967); Ilene H. Nagel & John Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982); Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 167 (1973) ("The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia Circuit. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit.").

[70] CRIMINAL SENTENCES, *supra* note 21, at 7.

[71] *Id.*

[72] 28 U.S.C. § 991(b)(1) (2006).

[73] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (2009).

[74] An example of this is the Anti-Drug Abuse Act of 1986, which created mandatory minimum sentences for drug crimes. Anti-Drug Abuse Act of 1986, 21 U.S.C. §§ 801–802, 841 (2006). Another example of the political influence on the Guidelines is Congress's repeated rejections of the Sentencing Commission's proposals to change the 100-to-1 crack-to-powder cocaine policy. *See* U. S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997). For more on the development of the Guidelines, see STITH & CABRANES, FEAR OF JUDGING, *supra* note 9, at 38–77.

era of politicized and symbolic policymaking."[75] The Sentencing Commission did not necessarily design the initial Guidelines around informed, tested sentencing policies, nor were the Guidelines designed to effectuate any specific purpose or set of priorities. Ultimately, the Guidelines were criticized as a rush job for which a final draft was prepared to meet a swiftly approaching deadline.[76] The Sentencing Commission admitted that it did not identify priorities when setting the sentencing ranges. Instead, the Commission stated:

> Adherents of ["just deserts" and crime-control rationales, such as deterrence] have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation.[77]

Rather than choosing guiding sentencing principles, the Commission adopted "an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice."[78] However, developing sentencing ranges based on past practices was not done in any regularized fashion. The Commission increased penalties for white-collar crimes and violent crimes, finding that the existing sentences were inadequate.[79] Drug offenses were also given significantly harsher penalties, and those penalties were based on weight rather than empirical data related to the types of sentences being imposed for such offenses or the harms created by drug offenders.[80] Overall, the Guidelines reflected harsher penalties than were the norm at the time, with custody being favored over probation in most situations.[81] Thus, the Guidelines

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[75] Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 41 (2004).

[76] *See* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 369 (1989). After a greatly criticized first draft of the Guidelines, the Sentencing Commission submitted a revised draft for public review in 1987, which also received much criticism. Rather than addressing the problems, the Commission moved quickly through the next revision process to meet the congressional deadline with very little further public input. *See Sentencing Commission Sends Guidelines to Congress*, 41 CRIM. L. REP. (BNA) 1009 (Apr. 15, 1987).

[77] From the U.S. SENTENCING GUIDELINES MANUAL (1988), set forth in T. HUTCHINSON & D. YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 4–5 (1989).

[78] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[79] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 15 (2004) [hereinafter FIFTEEN YEARS STUDY].

[80] *Id.* at 8–9.

[81] The Commission admitted that the Guidelines would reduce the availability of probation for certain property crimes from 60% to 33%, and that the percentage of offenders who would receive probation terms requiring some period of confinement would increase from 15% to over 35%. *See* U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES

contributed to the creation of an era of over-incarceration.[82] Even where the Guidelines did reflect past sentencing practices[83] by averaging the existing disparate sentences, the Commission retained the same biases in the Guidelines ranges that led to disparate sentencing in the first place. Rather than study the effects of certain sentences on crime control or a true community sense of retribution, the Commission allowed problematic sentences to serve as the basis for the new sentencing ranges, as though those problems could be averaged away.

These faults did not go unnoticed. Critics condemned the Guidelines for their rigidity and departure from individualized sentencing. Professor Charles Ogletree argued in 1988 that several failures made the Sentencing Guidelines "quite disappointing."[84] He stated that the Commission "did not draft guidelines that adequately considered important offender characteristics, such as age, prior drug history, and the extent of the individual offender's blameworthiness for the specific crime for which he is being sentenced."[85]

The failure to allow for adequately individualized sentencing was not the only source of discontent with the new sentencing scheme. Critics also argued that the Guidelines' punishments were too harsh for particular types of conduct.[86] For example, Professor Ogletree complained that "the Commission gave only modest consideration to the potential impact of prison overcrowding as a result of the existing mandatory drug and repeat offender statutes coupled with the implementation of the sentencing guidelines."[87] Further, some critics found the Guidelines out of line with public opinion.[88] Others complained that the Guidelines actually led to increased sentencing disparity.[89] On this point, Professor Ogletree asserted that, in

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AND POLICY STATEMENTS 8, 61 (1987); *see also* von Hirsch, *supra* note 73, at 369, 373.

[82] The Sentencing Commission acknowledged that the Guidelines would lead to a doubling of the federal prison population in the decade following their adoption, but did not give any significant recommendations on how to practically manage this huge increase. *See* von Hirsch, *supra* note 73, at 374 n.34 (citing T. HUTCHINSON & D. YELLEN, FEDERAL SENTENCING LAW & PRACTICE: SUPPLEMENTARY APPENDICES 215, 217 (1989)).

[83] *But see* STITH & CABRANES, *supra* note 9, at 60–61 (explaining that the Commission deviated from past practices far more often than it relied on them). This source cites U.S.S.C. 1997b, 6 and explains that "drug offenses constitute 40 percent of all convictions, firearms and robbery cases constitute another 10 percent of convictions, and varieties of white collar crime another 13 percent." *Id.*

[84] Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988).

[85] *Id.* at 1951.

[86] *See, e.g.*, MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY, 5–6 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$file/gssurvey.pdf (noting that most federal judges desired additional discretion to grant more lenient sentences than those recommended by the Guidelines).

