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SENTENCING IN TAX CASES AFTER *BOOKER*: STRIKING THE RIGHT BALANCE BETWEEN UNIFORMITY AND DISCRETION

SCOTT A. SCHUMACHER\*

## I. INTRODUCTION

IT has been nearly ten years since the Supreme Court's seminal decision in *United States v. Booker*,<sup>1</sup> in which the Court invalidated the mandatory application of the United States Sentencing Guidelines.<sup>2</sup> In the cases that followed, the Court addressed subsidiary issues regarding the application of the Guidelines and the scope of appellate review.<sup>3</sup> However, despite—or perhaps because of—these opinions, there is little consensus regarding the status and extent of appellate review, as well as the discretion afforded to sentencing courts.<sup>4</sup> More troubling, what consensus there is seems to permit judges to impose any sentence they wish, as long as the appropriate sentencing procedures are followed.<sup>5</sup> As a result, we are in danger of returning to “the ‘shameful’ lack of parity, which the Guidelines sought to remedy.”<sup>6</sup>

The Sentencing Reform Act and the Sentencing Guidelines were designed to reduce disparity in sentencing and to reign in what one commentator described as a “lawless system.”<sup>7</sup> However, the Guidelines, as ultimately conceived, drastically limited the sentencing judge's ability to impose a sentence that was appropriate for the conduct and culpability of

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1. 543 U.S. 220 (2005).

2. *Id.* at 233.

3. *See, e.g.*, *Spears v. United States*, 555 U.S. 261 (2009); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007).

4. *See, e.g.*, *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc); *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc); *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).

5. *See, e.g.*, *Tomko*, 562 F.3d at 568 (“[I]f the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.”).

6. *Cavera*, 550 F.3d at 224 (Sotomayor, J., concurring in part and dissenting in part) (citing S. REP. NO. 98-225, at 65 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3248).

7. *See* MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 8 (1973) (describing judges' sentencing power as “effectively subject to no law at all”).

the defendant, creating a different kind of sentencing disparity.<sup>8</sup> The current, post-*Booker* system provides more guidance than the pre-Guidelines system, but permits sentencing judges to disregard the Guidelines and develop their own sentencing policies.<sup>9</sup> As a result, rather than having a system that allows for sentences to be tailored to *individual defendants*, the current system allows sentences to be imposed based on the penal philosophy of *individual judges*.<sup>10</sup> This will inevitably lead to unwarranted sentencing disparity.<sup>11</sup> This Article traces the recent history of criminal sentencing and argues for a better system that allows for both guidance to sentencing judges and appropriately individualized sentences. John Rawls and H. L. A. Hart, in their seminal works on punishment, posited that there are two questions that must be asked, each at different stages of the sentencing proceeding.<sup>12</sup> The first question is why do we punish offenders? To that question, Rawls and Hart answer that we punish to deter others from committing crimes and to protect other members of society.<sup>13</sup> The second question is why do we punish this particular person? The answer to that question is because that person did something wrong and deserves to be punished.<sup>14</sup> They advocate that the first question is relevant to the legislative function, while the second is relevant to the judicial function at the time of sentencing an offender.<sup>15</sup>

I advocate a sentencing regime where the Sentencing Guidelines provide the starting point for each sentence and are based on the deterrent policies that are the answer to Rawls and Hart's first question. In tax cases, that means that the baseline Guidelines sentence should continue to focus on tax loss and general deterrence.<sup>16</sup> However, when it comes to sentencing the particular offender, judges should be instructed to sentence the offender based upon the offender's culpability and personal circumstances. Appellate review of these sentences should require that judges follow the initial Guidelines but allow variance from the Guidelines range if it is properly based on the individual characteristics of the defendant. In this way, sentences will be uniform where it is relevant and will have disparity that is warranted.

Part II of this Article will detail the sentencing procedures prior to the Sentencing Guidelines and the problems with that regime. In Part III, this

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8. See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 851–70 (1992).

9. See *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008).

10. See *id.*

11. See *infra* notes 197–206 and accompanying text.

12. See H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, in PHILOSOPHY OF PUNISHMENT (Robert M. Baird & Stuart Rosenbaum eds., 1988); John Rawls, *Two Concepts of Rules*, in PHILOSOPHY OF PUNISHMENT 37 (Robert M. Baird & Stuart Rosenbaum eds., 1988).

13. See Rawls, *supra* note 12, at 38–39; see also Hart, *supra* note 12, at 19–20.

14. See Rawls, *supra* note 12, at 38–39; see also Hart, *supra* note 12, at 19–20.

15. See Rawls, *supra* note 12, at 38–39; see also Hart, *supra* note 12, at 19–20.

16. See U.S. SENTENCING GUIDELINES MANUAL § 2T1.1 (2012).

Article will describe the Sentencing Reform Act, the Guidelines, and the issues that arose as a result of the Guidelines. Part IV will discuss *Booker* and its progeny, and it will describe the semi-chaotic current state of sentencing law. Finally, in Part V, I will outline what I view is a better system that preserves sentencing discretion without rendering the system standardless and lawless. My recommendation, although equally applicable to any federal sentence, will be examined through the lens of tax sentencing.

## II. SENTENCING PRIOR TO THE GUIDELINES

Prior to the Sentencing Reform Act and the Sentencing Guidelines, federal judges had nearly unfettered discretion in imposing criminal sentences.<sup>17</sup> As long as the sentence was within the statutory range, and not based upon a constitutionally impermissible basis, the sentence would not be disturbed.<sup>18</sup> Moreover, appeals of sentences were almost non-existent.<sup>19</sup> Thus, a convicted defendant's sentence was based, at least initially,<sup>20</sup> on the predilections, whims, and philosophy of the sentencing judge.<sup>21</sup> This was not always the case.

### A. *A Very Brief History of Pre-Guidelines Sentencing*

Prior to the middle of the nineteenth century, judges had very little discretion in sentencing matters. In the early development of the common law, sentences were imposed to keep what was at times a very fragile peace, and sentences took the place of the individual's "quest for vengeance."<sup>22</sup> Thus, retribution was the prevailing theory of punishment, and justice being a "substitute for vengeance, was brutal."<sup>23</sup> Indeed, most sentences for felonies in the early common law carried the death penalty.<sup>24</sup> In addition, all felonies carried with them the penalties of "forfeiture of goods and attainder," meaning that the felon's heirs could not

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17. See FRANKEL, *supra* note 7, at 5.

18. See *id.* at 5–6 (describing range of permissible judicial discretion in sentencing).

19. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) [hereinafter STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES].

20. Under the sentencing rules prior to the Sentencing Reform Act of 1984, defendants received indeterminate sentences. Prior to the Act, the amount of time actually served would depend upon the decision of the Parole Board. For a discussion of the sentencing rules prior to the Sentencing Reform Act of 1984 and the use of the Parole Board's discretion, see *infra* notes 33–39 and accompanying text.

21. See FRANKEL, *supra* note 7, at 8.

22. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 92, 111 (1930).

23. *Id.* at 92.

24. See generally 2 WILLIAM BLACKSTONE, COMMENTARIES. Even when the death penalty was relaxed, the sentences were nevertheless shocking. For misdemeanors, the usual penalty was pillory and flogging; for petty larceny, ears were cut off; and for other crimes, branding was imposed. See POUND, *supra* note 22, at 103.

succeed to his property or title.<sup>25</sup> When those draconian penalties were lessened, crimes nevertheless carried a fixed penalty.<sup>26</sup> The judge would supervise the trial or guilty plea, and once guilt was determined, the sentence would follow automatically.<sup>27</sup>

In the middle of the nineteenth century, penal theories other than retribution began to influence policy makers.<sup>28</sup> As a result, uniform sentences began to change, and judges were given the discretion to determine the sentence to be imposed.<sup>29</sup> This discretion reached its zenith, at least at the federal level, beginning in the 1910s, when rehabilitation became the predominate theory of punishment, and Congress established indeterminate sentencing.<sup>30</sup> It was believed that the propensity to commit a criminal act was a “sickness,” akin to mental illness, that could be “cured” through proper rehabilitation.<sup>31</sup> As a result, a sentence imposed on a person convicted of a crime should have been no longer than was necessary to cure or rehabilitate the person.<sup>32</sup> It was, of course, impossible to know at the time of sentencing exactly how long it would take for the convict to be cured and ready to re-enter society. Thus, parole boards were established to make this post-hoc diagnosis.<sup>33</sup> Under this system, judges could impose any sentence within the statutory range, with the sentence based upon the level of culpability or sickness of the defendant. Whether the defendant served all or even a major portion of that sentence was determined after the fact by the parole board. As a result, defendants would not know, and indeed could not know, the length of time they would spend in prison at the time of their sentencing.

The unfettered discretion of sentencing judges was blessed by the Supreme Court in *Williams v. New York*.<sup>34</sup> In *Williams*, the defendant was convicted of murder, and the jury recommended a punishment of life imprisonment. However, relying, in part, on evidence and facts that were not submitted to the jury at trial, the judge found that the defendant had committed other serious crimes and was a “menace to society.”<sup>35</sup> The

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25. POUND, *supra* note 22, at 103.

26. See Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821–22 (1968).

27. See *id.* at 822.

28. See Michele Pifferi, *Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe Between the 19th and the 20th Century*, 52 AM. J. LEGAL HIST. 325, 333–34 (2012).

29. See *Procedural Due Process at Judicial Sentencing for Felony*, *supra* note 26, at 822.

30. Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)*, FED. PROBATION, Sept. 1997, at 25–27.

31. See Alfred Blumstein, *American Prisons in a Time of Crisis*, 4 LAW, SOC'Y & POL'Y 13, 13–14 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016 (1991).

32. See Vitiello, *supra* note 31, at 1016.

33. See FRANKEL, *supra* note 7, at 89.

34. 337 U.S. 241 (1949).

35. *Id.* at 244.

judge sentenced the defendant to death. The defendant appealed, arguing that his due process rights were violated when the judge sentenced him by relying on facts that were not presented in court and were provided by persons the defendant was not permitted to cross-examine or confront. The Supreme Court rejected this challenge and held that there are different evidentiary standards for trial and for sentencing.<sup>36</sup> Under the then-prevailing indeterminate sentencing system, discretion was essential to making the appropriately individualized sentence, both at the time of sentencing and in later proceedings before parole boards.<sup>37</sup> Moreover, the Court asserted that the new, “modern” indeterminate sentencing regime usually resulted in a lesser sentence than under the prior system where judges simply imposed the full sentence for that crime. Judicial discretion and fact-finding served to benefit offenders and “[i]n general, these modern changes have not resulted in making the lot of offenders harder.”<sup>38</sup> Thus, sentencing judges were not limited to in-court evidence subject to the normal trial rules. Such a system “would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.”<sup>39</sup>

#### B. *Too Much Discretion: A Lawless System*

The system of unfettered judicial discretion and indeterminate sentencing came under focused attack in the 1960s and 1970s.<sup>40</sup> Following the work of the American Law Institute’s Model Penal Code and the National Commission on Reform of Federal Criminal Laws (Brown Commission), Congress began to reform the federal criminal laws into a more rational and fair classification of crimes.<sup>41</sup> While neither the Model Penal Code nor the Brown Commission specifically addressed sentencing, those efforts nevertheless paved the way for comprehensive sentencing reform.<sup>42</sup>

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36. *See id.* at 248–49.

