Discretion without Guidance

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Article

Discretion Without Guidance:
The Need to Give Meaning to § 3553
after Booker and its Progeny

WILLIAM W. BERRY III

The exercise of the discretion accorded to a judge in determining the sentence of a convicted criminal offender bears directly on the coherence and the legitimacy of any criminal justice system. The United States federal criminal sentencing system has, at various points in time over the past century, employed schemes that have approached either the one extreme of unfettered judicial discretion or the other extreme of highly restricted judicial discretion. In January, 2005, the United States Supreme Court held in United States v. Booker that the mandatory federal sentencing guidelines, the source of the strict restriction on judicial discretion for the twenty years prior, were no longer mandatory, but merely advisory.

Three years later, there is still significant confusion concerning the manner in which the federal sentencing statute, 18 U.S.C. § 3553, should be applied to determine the appropriate sentence in a particular case. The cases decided by the Supreme Court this term, Gall and Kimbrough, and the decision last term in Rita all address different aspects of the relative weight of the advisory guidelines in sentencing and the appellate review of different levels of reliance on the guidelines. None of this litigation, however, concerns the inherent conflicts in the applicable statutory provisions, particularly the application of the parsimony requirement that the sentence be “sufficient but not greater than necessary” to achieve each of the four purposes of sentencing, each of which likely dictate a significantly different outcome and certainly invoke and likewise forbid consideration of different criteria in sentencing.

This Article argues that for sentencing to be both reasoned and consistent, clear substantive meaning must be given to the application of the conflicting provisions of 18 U.S.C. § 3553. Using an English statute as an example, the Article proposes that Congress remedy the confusion by prioritizing among the competing aims it articulates in § 3553. After briefly suggesting why such action is unlikely, the Article assesses the current combination of elements of both indeterminate sentencing and mandatory guidelines schemes after this term’s cases. It concludes that, putting purposes aside, an assessment of the current state of affairs in federal sentencing depends in large part upon one’s normative view of the sentencing guidelines.
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I. INTRODUCTION

The nature and degree of discretion accorded to a judge in determining the sentence of a convicted criminal offender bears directly on the coherence and the legitimacy of any criminal justice system. The one extreme of providing unlimited judicial discretion is unsatisfactory because it typically results in inconsistent and disparate sentences for similarly culpable offenders with offenses similar in severity.1 The other extreme of eliminating judicial discretion entirely in sentencing likewise is inadequate as it serves to usurp the role of the judge in the sentencing process and results in unjust outcomes in individual cases.2

The United States federal criminal sentencing system has, at various points in time over the past century, employed schemes that have approached one extreme or the other. Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes.3 The Sentencing Reform Act of 1984 (the “Act”) moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.4 The Act outlined the factors that were to be included in sentencing determinations, but did not allow for separate

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1 MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1972).


consideration of these factors outside of the process provided under the guidelines regime because of the mandatory nature of the guidelines.\footnote{18 U.S.C. § 3553(a) (2000).}

In January, 2005, the United States Supreme Court held in United States v. Booker that the federal sentencing guidelines scheme violated the Sixth Amendment of the United States Constitution.\footnote{United States v. Booker, 543 U.S. 220, 226–27 (2005).} As explained in more detail below, the Court found that because the guidelines sometimes required judges (as opposed to juries) to find facts which resulted in an increase in the statutory maximum sentence, the guidelines violated the defendant’s Sixth Amendment right to a jury trial.\footnote{Id. at 235, 244.} To remedy the constitutional flaw in the guidelines, the Court determined that the guidelines were no longer mandatory, but merely advisory.\footnote{Id. at 245–46.}

Three years later, there is still significant confusion concerning the manner in which the federal sentencing statute, 18 U.S.C. § 3553, should be applied to determine the appropriate sentence in a particular case. The cases decided by the Supreme Court this term, Gall and Kimbrough, and the decision last term in Rita all address different aspects of the relative weight of the advisory guidelines in sentencing and the appellate review of different levels of reliance on the guidelines.\footnote{Rita v. United States, No. 06-5754 (U.S. June 21, 2007); Kimbrough v. United States, No. 06-6330 (U.S. Dec. 10, 2007); Gall v. United States, No. 06-7949 (U.S. Dec. 10, 2007).} None of this litigation, however, concerns the inherent conflicts in the applicable statutory provisions, including the parsimony requirement that the sentence be “sufficient but not greater than necessary” to achieve each of the four purposes of sentencing, each of which likely dictate a significantly different outcome and certainly invoke and likewise forbid consideration of different criteria in sentencing.\footnote{18 U.S.C. § 3553(a) (2000).}

This Article argues that for sentencing to be both reasoned and consistent, clear substantive meaning must be given to the provisions of 18 U.S.C. § 3553 and their application. Using an English statute as an example, the Article proposes that Congress remedy the confusion by prioritizing among the competing aims it articulates in § 3553.

After briefly suggesting why such action is unlikely, the Article assesses the current combination of elements of both indeterminate sentencing and mandatory guidelines schemes after this term’s cases. It concludes that, putting purposes aside, an assessment of the current state of affairs in federal sentencing depends in large part upon one’s normative view of the sentencing guidelines.

Part II of the Article provides a brief history of federal sentencing practices, including an examination of the statutory and jurisprudential
developments through the end of the most recent Supreme Court term. Part III argues that after Booker, § 3553 contains inherent flaws that must be addressed in order to apply it coherently and consistently, and explains how the Commission’s post-Booker data demonstrates this incoherence. Part IV offers a solution to curing the statutory defect Congressional action to correct the statutory flaw as modeled by the Criminal Justice Act of 1991 in the United Kingdom. After explaining why this solution is unlikely to be adopted, the Article concludes in Part V by suggesting that the appeal of the current “mixed approach” status of federal sentencing rests in one’s normative view of the sentencing guidelines.

II. AN OVERVIEW OF JUDICIAL DISCRETION IN SENTENCING

A. A Brief History of Federal Sentencing Practices

1. The Indeterminate Sentencing Era

While the United States Constitution does not specify which branch of government has the responsibility for federal sentencing, it is well-established that Congress has the power to set a sentence for a particular criminal offense, and, more importantly, “the scope of judicial discretion with respect to a sentence is subject to congressional control.”\(^{11}\) Throughout the first two hundred years of the United States, Congress typically provided statutory maximums or sentencing ranges for federal crimes and left federal judges broad discretion to consider any aggravating or mitigating factor they deemed relevant.\(^{12}\) Thus, Congress allowed federal judges the discretion to “conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come,” in determining a sentence.\(^{13}\) Like judges in other common law countries, American judges believed that sentencing was an area of their special competence, and accordingly, resisted all efforts to restrict their discretion, “even opposing proposals for appellate

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\(^{11}\) Mistretta v. United States, 488 U.S. 361, 364 (1989) (citing Ex parte United States, 242 U.S. 27, 41-42 (1916)); see also United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.”).


review, which had long existed in other countries."

The Supreme Court's narrow interpretation of the Act of 1891 as failing to permit a challenge on appeal to a trial judge's exercise of sentencing discretion similarly broadened federal judge discretion. The Supreme Court has explained that "[i]f there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Thus, prior to 1984, the discretion of federal judges in sentencing matters was "virtually free of substantive control or guidance.”

2. Common Sentencing Objectives in Individual Cases

During the era of indeterminate sentencing, four principal aims originally derived from the English common law were advanced as principles for sentencing criminal offenders, and have subsequently been codified in a federal statute at 18 U.S.C. § 3553(a)(2). First, the retributive principle of just deserts contemplates that the sentence will be proportional to the culpability of the offender and the harm caused by the criminal act committed. Second, the goal of incapacitation bases the determination of the punishment on the need to protect society from a threatening individual for a period of time. Third, the principle of rehabilitation requires that the sentencing determination rest on the "correction" of the offender that must take place before the offender can return to society. Finally, the concept of deterrence, both of the

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19 For a thorough discussion of each of these principles see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 75–87 (4th ed. 2005).

20 ANDREW VAN HIRSCH, CENSURE AND SANCTIONS 1 (1993).

21 ASHWORTH, supra note 19, at 80.

22 Id. at 82. For most of the twentieth century prior to the Act, the rehabilitative or "medical" model of sentencing prevailed in the federal and state courts. See, e.g., FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 5 (1981) (discussing twentieth century expressions of the rehabilitative ideal prior to its decline in the 1970s); PAMELA L. GRISSETT, DETERMINE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 1, 11–12 (1991) (discussing the rise of rehabilitative design from 1870 to 1970). This model viewed
individual from committing a crime again (specific), and of others who might be tempted to commit the same crime (general), serves as a principle by which offenders can be sentenced. 23

Careful thought about any of these objectives quickly reveals that they can often be incompatible with each other. 24 An obvious example is the incompatibility between general deterrence and desert, where the punishment needed to deter others may far exceed the punishment proportional to the crime committed. Similarly, the goal of incapacitation, in protecting society from an offender, may not necessarily comport with rehabilitating that offender. Recognition of the incompatibility of these principles suggests that a rational sentencing scheme will be based on only one of these objectives, or in the alternative, if more than one are adopted, it must specify how to prioritize the competing objectives. 25

3. The Flaws of Indeterminate Sentencing

In the indeterminate sentencing era, there was no consistency with which these objectives were used to make sentencing decisions. 26

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23 Ashworth, supra note 19, at 75; Franklin E. Zimring & Gordon J. Hawkins, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 92, 224 (1973). General deterrence can depend on a number of factors including the severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished; the target group's perceptions of the severity, swiftness, and certainty of punishment; the extent to which members of the target group suffer from addiction, mental illness, or other conditions which significantly diminish their capacity to obey the law; and the extent to which these would-be offenders face competing pressures or incentives to commit crime.

24 Ashworth, supra note 19, at 91. Justice Breyer's majority opinion in *Rita*, admits as much as it relates to the four objectives discussed here, recognizing "the abstract and potentially conflicting nature of §3553(a)'s general sentencing objectives." *Rita* v. United States, No. 06-5754, slip op. at 11 (U.S. June 21, 2007).

25 Ashworth, supra note 19, at 73; von Hirsch, supra note 20, at 47-48.

Predictably, the unlimited discretion afforded judges, combined with broad statutory sentencing ranges, resulted, over time, in increasingly observed disparities and inconsistencies in sentences. In 1958, Congress made its first attempt to remedy the widespread sentencing disparities among the federal courts by authorizing the creation of joint councils responsible for creating advisory "objectives, policies, standards, and criteria for sentencing." The disparities nonetheless continued. Federal judge Marvin Frankel described a sentencing judge's "almost wholly unchecked and sweeping" discretion as "terrifying and intolerable for a society that professes devotion to the rule of law."

In addition to the broad discretion given to judges, a second problem also arose—the discretion allowed to parole boards. As rehabilitation became increasingly important as a sentencing objective, Congress, like many state legislatures, adopted a parole system in which the period of imprisonment was left largely to parole boards and other officials outside

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of Punishment, 33 Rutgers L. Rev. 799, 801–02 (1981) (attributing the differences in sentencing decisions to different values, different methods of processing the available information, or both).