[87] Ogletree, *supra* note 81, at 1951; *see also* von Hirsch, *supra* note 73, at 374 (also arguing that the Sentencing Commission did not consider the Guidelines' effect on the prison population).

[88] *See* U.S. SENTENCING COMM'N, JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES 3, 5 (1997), *available at* http://www.ussc.gov/publicat/justpun.pdf.

[89] *See Sentencing Commission's First Effort Receives Outpouring of Criticism*, 40 CRIM L. REP. (BNA) 2223–28, 2225 (Dec. 17, 1986).

promulgating the Guidelines, the Commission "failed to address . . . the particular problem of racial disparity in sentencing."[90] He and others criticized the Commission for its lack of transparency while developing the final version of the Guidelines. The criticisms of the day dug directly into the sentencing purposes—honesty, uniformity, and proportionality—that Congress established for the Guidelines. All of these problems arguably persist today.

B. Today's Guidelines Are Still Discordant: Missing the Balance Among Uniformity, Honesty, and Proportionality

Although Congress has amended and revised the Sentencing Guidelines many times since their inception in the 1980s, the Guidelines' essential framework has remained the same. So, to, have their harsh, punitive nature and the consequences of that harshness. The Guidelines have remained a rigid grid calling for courts (and probation officers) to conduct mechanical calculations that lead to lengthy sentences.[91] The result has been the over-incarceration catastrophe that critics predicted when the Guidelines were first instituted.[92] Arguably, all of these problems would be worth their costs if the Guidelines actually achieved the goals for which they were created—honesty, uniformity, and proportionality. A twenty-year history has produced results that call into question the Guidelines' success at achieving those objectives.

The Court has touted uniformity as the Guidelines' most important goal.[93] Therefore, under the Guidelines, punishment should be the same for similarly situated offenders who have committed the same type of conduct and different for differently situated offenders who have committed different types of conduct.[94] However, empirical studies and scholarly research reveal that the Guidelines have failed to achieve these purposes. In some cases, the Guidelines even exacerbate sentencing disparities. For example, the Guidelines contribute to sentencing

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[90] Ogletree, *supra* note 81, at 1939.

[91] As Professor Michael Tonry has noted, there is a problem "[w]hen laws require that sentences be calculated by means of mechanical scoring systems, as the Federal Guidelines [do] rather than by looking closely at the circumstances of individual cases . . . ." Tonry, *supra* note 72, at 46.

[92] According to the Justice Department's Bureau of Justice Statistics, the American prison population exceeded two million in 2002. At the end of 2001, federal prisons were operating at 31% above capacity. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim02.pdf.

[93] United States v. Booker, 543 U.S. 220, 250 (2005) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.").

[94] For support of this definition of sentencing uniformity, see Justice Breyer's discussion in *Booker* of sentencing hypotheticals. *See id.* at 252–53.

disparities by allowing for reductions in offense points for substantial assistance[95] and by providing for the availability of fast-track[96] early disposition procedures that are used in some jurisdictions. Both of these processes allow for the disparate sentencing of defendants with the same real-world offense conduct.[97] Further, some scholars have pointed to the complexity of Guidelines calculations as a contributor to sentencing disparities.[98] The numerous factors involved in calculating sentences using the Guidelines can lead to varying results depending upon who selects the factors to include in the computation.[99] This discrepancy has been shown by studies involving different probation officers who, given the same facts, come to different sentencing range determinations.[100]

Studies conducted by the Sentencing Commission demonstrate that the Guidelines have not eliminated the federal sentencing disparity problem. A 2004 Sentencing Commission report noted that regional, inter-district differences in drug trafficking cases increased post-Guidelines.[101] The Commission suggested that much of the disparity was due to differences in charging and plea bargaining policies and practices among the ninety-four U.S. Attorney Offices.[102] Inter-judge sentencing variations, although reduced, also remain statistically significant.[103] The Commission's study revealed that disparities based on supposedly irrelevant offender characteristics, such as race and ethnicity, continue to exist under the Guidelines.[104] Other studies have confirmed these racial and ethnic disparities, as well as sentencing disparities along the lines of socioeconomic status, gender, and even political affiliation.[105]

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[95] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

[96] *See* PROTECT Act of 2003, 117 Stat. 650, § 401(m)(2)(B), 28 U.S.C.A. § 994 (2003) and U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 cmt. background (2005).

[97] *See* United States v. Galvez-Barrios, 355 F. Supp.2d. 958, 963–65 (E.D. Wis. 2005) (identifying fast-track programs as sources of sentencing disparity); *see also* FIFTEEN YEARS STUDY, *supra* note 76, at xii, 103, 106–07 (explaining the process of reducing sentences based upon substantial assistance and the fast-track early disposition procedure, and how both contribute to disparities under the Guidelines).

[98] Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT. R. 249, 252–53 (2005) (citing R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplifications*, 7 PSYCHOL. PUB. POL'Y & L. 739, 764–65 (2001)).

[99] *Id.*

[100] *Id.*

[101] *See* FIFTEEN YEARS STUDY, *supra* note 76, at 47–48.

[102] *Id.* at xii, 92.

[103] *Id.* at 99.