37. *See id.* at 249.

38. *Id.* Of course, the discretion that the sentencing judge exercised certainly made the lot of Mr. Williams a lot harder. Given that Williams was sentenced to death, the callousness of the Court’s statement is breathtaking.

39. *Id.* at 251.

40. *See* John J. Parker et al., *Report to the Judicial Conference of the Committee on Punishment for Crime*, FED. PROBATION, July–Sept. 1942, at 41 (raising problems with sentencing disparity and disparate treatment of offenders).

41. *See* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 294 (1993).

42. *See id.*

The source of the most important, and influential,<sup>43</sup> attack came from an unlikely source—a United States District Court judge.<sup>44</sup> In *Criminal Sentences: Law Without Order*, Judge Marvin E. Frankel set forth, in stark and vivid detail, the problems with the then-existing sentencing regime. First, judges could impose any sentence within the statutory limit. Given the often cavernous range of federal sentences,<sup>45</sup> sentencing judges were essentially not subject to any law at all.<sup>46</sup> Frankel noted the maxim that the United States is a nation of laws, not men. Yet, in the realm of sentencing, the vast discretion afforded judges created a “regime of such arbitrary fiat [that] would be intolerable in a supposedly free society, to say nothing of being invalid under our due-process clause.”<sup>47</sup>

Frankel also noted that in the effort to individualize sentences, the system is contrary to fundamental concepts of “equality, objectivity, and consistency in the law.”<sup>48</sup> Frankel acknowledged that individualized sentences were a good thing, but asserted that these sentences should be made to turn on objective criteria and “not left for [the] determination in the wide-open, uncharted, standardless discretion of the judge . . . .”<sup>49</sup> Thus, the most significant failure of the system was not just the unbridled discretion given to judges. Rather, it was that this discretion was conferred without any guidance or standards, save maximum penalties. Some judges believed that certain crimes called for the maximum penalty by default, unless the defendant’s case warranted mercy, while another judge—perhaps in the same courthouse—believed that the same crimes should receive no jail time, unless they were more serious than normal.<sup>50</sup>

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43. Judge Frankel’s book was read by Senator Edward Kennedy, who was chair of the Senate Judiciary Committee. Kennedy and others on the Judiciary Committee sought to implement the reforms urged by Frankel. See Feinberg, *supra* note 41, at 295. Senator Kennedy, in turn, became an influential voice in the sentencing reform movement, writing extensively on the subject. See, e.g., Edward M. Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423 (1980); Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208 (1976); Edward M. Kennedy, *Equal Justice and the Problem of Access*, 11 LOY. L.A. L. REV. 485 (1978); Edward M. Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979); Edward M. Kennedy, *Introduction to Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1 (1978); Edward M. Kennedy, *Reforming the Federal Criminal Code: A Congressional Response*, 8 N.C. CENT. L. REV. 1 (1976); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, AM. CRIM. L. REV. Spring 1979, at 353.

44. I say unlikely because the ultimate indictment of the system by Judge Frankel is that he and his fellow judges have too much discretion and power. It is unlikely that the powerful will relinquish power.

45. For example, mail fraud has a statutory maximum penalty of twenty years. See 18 U.S.C. § 1341 (2012). Thus, if convicted, a defendant could face anywhere from probation to twenty years in prison.

46. See FRANKEL, *supra* note 7, at 8.

47. *Id.*

48. *Id.* at 10.

49. *Id.* at 11.

50. See *id.* at 21.

Accordingly, “individualized sentencing” came to mean not that the sentence was based on the unique aspects of the defendant’s crime and personal history. Instead, it meant the individual predilections and prejudices of the judge.<sup>51</sup>

Another issue was the failure of indeterminate sentencing and the use of rehabilitation as a justification for sentencing.<sup>52</sup> Critics argued that the authority of parole boards to release convicts when they were sufficiently rehabilitated was too arbitrary and too shielded from public view, providing yet another avenue for unjust and unreviewable disparity.<sup>53</sup>

The sentencing procedures themselves added to the arbitrariness and lawlessness. “Individualized” sentences were based on information obtained quickly and from over-worked probation officers.<sup>54</sup> Sentencing hearings were often short and pro forma,<sup>55</sup> and the judge would usually impose the sentence immediately. Noting that judges generally ruminate at length before rendering an opinion in comparatively trivial legal matters, Judge Frankel lamented the common practice that, when imposing a criminal sentence that will subject a person to years of incarceration, judges imposed their judgment instantly, and from the bench, without so much as an explanation for the sentence imposed. “The court renders no ‘opinion’ because it has not followed the rational steps required to create one.”<sup>56</sup>

This failure to articulate reasons behind the sentence imposed further underscored the arbitrariness and lawlessness of the sentencing system. Without articulating these reasons, the judge appears to act without rules or the need to abide by them.<sup>57</sup> The failure to articulate the bases for a sentence also prevented any meaningful review of the sentence on appeal. This failure was not necessarily a problem, since sentences could not be reviewed on appeal. But the lack of appellate review merely com-

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51. See *id.* (“[S]weeping penalty statutes allow sentences to be ‘individualized’ not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vary encountered among occupants of the trial bench.”).

52. See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 552 (1978) (discussing limitations of rehabilitation and inability to “probe a person’s psyche and predict his future behavior”).

53. See Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 375 (2010).

54. See FRANKEL, *supra* note 7, at 27.

55. See *id.* at 37.

56. *Id.* at 38. This system also violated the maxim of Justice Frankfurter that “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954).

57. See FRANKEL *supra* note 7, at 39 (“The existence of a rationale may not make the hurt pleasant or even just. But the absence, or refusal, of reasons is a hallmark of injustice. So it requires no learning in law or political philosophy to apprehend that the swift ukase, without explanation, is the tyrant’s way. The despot is not bound by rules. He need not justify or account for what he does.”).



pleted the tragedy: federal judges with life tenure could impose any sentence within a statutory range, which commonly ranged from zero to twenty years.<sup>58</sup> The sentence was imposed with no common embarkation point, no common route, and very little process, either due or otherwise. These judges would then impose their sentence articulating no justification or reasoning, all without concern of appellate review. It is little wonder that Frankel deemed this regime to be “arbitrary, cruel, and lawless.”<sup>59</sup>

### III. THE RISE OF SENTENCING GUIDELINES

#### A. *The Sentencing Reform Act and Congressional Intent*

In response to the consensus that the current system of indeterminate sentencing was not working, as well as the criticisms leveled by Judge Frankel, the ABA,<sup>60</sup> and others,<sup>61</sup> Congress set about to revise the system. After several failed attempts,<sup>62</sup> Congress finally passed the Sentencing Reform Act of 1984 (the SRA).<sup>63</sup>

The SRA had three main objectives. First, the principal goal of the SRA was to alleviate the problem of sentencing disparity.<sup>64</sup> The primary vehicle for accomplishing this objective was the establishment of the Sentencing Commission, which would be tasked with adopting sentencing guidelines.<sup>65</sup> The sentencing guidelines would be used as a basis for all sentences imposed in the federal courts.<sup>66</sup>

Second, the SRA abolished parole and indeterminate sentencing.<sup>67</sup> Convicted defendants would be sentenced to a definite term of imprison-

58. *See, e.g.*, 18 U.S.C. § 1341 (2012).

59. FRANKEL, *supra* note 7, at x.

60. *See* STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, *supra* note 19. The committee that drafted this recommendation included several federal judges from district courts and the courts of appeals, as well as academics like Professor Herbert Wechsler. *See id.* at vii–ix.

61. *See supra* note 43.

62. *See, e.g.*, S. 2699, 94th Cong. (1975) (exhibiting Congress’s first attempt to enact sentencing guidelines legislation).

63. Pub. L. No. 98–473, 98 Stat. 1976.

64. *See* Feinberg, *supra* note 41, at 295. For example, a study showed that, in the Second Circuit, punishments for identical cases could range from three to twenty years of imprisonment. *See* S. REP. NO. 98-225, at 41 (1974) (citing ANTHONY PARTRIDGE & WILLIAM ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES 1–3* (1974)), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224.

65. *See* Feinberg, *supra* note 41, at 295–96. There were three primary reasons for having a commission, rather than Congress, draft the sentencing guidelines. *See id.* at 297. “First . . . Congress had neither the necessary time nor expertise” to develop something as complex as sentencing guidelines. *Id.* Second, there was a concern that Congress, subject to the pressures of politics, would substantially increase criminal sentences. *See id.* Finally, there was a real question as to whether congressionally-drafted guidelines could ever gain the full support of the Senate and House of Representatives. *See id.*

66. *See* 28 U.S.C. § 994 (2012).

67. *See* Feinberg, *supra* note 41, at 296.

ment or other punishment, and they would serve the entire sentence imposed by the judge.<sup>68</sup> This effort would restore “truth in sentencing,” or so the saying went.<sup>69</sup> Related to this goal was the removal of rehabilitation as a rationale for imposing a sentence.<sup>70</sup> Relying on Frankel’s book, as well as articles by Norval Morris and others,<sup>71</sup> Congress concluded that the well-intentioned, but ultimately misguided theory of rehabilitation as a goal of imprisonment could no longer be justified.<sup>72</sup>

Finally, the SRA provided appeal rights to both defendants and the government.<sup>73</sup> “Appellate review of criminal sentences would provide the mechanism for assuring that a sentence deemed too harsh or too lenient would be remedied by an appellate court . . . .”<sup>74</sup> In so doing, Congress established that sentencing is a legal question, subject to review.<sup>75</sup>

The SRA is divided into two sets of provisions. The first, in title 28, sections 991 through 998 of the United States Code, sets forth the make-up, powers, and duties of the Sentencing Commission.<sup>76</sup> The most significant provisions are in section 994, which requires the Commission to “promulgate and distribute to all courts of the United States” guidelines “for use of a sentencing court in determining the sentence to be imposed in a criminal case.”<sup>77</sup> The second set, in title 18, sections 3551 through 3559 of

68. *See id.* Offenders would, however, be eligible for a limited amount of good-time credit, which was also drastically reduced over prior practice. *See* 18 U.S.C. § 3624(b) (Supp. IV 1986).

69. *See* Feinberg, *supra* note 41, at 296; *see also* S. REP. NO. 98-225, at 54, 56 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3237, 3239.

70. *See* Feinberg, *supra* note 41, at 297–98.

71. *See* NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); *see also* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22.

72. *See* Feinberg, *supra* note 41, at 297–98.

