THE MORE THINGS CHANGE: A PSYCHOLOGICAL CASE AGAINST ALLOWING THE FEDERAL SENTENCING GUIDELINES TO STAY THE SAME IN LIGHT OF *GALL*, *KIMBROUGH*, AND NEW UNDERSTANDINGS OF REASONABLENESS REVIEW

Jelani Jefferson Exum[+]

I. INTRODUCTION 116
II. THE PSYCHOLOGY OF DECISION-MAKING AND THE USE OF SENTENCING GUIDELINES 117
A. The (Not So) Big Change: United States v. Booker 119
B. Psychology, Decision-Making, and Guidelines Miscalculations 122
III. UNDERSTANDING REASONABLENESS REVIEW: THE MOVE FROM *BOOKER* TO *RITA* TO *GALL* AND *KIMBROUGH* 126
A. The Many Possible Forms of Reasonableness 126
B. Reasonable Confusion 128
C. The Rita *Decision* 131
D. Continued Confusion and the Need for Gall 132
E. Gall *and the Real Meaning of Reasonableness Review* 137
F. Kimbrough, *Substantive Reasonableness, and the Increasingly Problematic Role of the Guidelines* 138
IV. THE DESIRE FOR FAMILIARITY AND THE NEED FOR CHANGE 141
A. What's Behind the Numbers?: The Calculation Process 142
B. When the Numbers are Wrong: The Trouble With Using the Guidelines in Their Traditional Form 145
V. A MORE REASONABLE WAY: REPURPOSING THE GUIDELINES FROM BENCHMARK ANCHOR TO RELIABLE RESOURCE 146
VI. CONCLUSION 150

[+] Associate Professor of Law, University of Kansas; A.B. 2001, Harvard University; J.D. 2004, Harvard Law School. Before embarking on an academic career, Professor Exum served as judicial law clerk to Judge Eldon E. Fallon, Eastern District of Louisiana, and subsequently to Judge James L. Dennis, United States Court of Appeals, Fifth Circuit. Prior to joining the faculty of the University of Kansas School of Law, she taught as a Forrester Fellow and Instructor in Legal Writing at Tulane Law School. Professor Exum wishes to thank the participants of the Junior Faculty Works-In-Progress Workshop held at Washington University in St. Louis School of Law on November 30, 2007, and her colleagues at the University of Kansas School of Law for their helpful comments. A special thank you is extended to Lowen Exum for his extensive comments and assistance.

I. INTRODUCTION

In December 2007, through two decisions, the Supreme Court sought to clean up the confusion that it created just shy of three years earlier when it rendered the Federal Sentencing Guidelines advisory in *United States v. Booker* and called for circuit courts to begin reviewing sentences for "unreasonableness."[1] In one of those December decisions, *Gall v. United States*, the Court clarified what it meant by reasonableness review and explained that such review had both a procedural and substantive component.[2] In the other decision, *Kimbrough v. United States*, the Court gave more meaning to the substantive component, explaining that district courts were free to disagree with policies set forth in the Sentencing Guidelines, such as the disparate treatment of crack and powder cocaine offenses.[3] What the Supreme Court neglected to do in these cases, however, was to reconcile the continued requirement that district courts calculate and consider the Sentencing Guidelines range in order to satisfy procedural reasonableness review with the limited substantive reasonableness review fashioned by *Gall* and *Kimbrough* combined. Now that sentencing judges have permission to consider systematic problems with the Guidelines as a basis for imposing a sentence outside of the Guidelines range,[4] it has begun to look increasingly unnecessary to require that district courts calculate the Guidelines range in order to impose a reasonable sentence. Several scholars have criticized the Sentencing Guidelines, the courts' reluctance to let go of them, and the confusion created by reasonableness review.[5] This Article does not seek to re-argue those positions; nor does the Article repeat claims that the Supreme Court's recent opinions do

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1. United States v. Booker, 543 U.S. 220, 261 (2005).

2. Gall v. United States, 128 S. Ct. 586, 597 (2007).

3. Kimbrough v. United States, 128 S. Ct. 558, 574–75 (2007).

4. *Id.* at 575.

5. For criticisms of the Guidelines, see Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?*, 2 FED. SENT'G REP. 189, 189–91 (1990) (arguing that losing judicial discretion leads to crudeness in sentencing rather than equity). *See also* Maria Rodrigues McBride, *Restoring Judicial Discretion*, 5 FED. SENT'G REP. 219, 219 (1993) (explaining several problems with the Federal Sentencing Guidelines, including increased disparity in sentencing and lack of checks and balances); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 905 (1992) (arguing that the Guidelines lead to results worse than the shortcomings of sentencing pre-Guidelines). For discussions of the courts' reluctance to let go of the Guidelines and the confusion created by reasonableness review, see Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence After* Booker, 18 FED. SENT'G REP. 174, 174–78 (2006) (examining the discrepancies among circuits in applying the vague reasonableness review standard). *See also* Douglas A. Berman, Claiborne *and* Rita—Booker *Cleanup or Continued Confusion?*, 19 FED. SENT'G REP. 151, 152–53 (2007) (discussing the enduring practical challenges following *Booker*).

not solve the constitutional problem caused by mandatory guidelines.[6] Rather, this Article examines the newly defined parameters of reasonableness review, discusses the psychology of sentencing decision-making, and reveals the folly of the continued requirement that district courts calculate the applicable Guidelines range before determining a reasonable sentence.

Booker was concerned with balancing uniformity in sentencing with renewed judicial discretion in choosing an appropriate individual sentence.[7] *Gall* and *Kimbrough* built on both of these goals by maintaining the Sentencing Guidelines as a source of sentencing uniformity, but also by defining reasonableness review to clarify the scope of judicial discretion to sentence outside of the Guidelines ranges.[8] However, the tension between procedural reasonableness based on consideration of the Sentencing Guidelines and substantive reasonableness that allows district judges to disregard the Guidelines for policy errors suggests that the best path toward achieving the balance between sentencing uniformity and sentencing discretion endorsed in *Booker* is to rethink the role of the Sentencing Guidelines. Examining sentencing and reasonableness review from a psychological aspect, rather than a purely constitutional one, reveals that there are practical reasons for adjusting the continued role of the Sentencing Guidelines, regardless of one's constitutional philosophy.

