August 14, 2009

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

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Synopsis

The Federal Sentencing Guidelines were initially created to increase uniformity in sentencing by diminishing the influence of individual judges’ biases in the sentencing determination. However, now that the Guidelines have been rendered advisory by the Supreme Court in United States v. Booker¹, and circuit courts have been directed to review sentences for “unreasonableness”, most of the Supreme Court’s attention has been focused on ensuring the preservation of uniformity, rather than recognizing the continued importance of bias reduction. The assumption, it seems, is that once uniformity in sentencing is achieved then the potential of judicial bias has been erased. However, judicial bias in sentencing is not necessarily eradicated by the uniformity promised by sentencing guidelines, and this possibility of bias in sentencing also has implications for the honesty and appropriate proportionality that Congress has called for to inform

* Associate Professor of Law, University of Kansas. Earlier versions of this paper were presented at the 2009 Law and Society Annual, Conference, the 2009 Southeast/Southwest People of Color Legal Scholarship Conference, and the 2008 Central States Law Schools Association Annual Conference. I would like to thank the participants of those conferences for their valuable comments and feedback on this project. Special thanks are extended to Sam Kamin, Russell Jones, Cassia Byrne Hessick, and Lowen Exum for their extensive comments and assistance. I would also like to thank C. Sebastian Orosco, my research assistance, for his hard work.

sentencing decisions.\textsuperscript{2} However, the Supreme Court has ignored these additional purposes of sentencing. Recently, in \textit{United States v. Gall}, the Supreme Court explained that in order for a sentence to be procedurally reasonable, district courts must first calculate and consider the proper Guidelines range, consider the §3553(a) sentencing factors, and adequately explain the chosen sentence.\textsuperscript{3} However, out of those three requirements for procedural reasonableness, only the requirement that district courts begin the sentencing process by calculating the applicable Guidelines range –the factor that the Court considers to be the most closely related to ensuring uniformity- has been given any force. The requirements to consider the §3553(a) factors and adequately explain the sentence have fallen by the wayside as vague concepts, though these are the requirements that can most effectively ensure the reduction of impermissible bias in sentencing by allowing for a check on both honesty and proportionality. This Article reveals the Supreme Court’s error in requiring that district courts begin their sentencing determinations by calculating and considering the applicable Sentencing Guidelines range in order for the sentence to be procedurally reasonable. Not only is this requirement based on a misreading of the sentencing statutes, but it also cuts against the sentencing principles set forth by Congress as well as the traditional concern with individualized sentencing that has always been at the heart of sentencing jurisprudence and that are reflected in both the honesty and proportionality goals.

\textsuperscript{2} Congress originally sought to achieve three goals with the Sentencing Guidelines: (1) “honesty in sentencing”; (2) “uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders”; and (3) “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity. U.S. Sent’g Comm’n, Guidelines Manual § 1A1.1 ed. n. (2007)(emphasis added).

\textsuperscript{3} 128 S.Ct. 586, 596 (2007).
This Article provides an in-depth look at the Guidelines themselves in order to make the argument that the Supreme Court’s approach to sentencing post-Booker is misguided. The Supreme Court’s framework for an advisory Guidelines scheme allows the biases that are already buried in the Guidelines themselves to continue to act as the prevailing factors in sentencing. These biases, whatever the source, counteract Congress’ three-fold purpose in promulgating the Sentencing Guidelines in the first place – honesty, uniformity, and proportionality. Even the recent Supreme Court decision, Kimbrough v. United States, acknowledged that the Guidelines can sometimes create unwarranted disparities and lead to sentences that are unduly harsh.\textsuperscript{4} The new, advisory Guidelines system provides the opportunity for the Court to require that sentences be based on §3553(a) factors, in order to create uniformity in sentencing purposes rather than just in sentencing results, and to require real explanations to justify those sentences. Therefore, this Article proposes that the Supreme Court do away with the procedural requirement that district courts begin the sentencing process by calculating the Guidelines range in order to remove the possibility of using the Guidelines as a shield behind which to hide bias in the name of uniformity. As this Article asserts, not only is this outcome statutorily mandated, but it serves Congress’ own articulated sentencing principles and is consistent with notions of sentencing fairness that is reflected in the concept of individualized sentencing.

\textsuperscript{4} 128 S.Ct. 558, 575 (2007) (“Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, \textit{i.e.}, sentences for crack cocaine offenses “greater than necessary” in light of the purposes of sentencing set forth in §3553(a).” (internal citation omitted)).
Introduction

This Article fills a gap in current scholarship on the Federal Sentencing Guidelines by bringing together many sentencing concerns and refocusing them on the Guidelines themselves. Since Booker, several scholars have written about the new, advisory Guidelines scheme. Some have focused on the constitutional problems that Booker failed to settle. Others have argued against a presumption of reasonableness for within-Guidelines sentences. For some, the biggest issues with the advisory Guidelines

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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. 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 Sentencing 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 Sentencing Guidelines and should, therefore, begin to give less credence to them as providing proper sentencing “guidance”. Some of these arguments were made when the Guidelines were first developed, but now, over twenty years later, and even with the Guidelines in their advisor form, there is data to back up these early concerns. The Guidelines themselves are imbedded with biases that encourage (or at least do not adequately diminish) disparities, and hide reasons for imposing sentences. 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 (race, age, gender, majority opinions in Booker); James L. Fant, Is Substantive Review Reasonable? An Analysis of Federal Sentencing In Light of Rita and Gall, 4 Seton Hall Circuit Rev. 447, 471 (2008) (explaining that the presumption of reasonableness insulates within-Guidelines sentences to create a de facto mandatory guidelines system).

7 See, e.g., Fant, supra note 6, at 577 (arguing that it is 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, 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)).
socioeconomic status, etc) or characteristics of the sentencing judge (political ideology, mood, sentencing philosophy). The Supreme Court emphasizes uniformity as its reason for continuing to require district courts to begin their sentencing determination with a Guidelines calculation. However, as this Article demonstrates, the Supreme Court’s stance is neither based on statutory construction nor on Congress’ own articulated sentencing policy.

This Article serves as a follow-up to the article, 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, which discussed the problem created when district courts are procedurally required to calculate Guidelines ranges, yet told that they can disregard the Guidelines when those ranges do not lead to substantively reasonable sentences.\(^8\) That article asserted that the psychological anchoring influence of the Sentencing Guidelines is so strong that requiring Guidelines calculations negates any real dedication to ensuring the independent substantive reasonableness of the resulting sentence. Therefore, that article proposed that the Sentencing Guidelines be reconfigured as a compilation of sentencing data, and that the Guidelines be used as just one of many sentencing resources available to a sentencing judge in coming to a reasonable sentence. The instant Article reveals the problems imbedded within the Guidelines themselves, which serves as yet another reason to rethink the role of the Sentencing Guidelines. Further, this Article acts as a precursor to an upcoming article in which I will discuss the appropriate means of employing an abuse of