73. *See id.* at 296–97.

74. *Id.*

75. *See id.*

76. *See* 28 U.S.C. §§ 991–998 (2012).

77. *Id.* § 994. The Commission was instructed to consider, *inter alia*:

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.

*Id.*

the United States Code, sets forth the matters the judge should consider when imposing a sentence. Most significantly, section 3553(a) requires a sentencing court to consider factors such as the nature and circumstances of the offense and the history and characteristics of the defendant.<sup>78</sup> Section 3553(a) also sets forth the penal philosophies that a court should consider, while notably not choosing between the varying, and often conflicting, philosophies.<sup>79</sup> Judges are to consider:

[T]he need for the sentence imposed— to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed . . . medical care, or other correctional treatment.<sup>80</sup>

The Sentencing Commission then undertook the herculean task of writing comprehensive guidelines applicable to every criminal sentence. Working from the time of its appointment on October 29, 1985, until April 13, 1987, the Commission studied the sentences imposed in 10,000 actual cases.<sup>81</sup> In developing the Guidelines, it attempted to follow what was “typical past practice,” and imposed sentences that were the average of

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78. See 18 U.S.C. § 3553(a) (2012). The factors courts were required to consider include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  - (2) the need for the sentence imposed—
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant; and
    - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  - (3) the kinds of sentences available;
  - (4) the kinds of sentence and the sentencing range established for—
    - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines
- \* \* \*
- (5) any pertinent policy statement
  - (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.

*Id.*

79. See *id.* § 3553(a) (2).

80. *Id.*

81. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 (1988). Actually, the Commission analyzed 10,000 “augmented presentence reports” and the ensuing sentences. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1743 (1992). Thus, the Commission drafted the Guidelines “in a partial vacuum, based primarily on prison sentence

these prior sentences.<sup>82</sup> However, the Commission did not even attempt to fully differentiate between all offenders and offenses: “Punishment, as the Commission came to see, is more of a blunderbuss than a laser beam. An effort to make fine distinctions among criminal behaviors is like a statistician running out crude statistics to ten decimal places, giving an impression of precision that is false.”<sup>83</sup>

Using a detailed set of rules, tables, and adjustments that look at the entire conduct of a convicted defendant, the Guidelines produce a numerical score, or offense level, that translates into a range of months of imprisonment. For tax cases, most defendants are sentenced under section 2T1.1, and the sentence is based primarily on the amount of the tax evaded, or “tax loss,”<sup>84</sup> with adjustments for more sophisticated tax crimes and for crimes that involve illegally-derived income.<sup>85</sup>

### B. *Problems with the Guidelines*

Problems with the Guidelines were raised almost immediately after their adoption.<sup>86</sup> The criticisms leveled at the Guidelines were the result of problems in both design and implementation.<sup>87</sup> First, the system that Congress created shifted to prosecutors the power that was formally in the hands of sentencing judges. Since the Guidelines were mandatory and

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statistics and presentence reports, omitting consideration of the judgment and thinking processes of the judges who produced those sentences.” *Id.* at 1744.

82. *See* Breyer, *supra* note 81, at 7. Breyer noted, however, that in certain cases, like white collar crime cases, the Commission increased the severity of sentences imposed over prior practice. *See id.* at 7 n.49. Indeed, under pre-Guidelines practice, roughly half of all tax defendants were sentenced to probation without imprisonment. This Guideline drastically curtailed the number of pure probationary sentences.

83. *Id.* at 14.

84. *See* U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1) (2012) (defining, for many tax related penalties, tax loss as loss that would have resulted had offense been successfully completed).

85. *See* JOHN A. TOWNSEND, LARRY A. CAMPAGNA, STEVE JOHNSON & SCOTT A. SCHUMACHER, *TAX CRIMES* 301–08 (2008) (discussing application of Guidelines in tax cases).

86. *See, e.g.*, Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the U.S. Sentencing Comm’n, *reprinted in* 52 Fed. Reg. 18, 121 (May 13, 1987) (stating that final Sentencing Guidelines adopted by Commission subverted its “ultimate goal” of drafting “a rational sentencing system”); Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 4 (1987) (arguing that Guidelines adopted by Sentencing Commission are “unlikely to bring rationality and uniformity to federal criminal sentencing”). *See generally*, A. VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* (1985).

87. *See* Robinson, *supra* note 86, at 4. There were other problems with the Guidelines that were attributable neither to the SRA nor the work of the Commission. Most notable were the continuing meddling of Congress in sentencing and the repeated imposition of mandatory minimum sentences. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

fact-driven, and since prosecutors are largely in control of sentencing facts, prosecutors were often able to dictate the sentence that was imposed.<sup>88</sup> More fundamentally, the Commission and the Guidelines are “an expression of confidence in the administrative state: the idea that ‘experts’ insulated from politics are well suited (and sometimes best suited) to make important public choices.”<sup>89</sup> This belief in the omniscience or omnicompetence of the Commission influenced the Commission’s work, as well as sentencing judges’ reactions to the Guidelines.<sup>90</sup>

The belief in the primacy of administrative experts manifested itself most fully when the Commission grabbed more power for itself and the Guidelines, contrary to the statutory mandate set forth by Congress.<sup>91</sup> The primary vehicle for preventing unjust results from a too-rigid application of the Guidelines was the ability of the sentencing judge to depart from the Guidelines.<sup>92</sup> Under the SRA, the sentencing judge would first consider the factors set forth in section 3553(a), including the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing.<sup>93</sup> The judge was then required, under section 3553(b), to determine the Guideline range and to decide whether a sentence within the Guideline range was appropriate, or whether a sentence outside the range was more appropriate because the Guidelines failed to adequately reflect the section 3553(a) factors.<sup>94</sup> Congress never intended to eliminate judges’ “thoughtful imposition of individualized sentences.”<sup>95</sup> However, “the departure power never operated as intended.”<sup>96</sup> The Commission substantially curtailed the ability of sentencing judges to depart, “except as explicitly authorized by the Commission itself.”<sup>97</sup> The Commission then sought to identify nearly every fact that could be relevant to the imposition of a criminal sentence and to make a rule about whether the sentencing judge should consider it, and if

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88. See Freed, *supra* note 81, at 1697–98 (“Guidelines are administrative handcuffs that are applied to judges and no one else. When an AUSA negotiates a disposition by setting or reducing charges and identifying relevant facts, she effectively restricts the judge’s sentencing range and, consequently, the ambit within which upward and downward adjustments can make a difference. . . . The judge’s sentencing range is now tethered to the prosecutor’s choice of charges and facts, unless the probation officer’s independent inquiry brings some facts into question.”).

89. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 253 (2005).

90. See Freed, *supra* note 81, at 1699–1700.

91. Other problems include failing to provide for sentences of probation for non-violent, first offenders. See, e.g., 28 U.S.C. § 994(j) (2012).

92. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1641 (2012).

93. See 18 U.S.C. § 3553(a) (2012).

94. See *id.* § 3553(b).

95. S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

96. Baron-Evans & Stith, *supra* note 92, at 1641.

97. *Id.* at 1646.

so, how.<sup>98</sup> In the Commission's view, it took into account all of the section 3553(a) factors in the Guidelines themselves, and thus would "prevent a court from using it as grounds for departure."<sup>99</sup>

Finally, as a result of the complexity of the Guidelines, and the limited ability to depart from them, the Guidelines system created its own disparities.<sup>100</sup> Some of the disparities resulted from the policy choices made by the Commission.<sup>101</sup> For example, the Guidelines have had a disproportionate impact on black offenders.<sup>102</sup> Moreover, offenders who differed significantly in their culpability, danger to the public, and risk of recidivism were treated the same.<sup>103</sup> Thus, the Sentencing Commission did not create guidelines so much as it created judicial straightjackets. Sentencing courts were not given guidance but were required to march in lockstep to a mandated result, regardless of the wishes of the judge.<sup>104</sup>

### C. *Booker and the Demise of Mandatory Guidelines*

The Guidelines were challenged on constitutional grounds almost immediately after their adoption, and the Supreme Court appeared to settle the constitutionality of the Guidelines in *Mistretta v. United States*.<sup>105</sup> However, more constitutional challenges were to come. Challenges to the federal Sentencing Guidelines were preceded by decisions involving state

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98. *See id.* at 1648.

99. 52 Fed. Reg. 18,046, 18,050 (May 13, 1987).

100. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 116 (2005).

101. *See* Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1, 1-6 (2004). Osler discusses examples of the "upside-down" world of the Guidelines. Examples of these disparities include: (1) "in child pornography cases, the sentence for an individual who sends a computer image of 'virtual' child pornography, made without the use of actual children, would face a sentence twice as harsh as that allowed under the Guidelines for a defendant who actually rapes a child;" (2) a person who manufactures a counterfeit identity document is punished more harshly than the person who then uses that same document to sneak into the country; and (3) "the punishment for possessing the weapon, which constitutes a threat, is often more severe than that for actually using a gun in a violent crime." *Id.* at 4 (footnote omitted).

102. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131-34 (Nov. 2004); *see also* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

103. Schulhofer, *supra* note 8, at 851-70.

104. Sentencing judges retained, as mentioned, a limited ability to depart. Some judges were more skilled than others at avoiding what they believed to be the harsh results of certain Guidelines sentences. *See* Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENT'G REP. 1 (1992).

105. 488 U.S. 361 (1989) (rejecting delegation doctrine and separation of powers challenges to Sentencing Guidelines).

sentencing guidelines.<sup>106</sup> In *Apprendi v. New Jersey*,<sup>107</sup> the defendant pled guilty to various firearm offenses, which carried a maximum sentence of ten years. However, at sentencing, the judge found that the offense was “motivated by racial bias,” and held that the hate crime enhancement applied, which authorized a twenty year sentence.<sup>108</sup> The Supreme Court reversed on Sixth Amendment grounds, holding that “[o]ther than the fact of 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.”<sup>109</sup> In *Ring v. Arizona*,<sup>110</sup> the Supreme Court applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found certain aggravating factors. As in *Apprendi*, the Court concluded that the defendant’s constitutional rights had been violated because the judge had imposed a sentence greater than the maximum that could have been imposed under state law without the challenged factual finding.

In *Blakely v. Washington*,<sup>111</sup> the Supreme Court extended the holdings of *Apprendi* and *Ring* to Washington state’s sentencing guidelines regime. The defendant in *Blakely* pled guilty to second-degree kidnaping, which carried a maximum sentence of ten years.<sup>112</sup> Under Washington’s sentencing guidelines, the standard range for this crime was forty-nine to fifty-three months.<sup>113</sup> However, after hearing the victim’s description of the kidnaping, the judge found that the defendant had acted with “deliberate cruelty,” which was one of the statutorily enumerated grounds for departure in domestic-violence cases, and sentenced the defendant to ninety months.<sup>114</sup> Treating the standard guideline range as the “statutory maximum,” the Court held that the judge’s finding of “deliberate cruelty” violated the Sixth Amendment, as enumerated in *Apprendi*.<sup>115</sup> The Court came to this conclusion despite the fact that *Blakely*’s sentence of ninety months was less than the ten year statutory maximum for the crime to which he pled.<sup>116</sup>

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106. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

107. 530 U.S. 466 (2000).