Part II of the Article discusses the anchoring phenomenon (a psychological aspect of decision-making), and links that concept to the current use of the Federal Sentencing Guidelines. In doing so, Part II includes a historical background of federal sentencing practice, and an explanation of the implications of Guidelines miscalculations. Part III of the Article analyzes the reasonableness review standard by discussing the possible and chosen methods for defining reasonableness review as the Supreme Court moved from *Booker* to *Rita* to *Gall* and *Kimbrough*, and the confusion that resulted. In Part IV, the Article examines the federal judiciary's reluctance to let go of the current usage of the Guidelines, and argues for considerable change in the Guidelines' role in sentencing. Finally, suggestions for repurposing the Guidelines are given in Part V of the Article.

II. THE PSYCHOLOGY OF DECISION-MAKING AND THE USE OF SENTENCING GUIDELINES

In order to appreciate the psychological impact of the Sentencing Guidelines and the case for revamping the function of the Guidelines, it is important to

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6. For arguments about the continued constitutional problems post-*Booker*, see Berman, *supra* note 5, at 151–52 (discussing the enduring constitutional challenges following *Booker*), and Graham C. Mullen and J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 626, 638, 641–42 (2007) (discussing the unconstitutionality of the Guidelines resulting from "fact-based departures").

7. United States v. Booker, 543 U.S. 220, 246 (2005).

8. Gall v. United States, 128 S. Ct. 586, 596–97 (2007); *Kimbrough*, 128 S. Ct. at 574.

understand how the Sentencing Guidelines came to be such a strong force in federal sentencing. Judges got their first taste of the Federal Sentencing Guidelines in 1987, when the Guidelines were adopted pursuant to the Sentencing Reform Act of 1984 (SRA).[9] Before the SRA, federal judges and the U.S. Parole Commission served as the primary sentencing authority over federal defendants.[10] For many reasons, all three levels of government expressed some degree of dissatisfaction with the wide discretion afforded to judges in federal sentencing, which led to the ultimate passage of the SRA.[11] According to the U.S. Sentencing Guidelines Manual, in imposing the Sentencing Guidelines, Congress originally sought to achieve three goals: (1) "*honesty* in sentencing"; (2) "*uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders"; and (3) "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity."[12] To attain these objectives, the SRA abolished federal parole and directed the Sentencing Commission to create categories of offense behavior and offender characteristics and to use the combination of such categories to prescribe ranges of appropriate sentences for each class of convicted persons.[13] Though it was not explicitly stated by the SRA that the Sentencing Guidelines ranges had to be entirely mandatory, as time passed it became evident that judges were to be bound by the Guidelines' sentencing ranges.[14] For twenty years, judges under this mandatory Guidelines regime had the very limited discretion to sentence defendants anywhere within a narrow sentencing range.[15]

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9. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

10. For an explanation of the Parole Commission's powers before the adoption of the Federal Sentencing Guidelines, see 18 U.S.C. §§ 4201–18 (2000), *repealed by* Sentencing Reform Act § 218(a)(5), 98 Stat. at 2027.

11. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) (noting his disagreement with the broad discretion given judges to determine sentencing procedures); *see also* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–89 (listing many criticisms of the sentencing system that "culminated in the [SRA]"); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977) (examining studies and concluding that "the data on unjust sentencing disparity have indeed become quite overwhelming"); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993) (describing Frankel's actions in criticizing the sentencing system).

12. U.S. SENT'G COMM'N, GUIDELINES MANUAL § 1A1.1 ed. n. (2007).

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

14. *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007) (explaining how the Guidelines slid from advisory to mandatory through judicial enforcement). In addition, the Supreme Court recognized the Guidelines as mandatory in *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and *Stinson v. United States*, 508 U.S. 36, 42 (1993).

15. *See* United States v. Booker, 543 U.S. 220, 233–34 (2005).

A. The (Not So) Big Change: United States v. Booker

Though the constitutionality of the Sentencing Guidelines in their mandatory form came under fire numerous times since the system's inception, it eventually appeared well-settled that the Guidelines were constitutionally sound.[16] However, in 1999, a line of cases began to unravel confidence in the constitutionality of the Federal Sentencing Guidelines.[17] Perhaps the heaviest blow to the constitutionality of the then-mandatory Federal Sentencing Guidelines came when the Supreme Court decided *Blakely v. Washington* in 2004 and, examining a Washington determinate sentencing scheme that shared many similarities with the Federal Sentencing Guidelines, clarified that a defendant's Sixth Amendment rights were threatened whenever a judge imposes a sentence not "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[18] In a dissent to the *Blakely* majority opinion, Justice O'Connor recognized that the Court's decision made the Federal Sentencing Guidelines vulnerable to attack.[19] And then came *Booker*.

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

17. This line of cases began with *Jones v. United States*, 526 U.S. 227 (1999), in which the Supreme Court held that provisions of the federal carjacking statute that imposed higher penalties for serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations. *Id.* at 229, 251–52. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that other than fact of prior conviction, any fact that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 495–96. This reasoning was based on an understanding that the "historical foundation" for the criminal law in this country recognizes a need to "guard against a spirit of oppression and tyranny on the part of rulers" by requiring that "*the truth of every accusation* . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Id.* at 477 (internal quotation marks omitted). Two years later, the Supreme Court advanced this line of thinking in *Ring v. Arizona*, 536 U.S. 584 (2002), by holding that a "trial judge, sitting alone" is prohibited from determining the existence of the aggravating or mitigating factors required for the imposition of the death penalty under Arizona law. *Id.* at 588. In *Ring*, the Court specifically dispelled any argument that sentencing factors should be treated differently than elements of a crime when it comes to whether a judge or jury has the authority to decide certain facts that increase a defendant's authorized punishment (the highest sentence based on the facts admitted to or found by the jury). *Id.* at 609.

18. Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

19. *Id.* at 323–26 (O'Connor, J., dissenting) ("The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government.").