See Norval Morris, Towards Principled Sentencing, 37 Md. L. Rev. 267, 272–74 (1977) (citing an experiment with all forty-three federal Second Circuit judges that showed wide disparities between the sentences they rendered for identical cases); Iene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 883–84, 896–97 (1990) (discussing how "[f]or a system claiming equal justice for all, disparity [in criminal sentencing] was an inexplicable yet constant source of embarrassment"). Such disparities were recognized as early as the beginning of the twentieth century. Charlton T. Lewis, The Indeterminate Sentence, 9 Yale L.J. 17, 17–18 (1900).

28 U.S.C. § 334(a) (2000). Congress's response to the existence of sentencing disparity came almost twenty years after several Attorneys General had raised concerns about the wide disparities and great inequalities in sentences. 1938 ATT'Y GEN. ANN. REP. 6–7; 1939 ATT'Y GEN. ANN. REP. 6–7; 1940 ATT'Y GEN. ANN. REP. 5–7; 1941 ATT'Y GEN. ANN. REP. 4. Federal judges themselves were even critical of the disparities. See, e.g., Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958) (noting that disparity of sentences in federal criminal cases "is an anomaly [to] a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other state of the proceedings against him"); Symposium, Appellate Review of Sentences, 32 F.R.D. 249, 257–58, 260–61, 264–65 (1962) (assessing appellate review of criminal sentencing).

FRANKEL, supra note 1, at 5. Numerous studies conducted in the 1970s and after confirmed the existence of serious disparities in sentencing. See, e.g., S. Rep. No. 98-225, at 41–45 (1983) (discussing several studies); Whitney North Seymour, Jr., 1972 Sentencing Study for the Southern District of New York, 45 N.Y. St. B.J. 163, 167 (1973) ("The following synopsis of selected individual cases in which prison sentences were imposed during the six-month study period graphically illustrates the basis for the sense of injustice on the part of individual defendants at the difference in sentencing of white collar and common criminals."). Even more troubling, studies demonstrated that illegitimate factors, namely race and gender, were often considered by judges in sentencing. See, e.g., Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th, Pt. 2, at 1118, 1179 (1984) (citing a study claiming the sentencing process plays a major role in creating racial disparities in our criminal justice system and also raising concern that southern federal judges "took only one factor into consideration in sentencing, and that was race"); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1:3 (2d ed. 1991) (citing studies reporting race- and gender-based disparities); Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1473, 1630 (1988) ("Several researchers have suggested that existing [sentencing] disparities result from racial discrimination on the part of judges and parole boards. Others are more tentative.").

GRISET, supra note 22, at 11–13.
of the courts. As with the disparity in sentences, there existed widespread disparities in granting parole to offenders, with no consistent standard applied across parole boards.


Largely in response to these concerns, Congress passed the Sentencing Reform Act of 1984 (the “Act”); it was the first significant reform effort in federal sentencing. The Act sought to remedy the “two ‘unjustifi[ed]’ and ‘shameful’ consequences” of the indeterminate sentencing system: “the great variation among sentences imposed by different judges upon similarly situated offenders,” and “the uncertainty as to the time the offender would spend in prison,” because of the potential for discretionary release by the parole board. To further the goals of uniformity and certainty, the Act established the United States Sentencing Commission as an independent agency in the judicial branch, and instructed it to promulgate guidelines to narrow the sentencing discretion of federal judges.

In doing so, Congress explicitly established that one of the purposes of the United States Sentencing Commission was to “establish sentencing policies and practices for the Federal criminal justice system that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.” Consistent with this purpose, Congress similarly required that the Commission “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2).” Another duty of the Commission was to provide “general policy statements regarding application of the guidelines or any other

31 DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 14–15 (1978); see also Parole Act, ch. 387, 36 Stat. 819, 819–820 (1910) (establishing a parole system); United States v. Grayson, 438 U.S. 41, 46–47 (1978) (“A fundamental proposal of this [reform] movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism.”).


34 Mistretta, 488 U.S. at 366 (quoting S. REP. NO. 98-225, at 38, 65 (1983)).


aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2).”

In addition to adhering to the sentencing objectives (desert, incapacitation, rehabilitation and deterrence) of § 3553(a)(2), the Act provided further guidance to the Sentencing Commission in forming the guidelines. First, it specified that the guideline sentence ranges must be within the statutory limits set by Congress, and must be applied by federal district judges to determine criminal sentences unless there is an aggravating or mitigating circumstance not adequately considered by the Commission, in which case a court is permitted to depart from the applicable guidelines range.

In formulating its offense categories and applicable sentencing ranges, the Act similarly mandated that the Commission consider seven factors: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. Similarly, the Act provided eleven additional factors for the Commission to consider in establishing categories of defendants, including, but not limited to, age, education, mental and emotional condition, physical condition, role in the offense, and criminal history. The Act also abolished parole and thus required defendants to serve the entirety of their sentences, with the possible exception of credit for “satisfactory behavior.”

Finally, Congress slightly altered the judicial discretion of the federal courts of appeal in reviewing decisions. Modifying the principle that appellate courts have no power to overturn a sentence which is within the limits allowed by a statute, Congress permitted appellate review under the guidelines when the district court sentenced an offender outside the guideline range, or the district court judge incorrectly applied the guidelines. Further, Congress established that unless there is clear error,

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40 § 994(d)(1)–(11), 98 Stat. at 2020.
41 § 3624 (a)–(b), 98 Stat. at 2008–09.
42 See Doroszynski v. United States, 418 U.S. 424, 443 (1974) (“Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all.”).
43 Thus, an offender may appeal a sentence when it “is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range,” and the government may appeal when the sentence “is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation,
the Court of Appeals must accept the facts found by the sentencing judge when reviewing a guideline sentence.\textsuperscript{44}

Congress modified the clear error standard in 2003,\textsuperscript{45} permitting \textit{de novo} review of sentences outside the guideline range (departures), meaning that the Court of Appeals could review the grounds for departure in the first instance, rather than having its review limited to whether the departure was clearly erroneous.\textsuperscript{46} Interestingly, this review allowed the Court of Appeals to overturn a departure that "does not advance the objectives set forth in section 3553 (a)(2)," or "departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553 (a)."\textsuperscript{47}

5. A Closer Look at the Statutory Structure of § 3553

To understand how the guidelines are to operate in practice, it is instructive to consider the broader statutory framework that established the guidelines, particularly in light of the severing and excising of the mandatory sentencing provisions after \textit{Booker}.\textsuperscript{48} Section 3553(a) first

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\textsuperscript{44} § 3742, 98 Stat. at 2011 (as amended at 18 U.S.C. § 3742 (2000)).
\textsuperscript{47} See supra note 44 and accompanying text.
\textsuperscript{48} § 401(d)(1), 117 Stat. at 670.
\end{flushleft}

The act requires the following factors to be considered in the imposition of a sentence:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and sentencing range established for—(A) the applicable category of the offense committed by the applicable category of defendant as set forth in the guidelines . . . ; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress . . . ; (5) any pertinent policy statement issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

states that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" set forth in § 3553(a)(2), which are the four traditional objectives of sentencing discussed above: desert, deterrence, incapacitation, and rehabilitation.\footnote{18 U.S.C. § 3553(a) (2000). This statutory framework is similar to the Criminal Justice Act of 2003 in the UK, which lists multiple sentencing objectives, but does not indicate which one should take priority over another. See Ashworth, supra note 19, at 41 (discussing the Criminal Justice Act of 2003); Andrew von Hirsch & Julian V. Roberts, Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions, 2004 Crim. L. Rev. 639, 640–42 (same).} The statute adds that "[t]he court, in determining the sentence to be imposed, shall consider": (1) the "nature and circumstances of the offense and the history and characteristics of the defendant," (2) the four objectives discussed above, (3) "the kinds of sentences available," (4) "the kinds of sentence and sentencing range established" under the Sentencing Guidelines, (5) "any pertinent policy statement—issued by the Sentencing Commission," (6) "the need to avoid unwarranted sentence disparities," and (7) "the need to provide restitution to any victims."\footnote{18 U.S.C. § 3553(a) (2000 & Supp. IV 2006).} Thus, § 3553 articulates seven factors that judges shall consider in determining the sentence to be imposed.\footnote{Id. § 3553(b).}

The next statutory section, § 3553(b), states:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.\footnote{Id. This section also states: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)." Id. Thus, the only situation where the guidelines are not mandatory is when a particular issue has not been considered by the guidelines.}

Further, "[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."\footnote{Id.} Accordingly, this section made the Sentencing Guidelines, prior to Booker, the mandatory framework for sentencing federal criminal offenders.

6. The Sentencing Guidelines

Pursuant to the Act, the United States Sentencing Commission
promulgated the federal sentencing guidelines in 1987. The guidelines covered all federal crimes, including federal regulatory crimes, "white-collar" crimes, and drug crimes. Under the guidelines scheme, a guideline sentence range is ultimately derived from a sentencing grid. The horizontal axis is the offender's criminal history score, which increases with each subsequent offense. The vertical axis is the offense level, of which there are forty-three, which increases as the seriousness of the offense increases.

Before referring to the grid, a judge must first consult a schedule of offenses that specifies the "base offense level." The judge may adjust the offense level upward or downward (almost always upward) on the basis of any applicable specific offense characteristics. The judge is then to apply to the offense level any applicable adjustments related to the victim, the role of the offender in the crime, any obstruction of justice by the offender, and finally for acceptance of responsibility. Next, the judge must calculate the offender's criminal history score. The adjusted offense level and the criminal history score are then used to determine the presumptive sentence range for the offender on the grid. Finally, the judge either determines a sentence within the prescribed range, or departs from the guidelines based on one of the grounds for departure articulated in the guidelines.

In calculating a guidelines sentence, judges do not take into account the § 3553(a)(2) sentencing objectives articulated by Congress. This is because the Commission failed to develop a method by which these principles could be practically applied. The inability of the Commission

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56 U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2006). It is worth noting, however, that the base offense level corresponds not to the crime proved at trial but to the actual conduct of the offender, termed "relevant conduct" by the Commission. Id. § 1B1.3 cmt. n.1.
57 Id. § 1B1.1. Each offense is defined thoroughly as the Commission sought to include any possible offense characteristic that relates to the seriousness of the offense. A common example is the possession of a firearm. Frank O. Bowman, III, Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 221–22 (2004).
59 Id.
60 Id. at ch. 5, intro. cmt. As a result of the Commission's attempt to be exhaustive, the guidelines articulate a few grounds for departure but numerous grounds for which departure is presumptively disfavored.
61 Id. at § 5K1.1–2.0. It is fair to say that this limitation on discretion is at the opposite end of the continuum from the indeterminate sentencing enjoyed prior to the guidelines. Stith and Cabranes describe the guidelines as a set of "administrative diktats" that the Commission "promulgated and enforced ipse dixit." STITH & CABRANES, supra note 14, at 95.
62 This failure to adhere to the § 3553 objectives makes the goal of reducing disparity incoherent.
to implement the sentencing objectives mandated by Congress may have stemmed from the failure of Congress to provide guidance as to the priority of such objectives.\textsuperscript{63} The Commission explained its decision to ignore these competing principles in establishing its guideline ranges:

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of ‘just deserts.’ . . . Others argue that punishment should be imposed primarily on the basis of practical ‘crime control’ considerations . . .