[104] *See id.* at xiv, 122–27 The study explains the odds of a typical black drug offender being sentenced to imprisonment are about 20% higher than the odds of a typical white offender, while the odds of a Hispanic drug offender are about 40 % higher. "Typical" refers to average offense and average seriousness. Further, "[t]he typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer. A similar effect is found for Hispanic drug offenders . . . ." *Id.* at 123. The Commission was not willing to say that these disparities are due to deep-seated racism, but did acknowledge that the disparity exists and that it was not eliminated by the Guidelines.

[105] *See, e.g.*, Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentencing Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC'Y REV. 789, 817 (1997) (finding sentencing disparities related

The Sentencing Guidelines were also designed to increase honesty in sentencing. As already explained, "honesty" refers to sentence determinacy and transparency.[106] During the era of mandatory Guidelines, any sentence imposed would be a reflection of whatever sentencing sources were used by the Sentencing Commission in developing the Guidelines ranges. These sources ranged from Congressional mandate to the Commission's own policy developments. In 2004, the Commission used its fifteen years of experience with the Guidelines to make the following statement regarding sentencing transparency:

> Sentencing may now be the most transparent part of the criminal justice system. Not only is sentencing done publicly in open court, with factual findings and determinations of law made on the record, but a detailed database of offense and offender characteristics and the judge's decisions are compiled by the Sentencing Commission.[107]

The Commission's statement is illustrative of an important belief—all that is required to give meaningful information about sentencing sources is to link factual and legal determinations to their applicable Guidelines categories (offense and offender characteristics). Perhaps this position had some persuasiveness pre-*Booker*; however, for reasons previously discussed, the Commission's own sources for creating the sentencing ranges are somewhat elusive.

Now, in the post-*Booker* advisory Guidelines regime, another wrinkle has been added to the meaning of sentencing transparency—courts are now able to sentence outside of the range set by the Sentencing Commission. The source of those resulting sentences ought to be just as important as, if not more important than, the sources of the Guidelines ranges themselves. The most effective way of enforcing the transparency of sentencing in an advisory Guidelines system would be to impose a strict requirement on sentencing courts to articulate their reasons for imposing a particular sentence. The sentencing statute

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to defendants' ethnicity, gender, education level, and non-citizenship status); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311–12 (2001) (finding that black and male offenders with low educational attainment and low income levels receive longer sentences, mainly due to sentencing departures); Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 781 (2006) (finding racial disparities in Guidelines sentences for white-collar offenses). Further, certain empirical and anecdotal studies conducted pre-Guidelines indicated that characteristics of individual judges affect sentencing outcomes. *See, e.g.*, Diamond & Zeisel, *supra* note 20, at 114 ("[I]t is reasonable to infer that the judges' differing sentencing philosophies are a primary cause of the disparity."). Other studies conducted in the Guidelines era indicate that judge characteristics can still influence sentencing outcomes. *See, e.g.*, Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008).

[106] *See supra* note 13 and accompanying text.

[107] FIFTEEN YEARS STUDY, *supra* note 76, at x, 80.

already calls for the articulation of reasons in § 3553(c):

> Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in subsection (a)(4),[108] the specific reason for the imposition of a sentence different from that described . . . must also be stated with specificity in the written order of judgment and commitment . . . .[109]

And while nothing in the *Booker* line of cases invalidated this provision, § 3553(c) ought to have an adjusted meaning in the advisory Guidelines regime. After *Booker*, a sentencing court does not have to rely on the Sentencing Commission's sentencing recommendation and, in fact, is prohibited from presuming that the applicable Guidelines range provides a reasonable sentence.[110] Therefore, rather than merely stating reasons in open court, a sentencing court should be required to tie those reasons to the § 3553(a) factors that both Congress and the *Booker* Court set forth as the guiding considerations in sentencing.

In *Rita*, the Supreme Court acknowledged the importance of a court stating its reasons, but then it downplayed the enforcement of an articulation of reasons and failed to require those reasons to be consistent with the § 3553(a) factors.[111] Particularly, the Supreme Court stated: "Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust."[112] The Court's words echo the Congressional concern about honesty and transparency in sentencing. However, the Court then stopped short of rigorous enforcement and explained:

> That said, we cannot read [§ 3553(c)] (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted," or "denied" on the face of a motion while

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[108] 18 U.S.C. § 3553(a)(4) directs district courts to consider the applicable Guidelines range in determining an appropriate sentence.

[109] 18 U.S.C. § 3553(c) (2000 & Supp. v. 2005).

[110] The Supreme Court stated very clearly in *Rita* that the presumption of reasonableness for within-Guidelines sentences is an appellate presumption only, and that district courts are not allowed to presume that Guidelines sentences are reasonable. Rita v. United States, 551 U.S. 338, 351 (2007) ("We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review." (emphasis in original)).

[111] *Id.* at 356.

[112] *Id.*

> relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.[113]

And, while the Court left the quantity of stated reasons to a sentencing judge's discretion, the Court did require that a district court articulate its reasoning enough "to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority."[114] This, of course, is a very vague directive that essentially leaves it to the circuit courts to determine whether the quality of the stated reasons is adequate. But, in a final word of what can barely pass as explanation, the Supreme Court fell back on its still-unclear "reasonableness" requirement, and indicated that a district judge may need to give a more robust explanation if "a party contests the Guidelines sentence generally under § 3553(a)—that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant *characteristics* in the proper way—or argues for departure."[115] This puts the onus on the parties to give the sentencing court a reason for further explanation, rather than expecting the court to give a meaningful explanation as a matter of course.