In *United States v. Booker*, the Supreme Court finally addressed whether the Federal Sentencing Guidelines, in their mandatory form, violated the Sixth Amendment.[20] The Court held that its articulation of the rights provided by the Sixth Amendment, as explained in *Blakely*, did indeed apply to the Federal Sentencing Guidelines.[21] The Court explained that it is well-settled that "the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"[22] However, applying this principle to the Sentencing Guidelines, the Court determined that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[23] As such, the Supreme Court concluded that there would be no constitutional problem with the Sentencing Guidelines if they were not binding on judges.[24] However, because the Guidelines had "the force and effect of laws," the Court determined that, in their mandatory form, the Sentencing Guidelines violated the Sixth Amendment by allowing for the imposition of an enhanced sentence based on a sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted to by the defendant.[25] At this point in the Court's opinion, it seemed as though the Guidelines really were going to be put away for good. But, at least for some Justices, the pull of the Guidelines was just too strong.[26]

Despite its conclusion that mandatory Guidelines violated the Sixth Amendment, in order to avoid invalidating the entirety of the Guidelines, the Supreme Court imposed the severability doctrine and instead invalidated only the two provisions of the Guidelines that the Court determined had the effect of making the Guidelines mandatory.[27] The Court turned to severability by looking to congressional intent and determining that Congress would prefer advisory Guidelines to any other possible fix to the constitutional problem of mandatory Guidelines.[28] The Court held that sentencing courts are required to

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20. *Booker*, 543 U.S. at 245.

21. *Id.* at 226–27, 232–33.

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

23. *Id.* at 233.

24. *Id.*

25. *Id.* at 233–35.

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

27. *Id.* at 259–60.

28. *Id.* at 246–49.

consider Guidelines ranges, but are permitted to tailor the sentence imposed in light of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a).[29] With this purported resolution of the constitutional problem posed by the Guidelines, the Supreme Court attempted to preserve uniformity in sentencing (by requiring judges to consider the Guidelines and statutory sentencing factors) while also returning to sentencing judges the discretion to sentence defendants outside of the Guidelines range with greater freedom.[30]

The *Booker* remedy was reached by excising 18 U.S.C. § 3553(b)(1), the provision making it mandatory for sentencing courts to impose a sentence within the applicable Guidelines range absent circumstances justifying a departure, and § 3742(e), the provision setting forth the standards for appellate review.[31] The Court struck § 3742(e), not because it disagreed with the standard of review set forth by the Guidelines, but because § 3742(e) contained cross-references to the excised § 3553(b)(1).[32] This left the Court with the need to read an implied standard of review into the Guidelines.[33] Looking to "the past two decades of appellate practice in cases involving departures," the Court determined that the implicit standard of review for sentences was a

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29. *Id.* at 259–60. Pursuant to § 3553(a), sentencing courts shall consider:

> (1) the *nature and circumstances of the offense* and the *history and characteristics of* the *defendant*;
>
> (2) the need for the sentence . . . to reflect the *seriousness of the offense*, to promote *respect for the law*, and to provide *just punishment* . . . ;
>
> (3) the *kinds of sentences available*;
>
> (4) the kinds of sentence[s] and the *sentencing range* established for . . . the . . . offense . . . ;
>
> (5) any *pertinent policy* statement . . . issued by the Sentencing Commission . . . ;
>
> (6) the need to avoid *unwarranted sentence disparities* . . . ; and
>
> (7) the need to provide *restitution* to . . . victims . . . .

18 U.S.C. § 3553(a) (2000 & Supp. V 2005) (emphasis added).

30. That the balance between uniformity and discretion is important to the Court was reiterated by Justice Breyer in the *Gall* oral argument. Justice Breyer asked:

> I want to know your view of it, too, because what I want to figure out here by the end of today is what are the words that should be written in your opinion by this Court that will lead to considerable discretion on part of the district judge but not totally, not to the point where the uniformity goal is easily destroyed.

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

31. *Booker*, 534 U.S. at 245. Section 3742(e) instructed circuit courts to review sentences to determine whether they were (1) in violation of law; (2) resulting from an incorrect application of the Guidelines; (3) outside of the applicable Guidelines range; and (4) whether the district court failed to provide a written statement of reasons, or the sentence departed from the Guidelines range based on an improper factor or in contradiction to the facts. 18 U.S.C. § 3742(e).

32. *Booker*, 543 U.S. at 260.

33. *Id.* at 260–61.

"review for 'unreasonable[ness].'"[34] According to the Court, this standard was "not foreign to sentencing law" and it was therefore "fair . . . to assume judicial familiarity with a 'reasonableness' standard."[35] As such, the Supreme Court effectively left it to the circuit courts to infuse meaning into reasonableness review of federal sentences. During the next couple of years, district and circuit courts struggled with understanding what an advisory Guidelines regime meant and what was required for a reasonable sentence.[36] As the courts dealt with this "new" system, several scholars and practitioners criticized the courts' strict treatment of sentences that fell outside of the Guidelines ranges, as compared to the more lenient treatment of within-Guidelines sentences, arguing that the Guidelines were being given an unconstitutional quasi-mandatory status.[37] However, though the effect of the Guidelines on sentencing has constitutional implications, it has practical, decision-making implications as well. It is these psychological concerns that can speak to those of any constitutional philosophy about the error of continuing the usual practice of requiring calculation of the Guidelines range before reasonable sentences can be imposed.

B. Psychology, Decision-Making, and Guidelines Miscalculations

A multitude of research studies indicate that people use shortcuts to make cognitive activity, such as complex decision-making, easier.[38] It is widely accepted among psychologists that people make numerical judgments by adjusting from a base anchor.[39] In other words, when people make numerical

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34. *Id.* at 261 (alteration in original).

35. *Id.* at 262–63.

36. *See* Lamparello, *supra* note 5, at 174.

37. *See, e.g.*, *Sixth Amendment—Federal Sentencing Guidelines—Presumption of Reasonableness:* Rita v. United States, 121 HARV. L. REV. 245, 245 (2007) (arguing that by approving a presumption of reasonableness for within-Guidelines sentences, the Supreme Court "implicitly sanctioned lower court treatment of the Guidelines as de facto mandatory after *Booker*.").

38. *See* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 753–54 (2001) (explaining that individuals "are likely to use shortcuts and other heuristics and to base their decisions on relatively limited information" (footnote omitted)).