108. See *id.* at 471.

109. *Id.* at 490 (emphasis added).

110. 536 U.S. 584, 592–93 (2002).

111. 542 U.S. 296 (2004).

112. See *id.* at 299.

113. See *id.*

114. See *id.* at 300.

115. See *id.* at 303–05.

116. See *id.* at 303.

Regardless of the merits of the decision,<sup>117</sup> *Blakely* meant that an attack on the federal Guidelines was inevitable.<sup>118</sup> Indeed, within six months, the Supreme Court decided *United States v. Booker*,<sup>119</sup> a multi-part decision with two majority opinions and four dissents that struck down the federal Sentencing Guidelines. The first part of the majority's decision dealt with the question of whether the Guidelines provisions allowing the sentencing judge to base a sentence on conduct that was not found by a jury violates the Sixth Amendment right to a jury trial.<sup>120</sup> The Court held that the mandatory application of the Sentencing Guidelines violated the Sixth Amendment.<sup>121</sup> Extending the curious logic in *Blakely*, the Court held that the Sixth Amendment right to a jury trial "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant,'"<sup>122</sup> and then two paragraphs later stated, "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."<sup>123</sup> Thus, the Court held that it is a violation of a defendant's right to a jury trial for the sentencing judge to base the sentence on facts not found by the jury, unless the sentencing judge found those facts in the exercise of his discretion.<sup>124</sup> The Court believed, and stated "everyone agrees," that if the Guidelines were merely advisory, the Sixth Amendment issue—and apparently the logical flaw as well—would be cured.<sup>125</sup>

In fashioning the appropriate remedy for the constitutional violation, the so-called "remedial majority" held that the sentencing court should still find the facts and must consider the Guidelines, but that the Guidelines were "effectively advisory" and permitted sentencing courts to tailor

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117. *Blakely* has come under heavy criticism. See, e.g., Bowman, *supra* note 53, at 418 (referring to *Blakely* decision as "silly" and "nearly incomprehensible"). Indeed, neither *Apprendi* nor the Sixth Amendment required the invalidation of the Washington guidelines in *Blakely* or the federal Guidelines in *Booker*. Neither the Washington guidelines nor the federal Guidelines permitted the sentencing judge to impose a sentence above the statutory range for the crimes for which the defendant was found guilty by a jury.

118. Indeed, the second question asked during the *Blakely* oral argument was: "Well, I assume that if your position were adopted it would invalidate the Federal sentencing scheme that we have." Transcript of Oral Argument at 4, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632), available at 2004 WL 728362.

119. 543 U.S. 220 (2005).

120. See *id.* at 245.

121. See *id.* at 226–27.

122. *Id.* at 232.

123. *Id.* at 233.

124. See *id.* The Court does not explain, other than a citation to *Williams*, how fact-finding as part of the exercise of discretion cures what it so clearly found to be a Sixth Amendment violation. I can see no logical or constitutional basis for this distinction, and *Williams* is a very shaky foundation indeed on which to base a revised sentencing regime.

125. See *id.*



the appropriate punishment to each offender.<sup>126</sup> The Court also excised the portion of the SRA that called for *de novo* review and held that appellate courts were to review sentences for “unreasonableness.”<sup>127</sup> However, as others have noted, making the Guidelines merely advisory does not change the “fundamental requirements of rational decisionmaking.”<sup>128</sup>

After *Booker*, just as under the mandatory Guidelines regime, judges find facts that determine the sentence, many of which were never found by a jury. A sentencing judge is given a range of sentencing choices, and “a sentence at the upper end of such a range cannot be rationally justified unless the judge finds some fact in addition to the elements of the crime.”<sup>129</sup> In tax cases, juries do not make findings with respect to tax loss, nor in drug cases do they make findings regarding the amount of cocaine sold. Indeed, the Guidelines still permit uncharged and acquitted conduct to be considered by the judge at sentencing. Thus, the remedy articulated in *Booker*, just like the constitutional portion of the opinion, is incompatible with the Sixth Amendment.<sup>130</sup>

*Booker* left many unanswered questions with which the lower courts have had to wrestle,<sup>131</sup> the thorniest being the nature and extent of appellate review. Simply stated, if the Guidelines are not binding, and are only advisory, can a sentence that is within statutory limits ever be a reversible error?

Ultimately, the Supreme Court itself has had to jump back into the fray, issuing no fewer than five opinions to clarify what it redundantly claims to have made “pellucidly clear” in *Booker*.<sup>132</sup> First, in *Rita v. United States*,<sup>133</sup> the Court held that when a district court sentences within the range that the Sentencing Commission deems appropriate, the court of appeals may presume that the sentence is reasonable. Thus, following *Rita*, the courts of appeals may apply a “presumption of reasonableness” to a sentence that reflects a proper application of the Sentencing Guidelines.<sup>134</sup> It did not *require* appellate courts to apply a presumption of reasonableness, however, which will invariably lead to inconsistent appellate review of sentences.<sup>135</sup>

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126. *See id.* at 245.

127. *See id.* at 259–61.

128. Bowman, *supra* note 53, at 439.

129. *Id.*

130. *See id.* at 440–41.

131. In his dissent in *Booker*, Justice Scalia warned that the opinion would “wreak havoc on federal district and appellate courts quite needlessly, and for the indefinite future.” *Booker*, 543 U.S. at 313 (Scalia, J., dissenting). Given the tens of thousands of cases that have cited *Booker* in the past four years, he appears to be correct.

132. *See Gall v. United States*, 552 U.S. 38, 46 (2007).

133. 551 U.S. 338 (2007).

134. *See id.* at 347.

135. For a more extensive discussion of this issue, see *infra* notes 264–65 and accompanying text.

Then in December 2007, the Court issued its decisions in *Gall v. United States*<sup>136</sup> and *Kimbrough v. United States*,<sup>137</sup> which attempted to further resolve the extent of appellate review of sentences imposed. In *Gall*, the defendant had been a member of a drug conspiracy while he was in college.<sup>138</sup> Several months after joining the conspiracy, Gall advised his co-conspirators that he was withdrawing from the conspiracy, and thereafter he did not sell illegal drugs of any kind.<sup>139</sup> He then graduated from college, obtained gainful employment, and put his prior life of crime behind him. Several years later, he was indicted for his role in the drug conspiracy and pleaded guilty.<sup>140</sup> Under the Guidelines, Gall's sentencing range was thirty to thirty-seven months of imprisonment. However, the district court, noting both Gall's brief participation in the conspiracy and his rehabilitation, sentenced Gall to probation for a term of thirty-six months.<sup>141</sup> The court of appeals reversed, holding that "a sentence outside of the Guidelines range must be supported by a justification that is proportional to the extent of the difference between the advisory range and the sentence imposed."<sup>142</sup> The Supreme Court reversed and rejected the idea that a sentence outside the Guidelines range must be justified by "extraordinary" circumstances.<sup>143</sup>

The Supreme Court then set up the procedure by which sentencing courts should determine and impose sentences. The sentencing court should begin by calculating the applicable Guidelines range, noting that, in an effort to maintain nationwide consistency, the Guidelines should be the starting point.<sup>144</sup> Then, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the section 3553(a) factors to determine whether they support the sentence requested by a party."<sup>145</sup> In so doing, the court "must make an individualized assessment based on the facts presented."<sup>146</sup> If the sentence is outside the Guidelines range, the court must "ensure that the justification is sufficiently compelling to support the degree of the variance."<sup>147</sup> Finally, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."<sup>148</sup>

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136. 552 U.S. 38 (2007).

137. 552 U.S. 85 (2007).

138. See *Gall*, 552 U.S. at 41.

139. See *id.*

140. See *id.* at 42.

141. See *id.* at 43.

142. *Id.* at 45 (internal quotation marks omitted).

143. See *id.* at 47.

144. See *id.* at 49.

145. *Id.* at 49–50.

146. *Id.* at 50.

147. *Id.*

148. *Id.*

The Court then turned to the nature of appellate review and held that courts of appeals must review the sentence under an abuse-of-discretion standard.<sup>149</sup> First, the reviewing court must ensure that the district court committed no significant procedural error, such as failing to calculate the Guidelines range or failing to consider the section 3553(a) factors. The appellate court must also “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”<sup>150</sup>

When conducting this review, the court . . . will take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.<sup>151</sup>

In *Kimbrough*, decided the same day as *Gall*, the Supreme Court addressed the situation in which it was the Guidelines themselves, rather than the exceptional conduct of the defendant, that were the basis of a sentence below the Guidelines range. *Kimbrough* had pleaded guilty to various drug-related charges, including possession with intent to distribute crack cocaine.<sup>152</sup> Under the Guidelines, *Kimbrough*’s sentencing range was 228 to 270 months.<sup>153</sup> The district court determined that a sentence in this range “would have been greater than necessary to accomplish the purposes of sentencing set forth in [section] 3553(a).”<sup>154</sup> The court also commented that the case “exemplified the disproportionate and unjust effect that crack cocaine guidelines have in sentencing.”<sup>155</sup> The court sentenced *Kimbrough* to 180 months in prison.<sup>156</sup> The Fourth Circuit vacated the sentence, holding that a sentence imposed “outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.”<sup>157</sup> The Supreme Court reversed the Fourth Circuit and held that as long as the sentencing judge follows the requirements of *Gall* (i.e.,

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149. *See id.* at 51.

150. *Id.*

151. *Id.* (citation omitted).

152. *See Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

153. *See id.* at 92.

154. *Id.* at 92–93 (internal quotation marks omitted).

155. *Id.* at 93 (internal quotation marks omitted). *Kimbrough* would have received a Guidelines range of 97 to 106 months had he been sentenced for an equivalent amount of powder cocaine. *See id.*

156. *See id.*

157. *United States v. Kimbrough*, 174 F. App’x 798, 799 (4th Cir. 2006) (per curiam).

there was no procedural error and the sentence was substantively reasonable) a sentence outside the Guidelines range, even if based on a disagreement with the Guidelines themselves, is not reversible error.<sup>158</sup>

Finally, in *Spears v. United States*,<sup>159</sup> the sentencing judge disagreed with the powder-to-crack cocaine ratio of 100:1 set forth in the Guidelines and sentenced the defendant using his own 20:1 ratio.<sup>160</sup> The court of appeals reversed, holding that while sentencing judges may disagree with the Guidelines as applied, they cannot adopt their own categorical crack-powder ratios in place of the Guidelines' ratio.<sup>161</sup> The Supreme Court summarily reversed the decision of the Eighth Circuit and held that sentencing courts are "entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."<sup>162</sup>

#### D. *The Application of the Guidelines Since Booker*

Despite the Supreme Court's efforts, or perhaps because of them, the courts of appeals are still unclear as to the nature of the review of sentencing decisions.<sup>163</sup> Part of this ambiguity is the lack of clarity in standards like "abuse-of-discretion" and "substantively reasonable." However, this uncertainty also stems from the confusion and lack of clarity at the Supreme Court level.<sup>164</sup> This section will discuss some of the appellate cases that illustrate this confusion.