The Supreme Court extended this line of thinking in *Gall*, stating that "a major departure [from the Guidelines] should be supported by a more significant justification than a minor one . . . ."[116] Once again, the Court did not explain what form this more significant explanation should take. Nor did it say that such explanation should indicate the sentencing court's reliance on the § 3553(a) factors. As a result of the Supreme Court's decision to not decide how thorough sentencing explanations ought to be, the circuit courts have taken it upon themselves to decide the matter. And, just as with the presumption of reasonableness, as well as other developments in the post-*Booker* sentencing world, the circuit courts have come to a variety of conclusions that take federal sentencing further away from the honesty that Congress sought and that the Supreme Court recognized as important.

Several circuits recognize that articulating reasons is required for a district court's sentence to be procedurally reasonable.[117] Similarly, most circuits identify the same or essentially the same reasons for the

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[113] *Id.*

[114] *Id.* (citing United States v. Taylor, 487 U.S. 326, 336–37 (1988)).

[115] *Rita*, 551 at 357 (emphasis added).

[116] Gall v. United States, 552 U.S. 38, 50 (2007).

[117] *See, e.g.*, United States v. Cavera, 550 F.3d 180, 192 (2d Cir. 2008) (asking, "But what does the procedural requirement, that the district court must explain its reasons for its chosen sentence, entail?"); United States v. Figaro, 273 F. App'x 161, 163–64 (3d Cir. 2008) ("It is therefore vital that the district court 'state adequate reasons for a sentence on the record so that this court can engage in meaningful appellate review.'" (quoting United States v. King, 454 F.3d 187, 196–97 (3d Cir. 2006)); *see* United States v. Cousins, 469 F.3d 572, 578 (6th Cir. 2006) (finding a sentence procedurally unreasonable when "the district judge failed to provide his reasoning for the variance").

articulation requirement, which often includes an acknowledgment that those reasons ought to be tied to the § 3553(a) factors. The Second Circuit gave a detailed explanation in the 2008 case, *United States v. Cavera*:

> Requiring judges to articulate their reasons serves several goals. Most obviously, the requirement helps to ensure that district courts actually consider the statutory factors and reach reasoned decisions. The reason-giving requirement, in addition, helps to promote the perception of fair sentencing. . . . Furthermore, the practice of providing reasons "helps [the sentencing process] evolve" by informing the ongoing work of the Sentencing Commission. Finally, for our own purposes, an adequate explanation is a precondition for "meaningful appellate review." We cannot uphold a discretionary decision unless we have confidence that the district court exercised its discretion and did so on the basis of reasons that survive our limited review. Without a sufficient explanation of how the court below reached the result it did, appellate review of the reasonableness of that judgment may well be impossible.[118]

The Second Circuit suggests that one of the goals of articulating reasons is to confirm that sentencing courts have properly considered the required sentencing factors. This should require that district courts explain how their imposed sentences relate to the § 3553(a) factors, which would satisfy the honesty goal. Even with this lengthy and promising explanation of the purposes of articulating reasons, the Second Circuit still had to explain how much and what type of articulation is needed to satisfy those purposes. In doing so, the Second Circuit merely echoed the words of the Supreme Court by determining that "what is adequate to fulfill these purposes necessarily depends on the circumstances" but declining to "require 'robotic incantations' that the district court has considered each of the § 3553(a) factors."[119] The Seventh Circuit's approach is nearly identical.[120] The Eighth Circuit gave even less meaning to the articulation requirement by openly presuming that "district judges know the law and understand their obligation to consider all of the § 3553(a) factors."[121] In each of these circuits, district courts are left with limited to no guidance on how to sentence transparently using the § 3553(a) factors to fulfill the § 3553(c)

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[118] *Cavera*, 550 F.3d at 193 (court's original emphasis included; internal citations omitted).

[119] *Id.* (quoting United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005) and citing *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006)).

[120] *See* United States v. Shannon, 518 F.3d 494, 496 (7th Cir. 2008) ("The court need not address every § 3553(a) factor in checklist fashion, explicitly articulating its conclusions regarding each one.").

[121] United States v. Jenkins, 321 F. App'x 544, 546–47 (8th Cir. 2009) (quoting United States v. Gray, 533 F.3d 942, 943 (8th Cir. 2008)).

requirement. And, the implication in most cases is that any articulation requirement is heavily geared toward explaining why a Guidelines sentence was not chosen, just as in the pre-*Booker* understanding of § 3553(c).

Even when circuit courts find that a district court has failed to adequately state reasons for a sentence, the circuit court's reasons for finding error tend to rely heavily on the district court's failure to explain why the Guidelines sentence was inadequate, rather than why the § 3553(a) factors make the imposed sentence reasonable. For instance, in the case of *United States v. Blackie*, the Sixth Circuit found plain error affecting the defendant's substantive rights because the sentencing court failed to indicate that the imposed sentence was outside the Guidelines range and failed to state specific reasons for sentencing outside of the Guidelines range.[122] The Sixth Circuit acknowledged that articulating reasons for a sentence "is important not only for the defendant, but also for the public 'to learn why the defendant received a particular sentence.'"[123] This position goes to the heart of the honesty in sentencing that Congress sought through the Commission and the Guidelines. The Sixth Circuit's reasoning reveals that its real concern was not whether the district court revealed sources that would inform whether the imposed sentence was reasonable, but rather the district court's failure to explain why the Guidelines sentence was unreasonable.