39. In the 1970s, cognitive psychologists Amos Tversky and Daniel Kahneman conducted a series of experiments on judgments and decision-making and found that people rely on a number of heuristic principles, including anchoring, to reduce complex decisional tasks. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128–30 (1974). Additionally, "scaling" is a phenomenon that is related to anchoring. In a 1986 study, Norbert Schwarz and others concluded that when given a range from which to make a decision, people use that range as a frame of reference that affects their ultimate decision. Norbert Schwarz et al., *Response Scales: Effects of Category Range on Reported Behavior and Comparative Judgments*, 49 PUB. OPINION Q. 388, 388–95 (1985). Though I refer to anchoring in this Article, scaling is also similarly relevant. However, the main point of the psychological discussion is that the Guidelines ranges act as anchors that pull judicial sentencing decisions toward that range.

decisions, they often rely on an initial value available to them and their ultimate decision is "anchored" to that initial value.[40] A 2001 study conducted by Birte Englich and Thomas Mussweiler indicated that judges are also susceptible to anchoring, and that their sentencing decisions are greatly influenced by suggested sentences.[41] While anchoring can be a helpful cognitive shortcut, it is also considered a judgmental bias that can greatly distort decision-making.[42] This is because even irrelevant anchors have an effect on decisions.[43] In their article *Inside the Judicial Mind*, Professors Chris Guthrie and Jeffrey Rachlinski and Judge Andrew Wistrich recognize that sentencing guidelines can act as unbiased anchors that can improve judicial decision-making by reducing a judge's reliance on irrelevant or biased anchors from prosecutors or defense attorneys.[44] However, this assumes that the sentencing guidelines themselves are not biased or flawed. Consequently, a court's reliance on the Guidelines as an anchor becomes problematic when that anchor is biased in some fashion. Examining the anchoring nature of Guidelines miscalculations by discussing an actual federal sentencing appeal best demonstrates the problem of biased anchors.

In *United States v. Medina-Argueta*, a Fifth Circuit post-*Booker* appeal, defendant Medina-Argueta pleaded guilty to harboring and conspiring to harbor illegal aliens, but preserved the right to appeal the district court's increase of his sentence by two levels pursuant to the "vulnerable victim" enhancement under § 3A1.1(b)(1) of the Guidelines.[45] Ultimately, the district judge determined that the applicable Guidelines range was thirty-seven to forty-six months imprisonment, and sentenced the defendant to consecutive thirty-seven-month prison terms on all charges.[46] However, on appeal the Fifth Circuit found that the district court improperly included in the vulnerable victim enhancement to the Guidelines range calculation.[47] Therefore, the Fifth Circuit determined that the correct Guidelines range was actually thirty to

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40. *See* Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–88 (2001).

41. Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1538–41 (2001).

42. *See id.* at 1536; *see also* J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 325–26 (describing anchoring's distortive effects on juries).

43. Guthrie, Rachlinksi & Wistrich, *supra* note 40, at 788 ("Even though the initial values were clearly irrelevant to the correct answer, the initial values had a pronounced impact on the participants' responses.").

44. *Id.* at 793–94.

45. United States v. Medina-Argueta, 454 F.3d 479, 480–81 (5th Cir. 2006).

46. *Id.* at 481.

47. *Id.* at 482–83. According to the circuit court, the vulnerable victim enhancement only applied to victims who are "vulnerable members of society and fall in the same category as the elderly, the young, or the sick." *Id.* at 482. Therefore, the mere status of being an illegal alien, as was the case with Medina-Argueta's victims, is not enough to find the unusual vulnerability necessary to warrant the vulnerable victim enhancement. *Id.*

thirty-seven months imprisonment.[48] Though the sentencing court had incorrectly calculated the Guidelines range, the thirty-seven-month sentence it imposed still fell within the correct thirty to thirty-seven month Guidelines range.[49] Therefore, the Court held that "in situations such as this, in which the district court miscalculates the guideline range yet imposes a sentence that falls within a properly calculated guideline range, the sentence enjoys a presumption of reasonableness."[50] The Fifth Circuit did not discuss that the sentence imposed was the lowest possible sentence in the district court's miscalculated Guidelines range. It was not mentioned by the circuit court that, once the correct Guidelines range was determined, the sentence imposed by the district judge was actually the highest possible sentence within that proper Guidelines range. Instead, the Fifth Circuit ignored that reality and found that applying the presumption of reasonableness in the face of this miscalculation was warranted because remanding would just result in the same sentence. In a footnote, the court explained:

> Furthermore, the district court stated that, in its view, any lower sentence would be inappropriate. . . . Medina-Argueta's sentence was not imposed "*as a result* of an incorrect application of" [the miscalculation], which would require reversal under the still-intact 18 U.S.C. § 3742(f)(1). Formalism does not require us to vacate Medina-Argueta's sentence so that the district court, on remand, will simply impose the exact same sentence, which on subsequent appeal we would be required to presume reasonable . . . .[51]

The approach taken by the Fifth Circuit ignores the psychological realities of sentencing. Researchers have explained that "[t]o the extent that judges use different judgmental anchors to make their sentencing decisions, the resulting sentences are likely to differ."[52] Therefore, it cannot be assumed that when the Guidelines range considered by the sentencing judge shifts, however slightly, that such a change would not make a difference in the ultimate sentence.[53]

Even the district judge's own statement that any lower sentence was inappropriate is not grounds to presume the sentence reasonable.[54] This is because one suggested reason for why anchoring occurs is the social implications theory.[55] According to this theory, anchors influence people because they believe that the anchors convey meaningful information, even if

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48. *Id.* at 483.

49. *Id.*

50. *Id.*

51. *Id.* at 484 n.2 (citation omitted).

52. Englich & Mussweiler, *supra* note 41, at 1537.

53. *Id.* at 1540–41.

54. *See* Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights From Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 607–08 (2006).