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Part I of this Article explains the history of federal sentencing discretion, from the pre-Guidelines era, to the mandatory Guidelines years, to the current advisory Guidelines period. This first Part will reveal the longstanding concern with individualized sentencing as a basis for justice and fairness and Congress’ desire to disassociate judicial discretion from that sentencing fairness concern by mandating that sentences be based on honesty, uniformity, and proportionality. Part II 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 II is to reveal the imprudence of relying on the Sentencing Guidelines as a sound resource based in studied sentencing policy. Once the folly of following the Sentencing Guidelines as sensible sentencing policy has been revealed, Part III explains that requiring that sentencing courts begin their sentencing determination with a Guidelines calculation is not statutorily mandated. This section also investigates what is lost by removing the Guidelines calculation as a starting point, highlighting the Supreme Court’s concern about sentencing uniformity. Part III 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. Finally, Part IV explores the sentencing procedure options left once the Sentencing Guidelines are removed from their current place of prominence. Part IV ends with the proposal that reviewing courts step in as the facilitator of sentencing uniformity, not by enforcing the Sentencing Guidelines, but by beginning to create a common law of sentencing centered around the §3553(a) sentencing factors. This more reasoned approach better protects the discretion standard of review for an advisory Guidelines system that has removed the Guidelines from the center of sentencing attention.
uniformity, honesty, and proportionality in sentencing that Congress sought to achieve in
directing the Sentencing Commission to develop the Sentencing Guidelines in the first
place, and the commitment to individualized sentencing that has characterized American
sentencing from the start. It would be a new tune for federal sentencing.

**Part I: A Progression Through Federal Sentencing Reforms**

Federal sentencing has moved through waves of varying heights of discretion for
district courts. Before the Federal Sentencing Guidelines were developed, for
approximately two centuries, federal judges had nearly unfettered discretion in
sentencing.\(^9\) Generally, so long as a sentence imposed 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 means of attaining fairness and justice in sentencing. Though this practice had been in
place since the beginning of our Nation’s history, it was in the 1930s and 1940s that the
Supreme Court began to speak on the importance of individualized sentencing as a means
of serving the then en vogue theories of punishment.

In 1932, the Supreme Court explained this connection between individualized
sentencing, notions of fairness, and judicial discretion in *Burns v. U.S.* when it stated, “It

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\(^10\) Kate Stith, et al, *FEAR OF JUDGING*, supra note 9, at 9; See *Dorszynski v. United States*, 418 U.S. 424, 432-43 (1974) (citing the proposition from *Gurera v. U.S.*, 40 F.2d 338, 340-341 (8th Cir.1930), that “the appellate court has no control over a sentence which is within the limits allowed by a statute.”).
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.”

Five years later, the Supreme Court echoed these sentiments in Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe, when it stated the following:

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.

Perhaps the idea that fairness and justice mandate sentencing tailored to the specific defendant was best articulated in the 1949 case, Williams v. New York, in which the Supreme Court expressed a dislike for rigid sentencing, explaining, “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.”

The Williams Court characterized individual sentencing as being a change in sentencing practices, saying, “[t]he 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.” According to the Court, this was a move from retribution to a focus on reformation and rehabilitation of offenders as the primary purpose of

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11 287 U.S. 216, 220 (1932).
14 Id.
sentencing.\textsuperscript{15} Despite the Court’s belief that sentencing focus had shifted, the Court recognized that judicial discretion in federal sentencing had been in place throughout American history.\textsuperscript{16} Overtime, 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. Before the era of the Federal Sentencing Guidelines, it was believed that the best method of achieving these individualized sentences was through broad judicial discretion. The problem, though, was that such discretion was thought to produce great disparities in sentencing across and within districts.

In order to look into allegations of sentencing disparity, in 1966 Congress created the National Commission on Reform of the Federal Criminal Laws, known as the “Brown Commission.” In 1971, the Brown Commission reported that “sentencing disparities were large and pervasive.”\textsuperscript{17} Sentencing disparities were revealed and confirmed by numerous studies and reports.\textsuperscript{18} Congress then took various steps designed to respond to

\begin{footnotes}
\textsuperscript{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.”)
\textsuperscript{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.” (footnote omitted))
\textsuperscript{18} See, e.g., S. REP. NO. 225, 98th Cong., 2d Sess. 37, 41, \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3221 (discussing a 1974 study 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 explaining that the great range of sentences that resulted ); Clancy, Bartolomeo, Richardson & Wellford, \textit{Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity}, 72 J. Crim. L. & Criminology 524 (1981); Diamond & Zeisel, \textit{Sentencing Councils: A
the Brown Commission’s findings, including enacting Senate Bill 2699 introduced by Senator Edward Kennedy in 1975.\textsuperscript{19} 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.\textsuperscript{20} Judge Frankel was deeply critical of unchecked judicial discretion in sentencing and called the sentencing power of judges during his day “terrifying and intolerable for a society that professes a devotion to the rule of law.”\textsuperscript{21} Judge Frankel pictured a structured sentencing system in which a “Commission on Sentencing” would create “binding guides”.\textsuperscript{22} In Frankel’s perfect sentencing scheme, the Commission would be a politically insulated body that would consist of “lawyers, judges, penologists, and criminologists” and also “sociologists, psychologists, business people, artists, and (…) former of present prison


\textsuperscript{19} S. 2699, 94th Cong. (1975).


\textsuperscript{21} Frankel, \textit{CRIMINAL SENTENCES}, \textit{supra note} 20, at 5.

\textsuperscript{22} \textit{Id.} at 122-23.
Nearly a decade later, the Sentencing Reform Act of 1984 (SRA) was passed, and in 1987 the Sentencing Guidelines were born.

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

According to the U.S. Sentencing Guidelines Manual, in imposing the Sentencing Guidelines, Congress originally sought to achieve three goals: (1) “honesty in sentencing”; (2) “uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders”; and (3) “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.” 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. These sentencing ranges were almost entirely binding on sentencing judges, and for nearly twenty years, judges under this mandatory Guidelines regime had the very limited discretion to sentence defendants anywhere within a narrow sentencing range.

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23 Id. at 119-23.
Despite the swing back toward the retributivist view of punishment and the handcuffing of judicial discretion under the Guidelines, the Supreme Court held strong to the ideal of individualized sentencing. In one of the Supreme Court’s benchmark sentencing cases, *Koon v. United States*, the Court repeatedly reiterated the importance of individualized sentencing.\(^{27}\) The Court read the Sentencing Reform Act as not eliminating all judicial discretion, but rather as “[a]cknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances[.].”\(^{28}\) According to the Court, individualization was Congress’ reason for allowing for limited departures from the Guidelines when, considering the Guidelines themselves, as well as Commission policy statements and official commentary, a district court found that there are circumstances that warrant a non-Guidelines sentence.\(^{29}\) Ultimately, the Court found that, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”\(^{30}\) Though Congress attempted to sever the tie between individualized sentencing and judicial discretion by enacting the PROTECT Act,\(^{31}\) which severely limited judicial ability to depart from the applicable Guidelines

\(^{27}\) 518 U.S. 81 (1996).

\(^{28}\) *Id.* at 92.

\(^{29}\) *Id.* at 92-3.

\(^{30}\) *Id.* at 113.

\(^{31}\) The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 is aimed at preventing child abuse. However, 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.
ranges and reinstated the *de novo* standard of review that the *Koon* Court had rejected, the Guidelines themselves reflect a glimmer of individualized sentencing.\(^{32}\) Rather than solely being based 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.\(^{33}\) Evidently though, with the Guidelines, Congress sought to curtail the aspects of individualized sentencing that allowed the entrance of judicial bias and led to unwarranted disparity.\(^{34}\) Though there were many critics of this new guidelines system, it eventually became well-settled that the Guidelines would withstand constitutional challenges.\(^{35}\)

\(^{32}\) 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 . . . which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.’).