In *United States v. Tomko*,<sup>165</sup> the Third Circuit struggled to apply the principles set out by the Supreme Court in determining whether the sentencing judge abused his discretion in imposing a sentence with no term of imprisonment in a tax evasion case.<sup>166</sup> The stipulated tax deficiency in *Tomko* was \$228,557, which would have resulted in a Guidelines range of twelve to eighteen months of incarceration.<sup>167</sup> However, the district court did not impose a term of imprisonment but instead sentenced Tomko to 250 hours of community service and three years of probation.<sup>168</sup> The

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158. See *Kimbrough*, 552 U.S. at 110–11.

159. 555 U.S. 261 (2009).

160. See *id.* at 262.

161. See *id.* at 262–63.

162. *Id.* at 265–66.

163. See, e.g., *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc); *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc); *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).

164. See *infra* notes 260–68 and accompanying text.

165. 562 F.3d 558 (3d Cir. 2009) (en banc).

166. The original panel decision in *Tomko* was issued on August 20, 2007. See *United States v. Tomko*, 498 F.3d 157 (3d Cir. 2007), *rev'd en banc*, 562 F.3d 558 (3d Cir. 2009). The en banc decision was not issued until April 17, 2009. The court of appeals, in a thirty-four page opinion, split eight to five on whether the sentence should be upheld. See *Tomko*, 562 F.3d at 574–75.

167. See *Tomko*, 562 F.3d at 561.

168. See *id.* at 563.

court imposed the lighter sentence because (1) Tomko had only a “negligible criminal history;” (2) his company employed more than 300 people, and Tomko’s incarceration would jeopardize their employment; and (3) Tomko’s record of charitable works.<sup>169</sup>

On appeal, a divided en banc court agreed on the general standard to be imposed. Quoting extensively from *Gall*, both the majority and dissent agreed that their review of the sentence should be in two stages. First, the court of appeals must ensure that the sentencing court committed no significant procedural error, such as improperly calculating the Guidelines range, treating the Guidelines as mandatory, failing to consider the section 3553(a) factors, or failing to adequately explain the chosen sentence.<sup>170</sup> Assuming there was no procedural error, the court of appeals must then consider the substantive reasonableness of the sentence, which requires the court to look at the “totality of the circumstances” surrounding the sentence.<sup>171</sup> Finally, the court of appeals should review both the procedural and substantive reasonableness of the sentence imposed for an abuse of discretion.

However, the majority and dissent disagreed as to the degree of deference to be given. The majority held that “if the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.”<sup>172</sup> While the majority was quick to point out that it did not necessarily agree with the sentence imposed, it was unwilling to disturb what it considered to be fact-bound inquiries that are better suited for a sentencing judge to make.<sup>173</sup> The majority thus confined its review to whether the sentencing judge considered the section 3553(a) factors, holding that “[t]he touchstone of ‘reasonableness’ is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a).”<sup>174</sup>

In so doing, the majority seemed to reserve little for itself in the way of substantive review. Indeed, the majority’s “touchstone of reasonableness”—and therefore its view of the substantive reasonableness of the sentence—only examines the procedural soundness of the sentence: whether

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169. *See id.* at 562–64.

170. *Id.* at 567 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

171. *See id.*

172. *Id.* at 568.

173. *See id.* at 560. The majority noted “‘[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.’” *Id.* at 561 (alteration in original) (quoting *Gall*, 552 U.S. at 51). The majority also noted that, “‘district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.’” *Id.* at 566 (quoting *Gall*, 552 U.S. at 52).

174. *Id.* at 575 (alteration in original) (quoting *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007)).

the record “reflects rational and meaningful *consideration*” of the section 3553(a) factors.<sup>175</sup> Under the majority’s deferential approach to appellate review, it is unclear under what circumstances the court would find a procedurally sound sentence substantively unreasonable.

The dissent undertook a more substantive review of the sentence imposed and the reasons given for the sentence. Purporting to use the same abuse-of-discretion standard of review as the majority, the dissent examined the reasons articulated by the sentencing judge for imposing a sentence well below the Guidelines range. The dissent also found support in the opinions of other courts of appeals and argued that even though it will give due deference to the district court’s decision that the section 3553(a) factors justify the extent of the variance, a reviewing court may nevertheless “find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence.”<sup>176</sup>

In analyzing the factors the sentencing court relied on in imposing the sentence, the dissent opined that a negligible criminal history did not support the variance “because Tomko’s status as a ‘first-time offender’ [did] not differentiate him from many, if not most, tax evaders.”<sup>177</sup> Likewise, the dissent found that Tomko’s employment record failed to distinguish him from other tax evaders. Many white-collar criminals run successful businesses, hence the desire to evade taxes. The dissent believed that the prospect of the business failing should not be considered as a mitigating factor, particularly “when the business itself was the vehicle through which the defendant perpetrated the crime.”<sup>178</sup> Finally, while the dissent acknowledged that Tomko’s charitable works, however well-timed, might justify some downward variance, they were not sufficient to support the degree of variance in this case. Thus, according to the dissent, only one out of the three reasons offered by the sentencing judge for the extraordinary variance justified a downward variance.<sup>179</sup>

In addition, the dissent noted that the “mitigating” circumstances relied upon by the sentencing court only addressed one of the section 3553(a) factors, and the judge failed to emphasize other factors, including the nature, circumstances, and seriousness of the offense.<sup>180</sup> The dissent noted that Tomko did much more than just fail to report income. Rather, he developed a sophisticated plan to evade taxes that spanned several

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175. *Id.* (quoting *Grier*, 475 F.3d at 571).

176. *Id.* at 578–79 (Fisher, J., dissenting) (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)); *see also* *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc); *United States v. Taylor*, 532 F.3d 68, 69–70 (1st Cir. 2008); *United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008).

177. *Tomko*, 562 F.3d at 583 (Fisher, J., dissenting) (citing *United States v. Goff*, 501 F.3d 250, 261 (3d Cir. 2007)).

178. *Id.* at 584 (citing *United States v. Reilly*, 33 F.3d 1396, 1424 (3d Cir. 1994); *United States v. Sharapan*, 13 F.3d 781, 785 (3d Cir. 1994)).

179. *See id.* at 585.

180. *See id.* at 585–86.

years and required planning, coordination, and coercion of numerous subcontractors. The dissent thus determined that not only did the sentencing judge's justifications for imposing Tomko's sentence fail to differentiate him from other tax evaders, but also "the severity of his offense and the extent of his culpability, as evidenced by the willful and brazen nature of his conduct, remove Tomko's tax evasion from the garden variety type."<sup>181</sup> Finally, the dissent noted the "perverse irony" of sentencing Tomko to "home confinement in the very mansion that was built through the fraudulent tax evasion scheme at issue . . . [a] house on approximately eight acres, with a home theater, an outdoor pool and sauna, a full bar, \$1,843,500 in household furnishings, and \$81,000 in fine art."<sup>182</sup>

In *United States v. Cavera*,<sup>183</sup> the defendant pled guilty to a firearms trafficking offense. The district court sentenced him to a longer sentence than was called for by the Guidelines, "simply because [it thought] the sentencing guidelines may understate the seriousness of this offense because of the consequences for the community of bringing or transporting . . . firearms into New York City."<sup>184</sup> A divided en banc Second Circuit wrestled with the question of whether the district court's use of information that did not pertain to the individual defendant, but only to perceived geographical and sociological differences, was reasonable.<sup>185</sup> The majority noted that, after *Kimbrough*, a sentencing judge "may vary from the Guidelines range based solely on a policy disagreement with the Guidelines . . . ."<sup>186</sup> The majority held that it would not substitute its own judgment for the district court's on the question of what is sufficient to meet the section 3553(a) factors and that it will "set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'"<sup>187</sup>

One of the dissents argued that "[w]here a district court's sociological and statistical findings, as to which it enjoys no special comparative advantage vis-a-vis the Sentencing Commission, do not reasonably follow from the evidence it cites, the court exceeds its allowable discretion and the sentence is unreasonable."<sup>188</sup> Judge, now Justice, Sotomayor, in her own dissenting opinion, decried the:

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181. *Id.* at 586.

182. *Id.* at 587.

183. 550 F.3d 180 (2d Cir. 2008) (en banc).

184. *Id.* at 185 (second alteration in original).

185. *Cavera* contained a majority opinion, two concurring opinions, two opinions that concurred in part and dissented in part, and one dissenting opinion. *See id.*

186. *Id.* at 191.

187. *Id.* at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)).

188. *Id.* at 212 (Straub, J., concurring in part and dissenting in part) (citation omitted).

[M]ajority's excessive deference to the district court's decision, which risks a regression of the sentencing process to the "greatest deficiencies of the pre-Guidelines regime," namely "its failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles."<sup>189</sup>

She warned that "[a]ppellate courts must not abdicate their responsibility to ensure that sentences are based on sound judgment, lest we return to the 'shameful' lack of parity, which the Guidelines sought to remedy."<sup>190</sup>

In *United States v. Feemster*,<sup>191</sup> a divided en banc Eighth Circuit addressed the scope of its appellate review.<sup>192</sup> After remanding the sentence twice, the court reviewed a drug sentence for a third time. The sole issue was whether the district court had adequately explained the basis for a reduction from a 360 month Guidelines sentence to 120 months. The majority held that the judge's explanations were sufficient.<sup>193</sup> The dissent disagreed, and asserted that the majority's review was essentially:

[A] standard of no appellate review at all. We adopt a posture today that is so deferential that, so long as the district court gives lip service and a bit of discussion to the relevant 18 U.S.C. § 3553(a) factors, a sentence will almost never be reversed, procedurally or otherwise.<sup>194</sup>

There are other cases that struggle with the standard of review after *Gall*.<sup>195</sup> What is significant about these cases is that, despite numerous attempts, the Supreme Court has failed to articulate a workable standard of review. If panels of courts of appeals cannot even agree on what the standard of review is, or how it is to be applied, sentencing judges will be further at-sea in discerning the amount of discretion they have in imposing sentences. Also, the majority of courts appear to be granting almost unlimited discretion to sentencing judges, which is contrary to the intent of Congress in the SRA and ignores the problems of the past.

With more discretion came more variance from the Guidelines:

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189. *Id.* at 217 (Sotomayor, J., concurring in part and dissenting in part) (quoting Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. REV. 1247, 1253–54 (1997)).