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation.\textsuperscript{64}

Instead of choosing a guiding principle, then, the Commission chose to solve this “philosophical problem” of developing a coherent sentencing system by “taking an empirical approach”\textsuperscript{65} and using averages of prior sentencing decisions to derive guideline ranges for offenses.\textsuperscript{66} The Commission thus admitted to abandoning the application of the § 3553(a)(2) objectives in developing its guidelines:

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins

\textsuperscript{63} U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2006).

\textsuperscript{64} Id. at ch. 1, pt. A.

\textsuperscript{65} Id. In many cases, this empirical approach resulted in significantly harsher sentencing ranges than had been previously used under the indeterminate sentencing regime. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 46 (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf; U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 25–26, 35–39 (1987). Such changes were justified as necessary “trade-offs” given the differing points of view of the initial commissioners. Breyer, supra note 55, at 23–24.

with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. . . . After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.  

The initial reaction of the federal courts to the passage of the guidelines was one of rebellion, with many federal judges deciding that the guidelines were unconstitutional, until the United States Supreme Court ruled otherwise in Mistretta v. United States. Over time, however, the consensus of the courts followed the mandates of the Commission and for the most part did not deviate from the guidelines structure. Further, in part because courts of appeal narrowed their ability to depart from the guidelines, district judges rarely departed from the guidelines as sentencing became a “rote process” where the sentencing “grid was God.” Despite academic criticism concerning the failure of the commission to implement the § 3553(a)(2) sentencing objectives, judges opted not to use the language of § 3553(a) to circumvent application of the mandatory guidelines. As a result, no consensus was developed as to how one might apply the § 3553(a)(2) factors or as to which one should have priority.

67 Id.
68 See Gertner, supra note 14, at 524 (“Sentencing discretion was central to their work, a pillar of judicial independence. So clear were they on this point that between 1987 and 1989, after the United States Sentencing Guidelines were enacted, two hundred judges declared them to be unconstitutional. (Justice Blackmun rejected these challenges in Mistretta).”).
70 Gertner, supra note 14, at 524–25.
71 FRANKEL, supra note 1, at 82–85.
73 Lynn S. Adelman et al., Federal Sentencing Under “Advisory” Guidelines: Observations by District Judges, 75 FORDHAM L. REV. 1, 4 (2006). The determination of when circumstances are unusual enough to warrant a departure depends on when the “purposes underlying the rule are no longer served,” but without a clear guiding purpose, particularly one tied to the guideline at issue, the departure determination is often left without support. Aaron Rappaport, Speaking of Purposes, 12 FED. SENT’G REP. 95, 96 (1999).
74 Indeed, the sentencing guidelines have been commonly criticized for many reasons including “policy grounds (that they unduly narrow judicial discretion and shift discretion to prosecutors), on process grounds (that they foreseeably cause judges and prosecutors to circumvent them), on ethical grounds . . . , on technocratic grounds . . . , on fairness grounds . . . , on outcome grounds . . . , and on normative grounds.” TONRY, supra note 14, at 72.
B. The Supreme Court's Apprendi Jurisprudence

The Court's recent Sixth Amendment jurisprudence has rested on the fundamental principle that any fact that exposes a defendant to a greater potential sentence must be found by a jury and established beyond a reasonable doubt, as opposed to a finding by a judge established merely by a preponderance of the evidence. Despite the longstanding common-law practice of requiring juries to make such determinations, the Supreme Court has only in recent years given it any weight as a constitutional principle required by the Sixth Amendment of the United States Constitution.

In Jones v. United States, the Court extensively traced the history of the Sixth Amendment and its corresponding case law. Although it interpreted the statute at issue not to reach the issue of the propriety of judicial fact-finding, the Court in Jones indicated that judicial fact-finding that increased the potential maximum punishment for a defendant potentially violated his constitutional rights.

Less than two years later, the Court issued its landmark decision in Apprendi v. New Jersey. The defendant, Charles Apprendi, challenged the sentence he received after being convicted of possession of a firearm for an unlawful purpose. Under the applicable New Jersey statute, the offense carried a penalty of five to ten years imprisonment. The judge, however, sentenced Apprendi to twelve years imprisonment under a separate "hate crime" statute that authorized an extended term of imprisonment, resulting in a new sentencing range between ten and twenty years. The "hate crime" statute was applied based on the judge's finding, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual

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76 Cunningham v. California, No. 05-6551, slip. op. at 8 (U.S. Jan. 22, 2007).
77 The Sixth Amendment principle is derived from the right to a trial by jury. The text of the Sixth Amendment states in full:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
U.S. CONST. amend. VI.
78 Jones v. United States, 526 U.S. 227, 239–52 (1999) (discussing Supreme Court precedent suggesting that under the Sixth Amendment, any fact that would increase the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt).
79 Id. at 248.
81 Id. at 469–71.
82 Id. at 468.
83 Id. at 469, 471.
orientation or ethnicity."  

The Supreme Court invalidated the sentence enhancement as a violation of the Sixth Amendment right to a jury trial because the increase in the maximum sentence resulted from the determination of a fact by the judge using a standard of preponderance of the evidence, as opposed to a factual determination by the jury pursuant to a beyond a reasonable doubt standard. The Court thus held that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."  

In Blakely v. Washington, an important precursor to United States v. Booker, the Supreme Court reaffirmed the Apprendi principle in striking down part of the State of Washington’s Sentencing Reform Act. The defendant, Ralph Howard Blakely, pleaded guilty to the charge of second-degree kidnapping with a firearm. The overall statutory maximum for Blakely’s offense was ten years, but, under Washington’s Sentencing Reform Act, the applicable sentencing range was forty-nine to fifty-three months unless the trial judge found “substantial and compelling reasons justifying an exceptional sentence.” Further, the Sentencing Reform Act provided a list of possible aggravating facts based upon which a judge could make such a finding; under no circumstance could a fact found by the jury as an element of the underlying offense provide a basis for imposing an exceptional sentence. Pursuant to this provision, the judge found that Blakely had acted with “deliberate cruelty” and sentenced him to ninety months in prison, three years above the standard range.  

In its application of Apprendi, the Supreme Court held that Blakely’s Sixth Amendment guarantee to trial by jury extended to the enhancement of the sentencing range, even though the sentence was within the ten year maximum authorized by the statute. The Court explained that

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84 Id. at 468–69 (quoting N.J. STAT. ANN. § 2C:44–3(e) (West 2005) (deleted by amendment 2001 N.J. Sess. Law Serv. ch. 443 (West 2002))).
85 Id. at 491–92.
86 See Almendarez-Torres v. United States, 523 U.S. 224, 239–247 (1998) (holding that a prior conviction need not be submitted to a jury and proven beyond a reasonable doubt in order for it to be used as a sentencing factor).
87 Apprendi, 530 U.S. at 490.
89 Blakely, 542 U.S. at 298–99. Blakely was initially charged with first-degree kidnapping, but he pleaded guilty to second-degree kidnapping involving domestic violence and the use of a firearm as part of a plea agreement. Id.
90 Id. at 299 (quoting WASH. REV. CODE § 9.94A.120(2) (2000)).
91 Id. at 299, 303–04.
92 Id. at 300–301.
93 Id. at 303–04.
the “statutory maximum” for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” . . . and the judge exceeds his proper authority.94

Thus, the relevant statutory maximum in Blakely was the top of the sentencing range, fifty-three months, because the judge could not have imposed a higher sentence without additional fact-finding.95

The Court’s decision in Blakely—to define the statutory maximum as the applicable sentence range prior to judicial fact-finding—immediately raised questions as to the constitutionality of the similar enhancements, resulting from judicial fact-finding, under the federal sentencing guidelines.96 United States v. Booker soon addressed these questions.97

C. The Booker Decision

At his federal trial, Freddie J. Booker was found guilty of possession with the intent to distribute at least fifty grams of cocaine base (crack), based on evidence that he had 92.5 grams in his duffel bag.98 The applicable statute, 21 U.S.C. § 841(b)(1)(A)(iii), prescribed “a minimum sentence of ten years in prison and a maximum sentence of life [imprisonment] for that offense.”99 The Sentencing Guidelines, based on Booker’s criminal history and the quantity of drugs the jury found him in possession of, required the judge to select a “base” sentence of not less than 210 months (seventeen years, six months) and not more than 262

94 Id. at 303–04 (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 87 (2d ed. 1872)).
95 Id. at 303.
97 United States v. Booker, 543 U.S. 220 (2005). A companion case with very similar factual circumstances, United States v. Fane, No. 04-105 (U.S. Jan. 12, 2004), was decided as part of the Booker decision. Id. at 220, n.4. For simplification, the forthcoming analysis refers only to the Booker case.
98 Id. at 227.
99 Id.
months (twenty-one years, ten months) in prison. After holding a post-trial sentencing proceeding, the judge, using a preponderance of the evidence standard, concluded that “Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice.” These findings mandated a new sentencing range of 360 months (thirty years) to life imprisonment, and the judge sentenced Booker to thirty years imprisonment.

1. The Sixth Amendment Violation

The question before the court in Booker was whether the sentence enhancement called for by the guidelines, and resulting in a sentence of thirty years, violated Booker’s Sixth Amendment right to a jury trial. Booker claimed that because the enhancement exceeded the original guideline maximum and was based on facts not determined by the jury, his right to a jury trial, pursuant to Apprendi and its progeny, had been violated.

In a 5-4 decision, the Supreme Court held that Booker’s sentence violated the Sixth Amendment, and, as a result, the application of the Sentencing Guidelines in this manner was unconstitutional. Importantly, the Court explained that the mandatory nature of the guidelines, requiring that the judge impose a sentence in excess of the initial statutory range based on facts not proven to a jury, caused the Sixth Amendment violation. The Court also emphasized, however, that the Sixth Amendment requirement that facts be proven to a jury does not limit “the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”

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101 Booker, 543 U.S. at 227.
102 Id.
103 Id. at 229 n.1. The Sixth Amendment to the United States Constitution states: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
104 U.S. CONST. amend VI.
105 Booker, 543 U.S. at 227–28 (citing United States v. Apprendi, 530 U.S. 466, 490 (2000)).
106 Booker, 543 U.S. at 225, 248, 267.
107 Id. at 233–34. Justice Stevens, writing for the court, stated that “[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.” Id. at 233.
108 Id. (citing Apprendi, 530 U.S. at 481 and Williams v. New York, 337 U.S. 241, 246 (1949)). Thus “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.” Id.
2. The Remedy

Curiously, the Court had a different 5-4 split in the second part of the opinion in which it determined the remedy for the unconstitutional application mandated by the Sentencing Guidelines. The Court chose not to abandon the guidelines, or, in the alternative, require jury fact-finding in situations where the guidelines procedures would violate the Sixth Amendment; instead the Court held that “the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) . . . must be severed and excised” because it was incompatible with the Sixth Amendment. As a result, the Court’s decision in Booker made “the Guidelines effectively advisory.” After Booker, the federal sentencing scheme still “requires a sentencing court to consider Guidelines ranges” as part of the court’s inquiry under § 3553(a)(4) “but it permits the court to tailor the sentence in light of other statutory concerns as well,” specifically the other factors under § 3553(a).