\(^{33}\) 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.S.G. §3B1.1 (authorizing the increase of the Offense Level for a defendant who was the leader or organizer of criminal activity); see also U.S.S.G. §3E1.1 (originally authorizing a two-point decrease of the Offense Level for the acceptance of responsibility).

\(^{34}\) 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 more defining. For instance, how does one determine when offenses and defendants are similar? This questions is somewhat beyond the scope of this article, however, recognition of this difficulty further highlights the shortcomings of the Guidelines in serving ill-defined sentencing purposes.

\(^{35}\) There are several cases in which the Supreme Court rejected constitutional challenges to the Sentencing 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...
The Guidelines did in fact withstand Constitutional scrutiny for twelve years before a line of cases began to unravel confidence in their constitutionality, beginning in 1999. The heaviest blow, though, came in 2004 when the Supreme Court decided **Blakely v. Washington**. In that case examining a Washington determinate sentencing scheme that shared many similarities with the Federal Sentencing Guidelines, the Supreme Court clarified that a defendant’s Sixth Amendment rights were threatened whenever a judge imposes a sentence not “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” This holding made the mandatory nature of

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 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 separation of powers principle).

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 an offense beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Id.** at 495–96. 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 (internal quotation marks omitted). 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(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.


**Id.** at 303–04 (2004).
the Sentencing Guidelines vulnerable to attack and the eventual defeat which would come in *Booker*.39

**B. Booker and a New Tenor for Sentencing Discretion?**

In *United States v. Booker*, the Supreme Court took up the issue of whether the Federal Sentencing Guidelines, in their mandatory form, violated the Sixth Amendment, and held that its articulation of the rights provided by the Sixth Amendment, as explained in *Blakely*, did indeed apply to the Federal Sentencing Guidelines.40 The Court upheld the principle that “the Constitution 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.’”41 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.”42 Therefore, the Court ultimately decided that there would be no Sixth Amendment violation if the Sentencing Guidelines were not binding on judges.43 In order to remedy the constitutional problem caused by mandatory Guidelines that allowed for the imposition of an enhanced sentence based on a sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted to by

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39 Justice O’Connor recognized this new vulnerability in her dissent when she wrote, “The consequences of today’s decision will be as far reaching as they are disturbing. Washington’s sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government.” *Id.* at 323-26 (O’Connor, J., dissenting).


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

42 *Id.* at 233.

43 *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 of the Court, 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.
the defendant, the Supreme Court instead invalidated only the provisions of the Guidelines that made the Guidelines mandatory. As a result, the Court held that sentencing courts are required to consider Guidelines ranges, but are permitted to tailor the sentence imposed in light of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a). 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.

The Court also determined that the appropriate standard of appellate review would be a “review for ‘unreasonable[ness].’” With this professed resolution of the constitutional problem posed by mandatory Guidelines, the Supreme Court attempted to preserve uniformity in sentencing (by requiring judges to consider the Guidelines and statutory

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44 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; (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).

45 Id. at 259-60.


47 Id. at 261 (alteration in original).
sentencing factors) while also returning to sentencing judges the discretion to sentence defendants outside of the Guidelines range with greater freedom.\footnote{That the balance between uniformity and discretion is important to the Court was reiterated by Justice Breyer in the \textit{Gall} oral argument. Justice Breyer asked:

\begin{quote}
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.
\end{quote}

Transcript of Oral Argument at 22, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949).}

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 decisions following \textit{Booker} purported to clarify the status of judicial sentencing discretion in the advisory Guidelines era. The first opinion was \textit{Rita v. United States}, which held that, on appeal, a rebuttable presumption of reasonableness can be applied to a sentence within a properly calculated Guidelines range.\footnote{551 U.S. 338 at 347 (2007).} In \textit{Rita}, which was an appeal from a Fourth Circuit case involving an illegal machine gun assembly kit in which Victor Rita was charged with perjury, making false statements, and obstructing justice, Rita’s sentence of thirty-three months imprisonment fell within the applicable thirty-three to forty-one month Guidelines range.\footnote{\textit{Id.} at 341-45.} The Fourth Circuit decided that all it took was a \textit{per curiam} opinion to affirm the sentence as presumptively reasonable.\footnote{See \textit{United States v. Rita}, 177 F. App’x 357 (4th Cir. 2006).} The Supreme Court affirmed the Fourth Circuit decision and upheld the presumption of reasonableness for within-Guidelines sentences.\footnote{\textit{Rita}, 551 U.S. at 347-51. The Supreme Court explained that this presumption: (1) is rebuttable, and not binding: and, (2) it is an appellate presumption only.}

The Court
explained that the presumption is based on a “double determination” of reasonableness, meaning that by the time a within-Guidelines sentence comes before an appeals court, “both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case.” Following this reasoning, the Court determined that within-Guideline sentences can be presumed reasonable because it can be presumed that a sentencing court has taken into account the §3553(a) sentencing factors and has exercised her discretion to impose a sentence within the same range that the Commission has found acceptable.

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, and Kimbrough v. United States. In Gall, the Court clarified that reasonableness review is a deferential abuse of discretion type of standard, which applies to all sentences, despite their distance from the applicable Guidelines range. Further, the Court explained that reasonableness review has both a substantive and procedural component. The Court described procedural reasonableness as follows:

53 Id. at 347.

54 Id. at 347-49. However, as discussed in Part II, 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.


56 Gall, 128 S. Ct. at 597.
[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, failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.\(^{57}\)

Once procedural reasonableness has been determined, then substantive reasonableness can be considered.\(^{58}\) 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 sentence].”\(^{59}\)

*Kimbrough* complimented *Gall* in clarifying the scope and breath of reasonableness review. In *Kimbrough*, the Supreme Court held that the then-existing crack/powder cocaine sentencing disparity in the Sentencing Guidelines was advisory only.\(^{60}\) As such, a sentencing judge is permitted to consider the disparity and find that, because of it, a within-Guideline sentence would be “‘greater than necessary’ to serve the objectives of sentencing.”\(^{61}\) The Court discussed at length the then-existing 100-to-1 crack/powder cocaine sentencing disparity ratio, explaining that the Sentencing Commission had discovered that the amount of the sentencing disparity was unwarranted and that the Commission had repeatedly attempted to achieve a reduction in the crack/powder cocaine ratio.\(^{62}\) Therefore, the Court ultimately found that “while [§

\(^{57}\) *Id.*

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Kimbrough*, 128 S. Ct. at 564.

\(^{61}\) *Id.* (quoting 18 U.S.C. § 3553(a) (Supp. V 2005)).

\(^{62}\) *Id.* at 568-69.
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.’

The Court continued this line of cases in June of 2008 with *Irizarry v. U.S.*

*Irizarry* held that district courts do not have to give parties notice when contemplating a variance from the recommended Guidelines range. The Court reasoned that the Guidelines should remain a starting benchmark in sentencing decisions, but that, now that the Guidelines are 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. So, just as the Supreme Court did through the combination of *Gall* and *Kimbrough*, in *Irizarry*, the Supreme Court places Sentencing Guidelines in the center of sentencing determinations yet tells district courts that they are permitted to look away from the spotlighted attraction.