190. *Id.* at 224 (citing S. REP. NO. 98-225, at 65 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3248).

191. 572 F.3d 455 (8th Cir. 2009) (en banc).

192. *Feemster* contains a majority opinion, two concurring opinions, and one dissenting opinion. *See id.*

193. *See id.* at 463–64.

194. *Id.* at 471 (Beam, J., dissenting).

195. *See, e.g.,* *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008); *United States v. Smart*, 518 F.3d 800 (10th Cir. 2008); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).



PERCENTAGE OF CASES SENTENCED WITHIN GUIDELINES<sup>196</sup>

Year	Total	Tax	Fraud	Drugs <sup>197</sup>	Year	Total	Tax	Fraud	Drugs
1998	66.3	75.4	75.5	95.9	2006	61.7	54.7	64.4	93.2
1999	64.9	74.1	72.3	93.8	2007	60.8	47.5	64.6	90.9
2000	64.5	71.2	68.6	93.0	2008	59.4	44.1	61.9	89.6
2001	64.1	66.2	70.7	92.9	2009	56.8	37.7	58.5	90.0
2002	65.0	63.2	71.2	95.2	2010	55.0	35.5	55.5	94.9
2003	69.4	62.6	74.8	88.8	2011	54.5	37.4	54.6	94.9
2004	72.1	69.3	76.0	95.8	2012	52.4	36.9	50.4	97.4
2005	70.9	71.6	75.7	91.4					

As this chart shows, while the overall sentences within the applicable Guidelines range declined, the tax sentences within the Guidelines declined much more dramatically. The fact that more than sixty percent of post-*Booker* sentences in tax cases now fall outside the Guidelines range demonstrates that there is substantially more disparity in tax cases post-*Booker*.<sup>198</sup> The question then becomes whether this disparity is warranted, which Congress presumably would support, or unwarranted, which the SRA was enacted to prevent.<sup>199</sup>

Whether disparity in sentences is warranted cannot be answered in the absolute. Whether a difference in treatment of two offenders is warranted will depend upon the individual facts of each case. Indeed, it is the failure to recognize this fundamental premise that caused the Guidelines, in their obsessively rigid constraint of judges, to be unworkable. If a judge does not impose a Guidelines sentence, it does not mean that the sentence is more just or more appropriate. It only means that the judge imposed an individualized sentence. While an individualized sentence might, in the abstract, be better than a cookie-cutter one, this would not be the case if sentences were based on inappropriate criteria or the judge incorrectly applied appropriate criteria.

## IV. ENSURING A MORE JUST SENTENCE

In the past 100 years, the sentencing pendulum has swung from unfettered discretion and indeterminate sentencing, to detailed and mandatory guidelines, and now to guidelines-with-discretion. The new, more balanced approach to sentencing appears to be an improvement,

196. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.27 (1998–2012), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Rep\\_and\\_Sourcebooks/Archives.cfm](http://www.ussc.gov/Research_and_Statistics/Annual_Rep_and_Sourcebooks/Archives.cfm).

197. The "Drugs" columns refer to drugs-simple possession. See *id.*

198. Of course, the possibility remains that all tax sentences have been uniformly reduced and there is no disparity. While data is not available to disprove this possibility, it seems unlikely.

199. See Feinberg, *supra* note 41, at 295.

and, indeed, many people believe that to be the case.<sup>200</sup> However, the current system is far from perfect. As detailed above, despite nearly eight years of Supreme Court and other appellate decisions on the scope of appellate review, there is no consensus among the courts on this issue. In fact, there is often no agreement *within* many circuits. Moreover, the post-*Booker* system allows for a judge to disregard the Guidelines and substitute the judge's own penal philosophy for that of the Sentencing Commission. Thus, the sentencing system we have now is less like H. L. A. Hart's game of cricket with an official scorer and is more like the game of "scorer's discretion."<sup>201</sup> There are rules, but only if the judge chooses to follow them; and there is appellate review, which really only amounts to ensuring that the judge purposefully followed—or ignored—the rules.

It is clear that the number of sentences outside the Guidelines has increased significantly since *Booker*.<sup>202</sup> Sentences imposed outside the Guidelines may, in many cases, be a positive development.<sup>203</sup> An excessively rigid Guidelines system leads to its own kind of disparity, and some have argued that the problem of disparity prior to the Guidelines was overblown in the first place.<sup>204</sup> Nevertheless, the problems with the pre-Guidelines, "lawless" system described by Judge Frankel were real, and the

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200. See, e.g., Baron-Evans & Stith, *supra* note 92, at 1633–34 ("The advisory guidelines system has broad support: the vast majority of federal judges believe that advisory guidelines achieve the purposes of sentencing better than any kind of mandatory guidelines system or no guidelines at all, the Criminal Law Committee of the Judicial Conference of the United States supports the advisory guidelines system, prosecutors prefer advisory guidelines to other available options, and the organized public and private defense bars support the advisory guidelines system." (footnotes omitted)).

201. See H. L. A. HART, *THE CONCEPT OF LAW* 141–47 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994). Hart analogizes the law and judges' role in the law to a game of cricket or baseball played first without, and then with, an official scorer. See *id.* The players can predict what the scorer's ruling will be because they know and have used the rules, and because the scorer will, in the vast majority of the cases, follow the rules. See *id.* at 143–44. Applying this analogy to law, judges have considerably more discretion than official scorers in a game, but they nevertheless are bound by laws, constitutions, and rules. See *id.* at 145. Hart warns that these "standards could not indeed continue to exist unless most of the judges of the time adhered to them, for their existence at any given time consists simply in the acceptance and use of them as standards of correct adjudication." *Id.*; see also Scott A. Schumacher, *MacNiven v. Westmoreland and Tax Advice: Using "Purposive Textualism" to Deal with Tax Shelters and Promote Legitimate Tax Advice*, 92 MARQ. L. REV. 33, 72–73 (2008).

202. See *supra* note 196 and accompanying table.

203. See, e.g., *Gall v. United States*, 552 U.S. 38 (2007).

204. See *United States v. Feemster*, 572 F.3d 455, 471 n.15 (8th Cir. 2009) (Beam, J., dissenting) ("I firmly believe, based upon almost five years of experience as a federal trial judge and the sentencing, pre-Guidelines, of at least 500 federal felons, that the 'disparity principle,' advanced by advocates as the foundation and bedrock underlying federal guideline sentencing, is an illusion, by at least half. Virtually every individual presents a different picture to a careful and conscientious sentencing judge. As a result, alleged uniformity is often disparity, viewed through a different prism.").

potential for abuse cannot be ignored. As Professor Bowman noted, “[s]hould the *Booker* system survive, the exercise of the added judicial discretion might secure better outcomes for some defendants, but it would also inevitably create more interjudge and interdistrict disparity.”<sup>205</sup>

In order to form a more perfect sentencing system, the sentencing regime should be modified to include three elements. First, just like the current system, there must be a set of guidelines that are the starting point for every sentence. Second, similar to the current system, judges should be required to impose a sentence that is adapted to the individual offender. However, this individualized determination should not be left to the unfettered and unguided discretion of the sentencing judge with only the vague standards listed in section 3553. Rather, each guidelines section should contain matters that are relevant and pertinent to individualizing a particular offender’s sentence. Finally, in order to ensure that the sentencing judge imposes the sentence correctly, the system must allow for real, substantive appellate review. Discretion assumes power, and power presupposes abuse of that power, or at least the ability to do so.<sup>206</sup> Thus, while guidelines and a common starting point, as well as the ability to deviate from those guidelines, are essential to a just system, real appellate review is necessary to quell the inevitable abuse of discretion. I will take each of these three proposals in turn.

#### A. *The Sentence Must Reflect the Culpability of the Offender*

Both the problems with the sentencing regime and the problems with the appellate standard of review stem from a lack of coherent philosophy underlying sentencing.<sup>207</sup> The philosophical bases upon which society punishes wrongdoers have bedeviled philosophers, scholars, and judges for centuries.<sup>208</sup> While a full exploration of this subject is beyond the scope of this Article, there are essentially five traditional theories for which punishment may be imposed: deterrence, retribution, just deserts, rehabil-

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205. Bowman, *supra* note 89, at 257.

206. See, e.g., Christine Mai-Due, *Judge in Rape Case Criticized for Light Sentence, Remarks About Victim*, L.A. TIMES (Aug. 28, 2013), <http://articles.latimes.com/2013/aug//nation/la-na-montana-judge-20130829> (imposing thirty-day sentence on former high school teacher for raping fourteen year-old student who later committed suicide). The judge stated that the victim was “older than her chronological age,” and that she was “as much in control of the situation” as her teacher. *Id.*

207. These two sets of problems are, of course, interrelated. It is because there is no coherent and consistent view of sentencing that appellate courts struggle with the nature and extent of appellate review. Likewise, since there is no consistent or coherent view of appellate review, sentencing courts struggle with the amount of authority they have in sentencing.

208. See, e.g., Cesare Beccaria, *On Crimes and Punishments*, in THEORIES OF PUNISHMENT 117 (Stanley E. Grupp ed., 1972); R.A. DUFF & STUART GREEN, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (2011); H. L. A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY (1982); PHILOSOPHY OF PUNISHMENT (Robert M. Baird & Stuart Rosenbaum eds., 1988); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994).

itation, and incapacitation.<sup>209</sup> Notably, and problematically, Congress did not resolve the debate regarding which of the purposes of sentencing should be primary.<sup>210</sup> Indeed, Congress instructed the Sentencing Commission and sentencing judges to consider each of these purposes in sentencing.<sup>211</sup> In order for a sentencing regime not to be all things to all people (or all judges), there must be a coherent—and consistent—system of sentencing. Without a coherent system, disparity, both warranted and unwarranted, is inevitable.<sup>212</sup>

### 1. *Two Theories of Punishment, One Sentencing System*

The five theories of punishment noted above can be divided into two overarching theories: the utilitarian theory and the retributivist theory. Utilitarians maintain that punishment is only justified if the benefits to society outweigh the harm caused to the person punished.<sup>213</sup> Utilitarians therefore rely on deterrence, rehabilitation, and incapacitation to justify punishment.<sup>214</sup> Retributivists focus on the conduct of the offender in justifying punishment. It is because *that* person did something wrong and violated the law that the person is being punished.<sup>215</sup> Thus, the theories advanced by the retributivist are retribution and just deserts.

For many legal theorists, these two theories of punishment were irreconcilable.<sup>216</sup> However, more recently, John Rawls and H. L. A. Hart each reconciled the utilitarian and retributivist theories into one coherent sentencing structure. In his influential work, *Two Concepts of Rules*, Rawls argued that in justifying punishment there are two questions: why do we punish at all, and why do we punish this particular person?<sup>217</sup> The utilitarian theory answers the first question, while the retributivist theory answers the second.<sup>218</sup> Rawls then asserts that each of these questions, as well as their answers, is relevant at different times in the sentencing proceeding:

The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices, that

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209. ROBERT M. BAIRD & STUART E. ROSENBAUM, *PHILOSOPHY OF PUNISHMENT* 8–9 (1988).