The Court also severed one other statutory section, § 3742(e), because it depended upon the Guidelines’ mandatory nature. The Court replaced the § 3742(e) standard of review (and requirement to adhere to the § 3553 factors) for departures from the guidelines with an appellate standard of “[r]easonableness.” This significantly expanded the discretion of the federal courts of appeal in reviewing sentencing decisions, allowing a reversal of a sentence based on the view that a district court’s sentencing decision was unreasonable.

D. The Impact of Booker on Judicial Discretion

The majority of courts have adopted a three-step process, consistent with Booker, in making sentencing determinations. First, the sentencing

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108 Id. at 225, 244–45. The new majority was comprised of the four dissenters on the Sixth Amendment question—Justice Breyer, Chief Justice Rehnquist, Justice O’Connor and Justice Kennedy—in addition to Justice Ginsburg. Id. at 244 n.*.

109 Id. at 245–46.

110 Id. at 245.

111 Id. at 245–46.

112 Id. at 245; see also 18 U.S.C. § 3742(e) (2000) (instructing the court of appeals to consider whether the sentence was “imposed in violation of law,” “as a result of an incorrect application of the sentencing guidelines,” “is outside the applicable guideline range,” or, if there is no applicable sentencing guideline, is “unreasonable”).

113 Booker, 543 U.S. 260–61.

114 As Justice Breyer explained, The remainder of the Act “function[s] independently.” Without the “mandatory” provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. The Act nonetheless requires judges to consider the Guidelines “sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,” the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the
judge must properly calculate the appropriate guideline range, including whether there are any guideline grounds for departure. Second, the judge must determine whether a guidelines sentence would adequately serve the factors enumerated by Congress in 18 U.S.C. § 3553(a), and if not, select a sentence that does. Third, and finally, the district court must articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guideline range and its application of § 3553(a).

Two virtually antithetical theoretical approaches have framed the discussion of the impact of Booker on federal sentencing. As explained below, the Supreme Court, rather than choose one approach, has sought (in Rita, Gall, and Kimbrough) to balance the approaches by including dicta in support of both while ruling out the wholesale adoption of either approach. The first approach has accorded substantial weight to the sentencing guidelines based on the presumption that the sentencing guidelines already take into account the other factors enumerated in 18 U.S.C. § 3553(a). The contrary view finds that the guidelines are only one of the factors included in 18 U.S.C. § 3553(a), all of which must be given equal consideration when arriving at an appropriate sentence. Each approach is considered in turn.

1. **The Incorporation Approach (mandatory)**

The first approach, which relies on an incorporation principle, is an attempt to minimize the impact of Booker on judicial discretion as much as possible. Taken to its logical extreme, the incorporation approach holds

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offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.


There is a split between the circuits concerning whether sentences below the guidelines based on Booker or § 3553 are "departures" or simply an application of the advisory guidelines. See Lee D. Heckman, The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World, OHIO ST. L.J. (forthcoming 2007) (manuscript at 36) (arguing that after Booker the departure concept is now obsolete), available at http://ssrn.com/abstract=979073.

Booker, 543 U.S. at 259–61.


See, e.g., United States v. Ranum, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005) (concluding that under Booker "courts must treat the guidelines as just one of a number of sentencing factors").

Given the historical attempts by judges to use their power to preserve as much discretion as possible, this approach appears at first glance counter-intuitive, but may be a reflection of a federal judiciary now comprised in part of advocates of the sentencing guidelines. Gertner, supra note 14, at 536–38.
that the sentencing guidelines remain, for all practical purposes, mandatory, despite the Supreme Court’s holding in *Booker*. The underlying premise of this approach is that the sentencing guidelines incorporate all of the § 3553(a) factors into the guideline calculation process. Thus, the guideline calculation by definition incorporates all of the § 3553(a) factors, and no further inquiry is needed. As a result, there is no determination to be made by the district court outside of the guideline structure. In practice, courts have not taken the conclusion quite so far, but instead have deemed the incorporation argument as a basis for establishing a strong presumption that the guidelines should not be departed for § 3553 reasons, except in extraordinary cases.\(^{121}\)

The support for this position can be found first in Congress’s admonitions to the Sentencing Commission in formulating the guidelines, many of which are identical to the § 3553(a) factors. Congress instructed the Sentencing Commission to take these factors into account when devising the guidelines.\(^{122}\) Further, it is not beyond reason to interpret the guidelines as the embodiment of these principles, including the § 3553(a) factors.\(^{123}\) Despite the statements in the guidelines to the contrary, the chair of the Sentencing Commission Ricardo H. Hinojosa testified before Congress that the Commission “considered the very factors listed in section 3553(a) and cited with approval in *Booker* . . . [d]uring the process of developing the initial set of guidelines and refining them throughout the ensuing years.”\(^{124}\)

2. *The Broad Discretion Approach (discretionary)*

By contrast, the broad discretion approach, taken to its extreme, interprets *Booker* as a “sea change in sentencing” — a virtual return to the pre-guidelines indeterminate sentencing scheme.\(^{125}\) This approach views

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11 See *supra* note 118 and accompanying text.
13 As explained by the Fourth Circuit Court of Appeals, The offense levels and criminal history categories squarely address “the nature and circumstances of the offense and the history and characteristics of the defendant.” The various adjustments and enhancements bear upon the need for the sentence “to reflect the seriousness of the offense . . . and to provide just punishment.” And the elevated criminal history categories for repeat offenders and career criminals reflect the congressional intention “to afford adequate deterrence to criminal conduct,” and “to protect the public from further crimes of the defendant.”

15 Michael W. McConnell, *The Booker Mess*, 83 DENVER U. L. REV. 665, 666–667 (2006). In his dissent, Justice Scalia explains how *Booker* enables a return to indeterminate sentencing: The statute provides no order of priority among all those factors, but since the
*Booker* as the transformation of a guideline-centric sentencing system into one where judges "exercise reasoned judgment in the course of a holistic sentencing decision-making process." The broad discretion approach relies on a plain reading of *Booker* and § 3553(a) to claim that the guidelines are no longer the principal determinant of a sentence, but instead merely one of a number of factors for federal judges to consider in sentencing. Another justification for this approach lies in the manner in which the guidelines either neglected or proscribed consideration of the factors outlined in § 3553. While few courts have used this approach to disregard completely the sentencing guidelines in their sentencing determinations, many have used the various § 3553(a) factors as a basis for moving significantly above or below the calculated guideline range in sentencing offenders.

3. Appellate Review

In the background of the competing approaches is the role of the federal circuit courts in reviewing post-*Booker* sentences on appeal. The various courts of appeal have grappled in a variety of ways with their newfound ability to determine whether a district court’s sentencing decision is a "reasonable" one. Reasonableness review by the appellate courts has two aspects, procedural and substantive, both of which are considered under an abuse of discretion standard.

The procedural reasonableness review requires a proper calculation of the guideline range (the first step in the post-*Booker* sentencing determination), making the failure to do so unreasonable. A second
aspect of procedural reasonableness review is the requirement that the district court provide reasons for its sentence, regardless of whether inside or outside the guideline range.\textsuperscript{133} Assuming the district court has satisfied the procedural requirements, the appellate court then exercises its post-
Booker power to review the application of the § 3553(a) factors for substantive reasonableness, that is, whether the district court abused its discretion in determining the sentence.\textsuperscript{134}

Not surprisingly, various courts of appeal have found below-guideline sentences based on § 3553 factors to be both reasonable\textsuperscript{135} and unreasonable,\textsuperscript{136} and likewise have found above-guideline sentences based on § 3553 factors to be both reasonable\textsuperscript{137} and unreasonable.\textsuperscript{138} Several of the courts of appeal, as later affirmed by Rita (see discussion infra),\textsuperscript{139} have held that a sentence within the prescribed guideline range is presumptively reasonable and will thus be upheld on appeal barring extraordinary circumstances.\textsuperscript{140}

E. Rita v. United States

The Court’s first attempt to parse the conflicting viewpoints of incorporation and broad discretion described above came in Rita v. United States.\textsuperscript{141} Decided in June, 2007, Rita considered the question of whether a

\textsuperscript{132} Id.

\textsuperscript{134} Id.

\textsuperscript{133} See, e.g., United States v. Berni, 439 F.3d 990, 991–93 (8th Cir. 2006) (concluding the district court properly applied Guidelines as advisory when imposing its sentence); United States v. Burns, 438 F.3d 826, 831 (8th Cir. 2006) (same); United States v. Pizano, 403 F.3d 991, 996–97 (8th Cir. 2005) (same); United States v. Menyweather, 431 F.3d 692, 694 (9th Cir. 2005) (same).

\textsuperscript{135} See, e.g., United States v. Pho, 433 F.3d 53, 54 (1st Cir. 2006) (concluding the sentence imposed by the district court was unreasonable in light of the Guidelines); United States v. Eura, 440 F.3d 625, 627 (4th Cir. 2006) (same); United States v. Moreland, 437 F.3d 424, 427 (4th Cir. 2006) (same); United States v. Clark, 434 F.3d 684, 685 (4th Cir. 2006) (same); United States v. Duhon, 440 F.3d 711, 713 (5th Cir. 2006) (same); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (same); United States v. Gatewood, 438 F.3d 894, 895 (8th Cir. 2006) (same); United States v. Castillo, 430 F.3d 230, 232 (5th Cir. 2005) (same).

\textsuperscript{136} See, e.g., United States v. Fairclough, 439 F.3d 76, 81 (2d Cir. 2006) (concluding the sentence imposed by the district court was consistent with the factors enumerated in 18 U.S.C. § 3553(a)); United States v. Reinhart, 442 F.3d 857, 864 (5th Cir. 2006) (same); United States v. Zuniga-Peralta, 442 F.3d 345, 347 (5th Cir. 2006) (same); United States v. Smith, 417 F.3d 483, 489 (5th Cir. 2005) (same); United States v. Saldana, 427 F.3d 298, 312 (5th Cir. 2005) (same); United States v. Jordan, 435 F.3d 693, 694 (7th Cir. 2006) (same).

\textsuperscript{137} See, e.g., United States v. Wolfe, 435 F.3d 1289, 1292 (10th Cir. 2006) (concluding the sentence imposed by the district court was unreasonable in light of the factors enumerated in 18 U.S.C. § 3553(a)); United States v. Castro-Juarez, 425 F.3d 430, 431 (7th Cir. 2005) (same).