Taken together, *Booker, Rita, Gall, Kimbrough,* and *Irizarry* solidify the proposition that 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 maintain informative power about 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 is no more. In these cases, the Supreme Court

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63 Id. at 570 (citation omitted) (quoting United States v. Booker, 543 U.S. 220, 245–46 (2005)).
65 Id. at 2202-03.
clung to the Sentencing Guidelines while also holding to notions of individualized sentencing. With all of these explanations, the Supreme Court has left one aspect of sentencing very clear – district courts must begin the sentencing process by properly calculating and considering the sentencing Guidelines. This role of the Guidelines would serve as an assurance that uniformity in sentences sought by mandatory guidelines would be preserved. *Booker* was a Constitutional decision in which the Supreme Court evidently determined that it was not constitutionally problematic to require that sentencing start with the Guidelines if those Guidelines were advisory. What the Supreme Court has not explained, however, is how starting with the Sentencing Guidelines is in line with the sentencing statute, and why it follows the sentencing policy set forth by Congress. Apparently, the Supreme Court is holding to its longtime position

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66 See, e.g., *Kimbrough*, 128 S.Ct. at 574 (reiterating the position that it held since *Booker* - that it is the sentencing judge who has “‘greater familiarity with . . . the individual case and the individual defendant’” alteration in original) (quoting *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007)) and 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*, 128 S. Ct. 586, 597 (2007)).

67 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 initial benchmark’” for a district court’s sentencing decision. *Id.* at 574 (quoting *Gall v. United States*, 128 S. Ct. 586, 596 (2007)). See also *Irizarry*, 128 S.Ct. at 2202 (“[T]he Guidelines, as the ‘starting point and the initial benchmark,’ continue to play a role in the sentencing determination[.]”).

68 The soundness of this Constitutional determination is still unclear to me as well as many other scholars. See, e.g., David Holman, *Death By A Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 Wm. & Mary L. Rev. 267 (2008) (argues that Supreme Court sentencing decisions perpetuated the Sentencing Guidelines’ Sixth Amendment violations); see, e.g., James L. Fant, Is Substantive Review Reasonable? An Analysis of Federal Sentencing in Light of Rita and Gall, 4 Seton Hall Circuit Rev. 447, 471 (2008) (arguing that the Supreme Court “left intact a conception of substantive review vulnerable to as-applied constitutional challenges”); see e.g., Douglas Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 Denv. U. L. Rev. 7 (2007) (indicating that constitutional issues were not resolved by *Booker*).
that there is something meaningful in the Guidelines ranges themselves. However, a closer look at the development of the Sentencing Guidelines casts this position in a very questionable light.

**Part II: Breaking Away from the Harmony: What Happened to the Sentencing Policies?**

In the *Booker* line of cases, the Supreme Court has made it clear that it views the Sentencing Guidelines as reliable and sound. This position began in *Booker* when the Court stated that “the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”\(^{69}\) Therefore, the Court determined that, “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” This trust that the Guidelines reflect sound sentencing policy continued to be evident in *Rita* when the Supreme Court discussed the Sentencing Commission’s responsibility to create Guidelines that reflect the §3553(a) sentencing factors.\(^{70}\) In *Rita*, the Court upheld the presumption of reasonableness for within-Guidelines sentences by reasoning that “[t]he 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.”\(^{71}\) *Gall* and *Kimbrough* are no different. In *Gall*, the Supreme Court reiterated that “even though the Guidelines are advisory rather than mandatory, they are (...) the product of careful study

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\(^{69}\) *Booker*, 127 S.Ct. at 2464. (citing 28 U.S.C. §994 (200 ed. and Supp. IV)).

\(^{70}\) *Rita*, 551 U.S. at 2463-65.

\(^{71}\) *Id.* at 2457.
based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”

Finally, even though, in Kimbrough, the Court acknowledged the faultiness of the Commissions creation of the crack cocaine sentencing ranges, the Court still defended “a key role for the Sentencing Commission.” The Court stated the Sentencing Commission has the capability to “base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” Evidently, even though it has purportedly downgraded the Guidelines to advisory status the Supreme Court continues to maintain confidence in the Sentencing Guidelines. The Guidelines, though, were not created in a manner that warrants such allegiance.

It seems that the Supreme Court has forgotten the early days of Guidelines formulation. As already explained, prior to the development of the Guidelines, criticism about disparate sentences was widespread. Much of this problem was due to different judges sentencing similarly situated defendants differently across and within districts. As

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72 Gall, 128 S.Ct. at 594.
73 Kimbrough, 128 S.Ct. at 574.
74 Id.
75 See, e.g., S. REP. NO. 225, supra note 18, at 41 (discussing a 1974 study in which fifty federal district court judges were asked to indicate the sentence that they would impose on twenty identical files from actual cases and noting that the range of sentences for one extortion case in the study ranged from 20 years imprisonment and a $65,000 fine to three years imprisonment and no fine); Clancy, Bartolomew, Richardson & Wellford, Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, 72 J. Crim. L. & Criminology 524 (1981); Diamond & Zeisel, Sentencing Councils: A Study of Sentence Disparity and Its Reduction, 43 U. Chi. L. Rev. 109 (1975); Frankel, The Sentencing Morass, and a Suggestion for Reform, 3 Crim. L. Bull. 365 (1967); Nagel & Hagan, The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity, 80 Mich. L. Rev. 1427 (1982); 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.’).
Judge Frankel pointed out, allowing sentencing judges to sentence with nearly no guidance led to “a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice.”\footnote{Frankel, CRIMINAL SENTENCES, \textit{supra} note 20, at 7 (1973).} Judge Frankel pointed to the need for “meaningful criteria” for assigning a sentence to a particular case.\footnote{\textit{Id.}} And, while the Sentencing Guidelines were supposed to give the courts such criteria when they were developed in the 1980s, critics of the time took issue with whether that criterion was truly meaningful.

\textbf{A. Politics as the Muse: How the Sentencing Guidelines Came to Be}

Congress created the Sentencing Commission to:

\ldots establish sentencing policies and practices for the Federal criminal justice system that \ldots 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 \ldots  

Additionally, as mentioned previously, Congress sought to achieve honest, uniformity, and proportionality with the Sentencing Guidelines.\footnote{U.S. Sent’g Comm’n, Guidelines Manual § 1A1.1 ed. n. (2007).} However, a convincing argument can be made that the Sentencing Commission has fallen short of meeting its sentencing responsibilities, and that it missed the mark on all three Guidelines’ objectives. Much of this failure initially was due to the atmosphere surrounding the development of the Sentencing Guidelines. Contrary to Judge Frankel’s vision for a Sentencing Commission that would be politically insulated, the actual Sentencing Commission was forced into

developing Guidelines based on Congress’ tough on crime approach of the 1980s.\textsuperscript{80} As one scholar stated, “Designed for an era of technocratic and rationalistic policymaking, [the Sentencing Commission] operated in an era of politicized and symbolic policymaking.”\textsuperscript{81} This means that the Sentencing Commission did not necessarily design the Guidelines around informed, tested sentencing policies. Nor were the Guidelines designed to effectuate any specific purpose or set of priorities. Ultimately, the Sentencing Guidelines were a rush job in which a final draft was prepared to meet a hasty deadline.\textsuperscript{82} The Sentencing Commission itself admitted that it did not identify a priority among sentencing purpose in deciding upon the Guidelines’ sentences. 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


\textsuperscript{81} Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 Stan. L. Rev. 37, 42 (2004).