The Sixth Circuit distinguished *Blackie* from *United States v. Hernandez*,[124] in which the court found a procedural error in the district court's failure to explicitly state a reason for a particular sentence within the Guidelines range.[125] The *Hernandez* court had held that such a statement was necessary for full compliance with § 3553(c), but still found that the defendant's substantive rights were not affected.[126] Ultimately, the Sixth Circuit distinguished *Blackie* from *Hernandez* by recognizing that the unexplained sentence imposed in *Hernandez* was within the Guidelines.[127] The Tenth Circuit took this approach as well. According to that court, the articulation requirement is necessary to reveal "the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation."[128] Apparently, circuit courts are comfortable considering the Commission's sources as the sources of district courts when a within-Guidelines sentence is imposed.

In all circuits, however, the Guidelines are taken to fulfill the honesty requirement in their own right, regardless of the § 3553(a)

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[122] United States v. Blackie, 548 F.3d 395, 401 (6th Cir. 2008).
[123] *Id.* at 403 (quoting *In re* Sealed Case, 527 F.3d at 191).
[124] 213 F. App'x 457 (6th Cir. 2007).
[125] *Blackie*, 548 F.3d at 402–03, n.3 (citing *Hernandez*, F. App'x at 459 n.62).
[126] *Id.* at 402–03, n.2.
[127] *Blackie*, 548 F.3d at 402–03, n.2.
[128] United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1222–23 (10th Cir. 2008).

factors theoretically analyzing a sentence's reasonableness. Thus, the articulation requirement is satisfied without direct reference to the § 3553(a) factors. The articulation requirement is only truly an issue when a sentence is outside of the Guidelines range. Such a situation creates an obligation to supply an explanation sufficient to convince a reviewing court that the Guidelines range was inappropriate. This narrowly read articulation requirement limits a lower court's duty to be honest in sentencing. It also reduces the duty to inform both the parties and public of the reasons why a particular sentence was chosen, merely entitling them to a reason why a Guidelines sentence was not chosen.

The third sentencing objective given by Congress to the Commission was proportionality. The proportionality requirement is concerned with imposing sentences that are consistent with the actual severity of the conduct underlying offenses.[129] The proportionality problem with the Guidelines is most evident in the drug offense category. In its 2004 report on fifteen years of using the Guidelines, the Commission admitted that finding the correct punishment ratios among different drugs and the correct quantity thresholds for each penalty level has proven problematic.[130] The Commission recognized that many of the drug Guidelines resulted in severe penalties for many street-level sellers and other low culpability offenders.[131] For example, the Guidelines categorize a person having two prior drug trafficking convictions as a career offender, which puts the sentencing range at or near the statutory maximum.[132] In 2000, there were 1279 offenders subject to the career offender provisions, triggering some of the Guidelines' most severe penalties.[133] This would not be so disturbing except for the fact that the Commission found that the recidivism rates among repeat drug traffickers is significantly less than other offenders in the career offender category.[134]

Although the Guidelines were designed to be a work in progress, twenty years after their inception, many of the same problems remain. Most troubling is that the Guidelines have fallen short of their intended goals to bring uniformity, honesty, and proportionality to sentencing, even after years of use and many opportunities for improvements. Despite this troubled run, the Supreme Court has continued to advocate for the Guidelines to play a prominent position, as shown by the holdings

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[129] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[130] FIFTEEN YEARS STUDY, *supra* note 76, at 51.

[131] *Id.*

[132] *Id.* at 133–34.

[133] *Id.*

[134] For example, violent offenders, another group in the career offender category, have a 52% recidivism rate as compared to the 27% recidivism rate among drug offenders who are put in the career offender categories. *Id.* at 134. Arguably this could support the argument that locking up these "career" drug offenders for such a long time actually causes the reduced recidivism so it is therefore sound sentencing policy, but the Commission did not seem to interpret the statistics in that manner. Rather, the Commission's study suggests that this treatment of drug offenders is unjustifiably harsh. *Id.*

in *Booker* and subsequent cases on the issue. The Court has so ruled without reference to how the Guidelines serve the proportionality and honesty purposes of sentencing. On the contrary, much emphasis has been placed on the Guidelines' role in maintaining sentencing uniformity. In elevating uniformity over honesty and proportionality, the Supreme Court purported to use Congressional policy valuations in its interpretation of the constitutionally appropriate role of sentencing guidelines. But the Guidelines only provide uniformity as an end in itself, rather than uniformity in order to reach sound sentencing. In sum, there is little support in policy for the level of importance to which the Supreme Court has elevated the Guidelines. This is especially so given that the Court could have been truer to the stated reasons for developing the Guidelines.

IV. STATUTORY ROOM TO DANCE TO A NEW SENTENCING BEAT

If the Sentencing Guidelines do not reflect the original policies Congress set forth, one would think that the reason the Supreme Court continues to require district courts to begin sentencing determinations with a Guidelines calculation is because it is mandated by statute. The first rule of statutory construction is to begin with the language of the statute.[135] When the language of the statute is clear, the plain meaning of the words is applied without further analysis.[136]

In *Booker*, the Supreme Court excised the portions of the sentencing statute that made the Guidelines mandatory.[137] The portion of the remaining statute that mentions consideration of the Guidelines is 18 U.S.C. § 3553(a), which requires that sentencing courts consider the following:

> (1) the nature and circumstances of the offense and the history and characteristics of 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; . . . (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for [the offense] . . . ; (5) any pertinent policy statement—issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities . . . ; and (7) the need to

[135] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.'" (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992))).