\textsuperscript{138} Rita v. United States, No. 06-5754 (U.S. June 21, 2007).

\textsuperscript{139} See, e.g., United States v. Green, 436 F.3d 449, 455–56 (4th Cir. 2006) (concluding a sentence imposed by a district court judge that is within a properly calculated Guideline range is presumptively reasonable); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) (same); United States v. Williams, 436 F.3d 706, 707–08 (6th Cir. 2006) (same). Indeed, only one circuit court has held a correctly calculated guideline sentence to be unreasonable. United States v. Lazenby, 439 F.3d 928, 929 (8th Cir. 2006).

\textsuperscript{140} Rita, No. 06-5754, slip op.
sentence within the prescribed guideline range is presumptively reasonable.\textsuperscript{142} Victor Rita was convicted at trial of perjury, making false statements, and obstructing justice based on statements he made under oath to a grand jury concerning his purchase of a machine gun-making kit.\textsuperscript{143} The recommended guideline sentence range was 33 to 41 months, and the trial judge sentenced him to 33 months.\textsuperscript{144} On appeal, Rita argued that his sentence was unreasonable because it did not adequately take into account his "history and characteristics"—namely his physical condition, likely vulnerability in prison, and military experience—and was "greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)."\textsuperscript{145} The Fourth Circuit upheld Rita's conviction based in large part on its determination that a sentence within a properly calculated guideline range is presumptively reasonable.\textsuperscript{146}

In affirming Rita's sentence, the United States Supreme Court held that a court of appeals "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," but quickly added that such a "presumption is not binding."\textsuperscript{147} Further, the majority opinion made clear that its adoption of the presumption did not favor one discretionary approach over the other, explaining: "Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge."\textsuperscript{148} Instead, the presumption simply reflects an agreement between the two entities with discretion—the sentencing commission and the federal trial judge—as to the sentence, which, therefore, simply makes it more likely that the sentence is reasonable.\textsuperscript{149}

In a separate concurrence, Justice Stevens, joined by Justice Ginsburg, emphasized the discretion of a district judge to go outside the guidelines and the deference such determination is entitled to on appeal.\textsuperscript{150} Further, combining these two opinions, it is clear that appellate review of district court sentencing determinations is not merely procedural: "In sentencing, as in other areas, district judges at times make mistakes that are

\textsuperscript{142} \textit{id.} at 1.
\textsuperscript{143} \textit{id.} at 2.
\textsuperscript{144} \textit{id.} at 4, 6.
\textsuperscript{145} \textit{id.} at 5–6 (quoting Brief for Appellant at i, 8, United States v. Rita, No. 05-4674 (4th Cir. 2006)).
\textsuperscript{146} \textit{id.} at 6.
\textsuperscript{147} \textit{id.} at 7. The decision to uphold the sentence was joined by eight of the nine justices, but Justice Breyer's majority opinion was only joined by six justices, two of whom—Justice Stevens and Justice Ginsburg—joined in a separate concurrence written by Justice Stevens. Accordingly, the reach of the majority opinion is limited in scope by the concurrence written by Justice Stevens.
\textsuperscript{148} \textit{id.} at 7.
\textsuperscript{149} \textit{id.} at 8.
\textsuperscript{150} \textit{id.} at 7 (Stevens, J., concurring).
substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur. Our decision in Booker recognized as much." \(^{151}\) In addition, Justice Stevens emphasized that the "rebuttability of the presumption is real," and, as a result, "appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal ‘presumption’ of reasonableness) or outside that range." \(^{152}\)

Of course, these opinions provide ammunition for both competing interpretations of Booker. The broad holding—that following the guidelines recommendation is presumptively reasonable, whatever the meaning of the presumption—clearly supports the incorporation view of adhering to the guidelines whenever possible. Further, the Rita majority opinion provides conclusive authority to courts of appeal that have been applying a presumption of reasonableness to within-guideline sentences that they can continue this practice. Finally, Justice Breyer's opinion clearly attempts to advance the view that the Guidelines for the most part incorporate the competing § 3553(a) criteria:

The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives. \(^{153}\)

On the other hand, both the majority opinion and Justice Stevens' concurrence advance the view that the district court is entitled to exercise its discretion under § 3553 to determine the appropriate sentence. Justice Stevens states: "While reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the sentencing judge’s individualized sentencing determination." \(^{154}\) He further highlights the situations where this discretion may come into play—on issues explicitly outside of the factors considered by the Sentencing Commission in establishing the Guidelines:

The Commission has not developed any standards or

\(^{151}\) Id. at 14.

\(^{152}\) Id. at 7 (Stevens, J., concurring).

\(^{153}\) Id. at 11.

\(^{154}\) Id. at 5 (Stevens, J., concurring).
recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.\footnote{Id. (citing 18 U.S.C. § 3553(a)(1); U.S. SENTENCING GUIDELINES MANUAL § 5H1.1–6, 11, 12 (2006); Breyer, supra note 55, at 19–20 (“The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. . . . Eventually, in light of the arguments based in part on considerations of fairness and in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors . . . The current offender characteristics rules look primarily to past records of convictions.”)).}

Thus, the “sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply,” as the federal trial judge “may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because . . . the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.”\footnote{Rita, No. 06-5754, slip op. at 12.}

F. Gall v. United States and Kimbrough v. United States

This term the Court has again considered the interplay of the two competing theoretical approaches in two cases, \textit{Kimbrough v. United States}\footnote{Kimbrough v. United States, No. 06-6330 (U.S. Dec. 10, 2007).} and \textit{Gall v. United States}.\footnote{Gall v. United States, No. 06-7949 (U.S. Dec. 10, 2007).} \textit{Kimbrough} answered in the affirmative the question of whether a district court can depart from the proposed guideline sentence after \textit{Booker} under § 3553 based on the conclusion that the 100:1 crack cocaine to powder cocaine ratio adopted by the Sentencing Commission results in a sentence that is “greater than necessary” to achieve the goals of § 3553(a)(2).\footnote{Kimbrough, No. 06-6330, slip op. at 2.} Written by Justice Ginsburg for a 7-2 majority, the Court held in \textit{Kimbrough} that a trial judge may determine that, in a particular case, a “within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing” and, because the Guidelines are advisory, the departure can be based on a direct disagreement with the policy determinations of the Sentencing Commission.\footnote{Id.} As with \textit{Rita}, the Court was clear to affirm both the principle that the Guidelines are advisory (broad discretion) and the principle that courts should still adhere to the policy determinations of the Sentencing Commission.
Commission and should sentence within the Guideline range in most cases (incorporation). In permitting a departure from a guideline sentence based solely upon a district court’s divergent view of the Commission’s adopted crack/powder cocaine policy, the Court affirmed that “as a general matter, courts may vary [from the Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”161 In addition, the Court rejected the Government’s arguments that the Guideline cocaine policy should be outside the discretion of the sentencing court and be protected from “advisory” status.162 Thus, “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case ‘outside the ‘heartland’ to which the Commission intends individual Guidelines to apply.’”163

The *Kimbrough* opinion, however, was equally concerned with reinforcing the incorporation approach. The Court stated that “[w]e have nevertheless preserved a key role for the Sentencing Commission . . . district courts must treat the Guidelines as the ‘starting point and the initial benchmark,’” and the Commission must continue “to formulate and constantly refine national sentencing standards.”164 The Court further emphasized that “in the ordinary case, the Commission’s recommendation will ‘reflect a rough approximation of a sentences that might achieve § 3553(a)’s objectives.’”165 As a result, although not the case in *Kimbrough*, “closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range ‘fails properly to reflect § 3553(a) considerations’ even in a mine-run case.”166

To this end, the Court went to great lengths to differentiate the crack cocaine Guidelines from the other Guidelines, explaining that the crack Guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.”167 The Court cited both the absence of using “empirical data and national experience” in devising the crack cocaine Guidelines and the Commission’s own finding that the crack/powder disparity “produces disproportionately harsh sanctions.”168 The Court thus seemed to be saying that while exceptional situations, such as in the crack cocaine case, may warrant a district judge departure from the Guidelines upon policy grounds, such a departure would not be

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161 *Id.* at 13 (quoting Brief for United States at 16 and citing *Rita*, No. 06-5754, slip op. at 12).
162 *Id.* at 14–20.
163 *Id.* at 21 (quoting *Rita*, No. 06-5754, slip op. at 12).
164 *Id.* at 20 (quoting *Gall*, No. 06-7949, slip op. at 11).
165 *Id.*
166 *Id.* at 21 (quoting *Rita*, No. 06-5754, slip op. at 12).
167 *Id.*
168 *Id.*
warranted in most other cases. 169

The Court followed a similar pattern in Gall, striking down a common law rule that required increasingly extraordinary circumstances for increasingly large departures from the Guidelines, while preserving the precept that such departures should be rare. 170 With Justice Stevens writing for a 7-2 majority, the Court rejected the application of a proportionality test used by several of the circuit courts 171 under which a sentence that constitutes a substantial variance from the Guidelines had to be justified by extraordinary circumstances to survive reasonableness review. 172 The Court held that

while the extent of the difference between a particular sentence and the recommended Guideline range is surely relevant, courts of appeal must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse of discretion standard. 173

As with Rita and Kimbrough, the Court in Gall provided language supporting both the discretionary and incorporation approaches. The Court prohibited the use of a presumption of unreasonableness for sentences outside the Guidelines range, and rejected any approach that moved too far

169 Id.


171 See, e.g., United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006) ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed" . . . However, circumstances may make a major variance reasonable."); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006) ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); United States v. Armendariz, 451 F.3d 352, 360 (5th Cir. 2006) ("[B]ecause 'the farther a sentence varies from the applicable Guideline sentence, the more compelling the justification based on factors in section 3553(a) must be,' the district court's failure to articulate fact-specific reasons . . . for its substantial deviation . . . militates against a holding that the sentence was reasonable."); United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) ("[W]hen the district court independently chooses to deviate from the advisory guidelines range (whether above or below it), we apply a form of proportionality review"—the greater the variance, the more compelling the justification must be.);

United States v. Bishop, 469 F.3d 896, 907 (10th Cir. 2006) ("[T]he extremity of the variance between the actual sentence imposed and the applicable guidelines range should determine the amount of scrutiny we give to the district court's substantive sentence."); United States v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006) (emphasizing that "[a]n extraordinary reduction must be supported by extraordinary circumstances"); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater leniety), the more compelling the justification . . . that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed."); United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005) ("An extraordinary reduction must be supported by extraordinary circumstances.").

172 Gall, No. 06-7949, slip op. at 2.

173 Id.
in that direction. The Court found that requiring extraordinary circumstances to move outside the Guidelines range and the use of a mathematical formula to limit the degree of departure outside the Guideline range both unduly infringed on the discretion of the district judges under the advisory guidelines. Such approaches, the Court explained, do “not reflect the requisite deference” owed to district judges who are “in a superior position to find facts and judge their import under § 3553(a) in the individual case.” Finally, in determining a sentence, a district judge “may not presume that the Guidelines range is reasonable,” but instead “must make an individualized assessment based on the facts presented” in light of the § 3553(a) factors.