210. This problem is not new to the SRA. As Judge Frankel stated regarding the pre-Guidelines state of the law, “Congress and state legislatures have failed even to study and resolve the most basic of the questions affecting criminal penalties, the questions of justification and purpose.” FRANKEL, *supra* note 7, at 7.

211. See 18 U.S.C. § 3553(a) (2012).

212. I realize that with politics being what it is, it is perhaps naïve to think that Congress and its multitude of members and viewpoints could ever articulate one coherent view on anything, let alone on sentencing. Indeed, as Frankel noted, Congress is not a philosopher’s grove. FRANKEL, *supra* note 7, at 62.

213. BAIRD & ROSENBAUM, *supra* note 209, at 8.

214. *Id.*

215. *Id.*

216. *Id.*

217. Rawls, *supra* note 12, at 38–39.

218. *Id.*

of the judge and that of the legislator, and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications of punishment. One reconciles the two views by the time-honored device of making them apply to different situations.<sup>219</sup>

Hart espoused a similar theory.<sup>220</sup> The Rawls and Hart model is the ideal framework for the application of the Guidelines after *Booker*. The general focus of the Guidelines should be utilitarian, with deterrence, incapacitation, and, to a certain extent, rehabilitation as the justifying principles. Thus, in tax cases, the initial Guidelines determination should be based, as is currently the case, on deterring others. In this regard, the introductory commentary to section 2T1.1 provides:

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a *primary consideration* underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.<sup>221</sup>

In its legislative capacity, the Sentencing Commission rightly focused on deterrence as the primary justification for tax prosecutions. Indeed, the introductory commentary is a perfect answer to the question of why we prosecute tax evaders.

But “tax loss calculations,” “preserving the integrity of the tax system,” and “deterrence” do not fully justify why we punish a *particular* tax evader, nor should a sentencing judge be bound by the rough-and-ready tax loss calculation.<sup>222</sup> The answer to why we punish a particular defendant requires the judge to focus on the retributivist justifications. This is particu-

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219. *Id.* at 39–40.

220. *See* Hart, *supra* note 12, at 16.

221. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1, introductory cmt. (2012) (emphasis added).

222. *See* Rawls, *supra* note 12, at 38–39; *see also* United States v. Cavera, 550 F.3d 180, 192 (2d Cir. 2008) (en banc) (noting that many Guidelines sentences, including tax offenses, drastically vary based only on amount of money involved). However, “a district court may find that even after giving weight to the large or small financial impact, there is a wide variety of culpability amongst defendants and, as a result, impose different sentences based on the factors identified in § 3553(a).” *Id.*

larly appropriate in tax cases, where often the sole difference between legal tax avoidance and illegal tax evasion is the mental state (i.e., the culpability) of the defendant.<sup>223</sup>

An example of this application is the case of Mary Estelle Curran.<sup>224</sup> Curran was prosecuted for failing to disclose Swiss bank accounts that she had inherited from her husband, which held as much as \$43 million.<sup>225</sup> Curran had hired a lawyer to disclose the accounts, but the lawyer did not file the proper paperwork until after the government already had her name from the bank.<sup>226</sup> Under the section 2T1.1 calculation, Curran faced a sentence of thirty to thirty-seven months. However, the defense presented evidence that Curran was a seventy-nine year-old widow, she was financially unsophisticated, and that she relied on her attorneys and her deceased husband regarding the tax treatment of this account.<sup>227</sup> Deeming the prosecution a “tragic situation,” the district court judge sentenced Curran to one year of probation, but then immediately revoked it, effectively sentencing her to probation for less than a minute.<sup>228</sup> Thus, the judge relied on both Curran’s lack of culpability and her age in dramatically lowering her sentence below the suggested Guidelines range.

By the same token, some tax evaders may be more culpable than their tax loss score would indicate and should therefore receive a harsher sentence. A noteworthy example of this situation is *United States v. Ciccolini*.<sup>229</sup> Ciccolini embezzled \$1,038,680 from a charitable organization of which he was the director.<sup>230</sup> Not only did he embezzle funds from a charity, he structured the deposits of the embezzled funds by making 139 separate deposits of less than \$10,000 each.<sup>231</sup> He also filed false tax returns for multiple years and underreported his tax liabilities by \$292,136.<sup>232</sup> Thus, this is a case in which the individual was more culpable than the garden-variety tax evader. The judge appeared to recognize this understanding.

The Presentence Report recommended a total offense level of fifteen, with a range of eighteen to twenty-four months. However, the district

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223. See, e.g., Scott A. Schumacher, *Magnifying Deterrence by Prosecuting Professionals*, 89 IND. L.J. 511 (2014).

224. See Susannah Nesmith & David Voreacos, *Widow Gets Less than Minute of Probation in U.S. Tax Case*, BLOOMBERG (Apr. 25, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-04-25/widow-gets-less-than-minute-of-probation-in-u-s-tax-case.html>.

225. See *id.*

226. See *id.*

227. See Defendant’s Sentencing Memorandum in Support of a Sentence of Probation at 2–3, *United States v. Curran*, 9:12-cr-80206-KLR (S.D. Fla. Mar. 19, 2013), available at [http://media.journalofaccountancy.com/JOA/Docs/Curran\\_brief.pdf](http://media.journalofaccountancy.com/JOA/Docs/Curran_brief.pdf).

228. See Nesmith & Voreacos, *supra* note 224.

229. 491 F. App’x 529 (6th Cir. 2012).

230. See *id.* at 530–31.

231. See *id.* at 531. Ciccolini made deposits in this manner to avoid certain currency reporting requirements. See *id.*

232. See *id.*

court found that Ciccolini had testified falsely during his plea colloquy, and the court found that the source of funds for both the structuring and tax counts were the proceeds of illegal activity.<sup>233</sup> As a result, the judge determined a total offense level of twenty-six, with a range of sixty-three to seventy-eight months.<sup>234</sup> Notably, while the judge appeared to correctly determine the defendant's Guidelines score, he did not vary above the Guidelines range based upon the defendant's abhorrent behavior, perhaps believing that the Guidelines sentence was appropriate. But in fashioning the individualized sentence, the judge did not determine the sentence based upon Ciccolini's culpability.<sup>235</sup> Rather, the judge relied on the writings of a "Nobel-winning economist," who argued that in financial crimes, "incarceration is less important than providing a disincentive to others and that the disincentive can sometimes be obtained through financial penalties."<sup>236</sup> The judge imposed a sentence of *one day* of incarceration, followed by three years of supervised release, and he ordered restitution of \$3,500,000.<sup>237</sup>

On appeal, the Sixth Circuit determined that the judge had no authority to order restitution and reversed the entire sentence, because sentences are "a package of sanctions" and the restitution portion of the sentence was the means by which the judge sanctioned the seriousness of the defendant's conduct.<sup>238</sup> Significantly, the court of appeals did not remonstrate the sentencing judge for employing a penal philosophy so at odds with the Guidelines.

## 2. *Institutionalizing Individuality*

Following *Booker*, sentencing courts, after they calculate the Guidelines range, are required to consider the section 3553(a) factors and "make an individualized assessment based on the facts presented."<sup>239</sup> As indicated, the section 3553(a) factors include "the nature and circumstances of the offense," the need for the sentence imposed to "reflect the seriousness of the offense," the need "to afford adequate deterrence," and the need "to protect the public from further crimes of the defendant."<sup>240</sup> Of course, many of these factors were already considered by the Sentencing Commission in fashioning the Guidelines range.<sup>241</sup> More significantly, some of these factors have nothing whatsoever to do with the

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233. *See id.*

234. *See id.*

235. *See id.* at 531–32.

236. *Id.* at 531.

237. *See id.* at 532.

238. *Id.* at 534 (quoting *Pepper v. United States*, 131 S. Ct. 1229, 1251 (2011)).

239. *United States v. Gall*, 552 U.S. 38, 50 (2007).

240. 18 U.S.C. § 3553(a)(1)–(2) (2012).

241. *See* 28 U.S.C. § 994(c)–(d) (2012).

individual facts of a given case.<sup>242</sup> Thus, it is relevant to the individual sentence that Gall abandoned the drug conspiracy and turned his life around well prior to his conviction. However, it is irrelevant for purposes of imposing an individualized sentence that the judge in *Kimbrough* believed the crack-powder cocaine ratio was unjust. That judge would presumably reach the same sentence in *every* crack cocaine prosecution and not just in the case of *Kimbrough*.<sup>243</sup> Likewise, it is relevant for purposes of imposing an individualized sentence that Curran was elderly and unsophisticated. However, it is irrelevant for imposing an individualized sentence that the judge in *Ciccolini* believes deterrence in white collar crime cases is best served by imposing a large fine in lieu of imprisonment. Yet, the current system allows judges to make these so-called individualized determinations that are not based on factors unique to the individual case at all.

In order for a sentence to be properly individualized, section 3553 should be amended to limit the factors that judges may consider in varying or departing from the Guidelines. Those factors should include the particular facts of the defendant's personal, family, and business situation and, significantly, should focus on the relative culpability of the defendant. The impact of the personal circumstances of the defendant, including family situation; physical condition or impairment, and age; charitable, public, or military service; diminished capacity, and mental or emotional conditions; and post-offense rehabilitation, should be left to the discretion of the sentencing judge.<sup>244</sup> Likewise, sentencing judges should also be permitted to vary from the Guidelines by relying on circumstances that are unique to the defendant's case but are not necessarily personal to the individual, including whether the Guidelines sentence will have adverse effects on employees or other innocent third-parties.<sup>245</sup> These factors are routinely and appropriately used by courts in varying from the Guidelines.<sup>246</sup>

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242. *See, e.g.*, 18 U.S.C. § 3553(a)(2)(B) (instructing sentencing courts to consider need for sentence to "afford adequate deterrence").

243. Indeed, the Supreme Court appears to have accepted as a fact that the sentencing court would have come to the same result in every case. The Court accepted this categorical rejection of the Guidelines because, in the Court's view, the crack-powder Guidelines were not the result of the considered judgment of the Commission, but were the result of the requirements of the Anti-Drug Abuse Act of 1986.

244. *See* U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 25B [hereinafter SENTENCING COMM'N REPORT], available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table25b.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table25b.pdf).

245. *See id.* But *see* *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc) (sentencing defendant well below Guidelines range). The sentencing decision was made on grounds that the dissent, and I, believe are dubious; the sentence was nevertheless affirmed. Alas, no system will be perfect.

246. *See* SENTENCING COMM'N REPORT, *supra* note 244.