[136] *Id.* ("And where the statutory language provides a clear answer, it ends there as well." (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992))).

[137] United States v. Booker, 543 U.S. 220, 223–24 (2005).

provide restitution to any victims of the offense.[138]

Section 3553(a)(4) clearly requires consideration of the Guidelines range in imposing a sentence; however, the statute does not mandate that the sentencing range should have more importance than any of the other listed factors. While, absent any statutory amendment on the part of Congress or a finding of unconstitutionality, the Supreme Court cannot order district courts to ignore the Guidelines calculations completely, there is also no statutory command compelling the Court to *begin* sentencing determinations with the calculation of the Guidelines range. In fact, it is actually contrary to statutory construction to elevate factor (4) above any of the other factors. The Supreme Court has added its own gloss to the meaning of § 3553(a) and, in doing so, diminished valuable (and required) sentencing considerations.

Even if the inquiry looked past the plain language of § 3553(a) and considered Congressional intent, each of the § 3553(a) factors serve the Congressional sentencing goals—honesty, uniformity, and proportionality. For instance, § 3553(a)(1) calls for considering specifics about the offense as well as the offender, allowing uniform and proportional sentences. The call for a sentence to "reflect the seriousness of the offense" and "to provide just punishment" hits directly at the heart of proportionality. The uniformity goal is reflected in the mandate to "avoid unwarranted sentence disparities." The directive to consider "pertinent policy statements" by the Sentencing Commission serves the honesty goal by guiding sentencing courts toward concrete sentencing sources. Finally, "promot[ing] respect for the law" is the purpose of seeking honesty in sentencing. Even when looking to Congressional purposes, it is arguable that all of the § 3553(a) factors have equal merit in achieving the goals of sentencing set forth by Congress. Therefore, the only apparent explanation for the Supreme Court imposing this starting calculation requirement is that the Court is hesitant to lose the promise of uniformity that the Guidelines originally represented. Placing the Guidelines calculations as the anchor for sentencing determinations is actually counter to what the Supreme Court claims to preserve. In actuality, the § 3553(a) sentencing statute provides ample room for the Court to encourage honesty, proportionality, and informed uniformity in sentencing determinations.

V. WHAT HAPPENS NEXT? CHANGING THE TUNE OF FEDERAL SENTENCING BY GUIDING DISCRETION TO REASONABLENESS

This article has demonstrated that there is no convincing statutory or policy-based reason for the Supreme Court to retain the Guidelines as

[138] 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

a required starting point in sentencing. Although the Guidelines were introduced to facilitate sentencing uniformity, they were also intended to promote honesty and proportionality. The Supreme Court has put the Guidelines in an undeserved place of prominence by requiring that sentencing determinations start with consideration of the Guidelines. When this procedural approach is coupled with a weak and unenforced articulation requirement, it is evident that the Court views the § 3553(a) factors—other than those that reference the Guidelines or the uniformity goal—as unimportant. The Supreme Court has failed to proffer any reason for not protecting all of the § 3553(a) factors. The § 3553(a) factors in their entirety, combined with a robust district court articulation requirement and controlled appellate review, could save sentencing uniformity and give meaning to the honesty and proportionality goals. By allowing district courts to individualize sentences with the guidance of all the § 3553(a) factors, a new rhythm in federal sentencing can be introduced.

Once the Guidelines are removed from the heart of sentencing, several beneficial changes must take place that give substantive meaning to uniformity, honesty, and proportionality. The § 3553(a) factors must become more important to sentencing determinations. Rather than simply explaining whether a Guidelines sentence was reasonable in a given case, district courts would have to explain how the imposed sentence comports with all of the § 3553(a) factors. After all, the statute clearly states that sentencing courts *shall* consider the § 3553(a) factors. Therefore, a district court would have to explain what exactly it was about the "nature and circumstances of the offense and the history and characteristics of defendant" that warranted the imposed sentence, even if a Guidelines sentence was imposed.[139] Further, when sentencing defendants, sentencing courts should have to describe how the imposed sentences "reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment . . . ."[140] A judge would also have to articulate how the imposed sentence "avoid[s] unwarranted sentence disparities" and "provide[s] restitution to any victims" where relevant.[141] The applicable Guidelines range would be just one of the many considerations that a sentencing court would be forced to consider and address clearly.[142]

One argument against removing the Guidelines as a sentencing benchmark is that doing so would eliminate any hope of sentencing uniformity and return us to the era of unfettered judicial discretion. As already explained, uniformity was sought by Congress as a means of eliminating the bias that lead to disparate sentencing. Therefore, a

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[139] *See* 18 U.S.C. § 3553(a)(2) (2000 & Supp. V 2005).
[140] 18 U.S.C. § 3553(a)(2)(A).
[141] 18 U.S.C. §§ 3553(a)(6), (7).
[142] 18 U.S.C. § 3553(a)(4).

system that reinforces the biases sought to be eliminated does not solve the problem. The current system saves uniformity for its own sake, rather than providing uniformly sound sentencing policy.[143] Uniformity should cease to be the courts' overriding focus. Another manner of preserving uniformity while removing the Guidelines as the starting point, is to focus sentencing decisions on the sentencing factors in a meaningful way.