On the other hand, the Court stated that if the district judge decides that an outside-Guidelines sentence is warranted, he/she “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance,” as the Court “finds it uncontroverted that a major departure should be supported by a more significant justification than a minor one.” Such an explanation is required, emphasized the Court, because the Guidelines, while advisory, are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”

As with Kimbrough, then, the Gall decision protects the ability of the district judge to depart significantly from the Guidelines in a particular case, provided a compelling case is made, while reinforcing the notion that such cases are to be the exception and not the rule.

III. § 3553 AFTER BOOKER AND THE NEED FOR SUBSTANTIVE GUIDANCE

A. Incomplete Approaches to Guiding Judicial Discretion

Despite the Supreme Court’s decisions in Gall and Kimbrough, the federal sentencing system remains intellectually incoherent in its application. The decision as to whether Booker still allows the guidelines to function in a virtually mandatory manner or instead reopens the potential for indeterminate sentencing (or more likely, somewhere in between) fails to address the manner in which the substantive discretion to sentence outside of the guidelines, if at all, should be applied. Neither a
system of indeterminate sentencing,\textsuperscript{180} nor a system of mandatory sentencing guidelines\textsuperscript{181} yields a coherent and principled sentencing system in the absence of a guiding purpose.

Assessing the weight that should be accorded to the guidelines does not address the central flaw in federal sentencing: the failure to adopt a primary principle by which to sentence criminal defendants, or at least by which to prioritize competing principles. The failure of Congress, the Sentencing Commission, or the federal judiciary to adopt a measure by which to frame sentencing discretion has inhibited the consistent application of such discretion, regardless of who possesses it. This is true under either post-Booker approach. Because the Sentencing Commission did not implement the § 3553(a)(2) objectives, the sentencing ranges for a given offense can be based on different objectives, or more likely, not based on any objective at all.\textsuperscript{182} As a result, the incorporation approach will not result in a coherent approach to sentencing. Similarly, the broad discretion approach provides no guidance as to which § 3553(a)(2) objective should be applied when they conflict, and further provides no guidance when the § 3553(a)(2) objectives conflict with the recommended guideline sentence or any of the other § 3553 factors.

This shortcoming is both one of philosophical and practical import. As explained earlier, the Sentencing Commission eschewed its responsibility to set up the guidelines so that they meaningfully applied the purposes enunciated by Congress in the Sentencing Reform Act. On a theoretical level, it is troubling because the federal sentencing guidelines are intellectually bankrupt—they contain no intelligible philosophical principle by which sentences are considered or justified. Andrew von Hirsch and Andrew Ashworth, among others, have emphasized the importance of choosing a purpose or set of purposes to guide the sentencing process in order to make sentencing decisions both principled and coherent.\textsuperscript{183} The

\textsuperscript{180} See FRANKEL, supra note 1, at 88 ("There is no sound justification for a general and uniform system of indeterminacy, and the use of this idea across-the-board has blocked or concealed the need for concrete justification in specific cases where indeterminate sentences may conceivably make sense.").

\textsuperscript{181} See TONRY, supra note 14, at 159 (noting that supporters of mandatory sentencing often fail to consider "problems of implementation, foreseeable patterns of circumvention, or the certainty of excessively and unjustly severe penalties for some offenders"); Ogletree, Jr., supra note 75, at 1952 (emphasizing that the guidelines set forth by the Sentencing Commission "failed to provide federal judges with much guidance in applying any particular purpose to any particular sentence").

\textsuperscript{182} See, e.g., Rita v. United States, No. 06-5754, slip op. at 7–12 (U.S. June 21, 2007) ("The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.").

\textsuperscript{183} See ASHWORTH, supra note 19, at 73 (suggesting that there should be declared "a primary rationale, and to provide that in certain types of case one or another rationale might be given priority");
failure of the Sentencing Commission to use any purpose to devise the guidelines has been the subject of significant criticism, even before the purposes became one of the means by which the sentences were determined after Booker.

Of course, the practical import of these purposes becomes even more important and in need of remedy in a post-Booker world, and cannot be ignored if federal sentencing aspires to be coherent and principled in its application. Additionally, because the philosophical ideals overlay the sentencing process, the purposes are central to the application of 18 U.S.C. § 3553 in determining the appropriate sentence.\textsuperscript{184} The parsimony provision mandates that the sentence be “sufficient, but not greater than necessary” to achieve the stated purposes.\textsuperscript{185} The statute, however, is silent on the question of how to determine a sentence range when the purposes indicate different results. For instance, a ten-year sentence for cocaine possession may be sufficient but not greater than necessary to deter others from committing the same crime (serving the purpose of general deterrence), but it also may be greater than necessary to achieve the purposes of just punishment, rehabilitation, or incapacitation.\textsuperscript{186} Thus, establishing priorities among purposes is paramount because the statute plainly requires that the actual sentencing determination apply these purposes.\textsuperscript{187}

So, as is the practice in most district courts after Booker, the court follows the process explained above: it calculates the guideline sentence and then must apply the statute to determine whether the sentence should

\begin{itemize}
\item \textbf{VON HIRSCH, supra note 20, at 1 (noting that proportionality, as a sentencing purpose, “provides sentencers with a degree of guidance, in a way that competing theories seldom do”); see also FRANKEL, supra note 1, at 59 (“[T]he ultimate questions of substance—the length, frequency, and kinds of sentences—will not be handled with rationality and overall fairness until we have organized the work of evolving rational and fair principles of law.”).}
\item \textsuperscript{183} For a pre-Booker examination of the importance of sentencing purposes, see Aaron J. Rappaport, Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment, 6 BUFF. CRIM. L. REV. 1043, 1044–45 (2003).
\item \textsuperscript{184} 18 U.S.C. § 3553(a) (2000).
\item \textsuperscript{185} One possible reading of the statute would suggest that the judge chooses the sentence sufficient to achieve all of the purposes collectively, but this would result in the highest sentence compliant with the purposes to be chosen, but undermines the concept of parsimony.
\item \textsuperscript{186} See Adam Lamparello, Introducing the “Heartland Departure,” 27 HARV. J.L. & PUB. POL’Y 643, 654–55 (2004) (stating that the “heartland” of the guidelines is not drawn from sentencing purposes but is merely a codification of pre-guidelines’ inconsistent sentencing); Jeffrey S. Parker & Michael K. Block, The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 GEO. MASON L. REV. 1001, 1014, 1016 (2001) (arguing that the Commission evaded the purposes as drawn from the accumulated experience of indeterminate sentencing era and presenting empirically-based guidelines as a consensus view); Rappaport, supra note 184, at 1121 (stating that the sentence ranges of the Guidelines lacked “the authority of principle,” highlighting the need for a distinct purpose to be chosen); Aaron J. Rappaport, Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines, 52 EMORY L.J. 557, 641 (2003) (arguing that the lack of discussion of the ultimate purpose of the Guidelines in the first fifteen years of its existence constitutes a serious failing).
\end{itemize}
be increased or decreased. The Supreme Court has given no substantive guidance on how this process is to work, simply adopting a "totality of the circumstances approach," allowing the district court to choose which of the conflicting provisions, if any, to use in adjusting the Guideline calculation. How should a district court reconcile conflicting outcomes from the application of § 3553(a)? For instance, what principle should a court use when a proposed guideline sentence is both "greater than necessary" to achieve the purpose of rehabilitation as well as "not sufficient" to achieve the purpose of deterrence?

In addition to serving as a basis for analyzing the appropriateness of a Guidelines sentence, the purposes of sentencing are likewise a method of informing what factors may be considered at sentencing. A pure just deserts model, for instance, considers only the culpability of the offender and the harm committed by the crime, and precludes consideration of personal characteristics of the offender such as future dangerousness or the effect of the sentence on family members. While the guidelines attempt to articulate favored and disfavored grounds for departure, it is unclear after Booker whether some of the disfavored grounds are now a basis for applying a sentence above or below the recommended guideline range, where such factors are part of the application of the parsimony principle. Thus, identifying the priority and respective weight of the purposes informs the determination of what criteria can serve as grounds to aggravate or mitigate a sentence.

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189 Gall, No. 06-7949, slip op. at 11. As Justice Stevens explains in Rita, some of the provisions of the sentencing guidelines may not comport with the standards in § 3553. Rita v. United States, No. 06-5754, slip op. at 5 (U.S. June 21, 2007) (Stevens, J., concurring). He does not explain, however, how to address substantive conflicts in the application of § 3553. Doug Berman advocates a "reasoned" approach, but does not explain how such reasoning is to take place. Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO St. J. CRIM. L. 37, 54-55 (2006) (stating that sentencing includes forward-looking, offender-oriented assessments and calls upon an expert, repeat-player judge to exercise reasoned judgment).
190 The easy answer, of course, is to use the incorporation approach and adopt the fiction that the Guidelines incorporate all of the § 3553(a) purposes. The court must, however, indicate that it has considered these purposes, because adopting a "pure" incorporation approach violates Gall's prohibition against presuming that the Guidelines range is reasonable. Gall, No. 06-7949, slip op. at 10.
191 See FRANKEL, supra note 1, at 113.
192 Indeed, Aaron Rappaport has attempted, through the technique of rational reconstruction, to attribute purposes to various guideline provisions, finding that the Commission's rationales are mostly utilitarian in nature. Rappaport, supra note 187, at 561, 642.
193 It is clear after Kimbrough and Gall that all such characteristics are in play, with no clear guidance on the weight that should be accorded any one principle or aggravating/mitigating fact. The broad flexibility accorded district judges here is limited only by the abuse of discretion standard on appeal. The "nature and circumstances of the offense" and the "characteristics of the offender" provisions of § 3553, if taken seriously, seem to open the door for such considerations, but create another level of internal conflict where such criteria are not a part of the application of the parsimony provision for a particular purpose of sentencing.
The problem in application extends, however, beyond the parsimony provision of § 3553(a)(2). It is clear that the proposed guideline sentence should be evaluated in light of the § 3553 factors, principally in considering other aspects of the "nature and circumstances of the offense" and the "history and characteristics of the offender," but again, there is no guidance as to how to resolve the internal conflicts within the statute. In considering the characteristics of the offender, for instance, the guidelines explicitly disfavor departures based on numerous personal characteristics, but such characteristics are clearly part of the inquiry.194

Before suggesting a potential remedy to the internal inconsistencies of the application of § 3553, it is instructive to examine how the district courts have decided cases after Booker in order to better understand the confusion and note the relative lack of disparity in outcomes. Much like Congress in passing the Sentencing Act and the Sentencing Commission in promulgating the guidelines, the courts have generally not attempted to prioritize the competing role of the purposes of sentencing in the application of § 3553(a), even when using the parsimony principle as a basis for a below-guideline sentence. The courts have taken this view despite recognizing the conflicting nature of these purposes, typically treating the purposes as either (1) elements encapsulated in the guideline ranges, (2) philosophical concepts not to be applied or (3) as a singular justification (choosing one) for departure without addressing its relation to the others.195