\textsuperscript{82} Explained in Andrew von Hirsch, Federal Sentencing Guidelines: Do they Provide Principled Guidance?, 27 Am. Crim. L. Rev. 367, 369 (1990). After a greatly criticized first draft of the Sentencing guidelines, the Sentencing Commission submitted a revised draft for public review in 1987, which also received large criticism. However, 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).
guidelines would find the widespread acceptance they need for effective implementation.\(^8^3\)

Rather than choosing guiding sentencing principles, the Commission adopted “an empirical approach that use[d] data estimating the existing sentencing system as a starting point.”\(^8^4\) However, developing sentencing ranges based on past practices was not done in any regularized fashion. For instance, the Commission increased penalties for white collar (fraud) crimes and violent crimes, finding that the existing sentences were inadequate.\(^8^5\) Drug offenses were also given significantly harsher penalties, and those penalties were based on weight rather than empirical data.\(^8^6\) Overall, the Guidelines reflected harsher penalties than were the norm at the time, with custody being favored over probation in most situations.\(^8^7\) And, without any justification for the anticipated consequences of such a prison-happy system, the Guidelines began an era of over-incarceration.\(^8^8\) Even where the Guidelines did reflect past sentencing practices\(^8^9\) by


\(^{8^4}\) See U.S. Sent’g Comm’n, Guidelines Manual 4, 368 (2008) (stating that the Guidelines were developed with the goal of achieving sentencing uniformity “by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practices[.]”).

\(^{8^5}\) U.S.S.C. 1987 c. 18, c. 19.

\(^{8^6}\) U.S.S.C. 1987 c. 18.

\(^{8^7}\) 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 will increase from 15% to over 35%. See U.S. Sent’g Comm’n, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 8, 61 (1987); See also von Hirsch, 27 Am. Crim. L. Rev. at 369, 373.

\(^{8^8}\) 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, con Hirsch, 27 Am. Crim. L. Rev. at 37 (citing T. Hutchinson & D. Yellen, FEDERAL SENTENCING LAW & PRACTICE: SUPPLEMENTARY APPENDICES 215, 217 (1989)).
averaging the existing disparate sentences, the Commission merely calculated into the Guidelines ranges the same biases that were leading to disparate sentencing in the first place. Rather than studying 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.

These Sentencing Guidelines faults did not go unnoticed. Of course, initially the Guidelines were criticized for being too rigid and moving away from individualized sentencing. In 1988, Professor Charles Ogletree argued that several failures made the Sentencing Guidelines “quite disappointing.” For one, 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.” However, the failure to allow for adequately individualized sentencing was not the only source of discontent with the new sentencing scheme. Some argued that the Guidelines punishments were too harsh for particular conduct. Prof. Ogletree found it problematic that “the Commission gave only modest consideration to the potential impact of prison

89 But see Kate Stith, et al., FEAR OF JUDGING, supra note 9, at 60-61, explaining that the types of cases for which the Commission actually relied on past practices was greatly outnumbered by the category of cases for which the Commission deviated. 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.”
91 Id. at 1951.
overcrowding as a result of the existing mandatory drug and repeat offender statutes coupled with the implementation of the sentencing guidelines.”

Further, the Guidelines were seen by some as being out of line with public opinion in several instances. Others complained that the Guidelines actually led to increased sentencing disparity. On this point, Prof. Ogletree asserted that, in promulgating the Guidelines, the Commission failed to address “the particular problem of racial disparity in sentencing.” At the heart of it all, the Commission was criticized for not being open and transparent enough in developing the final version of the Guidelines. However, even with that concession, the criticisms of the day dig directly into the sentencing purposes that Congress itself set forth for the Guidelines – honesty, uniformity, and proportionality. Most troubling is the realization that all of these problems with the Guidelines arguably continue to exist today.

B. Today’s Guidelines Still Discordant:

Missing the Balance Between Uniformity, Honesty, and Proportionality

Though there have been numerous amendments and revision to the Sentencing Guidelines since their inception in the 1980s, the basic framework of the guidelines has remained the same, as well as their harsh, punitive nature and the consequences of that harshness. The Guidelines have remained a rigid grid calling for courts (and probation

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93 Ogletree, supra note 90, at 1951; see also von Hirsch, 27 Am. Crim. L. Rev. at 374 (also arguing that the Sentencing Commission did not consider the Guidelines’ effect on the prison population).
96 Ogletree, supra note 90, at 1939.
officers) to conduct mechanical calculations leading to lengthy sentences.\footnote{As Prof. Michael Tonry has noted, there is a problem “[w]hen laws require that sentences be calculated by means mechanical scoring systems, as the Federal Guidelines [do] rather than by looking closely at the circumstances of individual cases[.]” 58 Stan. L. Rev. 37, at 46.} The result has been the over-incarceration catastrophe that was predicted by critics when the Guidelines were first instituted.\footnote{According to the Justice Department’s Bureau of Justice Statistics, the American prison population exceeded 2 million in 2002. At the end of 2001, federal prisons were operating at 31 percent above capacity. PRISON AND JAIL INMATES AT MIDYEAR 2002, available at http://www.ojp.usdoj.gov/bjs/abstract/pjim02.htm.} Arguably, all of these issues would be worth their costs if the Guidelines actually attained the goals for which they were created – honesty, uniformity, and proportionality. However, twenty years of the Guidelines have allowed for time to collect data that calls into questions the Guidelines’ success at achieving those objectives.

Undoubtedly, the most important goal of the Sentencing Guidelines is achieving uniformity in sentencing, meaning decreasing sentencing disparities by basing punishment upon real offense conduct.\footnote{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.”).} Therefore, under the Sentencing Guidelines, punishment should be the same for similar offenders who have committed the same type of conduct, and different for differently-situated offenders who have committed different conduct.\footnote{For support of this definition of sentencing uniformity, see Justice Breyer’s discussion in Booker of sentencing hypotheticals. See Booker, 543 U.S. at 252-53.} However, several empirical studies and scholarly research have reveled that the Guidelines have not actually achieved these purposes, and that, in some cases, the Guidelines even exacerbate sentencing disparities. For example, the Guidelines...
contribute to sentencing disparities by allow for reductions in offense points for substantial assistance and by providing for the availability of fast-track procedures that are used in some jurisdictions allows for defendants with the same real-world offense conduct to be sentenced quite differently.\textsuperscript{101} Further, some scholars have pointed to the complexity of Guidelines calculations as a contributor to sentencing disparities.\textsuperscript{102} The great number of sentencing factors involved in sentencing calculations can lead to varying results depending upon who is picking the factors to include in the computation.\textsuperscript{103} This discrepancy has been shown by studies on different probation officers given the same facts yet coming to different sentencing range determinations.\textsuperscript{104}

When shown the results of studies conducted by the United States Sentencing Commission, even those who are hesitant to blame sentencing disparities on the Guidelines themselves have to at least admit 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.\textsuperscript{105} The Commission suggested that much of the disparity was due to differences in charging

\textsuperscript{101} See, \textit{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); \textit{See also}, U.S. Sent’g Comm’n, \textsc{Fifteen Years of Guidelines Sentencing: An Assessment of How Well The Federal Criminal Justice System Is Achieving The Goals of Sentencing Reform} xii (2004) [hereinafter, \textsc{Fifteen Years Study}] (explaining the process of reducing sentences based upon substantial assistance [p. 103] and the fast track early disposition procedure [p. 106-107], and how both contribute to disparities under the Guidelines).