One might also argue that without the Guidelines as a starting point, district courts will be given the arduous and inefficient task of giving lengthy sentencing explanations even in garden variety cases. In fact, besides the loss of uniformity argument, once one accepts the premise that the Guidelines are poor indicators of sentencing reasonableness, efficiency is the only justification for using the Guidelines as a starting point. Such an argument would claim that it would be too time-consuming for courts of appeals to develop the meaning of the § 3553(a) factors, or for district courts to explain how the sentences they impose relate to the § 3553(a) factors. However, the most efficient means of coming to a reasonable sentence is not a § 3553(a) factor, and as such, efficiency should not have the same level of importance as the factors that are actually listed as proper considerations in the sentencing statute.

Furthermore, a robust explanation requirement still leaves room for courts to develop efficient ways of stating their reasons without completely skirting the statutory duty to consider the factors set forth in § 3553(a). For example, a particular district or circuit could use stock language to describe the applicability of the sentencing factors for similar cases, while only making an elaborate explanation when a case warrants it. This is very different from simply giving a cursory statement that the court has considered the § 3553(a) factors, because it would identify for appellate courts the individual sentencing factors that the district court found to be of particular importance to that specific case. An appellate court could then determine whether the district court's focus on a particular § 3553(a) factor was consistent with that circuit's developing sentencing practice.

Arguably, this approach also threatens the presumption of reasonableness for within-Guidelines sentences that has been adopted by many circuits.[144] However, the Supreme Court has made clear that the presumption of reasonableness is only an appellate presumption, and that

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[143] There is an argument that uniformity is a valuable goal even if it is empty uniformity. One could say that even unduly harsh and non-transparent sentences are acceptable if all similarly situated offenders are sentenced in the same manner. This argument would be more persuasive if Congress listed uniformity as its only or main objective in sentencing. However, the sentencing statute clearly lists other important sentencing factors. Therefore, if courts are to follow the current sentencing statute, uniformity for the sake of uniformity cannot be the only goal considered.

[144] The Fourth, Fifth, Sixth, Seventh, Eight, and Tenth Circuits have adopted a presumption of reasonableness for within-Guidelines sentences. *See, e.g.* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Tobacco, 428 F.3d 1148, 1151 (8th Cir. 2005); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

the district courts are prohibited from presuming that within-Guidelines sentences are reasonable simply because they are Guidelines sentences.[145] Therefore, even under the Court's current sentencing approach, district courts must consider the § 3553(a) factors when determining a reasonable sentence.[146] The appellate presumption of reasonableness, however, strips the circuit courts of their duty to determine whether the sentencing courts have in fact considered the reasonableness of the imposed sentence for themselves. It is appellate review that can effectively maintain uniformity in the post-*Booker* era.

By requiring district courts to clearly tie their sentences to the § 3553(a) factors, honesty in sentencing can be strengthened. There are several reasons to desire honesty in sentencing—from promoting the public's respect for the law to informing the parties for appeal purposes. As far as bias reduction is concerned, honesty in sentencing plays a vital role in forcing a sentencing judge to come up with valid reasons for imposing a sentence. It is true that a sentencing judge could fabricate an explanation in order to hide the impermissible reasons that may drive his or her decision (e.g. justifying a particularly long sentence to provide fair punishment when the judge is actually biased against defendants of that race or economic class). Regardless, the requirements do have merit. For example, when a judge must provide meaningful explanations about how sentences satisfy particular sentencing factors, appellate courts have greater opportunities to uncover dishonesty in sentencing judges' reasoning.

Another progressive change would result from removing the Guidelines as the starting point of sentencing determinations. The question remains whether the Guidelines' placement at the beginning of the process is important. After all, courts are required to consider the Guidelines at some point. Psychological anchoring studies suggest that it is difficult for decision-makers to break away from their initial starting point.[147] Therefore, beginning the sentencing determination with the Guidelines makes it difficult for a sentencing court to give equal consideration to the other § 3553(a) factors. There is no statutory basis for the Supreme Court to forbid courts from beginning their sentencing determination by calculating the applicable Guidelines range. However, by removing the requirement that they begin with the Guidelines, the Supreme Court would at least create the possibility of avoiding this anchoring effect. Once this is done, other sentencing resources can be used to fulfill the other § 3553(a) factors, especially those that speak to

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[145] *See* Rita v. United States, 551 U.S. 338, 351 (2007).

[146] *See* Gall v. United States, 552 U.S. 38, 49–50 (1997) (explaining that, in order for a sentence to be procedurally reasonable, a district court must have considered the § 3553(a) factors).

[147] *See generally* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall, Kimbrough, *and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115 (2008) (discussing the anchoring effect and why it is problematic in the current advisory Guidelines).

sentencing proportionality.

Some might argue that the Guidelines are the only reliable sentencing resource that district courts have at their disposal. There are other resources available, and once they are accepted as relevant, more resources may emerge. For instance, federal district courts can learn from the numerous state court initiatives on sentencing reform.[148] This potential fits with the directive of § 3553(a)(3) that "the kinds of sentences available" be considered by district courts. Considering a variety of sentencing resources along with the Commission's own policy statements[149] will give district courts a richer database from which to select a reasonable sentence, and will give appellate courts a true basis for determining whether district courts in fact considered all of the § 3553(a) factors. Attorneys and sentencing experts would then have the room to argue about sentencing proportionality, as well as other important sentencing characteristics, in ways that were previously trumped by reliance on the Guidelines. Of course, determining proportionate sentences is no easy task. The line between when a sentence is severe enough to reflect the seriousness of the real offense conduct, and when the sentence is too severe, is not entirely clear. This is why multiple resources should be utilized to inform a judge's decision on the appropriateness of a particular sentence in an individual case.