However, the Guidelines should also be amended to provide more structure for judges to base sentences more explicitly on the relative culpability of the individual defendant. Section 3553 provides that the sentence should “reflect the seriousness of the offense,”<sup>247</sup> and section 994 instructs the Sentencing Commission to fashion Guidelines that, *inter alia*, reflect the “circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense.”<sup>248</sup> Yet, many of the Guidelines provisions focus primarily on the harm caused by the crime, but largely ignore, or minimize, the defendant’s relative culpability.<sup>249</sup>

The tax Guidelines are a perfect example of this shortcoming. The Guidelines sentence under 2T1.1 is driven primarily by tax loss. There is a twelve-point difference between a tax loss of \$2,000 and a loss of \$200,000. Yet, the Guidelines provide only a two-point increase for a sophisticated means adjustment, the only specific offense characteristics adjustment that is applicable in legal-source tax prosecutions.<sup>250</sup> Moreover, this two-point increase can be canceled out by an acceptance of responsibility adjustment, making the defendant’s culpability and the manner in which the tax loss was generated virtually irrelevant. Similarly, the Guidelines for anti-trust violations are driven almost exclusively by the volume of commerce affected by the offense.<sup>251</sup> Thus, these Guidelines focus almost exclusively on the harm caused and largely ignore, or minimize, the relative culpability of the individual defendant.

The Guidelines should allow for a finer-grained analysis of the defendant’s culpability. In this regard, the Department of Justice has proposed an amendment to section 2T1.1 that would permit an upward departure where “the offense level determined under this guideline substantially understates the seriousness of the offense.”<sup>252</sup> As an example, the recommendation cites a defendant who fails to disclose an offshore bank account that has unreported income from the account that is relatively small in comparison with the value of the assets hidden.<sup>253</sup> Because of this situation, the tax loss computation might understate the defendant’s true culpability.<sup>254</sup>

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247. 18 U.S.C. § 3553(a)(2)(A).

248. 28 U.S.C. § 994(c)(2) (2012).

249. The Guidelines do allow for adjustments for the defendant’s “role in the offense,” which increases the defendant’s sentence if the defendant was a manager or leader. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2012).

250. *See id.* § 2T1.1(b). There is an additional two-point increase if the income that was underreported is derived from criminal activity, like narcotics sales. *See id.*

251. *See id.* § 2R1.1.

252. Letter from Jonathan Wroblewski, Dir., Office of Policy and Legislation, U.S. Dep’t of Justice, to The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 14 (July 11, 2013), *available at* <http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>.

253. *See id.*

254. *See id.*

While there is a good deal of merit to this proposal, assessing the relative culpability of the defendant should not be relegated to a *departure* from the Guidelines, as if considering the defendant's culpability is an extraordinary matter. Rather, judges should be mandated to consider that culpability in every case. The fraud Guidelines, in section 2B1.1, might provide a useful template for individualizing the Guidelines sentence based on individual conduct and culpability of the defendant and not just the monetary harm caused to the victim. Courts could be instructed to consider factors like whether the tax crime occurred over multiple years, whether the conduct was more sophisticated than the limited two-point enhancement would provide,<sup>255</sup> whether the defendant was advised by a professional,<sup>256</sup> and whether the defendant was part of an illegal protest movement. Whatever is agreed upon as relevant for these purposes, the focus should be on the culpability of the defendant that makes the defendant's conduct more serious or less serious than the Guidelines starting point.

How is the system that I propose different from the post-*Booker* system we currently enjoy? Are sentencing judges not required to start with the Guidelines and then consider things like "the seriousness of the offense," "just punishment," and the defendant's need for rehabilitation in imposing their sentences?<sup>257</sup> In a way, yes. But judges are required to consider *all* of the section 3553 factors, which include not only these retributivist factors, but also deterrence, protecting the public, and promoting respect for the law.<sup>258</sup> Moreover, judges are given no guidance on which of these factors they should choose from, and they are left to apply their own penal philosophy in imposing their sentences. Thus, a judge could rely solely on deterrent theories in imposing the sentence, ignoring the retributivist factors.<sup>259</sup> The system must ensure that the culpability of the individual offender forms the basis of the individualized sentence, not the penal philosophy of the individual judge.

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255. Section 2T1.1 currently only allows for a two-point increase for sophisticated means. See U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(b) (2012). Sophisticated means is defined to include the use of an offshore account. See *id.* But there are many gradations of sophistication from the simple ownership of an offshore account that the defendant inherited, to the use of multiple layers of entities to hide the defendant's ownership of an offshore account.

256. Ordinarily, a defendant's reliance on the advice of a professional is a defense to the willfulness element of tax crimes. See TOWNSEND ET AL., *supra* note 85, at 175. However, juries nevertheless find defendants guilty of tax crimes even though they were advised that the conduct was acceptable. See, e.g., *United States v. Snipes*, 611 F.3d 855, 859–60 (11th Cir. 2010).

257. See 18 U.S.C. § 3553 (2012).

258. See *id.*

259. See, e.g., *United States v. Ciccolini*, 491 F. App'x 529 (6th Cir. 2012).

B. *Sentences Should Be Subjected to Real and Substantive Appellate Review*

In order to ensure that sentencing judges correctly apply the Guidelines and correctly impose the ultimate sentence on appropriately individualized factors, sentencing decisions must be subject to robust appellate review. Unfortunately, the Supreme Court's jurisprudence has left lower courts with a confusing and inconsistent mandate.<sup>260</sup> The standard of review that the Court has articulated is "reasonableness" review.<sup>261</sup> However, the Court, in explaining what the reasonable review entails, equates reasonableness with abuse-of-discretion.<sup>262</sup> But those two standards "are not equivalent."<sup>263</sup> In addition, the Court allows, but does not require, courts of appeals to employ a presumption of reasonableness when the sentence is within the Guidelines range, but does not afford that same presumption to sentences outside of the range. Such a presumption is contrary to the abuse-of-discretion standard the Court purports to use.<sup>264</sup> Permitting but not requiring courts to use this presumption also creates inter-circuit, and perhaps inter-panel, inconsistencies by allowing courts of appeals to decide whether they will review a Guidelines sentence more deferentially than one outside of the Guidelines. Thus, abuse-of-discretion review could mean different things in different cases, not a usual feature of appellate review.<sup>265</sup>

Moreover, under traditional abuse-of-discretion review, courts review factual findings for clear error, while questions of law are reviewed *de novo*.<sup>266</sup> However, after *Kimbrough*, sentencing judges can disregard the policies of the Guidelines and can develop their own sentencing regime—their own law. As Judge Posner stated, "[i]t is apparent from *Kimrough v. United States*, that the regime created by the *Booker* case, which demoted the guidelines from mandatory to advisory status, permits a sentencing judge to have his own penal philosophy at variance with that of the Sentencing Commission."<sup>267</sup> But, developing an original penal philosophy at variance with the Guidelines is a legal question, which ordinarily would be subject to *de novo* review.<sup>268</sup> Thus, courts of appeals are to engage in "reasonableness" review, which is really abuse-of-discretion (although they are

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260. See Carissa BYTNE HESSICK & F. Andrew HESSICK, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 13 (2008).

261. See *id.* at 9–10.

262. See *Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining *Booker* "made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions"); *Rita v. United States*, 551 U.S. 338, 351 (2007) ("[A]ppellate 'reasonableness' review merely asks whether the trial court abused its discretion . . .").

263. HESSICK & HESSICK, *supra* note 260, at 15.

264. *Id.* at 19.

265. See *id.* at 22.

266. *Id.* at 14, n.66.

267. *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008) (citation omitted).

268. See HESSICK & HESSICK, *supra* note 260, at 25.

in fact two different standards), and the kind of abuse-of-discretion review courts are to use bears little resemblance to traditional abuse-of-discretion review. The following section offers a better alternative.

1. *Sentencing Decisions Should Be Subject to Traditional Abuse-of-Discretion Review*

Determining a sentence and entering a judgment and commitment order involve the application of law to facts. There is nothing about these determinations that make them incapable of substantive appellate review. In determining a sentence, judges make hard choices in reviewing evidence and must make determinations regarding credibility. But judges make similar factual and credibility determinations in nearly every case. Those decisions are not absolved from thorough appellate review.<sup>269</sup>

The Rawlsian system, combining utilitarian principles at the legislative (or Commission) level with retributivist principles left to the trial judge, is well-suited for traditional abuse-of-discretion review. Under this system, appellate courts would be tasked with reviewing whether the sentencing judge correctly applied the objective, legal matters. This would entail reviewing whether the sentencing judge correctly calculated the Guidelines range and based the sentence on a correct application of the individualized, retributivist factors. Despite the holding in *Kimbrough*, sentencing judges should not be permitted, as Judge Posner explained, to develop their “*own penal philosophy at variance with that of the Sentencing Commission.*”<sup>270</sup> The Guidelines, to the extent they employ utilitarian principles, must be the starting point. To permit otherwise is simply to instill a lawless system.

In order to prevent the abuses of the past, there should be a uniform starting point, and then an individualized sentence, to take into account the facts of the individual defendant’s case, not the sentencing philosophy of the individual sentencing judge. Appellate courts would then review for clear error whether the facts on which the judge based the individualized sentence support the sentence imposed. Using traditional abuse-of-discretion review, where questions of law are reviewed *de novo* and findings of fact are reviewed for clear error, would allow for the required uniformity and individualization.

## V. CONCLUSION

Imposing a criminal sentence on an offender is, or at least should be, one of the most momentous tasks a judge undertakes. Being sentenced to a term in prison is undoubtedly the most momentous legal judgment an individual will endure. Subjecting these sentences to clear and identifiable legal rules and procedures that allow for both uniformity and individ-

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269. See STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, *supra* note 19, at 5.

270. *Higdon*, 531 F.3d at 562.

ualization, where appropriate, is essential to a just system. We have centuries of experience on which to draw in crafting a sentencing regime. More recently, the SRA was enacted in response to real problems and real abuses in a system of unfettered discretion. Less-fettered discretion is only less bad if used appropriately,<sup>271</sup> particularly when it is paired with a seemingly unworkable standard of review.<sup>272</sup> Policymakers should revisit the SRA and craft revisions so that there is a consistent sentencing law that is applicable to every case. Judges should not be allowed to devise and deploy their own penal system, which is in effect creating their own law. Judges should be allowed to make appropriately individualized determinations in each case, but only if the facts of the individual case make that case different from the mine-run case contemplated by the Commission and the Guidelines. In this way, criminal defendants will be subject to the same law as every other defendant, and criminal defendants will receive the sentences they deserve.

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271. *See, e.g.*, *United States v. Engle*, 592 F.3d 495, 497–99 (4th Cir. 2010) (sentencing defendant to eighteen months’ home detention with work release and international travel privileges, despite having committed tax evasion over sixteen years and having paid only \$480 of \$2 million in taxes owed during four year interval between his guilty plea and sentencing).

272. I use the word “unworkable” because of the confusion the current standard of review appears to have engendered. *See, e.g.*, *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc); *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc); *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).