\textsuperscript{103} \textit{Id}.


\textsuperscript{105} \textsc{Fifteen Years Study, supra} n. 101.
and plea bargaining policies and practices among the ninety-four U.S. Attorney’s Offices. Inter-judge sentencing variations, though reduced, also remain statistically significant. The Commission’s study also revealed that disparities based on supposedly irrelevant offender characteristics, such as race and ethnicity continue to exist under the Guidelines. Other studies also confirm these racial and ethnic disparities, as well as sentencing disparities along the lines of socio-economic status, gender, and even political affiliation.

106 Id. at xii, 92.
107 Id. at 99.
108 Id. at xiv, 122-27 (explaining the odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher. Typical refers to average offense and average seriousness. Further, the typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence that is approximately seven months longer. A similar effect is found for Hispanic drug offenders. Admittedly, the Commission was not willing to say that these disparities are due to deep-seated racism, but does acknowledge that the disparity exists and that they weren’t eliminated under the Guidelines).
In addition to uniformity, the Sentencing Guidelines were also designed to increase honesty in sentencing. Honesty refers to being transparent about the sources used to inform sentencing.\textsuperscript{110} 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 would range from Congressional mandate to the Commission’s own policy developments. In 2004, in its study on fifteen years with the Federal Sentencing Guidelines, the Commission made the following statement regarding sentencing transparency:

Sentencing may now be the most transparent part of the criminal justice system. Not only is sentencing done publically 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.\textsuperscript{111}

The Commission’s view of its success in meeting the honesty goal is based on the view that 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-\textit{Booker}.

Though, for reasons previously discussed, the Commissions’ own sources for creating the sentencing ranges are somewhat elusive. Certainly, though, in the post-\textit{Booker} advisory Guidelines regime, another wrinkle is added to the meaning of sentencing transparency. Now, sentencing courts are able to sentence outside of the range set by the Sentencing Commission, and the source of those resulting sentences ought to be just as important as, if not more than, the sources of the Guidelines ranges themselves. The most effective outcomes. See, e.g., Max M. Schanzenbach and Emerson H. Tiller, \textit{Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform}, 75 U. Chi. L. Rev. 715 (2008).

\textsuperscript{110} U.S Sent. Guidelines Ch. 1, Pt. A, intro comment 3.

\textsuperscript{111} \textit{Fifteen Years Study}, supra n. 101, at x, 80.
way of enforcing the transparency of sentencing in an advisory Guidelines system is to impose a strict requirement on sentencing courts to articulate their reasons for imposing a particular sentence. The sentencing statute already calls for the articulation of reasons in §3553(c), which provides:

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-

(2) is not of the kind, or is outside the range, described in subsection (a)(4)\textsuperscript{112}, the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment....

And while nothing in the 	extit{Booker} line of cases invalidated this provision, it seems as though 3553(c) ought to have an adjusted meaning in the advisory Guidelines regime. Post-	extit{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.\textsuperscript{113} 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 	extit{Booker} Court set forth as the guiding considerations in sentencing.

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\textsuperscript{112} 18 U.S.C. §3553(a)(4) directs district courts to consider the applicable Guidelines range in determining an appropriate sentence.
\textsuperscript{113} The Supreme Court stated very clearly in 	extit{Rita} that the presumption of reasonableness for within-Guidelines sentence is an appellate presumption only and that district courts are not allowed to presume that Guidelines sentences are reasonable. 551 U.S. at 351 (We repeat that the presumption before us is an \textit{appellate} court presumption. Given our explanation in 	extit{Booker} that appellate “reasonableness” review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review.).
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In *Rita*, the Supreme Court acknowledged the importance of a court stating its reasons, but then downplayed the enforcement of an articulation of reasons and failed to require those reasons to be consistent with the §3553(a) factors. 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.\(^{114}\)

The Court’s words echo the Congressional concern about honesty and transparency in sentencing. Then, however, the Court 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 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.\(^{115}\)

And, while the Court left the quantity of stated reasons to a sentencing judge’s discretion, the Court did at least require that district courts give enough of a reasons articulation “to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.”\(^{116}\) This, of course, is a very vague directive that essentially leaves it up to the circuit courts to determine the adequacy of the quality of the stated reasons. But, in a final word of what can barely pass as elucidation, the Supreme Court fell back on its still-unclear

\(^{114}\) *Rita*, 551 U.S. at 356 (2007).

\(^{115}\) *Id.*

\(^{116}\) *Id.* (citing *United States v. Taylor*, 487 U.S. 326, 336-337 (1988)).
“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[.]”\(^{117}\) This of course puts the onus on the parties to give the sentencing court a reason for further explanation, rather than meaningful explanation being the expected course of action by the courts. The Supreme Court went a bit further on this line of thinking in \textit{Gall} when it said that “a major departure [from the Guidelines] should be supported by a more significant justification than a minor one[.]”\(^{118}\) Again, however, the Court did not explain what form this more significant explanation should take, and did not 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 not to decide how thorough sentencing explanations ought to be, the circuit courts have taken it upon themselves to decide the matter. And, just as in the case of the presumption of reasonableness, as well as other developments in the post- \textit{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 has recognized as important.

Several circuits recognize that articulating reasons is required for a district court’s sentence to be procedurally reasonable.\(^{119}\) Similarly, most circuits identify the same or

\(^{117}\) Id. at 358.

\(^{118}\) \textit{Gall}, 128 S.Ct. at 597.

\(^{119}\) \textit{See}, e.g., \textit{U.S. v. Cavera}, 550 F.3d 180, 192 (2nd Cir. 2008) (asking, “But what does the procedural requirement, that the district court must explain its reasons for its chosen sentence, entail?”); \textit{U.S. v. Figaro}, 273 Fed.Appx. 161, 163-64 (3rd Cir. 2008) (“It is therefore vital that the district court ‘state
essentially the same reasons for the 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, *U.S. 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.\(^{120}\)

The Second Circuit suggests that one of the goals of reasons articulation 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. However, 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. The Second Circuit played it safe, merely echoing 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

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\(^{120}\) *Cavera*, 550 F.3d at 193 (court’s original emphasis included; internal citations omitted).
court has considered each of the §3553(a) factors.” 121 The Seventh Circuit’s approach is nearly identical. 122 The Eight Circuit takes a more honest approach to its disregard for the articulation requirement by openly presuming that “‘district judges know the law and understand their obligation to consider all of §3553(a) factors.’” 123 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) requirement. And, in most cases, the suggestion is that any requirement that district court’s articulate reasons for a sentence, 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’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 U.S. v. Blackie, the Sixth Circuit found plain error affecting the defendant’s substantial 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. 124 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.’” 125 This position touches on the heart of the honesty in sentencing that Congress sought through the