Sentencing is not a precise practice; however, it results in a precise punishment that must reflect precise factors. By allowing for many voices to chime in on the best methods for achieving this goal, courts will become better equipped to fit a sentence to an array of factors and characteristics. This challenge by other sentencing sources may also prompt the Commission to be more thorough in explaining the reasons behind its own recommended Guidelines ranges to demonstrate that those ranges should be given weight. In creating these explanations, the Commission may find reason to recommend that particular Guidelines ranges be revamped in order to be more in line with the sentencing purposes. This process would ensure that the Sentencing Commission is actually treating the Guidelines as the ever-evolving embodiment of the informed sentencing policy described by the Supreme Court in *Rita*.[150]

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[148] *See* PEW CENTER ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (2009); ROGER K. WARREN, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007); STEVE AOS, MARNA MILLER & ELIZABETH DRAKE, WASHINGTON STATE INST. FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTION TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006); TRACY W. PETERS & ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC'S SENTENCING REFORM SURVEY 10 (2006). The National Center for State Courts also provides numerous sentencing resources on the Center For Sentencing Initiatives section of its website, *See generally* National Center for State Courts: Research, http://www.ncsconline.org/csi/analysis.html (last visited Mar. 25, 2009).

[149] *See* 18 U.S.C. § 3553(a)(5) (2000 Supp. V 2005).

[150] *See* Rita v. United States, 551 U.S. 338, 350. In *Rita*, the Court acknowledged that "[t]he Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." The Court envisioned a process in which "[t]he Commission will collect and examine the results. In doing so, it

As all sentencing sources, including the Guidelines, become more refined and meaningful, district judges can become the sentencing experts that are in a "superior position to find facts and judge their import under § 3553(a)" as characterized by the Supreme Court.[151]

An obvious criticism of this approach is that the § 3553(a) factors are imprecise and that they can be given any meaning and used to justify any sentencing outcome. While this is certainly true, circuit courts can give meaning to the § 3553(a) factors in order to foster uniformity in sentencing purposes by removing the Guidelines from the start of sentencing. For instance, when district courts claim that a particular sentence is reasonable because it satisfies the § 3553(a) factors, and gives specific explanations as to why this is so, appellate courts can begin to speak to whether the district courts' reasons in fact correspond to the particular § 3553(a) factors. The circuit courts can begin to develop a legal definition of the § 3553(a) factors by determining what facts can be considered with regards to specific factors.[152] Circuit courts can guarantee that the district courts' reasons do in fact correlate to the § 3553(a) factors as they have come to be understood in that circuit, giving uniform meaning to the sentencing factors. In this way, circuit courts will ensure that district courts do not abuse their sentencing discretion, which is bounded by the § 3553(a) factors. Appellate courts will become the facilitators of sentencing uniformity, not by enforcing the Guidelines, but by ensuring that sentencing courts are using a common meaning of the factors set forth in § 3553(a). The § 3553(a) factors will become the new sentencing benchmarks, rather than pre-determined Guidelines ranges. This guided discretion approach is a more reasoned method that better protects the uniformity, honesty, and proportionality in sentencing that Congress sought to achieve in directing the Commission to develop the Guidelines in the first place.

VI. CONCLUSION

The current process of sentencing in federal courts clings to uniformity above all other sentencing objectives. Such uniformity is thought to be embodied in the application of the Guidelines. And though

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may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly." *Id.*

[151] Gall v. United States, 552 U.S. 38, 51 (1997).

[152] One might ask whether the resulting legal rules developed by circuit courts would actually represent an improvement over the Guidelines. The answer is that it may, and it may not. The opportunity always remains for Congress to amend the sentencing statute to adjust the appropriate sentencing factors, or to give them more precise meanings if Congress is not satisfied with circuit court interpretations. The approach proposed by this Article merely gives one method of attempting to make up for the Guidelines' shortcomings. It is certainly always within Congress' power to remedy those shortcomings on its own through the legislative process.

the Supreme Court made room for district courts to exercise their discretion in sentencing outside of the Guidelines in *Booker*, the Supreme Court's directive that sentencing must begin with a Guidelines calculation threatens that discretion. Beginning with the Guidelines might be an acceptable requirement if the Guidelines in fact contained principles that reflect the goals of sentencing that Congress has identified—uniformity, honesty, and proportionality. However, as this Article has demonstrated, all three of those goals are lacking in the current Guidelines. This is not to say that an advisory guidelines regime could never work. When the actual sentencing factors set forth in § 3553(a) are reflected in a court's reasons for imposing a sentence and direct the circuit court's analyses of whether a sentence is reasonable, the promise of advisory guidelines can begin to be realized. Not only will district courts have guidance in choosing an appropriate sentence, but circuit courts can also ensure uniformity through reviewing sentencing reasons, rather than just relying on the presumed reasonableness of the Guidelines. This approach will allow sentencing courts to practice the sort of individualized sentencing that the United States has considered fair for hundreds of years, while still protecting defendants from impermissible judicial bias. Finally, once the Guidelines are given less weight, there will be room for courts, practitioners, and scholars to begin thinking outside of the Guidelines box and really consider alternative methods of sentencing that will reflect sound sentencing policies. In this new sentencing system, although district judges may begin to hum their own sentencing tunes, all of the inspiration behind all of those melodies will be uniformly reasonable.