55. *See id.* at 601–02.

the anchors do not.[56] In *Rita v. United States*, the case that ultimately upheld the use of the presumption of reasonableness for within-Guidelines sentences, the Supreme Court endorses this view of the Sentencing Guidelines' importance when it goes to great lengths to express the role of the Sentencing Commission in determining sentencing factors and appropriate sentencing ranges.[57] This position is repeated in *Gall*, where the Court describes the Sentencing Guidelines as "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[58]

In fact, the history of judicial application of the Federal Sentencing Guidelines indicates that judges also have felt that the Guidelines contain relevant and trustworthy sentencing determinations. Judge Nancy Gertner has made this observation several times in her writings on federal sentencing. In her article *From Omnipotence to Impotence: American Judges and Sentencing* Judge Gertner stated that, "In fact, in the new advisory regime, judge after judge announced that the Commission had considered *all* the purposes of sentencing; the Guidelines perfectly embodied them. All the judge had to do—the expert clerk again—was to apply them."[59] It is undoubtedly true that, in *Booker*, the Supreme Court intended for the Guidelines to act as an anchor in judicial sentencing decisions. The Supreme Court maintained the Guidelines in an advisory role to act as just that—an anchor to promote uniformity in judicial sentencing decisions across districts.[60] Fundamentally, there is nothing faulty about relying on guidelines as anchors in order to facilitate uniformity. The problem, though, arises when those guidelines are faulty. Because of the anchoring effect, the requirement to consider the Sentencing Guidelines will affect the sentencing judge's ultimate determination. However, once that anchor is tainted by the inclusion of an improper sentencing consideration, leading to a miscalculation, then the Guidelines become a faulty anchor that nonetheless influences the ultimate sentence imposed. Because the judge in *Medina-Argueta* considered a faulty anchor in determining that nothing but a thirty-seven-month sentence would be appropriate,[61] his decision is not reliable as one made independently of his Guidelines miscalculation.

Once the Guidelines range is calculated, that range automatically influences the sentencer. And, when that range has been determined erroneously, the resulting sentence is automatically affected. The Supreme Court has partially addressed this reality by crafting a procedural aspect to reasonableness review, under which a miscalculation renders a sentence procedurally unreasonable.[62]

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56. *Id.* at 602.
57. Rita v. United States, 127 S. Ct. 2456, 2463–65 (2007).
58. Gall v. United States, 128 S. Ct. 586, 594 (2007).
59. Gertner, *supra* note 14, at 536.
60. *See Gall*, 128 S. Ct. at 596.
61. United States v. Medina-Argueta, 454 F.3d 479, 483 (5th Cir. 2006).
62. *Gall*, 128 S. Ct. at 597.

However, the Court neglected to discuss the effect of the Guidelines on a sentencing decision when it broadened the scope of substantive reasonableness review by giving district courts the discretion to disregard the applicable Guidelines range when that range is tainted by bad sentencing policy. This point is best understood through a more thorough discussion of reasonableness review.

III. UNDERSTANDING REASONABLENESS REVIEW: THE MOVE FROM *BOOKER* TO *RITA* TO *GALL* AND *KIMBROUGH*

The Supreme Court seemed to recognize the Sentencing Guidelines as an anchor designed to promote sentencing uniformity when, in *Gall*, it explained that "[a]s a matter of administration and to secure a nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[63] In clarifying reasonableness review in *Gall*, the Supreme Court decided to keep the Guidelines in its place of prominence, telling circuit courts that district courts must first bow to the Guidelines before making any sentencing decision.[64] However, on the very same day, in *Kimbrough*, the Court gave district courts permission to knock the Guidelines off of its pedestal in certain situations.[65] In other words, the Supreme Court maintained the importance of the Sentencing Guidelines despite its demotion to advisory status by *Booker*, at the same time increasing the district courts' power to disregard those all-important Guidelines in the case of systematic errors that go beyond the situation of the particular individual before the court. The mixed message sent in the Court's clarification of the reasonableness review standard is what makes the Court's adherence to the Guidelines' calculation requirement look increasingly misplaced. The dilemma caused by continuing to require calculation of the Guidelines becomes clearer through a discussion of how reasonableness review took shape in the years following *Booker*.

A. The Many Possible Forms of Reasonableness

Once the Supreme Court decided in *Booker* that mandatory sentencing guidelines violated the Sixth Amendment, there were many remedies that the Court could have chosen from to cope with the consequences of its constitutional decision. One option would have been to invalidate the Guidelines entirely.[66] Another possibility for the Court would have been to

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63. *Id.* at 596.

64. *See id.*

65. *See* Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).

66. In finding that certain portions of the Guidelines could be excised to correct the constitutional problem, the Court determined that the Guidelines were not inapplicable as a whole. United States v. Booker, 543 U.S. 220, 245–46 (2005). In the remedy opinion, the Court stated, "We must decide whether or to what extent, 'as a matter of severability analysis,' the Guidelines 'as a whole' are 'inapplicable . . . such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the

require jury determinations of all facts that would influence a defendant's sentence.[67] Instead, though, the Supreme Court decided to resuscitate the Guidelines and leave them in an advisory form for district courts to consider.[68] Then, rather than leaving the current standard of review intact, the Court read reasonableness review into the remaining portions of the Guidelines.[69]

Even once it had adopted reasonableness review, the Supreme Court had many options for giving that standard clear meaning, rather than leaving it in the hands of circuit courts that had become quite comfortable with their role in the mandatory Guidelines regime. The Supreme Court could have decided whether reasonableness review would have both a procedural and substantive element; whether it would be an objective or subjective standard; and how substance and procedure would intersect with objectivity or subjectivity. The following table may provide a helpful way of looking at these choices.

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offense of conviction.'" *Id.* at 245 (quoting Petition for Writ of Certiorari at (I), *Booker*, 543 U.S. 220 (No. 04-104)).

67. *See id.* at 246. The Court cited to several reasons for concluding that "the constitutional jury trial requirement is not compatible with the [Sentencing] Act as written and that some severance and excision are necessary." *Id.* at 248. One of those reasons included the statute's language that "'[t]he court' . . . consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" *Id.* at 249 (first alteration in original) (quoting 18 U.S.C. § 3553(a)(1) (2000 & Supp. V 2005)). Another reason was Congress's desire to base punishment on real conduct that the Court argued is best determined by a judge. *Id.* at 250. The Court also determined that a jury trial requirement would make the sentencing system more complex than Congress intended. *Id.* at 254–55. Additionally, the Court concluded that plea bargaining in a jury requirement system would increase disparity in sentencing. *Id.* at 255–57. Lastly, the Court determined that "Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*," as the Court expects would result if the jury requirement were imposed. *Id.* at 257.

68. *Id.* at 246.

69. *Id.* at 260–61.