121 Id. (quoting U.S. v. Crosby, 397 F.3d 103, 113 (2nd Cir. 2005) and citing Fernandez, 443 F.3d 19, 30 (2nd Cir. 2006)).
122 See U.S. v. Shannon, 518 F.3d 494 (7th Cir. 2008) (“The court need not address every §3553(a) factor in checklist fashion, explicitly articulating its conclusions regarding each one.
125 Id. at 403 (quoting In re Sealed Case, 527 F.3d at 191).
Sentencing Commission and the Sentencing Guidelines. However, the Sixth Circuit’s own reasoning reveals that its real concern was not with whether the district court revealed sources that would inform whether the imposed sentence was reasonable, but rather with the district court’s failure to explain why the Guidelines sentence was unreasonable. The Sixth Circuit distinguished Blackie’s case from the case of United States v. Hernandez, in which the court found a procedural error in the district court’s failure to state a reason for selecting a particular sentencing within the Guidelines range, but found that the defendant’s substantial rights were not affected. Ultimately, the Sixth Circuit found it important in distinguishing Blackie from Hernandez that, in Hernandez, the un-explained sentence imposed was a within-Guidelines sentence. The Tenth Circuit also takes this approach and says that the requirement to articulate reasons for a sentence is necessary to reveal “the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation.” Apparently, circuit courts are comfortable reading the Sentencing Commission’s sources as implicit sources of district courts when a within-Guidelines sentence is imposed. What is evident in all circuits, however, is the reliance on the Guidelines as fulfilling the honesty requirement in their own right without much regard for the authority of the §3553(a) factors to explain the reasonableness of a sentence. We are left with the situation in which the requirement to articulate reasons is satisfied without direct reference to the §3553(a) factors, and is only really an issue when a sentence is outside of the Guidelines range and explanation is needed to convince a reviewing court that the Guidelines range was inappropriate. This narrow view of the articulation requirement limits sentencing courts’ duty to be honest in their sentencing, and to actually inform the parties and the public of why a particular sentence was chosen (not merely why a Guidelines sentence was not chosen).

126 U.S. v. Alapizco-Valenzuela, 546 F.3d 1208, 1223 (10th Cir. 2008).
Proportionality was the third sentencing objective given by Congress to the Sentencing Commission. The proportionality requirement is concerned with imposing sentences that are consistent with the severity of real conduct underlying offenses. The proportionality problem with the Guidelines is most evident in the drug offense category. In its 2004 report on fifteen years with the Sentencing Guidelines, the Sentencing Commission admitted that finding the correct punishment ratios among different drugs and the correct quantity thresholds for each penalty level has proven problematic. The Commission recognized that many of the drug Guidelines resulted in severe penalties for many street-level sellers and other low culpability offenders. For example, the Sentencing 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. In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. This may not be so disturbing except for the fact that the Commission found that the recidivism rates among repeat drug traffickers is significantly less than others in the career offender category.

128 FIFTEEN YEARS STUDY, supra n. 101, at 51.
129 Id.
130 Id. at 133-34.
131 Id.
132 Violent offenders make up other defendants in the career offender category. Of violent offenders in the career offender category there is a 52% recidivism rate as compared to the 27% recidivism rate among these 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, however, the Commission did not seem to interpret
Though the Guidelines were designed to be a work in progress, twenty-years after their inception, many of the same problems remain. Most problematic is that, even with years of opportunities to improve, the Guidelines’ have fallen short of their intended goals of bringing uniformity, honesty, and proportionality to sentencing. However, in _Booker_ and subsequent cases on this issue, the Supreme Court has held fast to the need for a prominent position for the Guidelines. This has been done without reference to how the Guidelines serve the proportionality and honesty purposes of sentencing. Instead, much emphasis has been placed on the Guidelines’ role in maintaining sentencing uniformity. However, for the reasons previously discussed, the benefit of uniformity under the Guidelines is uniformity for uniformity’s sake, rather than uniformly sound sentencing policy. Therefore, policy considerations seemed to have little to do with the Supreme Court’s repeated decision to elevate the importance of the Sentencing Guidelines in sentencing determination at a time when the Court could have penned a very different tune.

**Part III: So, To What Beat Was The Supreme Court Moving?: Releasing Uniformity in Order to Sing Uniformly Individual Tunes**

If the Sentencing Guidelines do not reflect the sentencing polices set forth by Congress, one would think that the reason the Supreme Court continues to require district courts to begin sentencing determinations with a Guidelines calculation is because such an approach is mandated by statute. However, in _Booker_, the Supreme Court excised the portions of the sentencing statute that made the Guidelines mandatory. The portion of the

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the statistics in that manner. Rather, the Commission’s study suggests that this treatment of drug offenders is unjustifiably harsh.
remaining statute that mentions consideration of the Guidelines is 18 U.S.C. §3553(a) which requires that sentencing courts consider the following:

(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.

Section 3553(a)(4) clearly requires consideration of the Guidelines range in imposing a sentence, however, the statute does not say that the sentencing range should have more importance than any of the other §3553(a) sentencing factors. While, absent any statutory amendment on the part of Congress or a finding of unconstitutionality, the Supreme Court cannot order district courts to avoid Guidelines calculations completely, there is clearly no statutorily-mandated reason for the Court to require that sentencing determinations begin with the calculation of the Guidelines range. Instead, the considerations mandated by §3553(a) in many ways coincide with the Congressional sentencing goals – honesty, uniformity, and proportionality, as well as reflecting traditional individualized sentencing concerns. §3553(a)(1) calls for considering specifics about the offense as well as the offender, hinting at individualized sentencing ideals. 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, of course, reflected in the mandate to “avoid unwarranted sentence disparities.” Finally, “promot[ing] respect for the law” is what honesty in sentencing is all about. Therefore, the only 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. For all of the reasons already explained, placing the Guidelines calculations as the anchor for sentencing determinations is actually counter to what the Supreme Court claims to preserve.

The usual argument against removing the Guidelines as a sentencing benchmark is that doing so would lose any hope of sentencing uniformity and return us to the era of unfettered judicial sentencing discretion. However, as already explained, uniformity was sought by Congress as a means of eliminating the bias that was leading to disparate sentencing. Therefore, it does not solve the problem to fight for uniformity in a system that only reinforces the biases sought to be eliminated. This is saving uniformity for the sake of uniformity, rather than for uniformly sound sentencing policy. Therefore, uniformity should cease to be the Court’s overriding focus. As §3553(a) exhibits, uniformity is but one of the sentencing factors that a court must consider. Instead, as the next section discusses, one manner of preserving uniformity, even while removing the Guidelines from the starting point, is to focus sentencing decisions on the §3553(a) factors in a meaningful way. Therefore, the fear of losing uniformity if sentencing courts are no longer required to begin their sentencing determination with the Guidelines is an overreaction.

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.