When district judges have departed from the guideline sentences in the three years since Booker (around ten percent of the cases), there have been a variety of rationales for such departures,196 with § 3553 operating as a one-stop shop for choosing a justification.197 There has been no common law development of when or which circumstances warrant departure; instead, departures have been predominately a function of the individualized sentencing determinations of the judge.198

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194 See supra note 155 and accompanying text.
195 See Rita, No. 06-5754, slip op. at 11 ("Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives"); see also United States v. Gammie, 498 F.3d 467, 469 (7th Cir. 2007) (stating "[t]he [§ 3553(a)] factors are intangibles, 'weighable' only in a metaphorical sense").
197 See ASHWORTH, supra note 19.
198 This is unfortunate, as several commentators have suggested that the courts have a significant role to play here. See, e.g., Berman, supra note 3, at 30 (suggesting that the courts have a significant role to play in the development of the guidelines).
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The ironic consequence, however, is that the availability of broad discretion (to at least justify why one is departing from the guideline range) has apparently resulted in the widespread acceptance of the guidelines as a normative approach that should be departed from only in extraordinary situations. The standard struck down in Gall, which had been adopted by most circuits, was one example of the presumptive manner in which the guidelines have been applied after Booker. Even before Rita held that the presumption of reasonableness within guideline range sentences on appeal was non-binding and rebuttable, the approach of deferring to within-guideline sentences had become the norm in federal sentencing. To date, there has not been a within-guidelines sentence reversed as unreasonable. Thus, with the ability to depart for virtually any reason (based on the broad text of § 3553) has come with a strong presumption that doing so should only be done in unique situations.

The upshot of the Booker jurisprudence then is that the narrow permissible rationales for departing from the guidelines before Booker have been replaced by an open-ended, “blank check” license to depart from the guidelines for any rational basis drawn from § 3553. Even after Gall, significant departures must, however, articulate compelling facts or circumstances to avoid reversal for abuse of discretion. Further, even after Kimbrough, the basis for departure should generally not be an assessment of whether guideline provisions or policy statements as a matter of law are consistent with § 3553 or whether they provide an appropriate baseline from which to depart for a given offense.

As a result, the increase in district court sentencing discretion has resulted in very little change in the use of the guidelines, with the number of departures very similar to what occurred pre-Booker. Despite having greater ability to depart, the federal judges seem as willing to sentence within the guidelines as prior to Booker and if anything, appear more wedded to the guidelines as a strongly presumptive norm than before Booker, as the average sentence per offense has increased since January 2005.

199 Appellate Brief for the United States at 8, Gall v. United States, No. 06-7949 (U.S. Aug. 22, 2007).
200 Rita v. United States, No. 06-5754, slip op. at 7 n.3 (U.S. June 21, 2007) (Scalia, J., concurring).
203 U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Section 2, Figure G & Section 3, Figure G (2005), available at http://www.ussc.gov/amrpt/2005/sbtoc05.htm [hereinafter 2005 SOURCEBOOK].
204 Id. at sec. 2, tbl.13 & sec. 3, tbl.13 (showing that number of sentences and length of sentences in both median and mean months has increased since January of 2005).
B. Post-Booker Data

The United States Sentencing Commission has published summaries of post-Booker sentencing outcomes.\textsuperscript{205} For the fiscal year 2006 (October 1, 2005–September 30, 2006), federal district courts departed from the Guideline range based on a non-Guideline reason (§ 3553 or Booker) in approximately nine percent of cases, with eight percent being below Guideline range departures.\textsuperscript{206}

The upward Booker departures occurred predominately in immigration, fraud, firearms, and drug trafficking cases, with a large percentage of pornography/prostitution cases receiving upward Booker departures as well.\textsuperscript{207} The downward Booker departures occurred primarily in the same offenses: immigration, fraud, firearms, drug trafficking cases, and pornography/prostitution.\textsuperscript{208} A significantly higher than average percentage of money laundering and tax cases received downward Booker departures.\textsuperscript{209}

In the upward Booker departure cases, judges had a median sentence increase of around forty-five percent, with the median sentence for such offenders being fifty and sixty months and the median increase from the Guideline maximum being fourteen and fifteen months.\textsuperscript{210} In the downward Booker departure cases, judges had a median sentence decrease of around thirty-five percent, with the median sentence for such offenders being twenty-four months, with the median decrease in sentence being twelve and fifteen months.\textsuperscript{211}

The upward Booker departures relied on four § 3553(a) provisions: nature and circumstances of the offense/history of the defendant, just deserts, deterrence and incapacitation, in that order.\textsuperscript{212} The downward

\textsuperscript{205} See, e.g., 2006 SOURCEBOOK, supra note 196 (discussing the impact of Booker through Guideline departures); 2005 SOURCEBOOK, supra note 203 ("The data in this report pertain to cases sentenced both before and after the United States Supreme Court's January 12, 2005, decision in Booker v. United States, 543 U.S. 220 (2005).")

\textsuperscript{206} 2006 SOURCEBOOK, supra note 196, at tbl.N. Note that the statistics distinguish between "departure[s]" with Booker and sentences outside the Guideline range based on Booker and § 3553. \textit{Id.}

For purposes of this Article, this distinction is disregarded.

\textsuperscript{207} \textit{Id.} at tbl.27. This result is not surprising as these categories have the largest raw number of cases. \textit{Id.} Other categories also may have had a high percentage of departures but were not mentioned because of the small size of the sample.

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.} at tbls.32A, 32B.

\textsuperscript{211} \textit{Id.} at tbls.31B, 31C. Pursuant to § 3553(c), judges are required to explain their departures on a standard form provided by the Sentencing Commission, and are to select all rationales used as a basis to depart from the Guideline range. See 18 U.S.C § 3553(c) (2000) ("The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.").

\textsuperscript{212} 18 U.S.C. § 3553(a) (2000); 2006 SOURCEBOOK, supra note 196, at tbls.24A, 24B. Note that the chart sometimes separates categories that represent the same concept, such as "afford adequate deterrence to criminal conduct" and "deterrence," based on how the surveys were completed. \textit{Id.} For purposes of the analysis here, such categories are combined.
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Booker departures similarly relied upon the nature and circumstances of the offense/history of the defendant as the primary rationale, followed by the § 3553(a)(2) factors of just deserts and deterrence.213

From this data, it is evident that in almost ten percent of the cases, the district courts have chosen to depart from the Guidelines, and, as a result, have substituted their own discretion for that of the Sentencing Commission. Further, the size of the departures have been significant, with a median of no less than thirty percent below the Guideline minimum or forty percent above the Guideline maximum. As the most common justification for departing from the Guideline range is the broad category of the nature and circumstances of the offense/history of the defendant and with rationales for departures ranging broadly across the possible § 3553 factors, it is unlikely that there is any consistent principle guiding such departures. These results highlight the need for such a guiding principle in defining what goal is to be achieved in sentencing an individual defendant.

IV. A COMPARATIVE APPROACH: SIMPLE STATUTORY REMEDIES

To remedy the problematic nature of applying § 3553 in a complete and intellectually honest manner after Booker, Congress could revise the Criminal Justice Act. A first step would be to either choose between, or prioritize among, the § 3553(a)(2) purposes of sentencing. The sentencing system of England and Wales demonstrates how this could operate in practice to guide sentencing discretion meaningfully.

Before the passage of its 2003 Criminal Justice Act, which outlined sentencing objectives in much the same way as § 3553, the sentencing system in England and Wales articulated a statutory preference for the principle of proportionality, or just deserts, in custodial sentencing.214 Under the Criminal Justice Act of 1991, a custodial sentence generally was required to be based on the concept of just deserts. The sentence was to be proportional to the culpability of the offender215 and the harm risked or caused by the offense.216 In cases of violent or sexual offenses, a second

213 Id. at tbls.25A, 25B. In addition to these statistics, the United States Sentencing Commission engaged in extensive multivariate analysis of post-Booker outcomes (as compared with pre-Booker outcomes) and found statistically significant relationships between four factors and the decision to impose a below-range sentence: the application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING vii–viii (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

214 ASHWORTH, supra note 19, at 73, 98–100, 269.

215 The determination of culpability includes consideration of the offender’s motives for committing the crime, the offender’s intent to commit harm, the offender’s capacity to obey the law, and the offender’s role in the offense. VON HIRSCH, supra note 20, at 29–30.

216 part I Section 2 of the Criminal Justice Act 1991 states, in part:

(2) The custodial sentence shall be—for (a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences
principle of incapacitation took priority over just deserts, as the goal of protecting society from such an offender outweighed the goal of limiting the sentence to a length proportional to the seriousness of the crime committed.\textsuperscript{217} Thus, under the Criminal Justice Act of 1991, judges had specific guidance as to the criteria to be used in sentencing. In all non-sex offense cases, the culpability of the offender and the harm caused served as the basis for sentencing. In sex offenses, the judges sentenced in light of the offender’s future dangerousness and likelihood of recidivism.

Taking these provisions as a point of departure, an attempt to prioritize the sentencing principles of § 3553(a)(2) would be a logical first step to channel discretion in sentencing in order to make sentencing determinations more coherent, consistent, and fair.\textsuperscript{218} This Article does not advocate one approach over the other—that is a political and philosophical question beyond the scope of this article about which much has already been written. Instead, the suggestion here is to adopt one guiding principle as a framework for determining sentence lengths, and in doing so, establish the criteria that should (and should not be) considered in formulating a sentence. As most commentators believe, a sentencing system should contain elements of retributivism and utilitarianism. Adding secondary criteria in order to aggravate or mitigate sentences would likewise be appropriate. For instance, if Congress adopted just deserts as the guiding principle, a sentencing scheme could also use the need for rehabilitation as a mitigating factor for certain types of cases.\textsuperscript{219}

In \textit{Booker}, Justice Breyer invited Congress to act to clarify the statute:

\begin{quote}
associated with it; or (b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

(3) Where the court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it, the court shall—(a) state in open court that it is of the opinion that subsection (2)(b) above applies and why it is of that opinion; and (b) explain to the offender in open court and in ordinary language why the sentence is for such a term.

(4) A custodial sentence for an indeterminate period shall be regarded for the purposes of subsections (2) and (3) above as a custodial sentence for a term longer than any actual term.


\textsuperscript{217} The statute leaves open room for other justifications to take precedence over the statutory goal of desert, but that does not undermine the broader point of the need to frame discretion to achieve coherence and ultimately justice in sentencing.

\textsuperscript{218} Indeed, one of the main criticisms of the Criminal Justice Act of 1991 was simply that the judges chose not to adhere to its principles. \textit{See}, e.g., \textit{Ashworth}, supra note 19, at 98, 100 (observing that the judiciary did not embrace the Criminal Justice Act of 1991, in particular its focus on desert as a primary rationale of sentencing).