	OBJECTIVE (CIRCUIT COURT'S POINT OF VIEW)	SUBJECTIVE (DISTRICT COURT'S POINT OF VIEW)
PROCEDURAL REASONABLENESS	Deference to imposed sentence so long as there are no miscalculations and reviewing court can find § 3553(a) factors to support the sentence.	Deference to imposed sentence so long as the district court has calculated the Guidelines (even if there are errors in the calculation) and has stated any § 3553(a) factors in support of the sentence.
SUBSTANTIVE REASONABLENESS	Deference to imposed sentence so long as reviewing court can identify legitimate reasons to support sentence.	Deference to imposed sentence so long as district court has given reasons for sentence that are not contrary to law or facts.

As this table displays, one question emerging from *Booker* was whose concept of reasonableness was to rule. Would circuit courts give deference to district courts that gave reasons to support the reasonableness of their sentencing determinations? Or was it the job of circuit courts to create their own common law of reasonableness requirements that they would apply to cases on review? However, deciding whether reasonableness review was to be a subjective or objective standard was not all that was left to be answered by the Supreme Court after *Booker*. There was also the issue of whether reasonableness review considered a district court's procedural steps only, or whether there would be a substantive component to reasonableness review.[70] None of these issues were answered by *Booker*, and so the circuit courts were left with the task of sorting through these questions. Confusion resulted.

B. Reasonable Confusion

One development that emerged from the circuit courts' confusion about what reasonableness review meant was the presumption of reasonableness for sentences that fell within the applicable Guidelines range. The presumption of reasonableness allowed circuit courts to continue treating within-Guidelines sentences in the same way as before *Booker* was decided, by essentially stamping reasonableness on those sentences. The Eighth Circuit was one of

70. The Court's continued indecision about whether reasonableness review would have a procedural and/or substantive component was evident in the oral arguments in *Gall*. At one point, Chief Justice Roberts asked, "Well then, what's left of the appellate review? I mean, under your theory is there any substantive review for the appellate court or is it all just procedural . . . ." Transcript of Oral Argument at 9, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949).

the first to adopt the presumption in July 2005.[71] It did so with little explanation and fanfare, simply stating, "[The defendant's] sentence, however, was within the guidelines range for his offense level . . . and as a result, we think that it is presumptively reasonable."[72] Just days later, the Seventh Circuit also imposed a presumption of reasonableness to a within-Guideline sentence. In *United States v. Mykytiuk*, the Seventh Circuit explained:

> But while a *per se* or conclusively presumed reasonableness test would undo the Supreme Court's merits analysis in *Booker*, a clean slate that ignores the proper Guidelines range would be inconsistent with the remedial opinion. As *Booker* held, "the district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country.[73]

The Fourth Circuit agreed with the Seventh Circuit in February 2006 and also adopted the presumption of reasonableness,[74] just as the Sixth Circuit did the month before.[75] Likewise, when the Tenth Circuit adopted the presumption in February 2006, it also cited the Guidelines' purpose of fostering uniformity in sentencing as support for its decision.[76]

The Fifth Circuit provides, perhaps, one of the most explicit demonstrations of how the presumption of reasonableness developed. In reasoning that a sentence within the Guideline range needed "little explanation," the Fifth Circuit stated, in *United States v. Mares*, "If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines."[77] In a handful of cases in the year following *Mares*, the Fifth Circuit further developed its reasonableness review standard by adopting a full-blown rebuttable presumption of reasonableness for within-Guidelines sentences. Drawing on a district court's *Booker* duty to "consider" the Sentencing Guidelines, the Fifth Circuit, in the 2005 decision *United States v. Alonzo*, followed the leads of the Third, Seventh, and Eighth Circuits and agreed that "a sentence within a properly calculated Guideline range is presumptively reasonable."[78] The court explained that this presumption did not mean that such sentences are per se

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71. *See* United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005).

72. *Id.* at 717.

73. United States v. Mykytiuk, 415 F.3d 606, 607–08 (7th Cir. 2005) (citation omitted) (quoting *Booker*, 543 U.S. at 264).

74. *See* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006).

75. *See* United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006).

76. *See* United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) (per curiam).

77. United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005).

78. United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006).

reasonable.[79] Rather, the court reasoned that its indication in *Mares* that it would give great deference to sentences within the Guidelines range was practically the same as a presumption of reasonableness for such sentences whereby a defendant maintains the burden of demonstrating that the sentence is unreasonable.[80]

According to the circuits that have adopted a presumption of reasonableness for within-Guideline sentences, the presumption is based on the Supreme Court's directive to district courts that they "consider" the Sentencing Guidelines.[81] In so holding, these circuits note that the purported objective is to preserve the uniformity in sentencing facilitated by the Sentencing Guidelines by requiring that sentencing judges use the properly calculated Guidelines range as a beginning frame of reference. At the same time, these circuits adopting the presumption of reasonableness claim that such a presumption does not cut against the judicial discretion allowed by *Booker*, because it does not *require* district judges to sentence within the Guidelines range. Instead, the presumption of reasonableness merely allows reviewing courts to presume that sentencing judges have considered the relevant sentencing factors when they choose a sentence that falls within the Guidelines range. Though this presumption can, theoretically, be rebutted by a defendant by showing that the sentence is somehow unreasonable in his particular case, it has acted as a rubber stamp, affording within-Guidelines sentences their pre-*Booker* treatment.[82] The effect of the presumption of reasonableness for within-Guidelines sentences suggests that the possibility of rebutting the presumption is nearly non-existent. The New York Council of Defense Lawyers (NYCDL) has gathered data showing that, out of 1152 appeals of within-Guidelines sentences post-*Booker*, only sixteen sentences have been vacated.[83] Out of those sixteen, only one was vacated because the within-Guidelines sentence was determined to be substantively unreasonable.[84] The others were vacated for procedural reasons owing to the district court's failure to adequately articulate reasons for the sentence.[85] The one case of a within-Guidelines sentence found to be substantively unreasonable, *United States v. Lazenby*, was a highly unusual case in which two defendants treated in the same appeal were given vastly different sentences.[86] The NYCDL research shows that parties are overwhelmingly losing appeals of sentences that fall

79. *Id.*

80. *Id.*

81. United States v. Booker, 543 U.S. 220, 245 (2005).

82. *See* Lamparello, *supra* note 5, at 175–76.

83. Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 3, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754).

84. *Id.* app. at 3a.