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133 I suppose 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. However, 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 can’t be the only goal considered.
even in run of the mill cases. In fact, once one accepts the premise that the Guidelines
are not good indicators of sentencing reasonableness, the only argument against removing
the Guidelines from the starting point besides the loss of uniformity argument is one
based on efficiency. Such an argument would say that it would be too time-consuming
for circuit courts to develop the meaning of the §3553(a) factors, or for district courts to
take the time to explain how the sentences they impose relate to the §3553(a) factors.
Considering that the most efficient means of coming to a reasonable sentence is not a
§3553(a) factor, efficiency therefore, should not be given the same level of importance as
the factors that are actually listed as proper considerations in the sentencing statute.
Arguably, this threatens the presumption of reasonableness that has been adopted by
many circuits.\footnote{\textsuperscript{134} The Fourth, Fifth, Sixth, Seventh, Eight, and Tenth Circuits have clearly adopted a presumption of
reasonableness for within-Guidelines sentences. See, e.g. \textit{United States v. Green}, 436 F.3d 449 (4th Cir.
2006); \textit{United States v. Alonzo}, 435 F.3d 551 (5th Cir. 2006); \textit{United States v. Williams}, 436 F.3d 706, 708
(6th Cir. 2006); \textit{United States v. Kristl}, 437 F.3d 1050, 1054 (10th Cir. 2006); \textit{United States v. Mykytiuk},
415 F.3d 606 (7th Cir. 2005); \textit{United States v. Tobacco}, 428 F.3d 1114 (8th Cir. 2005).} In any case, the Supreme Court has made clear that the presumption of
reasonableness is only an appellate presumption, and that district courts are prohibited
from presuming that within-Guidelines sentences are reasonable simply because they are
Guidelines sentences.\footnote{\textsuperscript{135} See, \textit{Rita}, 551 U.S. at 351.} However, the appellate presumption of reasonableness 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. Therefore, apart
from it being unwise to presume that a Guidelines sentence is a reasonable reflection of
the §3553(a) factors, the presumption gets in the way of meaningful appellate review as
Part IV: What Happens Next?: Changing the Tune of Federal Sentencing by Guiding Discretion to Reasonableness

This article has demonstrated that there is no convincing reason, neither statutory nor policy-based, for the Supreme Court to maintain that the Sentencing Guidelines are required starting point in sentencing. As previously explained, though the Guidelines were introduced to facilitate sentencing uniformity, there were also other factors that were to guide sentencing – namely honesty and proportionality. The Supreme Court’s requirement that a sentencing determination start with the Guidelines consideration places the Guidelines in an undeserved place of prominence. When this procedural error is coupled with the weak and unenforced requirement that district courts articulate reasons for their sentences, the unimportance of the §3553(a) factors that don’t deal with the Guidelines and uniformity becomes quite evident. The Supreme Court has given no valid reason for ignoring the other §3553(a) factors. This is unfortunate because the other §3553(a) factors combined with a robust district court articulation requirement and controlled appellate review all hold the key to saving sentencing uniformity and giving meaning to the honesty and proportionality goals. By allowing district courts to individual sentences with the guidance of the §3553(a) factors, and without the pressure of the Guidelines as a starting point, a new rhythm in federal sentencing can be introduced.

136 The significant role that circuit courts should play in federal sentencing is somewhat outside of the scope of this article. However, this important topic will be discussed in a subsequent article by the author.
Once the Guidelines are removed from the heart of sentencing, several beneficial changes can take place. First, the §3553(a) factors will have to become more important to the sentencing determination. Rather than simply explaining whether a Guidelines sentence was or was not 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 how the imposed sentence what exactly it was about the “nature and circumstances of the offense and history and characteristics of defendant” that warranted the imposed sentence, even if a Guidelines sentence was imposed.\(^\text{137}\). Further, in sentencing a defendant, a sentencing court should have to express some sentiments about how the imposed sentence “reflect[s] the seriousness of the offense, promote respect for the law, and to provide[s] just punishment”.\(^\text{138}\) Other factors that a sentencing judge would have to articulate in her reasons would be how the sentence imposed “avoid[s] unwarranted sentence disparities” and “provide[s] restitution to victims” where relevant.\(^\text{139}\) The applicable Guidelines range would just be one of the many considerations that a sentencing court would be forced to think about and speak to clearly.\(^\text{140}\)

The second melodious change that would occur by removing the sentencing Guidelines from the starting point is that other resources can be introduced into the sentencing determination. One might ask why it would matter that the Guidelines are

\(^{137}\) *See*, 18 U.S.C. 3553(a)(1).


\(^{139}\) *See*, 18 U.S.C. §3553(a)(6) & (7).

required to be the first source considered if the sentencing statute mandates that the
Guidelines must be considered anyway. Psychological anchoring studies suggest that it
is difficult for decision-makers to break away from their initial starting point.\footnote{141} This
would make it very difficult for a sentencing court to give equal consideration to the
other §3553(a) factors. Though there’s no statutory basis for the Supreme Court to forbid
sentencing courts from beginning their sentencing determination by calculating the
applicable guidelines range, by removing the requirement that they begin with the
Guidelines, the Supreme Court will at least open up the possibility of avoiding this
anchoring affect. Once this is done, other sentencing resources can be used to inform the
other §3553(a) factors, especially those that speak to sentencing proportionality. Some
might argue that the Federal Sentencing Guidelines is the only reliable sentencing
resource that district courts have at their disposal. However, there are many sentencing
resources available, and once they are accepted as relevant, more resources will certainly
emerge. For instance, federal district courts can learn from the numerous state court
initiatives on sentencing reform.\footnote{142} This potential fits with the directive of §3553(a)(3)

\footnote{141} For a discussion of the anchoring affect and why it is problematic in the current advisory Federal
Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and

\footnote{142} 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 INSTITUTE 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). Further, the National Center for State Courts
provides numerous sentencing resources on the Center For Sentencing Initiatives section of its website,
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 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. The heightened articulation requirement will increase honesty in sentencing by revealing judicial reasons for imposing a sentence. Arguably, this requirement will reduce judicial bias by requiring district courts to come up with legitimate reasons for the sentences they impose. Further, counsel 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.

Third, by removing the Guidelines from the starting place for sentencing, circuit courts can begin to give meaning to the §3553(a) factors in order to foster uniformity in sentencing purposes. For instance, when a district court claims that a particular sentence is reasonable because it satisfies the §3553(a) factors and gives a specific explanation 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. In essence, the circuit courts can begin to develop a sort of common law of sentencing by determining what facts can be considered with regard to specific §3553(a) factors. Circuit courts can guarantee that the district court’s 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, the circuit courts will ensure that district courts do not abuse their sentencing discretion

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which is bounded by the §3553(a) factors. Reviewing courts will become the facilitators of sentencing uniformity, not by enforcing the Sentencing Guidelines, but by ensuring that sentencing courts are using a common meaning of the factors set forth in §3553(a). Then, 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 Sentencing Commission to develop the Sentencing Guidelines in the first place.

**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 Sentencing Guidelines. And though, in *Booker*, the Supreme Court made room for district courts to exercise their discretion in sentencing outside of the Guidelines, 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 sentencing 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 Sentencing Guidelines. This is not to say that an advisory guidelines regime could never work, however. When the actual sentencing factors set forth in §3553(a) are reflected in a court’s reasons for imposing a sentence and direct the reviewing courts’ 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 ensure sentencing uniformity through
reviewing sentencing reasons, rather than just relying on the presumed reasonableness of
Guidelines. This approach will allow sentencing courts to practice the sort of
individualized sentencing that this Nation has considered fair for hundreds of years, while
still protecting defendants from impermissible judicial bias. Additionally, 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. And, in this new sentencing
system, although district judges may begin to hum their own individual sentencing tunes,
all of the inspiration behind all of those melodies will be uniformly reasonable.