\textsuperscript{219} For instance, Norval Morris has advocated for a concept of limited retributivism in which retribution defines the sentence range and utilitarian considerations are used to modify the sentence within the range. Morris, supra note 27, at 275–76, 283–85.
Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.\textsuperscript{220}

It is unlikely that Congress will do so. The debate between utilitarian and retributive justifications for punishment has a long history and, as a result, engenders significant controversy. Adopting a guiding principle could be politically costly, particularly if it could be painted as weak on crime. Having the Sentencing Commission, a politically insulated institution, choosing between the purposes of punishment and giving it priority was part of the rationale behind the Sentencing Reform Act at its inception.\textsuperscript{221}

In addition to any potential political cost, Congress has little reason to adjust the post-

\textit{Booker} status quo. In a political climate which still favors harsh on crime rhetoric and legislation, an increase in the average sentence and a strong normative leaning toward the sentencing guidelines does not provide Congress much impetus for reform.\textsuperscript{222} Also, the shift from "mandatory" to "advisory" guidelines opens the door for public perception of judicial leniency in sentencing, fostered by the penal populist rhetoric of politicians.\textsuperscript{223} As it has done in the past, political candidates can use the \textit{Booker} decision to garner political support for additional harsh on crime legislation such as mandatory minimum sentences.

This brief examination of the British system simply reinforces the ideal of the Sentencing Commission as the appropriate policymaking body.\textsuperscript{224} While Congress can certainly accomplish this purpose, the Sentencing Commission can in theory employ both the time and expertise to make tough policy decisions concerning sentencing. Indeed, the purpose of the


\textsuperscript{222} See \textsc{David Garland}, \textsc{The Culture of Control: Crime and Social Order in Contemporary Society} 202 (2001) ("[P]olitical actors in Britain and America have repeatedly chosen to respond to widespread public concern about crime and security by formulating policies that punish and exclude. They have assumed the posture of a sovereign state deploying its monopoly of force to impose order and punish law-breakers.").

\textsuperscript{223} See Francis T. Cullen et al., \textit{Public Support for Correctional Rehabilitation in America: Change or Consistency?}, in \textsc{Changing Attitudes to Punishment: Public Opinion, Crime and Justice} 128, 143 (Julian V. Roberts & Mike Hough eds., 2002) ("The result is a disquieting spiral in which punitive sentiments—real enough but not the full nature of what the public thinks about crime—prompt political officials to implement harsh policies and then to stir up and intensify citizens' support for their 'get tough' agenda.").

Commission in many ways, as explained above, is to make coherent political decisions concerning how sentencing should be carried out. Putting aside the Commission’s initial unwillingness to choose between or prioritize the purposes of punishment in 1987, the Commission’s failure to respond to Booker (other than its extensive data collection efforts) demonstrates its internal political posture and likewise suggests that it is unlikely to revise the Guidelines in response to Booker.

Further, neither the Sentencing Commission itself nor its “constituents” see the post-Booker world as one needing immediate reform. As noted in Gall and Kimbrough, the Commission still has an important role to play as the advisory guidelines are still the baseline in all sentencing determinations. The Department of Justice is willing to go along with advisory guidelines so long as most cases are sentenced within the Guideline ranges, preserving its leverage at the plea bargaining table through continued predictability. The federal judges likewise are not displeased with the post-Booker increase in discretion and continued presence of the guidelines as a baseline. And, as explained above, Congress is, for now, unlikely to engage in major sentencing reform.

V. THE BEST OF BOTH WORLDS?

Given the likelihood that neither Congress nor the Sentencing Commission will address the internal conflict in the application of § 3553, how can one make sense of the current combination of elements of both indeterminate sentencing and mandatory guidelines schemes after this term’s cases? Putting aside the internal statutory conflicts concerning the purposes of sentencing, does the post-Booker framework, as it stands after Kimbrough and Gall, achieve an effective balance between the incorporation and broad discretion approaches?

After Booker, there is little doubt that district courts have broad discretion in a particular case to sentence as they see fit, remedying the potential problems that can occur within a mandatory system where characteristics unaccounted for by the Guidelines can create injustice in an individual case. Similarly, the language of the Court promoting adherence to the Guidelines in most cases and on most policy matters, as

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226 Striking this balance between treating like offenders alike while providing for individualized sentences can be quite difficult, as Justice Blackmun has noted in the death penalty context. See Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting as to the denial of petition for certiorari) (“[T]he consistency [of treating like offenders alike] and the fairness to the individual . . . are not only inversely related, but irreconcilable in the context of capital punishment . . . . All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.”).
well as the abuse of discretion standard of review, serve as a check against the disparity that caused such objection in the indeterminate sentencing era. The result, then, of the compromise between the two approaches is a leaning in the direction of the incorporation approach, with a within-guidelines approach serving as the likely outcome in most cases.

Nonetheless, after Booker, district court judges now have an opportunity, using § 3553, to evaluate the policies of the sentencing commission and the efficacy of its guidelines in particular cases, or at the very least, to consider the proposed guideline sentence in light of factors not considered by, or disfavored by, the guidelines.\textsuperscript{227} The degree to which courts, as a rule and not an exception, should engage in a more broad discretion model as opposed to an incorporation approach rests on a normative assessment of the guidelines.

The state of affairs in federal sentencing thus depends in large part upon one’s normative view of the sentencing guidelines. To the extent that one subscribes to the federal sentencing guidelines as a reasoned, well-established framework, the post-Booker jurisprudence makes sense and serves as a reasonable compromise between the two competing approaches of broad discretion and incorporation. The contrary view, described in more detail below, advocates more widespread use of judicial discretion based on questions concerning the underpinnings of the Guidelines and as well as their substance.

The lack of clear philosophical purpose behind the sentencing guidelines structure notwithstanding, many commentators have articulated significant reasons to be skeptical about the deference the Sentencing Guidelines provisions should be accorded.\textsuperscript{228} As explained by Kate Stith and Jose Cabranes:

\begin{quote}
[T]he Guidelines are simply a compilation of administrative dikta. A set of unexplained directives may warrant unquestioning obedience if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but this is not a common occurrence in human affairs—at least not in democratic societies. . . . The Commission's reluctance to explain itself to the public thus leaves us with a set of rules promulgated and enforced ipse dixit—because the Commission says so. In the absence of some reasoned explanation for a particular rule, it is difficult to understand, much less defend, the rule. Unless there is
\end{quote}

\textsuperscript{227} Even advocates of the incorporation approach, including Justice Breyer, acknowledge the requirement that the proposed guideline sentence be considered in light of non-guideline factors (flowing from § 3553) and require departing from the proposed guideline in certain cases. Rita v. United States, No. 06-5754, slip op. at 10–12 (U.S. June 21, 2007).
\textsuperscript{228} See supra note 166 and accompanying text.
reason to believe that the Commission has some unusual capacity to discover important or eternal truths, its argument from authority leaves the Guidelines with little or no independent validity or legitimacy.\textsuperscript{229}

The specific provisions of the Guidelines, particularly the 100:1 crack cocaine to powder cocaine ratio struck down in \textit{Kimbrough}, have also engendered significant criticism from the academic community.\textsuperscript{230} The use of drug quantity as the primary basis for determining a length of a sentence is another example of a guidelines provision that has been repeatedly called into question.\textsuperscript{231} The guidelines have also received ongoing criticism over the use of "relevant conduct" to determine the sentence, including not only that which has not been found by a jury, but also even facts (or criminal charges) of which the jury acquitted the defendant.\textsuperscript{232}

In light of the number of purported flaws in the guidelines, the


\textsuperscript{231} \textit{See, e.g.}, Alschuler, \textit{supra} note 2, at 920 ("[D]etermining how many years to imprison someone by weighing sugar cubes and blotter paper is madness."); Steven B. Wasserman, \textit{Toward Sentencing Reform for Drug Couriers}, 61 BROOK. L. REV. 643, 653 (1995) ("Drug weight should be demoted as a sentencing factor for drug couriers who are indisputably ‘minimal participants’ with no prior history and no economic stake in the weight of the drugs with which they are arrested.").

\textsuperscript{232} \textit{See, e.g.}, Stith & Cabranes, \textit{supra} note 229, at 1273 ("Perhaps the most extraordinary conceptual invention of the Commission is the idea of ‘relevant conduct’—an idea whose significance looms large in the new sentencing regime. The concept, as it happens, is novel."); Michael Tonry, \textit{Rethinking Unthinkable Punishment Policies in America}, 46 UCLA L. REV. 1751, 1757 (1999) (stating that "[r]eal offense sentencing[] reflects a radical rejection of basic ideas of fairness" and "exists in the federal sentencing guidelines and, so far as I have found, nowhere else in the United States or in any other Western country"); David Yellen, \textit{Just Deserts and Lenient Prosecutors: The Flawed Case for Real Offense Sentencing}, 91 NW. U. L. REV. 1434, 1437, 1440 (1997) (stating that "society’s right to punish an individual flows directly from, and is limited by, the conduct for which that individual has been convicted" and that "[a] guideline system based on the offense of conviction, with moderate adjustments for facts about the offense and the offender that do not constitute other crimes . . . would probably improve greatly on the current guideline system").
"contrary view" would certainly suggest a reason to pause about giving blind deference to the Guidelines now that they are advisory. Critical review of the guidelines and their policies and provisions by federal judges could certainly help provide purpose and thoughtfulness to these provisions, to the extent that one believes they are not well-formulated. Indeed, it is clear that both the remedy proposed by Booker and the decision in Rita expect broader considerations to be brought to bear when considering whether to adopt the calculated guideline sentence range in an advisory system.

To the degree that such sentiments become part of the judicial sentencing process, while at this point likely to diminish the normative weight of the Guidelines, such evaluations could serve as the basis for the development of a federal common law of sentencing. Defining which provisions of the Guidelines should invoke stronger § 3553 scrutiny can help justify outside-guidelines sentencing decisions as based on ex-ante principles rather than ex-post totality of the circumstances determinations.

This Article has sought to achieve three purposes. First, it has provided a current analysis of the history and doctrine concerning judicial discretion in the federal judiciary. Second, it has attempted to demonstrate why the relevant statute, 18 U.S.C. § 3553, has internal conflicts that prevent giving effect to all of its provisions in one determination, particularly with respect to the parsimony provision and the purposes of punishment. Finally, given this "problem," the Article discusses potential solutions to the incoherence. It uses a comparative approach to suggest how Congress could reform § 3553. After explaining why such action is unlikely, the Article concludes by surmising that the efficacy of the present (and even future) state of federal sentencing, putting aside the internal inconsistencies of § 3553, rests in large part upon one's normative assessment of the sentencing guidelines.

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233 See Berman, supra note 3, at 71 (indicating that the departure system was not applied as intended and should have served as a mechanism by which judges could provide meaningful feedback concerning the guidelines as they related to the fundamental purposes of punishment).


235 See FRANKEL, supra note 1, at 112–13 (advocating this position prior to the development of the guidelines).