85. *Id.*

86. United States v. Lazenby, 439 F.3d 928, 929 (8th Cir. 2006).

within the Guidelines range when a presumption of reasonableness is applied.[87] These results imply that the presumption of reasonableness may not be acting as much like a truly rebuttable presumption as the Supreme Court and circuits employing the presumption have suggested. Rather, it appears that in practice the presumption of reasonableness acts as a tool that allows courts to live in a pre-*Booker* mandatory Guidelines world. What is clear from the development of the presumption of reasonableness, though, is that courts feel comfortable enough giving credibility to the ranges provided in the Sentencing Guidelines that sentences falling within Guidelines ranges are viewed as being more reliably reasonable than other sentences.

C. The Rita *Decision*

The Supreme Court apparently agreed with the line of thinking adopted by presumption circuits when, in *Rita v. United States*, it held that, on appeal, a rebuttable presumption of reasonableness can be applied to a sentence within a properly calculated Guidelines range.[88] *Rita* was an appeal from a Fourth Circuit case involving an illegal machine gun assembly kit in which Victor Rita was charged with perjury, making false statements, and obstructing justice.[89] Because Rita's sentence of thirty-three months imprisonment fell within the applicable thirty-three to forty-one month Guidelines range, all it took was a per curiam opinion for the Fourth Circuit to affirm the sentence as presumptively reasonable.[90] Ultimately, in *Rita*, the Supreme Court affirmed the Fourth Circuit decision.[91] In upholding the presumption of reasonableness for within-Guidelines sentences, the Supreme Court made several observations about that presumption. First, the Court noted that "the presumption is not binding."[92] According to the Court, this rebuttable presumption of reasonableness imposes neither a greater burden of persuasion nor proof on either the prosecution or the defense.[93] The Court's second observation was that the presumption of reasonableness is an appellate presumption only, meaning that a district court cannot simply sentence a defendant within the Guidelines range because it presumes that range to be reasonable.[94] Perhaps the third observation is the most important in explaining why the Court

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87. *See* Brief for New York Council of Defense Lawyers, *supra* note 83, app. at 3a. The NYCDL study did not follow a perfectly scientific model. In its brief, the NYCDL explains that its "numbers do not capture those within-guidelines sentences that were not appealed, or the significant number of appeals that continue to challenge *only* the guidelines calculation." *Id.* at 7, n.7.

88. Rita v. United States, 127 S. Ct. 2456, 2462 (2007).

89. *Id.* at 2460.

90. *See* United States v. Rita, 177 F. App'x 357 (4th Cir. 2006).

91. *Rita*, 127 S. Ct. at 2470.

92. *Id.* at 2463.

93. *Id.*

94. *Id.* at 2465.

ultimately upheld the presumption. According to the Supreme Court, the presumption is based on the belief that, by the time a within-Guidelines sentence comes before an appeals court, "*both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case."[95] This "double determination," as the Court labels it, acts as a sort of reliable indicator that the within-Guidelines sentences are, more likely than not, reasonable sentences.[96]

To support the "double determination" rationale, the Court went into great detail to explain Congress's directive to both the sentencing judge and the Sentencing Commission to consider the § 3553(a) sentencing objectives.[97] Overall, the Court stated that the statutes contemplate a sentencing world in which district judges who sentence within the range set forth by the Sentencing Guidelines undergo the same § 3553(a) analysis as was taken by the Sentencing Commission in determining an appropriate sentencing range.[98] Therefore, the *Rita* decision operates under the assumptions that: (1) Guidelines ranges result from the Commission following the § 3553(a) objectives; and (2) sentencing judges independently consider the § 3553(a) factors when they decide to sentence a defendant within the Guidelines range. Whether or not these assumptions are based in sentencing reality, the Court makes it clear that it finds the presumption of reasonableness for within-Guidelines sentences valid because, after taking into account the purposes of sentencing, a sentencing judge has exercised his discretion to impose a sentence within the same range that the Commission has found acceptable.[99] Consequently, the within-Guidelines sentence has a "double determination" of reasonableness, thus earning the rebuttable presumption.

D. Continued Confusion and the Need for Gall

After *Rita*, as was the case with *Booker*, there were still many unanswered questions about reasonableness review and the proper role of the Sentencing Guidelines within the reasonableness review framework. In *Rita*, the Supreme Court did not elaborate on whether reasonableness review has both a procedural and substantive component. Nor was it clear whether any miscalculation of the applicable Guidelines range by a district court would

95. *Id.* at 2463.

96. *Id.*

97. *Id.* (explaining that the § 3553(a) sentencing objectives are considerations of: "(1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) 'just punishment' (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution").

98. *See id.*

99. *Id.* at 2465. As is discussed in Part III.F of this Article, there is reason to believe that, at least in the context of cocaine sentencing, the Sentencing Commission does not properly follow the § 3553(a) factors.

ultimately render the sentence imposed ineligible for the presumption of reasonableness, even if the sentence happened to fall within the range that would have been determined absent the miscalculation. In *Rita*, the Supreme Court stated: "Several Circuits have held that . . . they will presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence. The most important question before us is whether the law permits the courts of appeals to use this presumption. We hold that it does."[100] Thus, the Court merely required that a sentence fall within a properly calculated Guidelines range for the presumption of reasonableness to apply. The Court did not specify that it must be the district court that properly calculates the Sentencing Guidelines range. In other words, the Court seemingly left open the possibility that the *Rita* holding applies anytime a sentence falls within the proper Guidelines range, whether or not it is the district court that properly calculates the range. For example, if the district court in *Rita* had miscalculated the Guidelines range to be twenty-five to thirty-three months imprisonment but still sentenced Rita to thirty-three months, the Supreme Court's words would leave room for the Fourth Circuit to apply a presumption of reasonableness to the sentence because it did fall within the proper thirty-three to forty-one month range despite the district court's miscalculation.

However, at a later point in the *Rita* decision, the Court states its holding slightly differently: "The first question is whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it can."[101] In this latter statement, the Court was more careful to apply its holding only to those sentences that reflect a proper application of the Sentencing Guidelines. Although properly calculating the Guidelines range would certainly indicate a proper application of the Sentencing Guidelines, it was still not clear that the Court believed proper calculation by the district court to be necessary for the presumption of reasonableness to apply. In other words, the requirements for procedural reasonableness remained unclear. Could a sentence be procedurally reasonable if a district court made a Guidelines miscalculation based on a legal error such as applying a sentencing enhancement improperly? Thinking about the answer to the miscalculation question is important to the discussion of the need to revise the role of the Sentencing Guidelines because the answer reveals the extent of the Supreme Court's understanding of the psychology of decision-making. This ultimately supports the argument that the Supreme Court failed to consider that same psychological aspect when it maintained the Guidelines' calculation requirement.

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100. *Id.* at 2459 (citation omitted).

101. *Id.* at 2462.

One possible source for an answer to the miscalculation question is in § 3742(f) of the Guidelines, which survived *Booker*'s severability analysis and reads, in part:

> (f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—
>
> > (1) was imposed in violation of law or imposed *as a result of an incorrect application of the sentencing guidelines*, the court shall *remand the case for further sentencing proceedings* with such instructions as the court considers appropriate . . . .[102]

Prior to the *Booker* decision, during the Guidelines' mandatory days, the Supreme Court clarified that § 3742(f)(1) did not require remand for all Guidelines calculation errors. In *Williams v. United States*, the Court explained that a sentence is "imposed *as a result of* an incorrect [Guidelines] application" in the following situations:

> When a district court has not intended to depart from the Guidelines, a sentence is imposed "as a result of" an incorrect application of the Guidelines when the error results in the district court selecting a sentence from the wrong guideline range. When a district court has intended to depart from the guideline range, a sentence is imposed "as a result of" a misapplication of the Guidelines if the sentence would have been different but for the district court's error.[103]

Ultimately, the Supreme Court held that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed."[104] In making the Guidelines advisory, *Booker* did not invalidate § 3742(f), and circuits have taken different views of the role of § 3742(f)(1) in the post-*Booker* advisory Guidelines regime. In a majority of circuits, miscalculations of the applicable Guidelines range render a sentence unreasonable.[105] However, a minority view allows for miscalculations not

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102. 18 U.S.C. § 3742(f) (Supp. V 2005) (emphases added).

103. Williams v. United States, 503 U.S. 193, 202–03 (1992).

104. *Id.* at 203.

105. *See, e.g.*, United States v. Afridi, 241 F. App'x 81, 85 (4th Cir. 2007) (per curiam) (citing United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006)) (stating that a sentence may be unreasonable if the court rejects congressional or sentencing commission policies); United States v. Kristl, 437 F.3d 1050, 1054–55 (10th Cir. 2006) (noting that remand is required if the district court miscalculates the sentencing range); United States v. McBride, 434 F.3d 470, 475 n.3 (6th Cir. 2006) (addressing the possibility of vacating a sentence resulting from district court failure to consider § 3553(a) factors).

only to result in reasonable sentences, but also to earn a presumption of reasonableness.[106]

The minority circuit approach, employed by the Fifth Circuit, uses § 3742(f)(1) as a basis for applying a presumption of reasonableness for sentences that fall within the proper Guidelines range even when the district court has miscalculated the applicable range.[107] The Fifth Circuit has acknowledged that, prior to *Booker*, it would often remand cases for resentencing when the sentencing judge miscalculated the Guidelines range.[108] However, the Fifth Circuit has also explained that, because those sentences were imposed when the Guidelines were still mandatory, it could determine that the sentences were imposed "*as a result of* an incorrect application" of the Sentencing Guidelines.[109] Ultimately, the Fifth Circuit noted that, post-*Booker*, "[f]ormalism does not require us to vacate [a defendant's] sentence so that the district court, on remand, will simply impose the exact same sentence, which on subsequent appeal we would be required to presume reasonable."[110] When a sentencing court has made clear that it would impose the same sentence regardless of whether a certain enhancement applies, then the "formalism" rationale is defensible.[111] However, in practice, this minority circuit approach applies the presumption of reasonableness even when there is no discussion regarding whether the district judge would have applied the same sentence regardless of the miscalculation, or whether the sentence was a result of the incorrect application of the Guidelines. Instead, the minority view grants the presumption of reasonableness solely on the basis of the sentence falling within the correct Guidelines range, regardless of whether the district court actually considered the proper Guidelines range before sentencing.[112]

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106. *See, e.g.*, United States v. Medina-Argueta, 454 F.3d 479, 481 (5th Cir. 2006).

107. *Id.* at 483.

108. *Id.* at 484.

109. United States v. Angeles-Mendoza, 407 F.3d 742, 754 (5th Cir. 2005).

110. *Medina-Argueta*, 454 F.3d at 484, n.2.

111. Though, as I have previously argued, even the district court's announcement that it would impose the same sentence is untrustworthy because the court has been influenced by the Guidelines range it calculated. *See* discussion *supra* Part II.B.

112. This minority view is at work in the following cases:

In *United States v. Nikonova*, 480 F.3d 371 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 163 (2007), one issue on appeal was whether the district court miscalculated the applicable Guidelines range by improperly increasing Nikonova's sentence with a sadistic-image enhancement for the content of some of the child pornography she possessed. *Id.* at 374. The Fifth Circuit found that it did not need to resolve that issue because the thirty-one-month sentence still fell within the twenty-seven to thirty-three month Guidelines range that would have been applicable without the enhancement. *Id.* at 375. The Fifth Circuit in *Nikonova* makes no mention of whether the district court would have imposed the same sentence regardless of whether the sadistic-image enhancement applied. *Id.* at 374–75.

In *United States v. Castillo-Rios*, 212 F. App'x 355 (5th Cir. 2007), the district court calculated the defendant's Guidelines range as seventy to eighty-seven months. *Id.* at 374. The Fifth Circuit determined that without the enhancement to the defendant's criminal history points,

Even in the months following *Rita*, there was no indication that the Fifth Circuit would join the majority of circuits in refusing to apply a presumption of reasonableness when the district court has miscalculated the proper Guidelines range. In several cases, the Fifth Circuit applied the presumption of reasonableness despite miscalculations without any discussion of whether the sentencing court would have come to the same decision without the miscalculation.[113] Therefore, at least from the Fifth Circuit's perspective, it was not at all apparent that reasonableness review required a correct Guidelines calculation. All that was required was that Guidelines were calculated, whether correctly or incorrectly. And, if there was a miscalculation, the sentence certainly would still be reasonable if it was a sentence within the range "suggested" by the Sentencing Guidelines. This view of reasonableness falls within the procedural–subjective reasonableness review box because it gives significant deference to the district court following the proper procedure of calculating the Guidelines and giving reasons for the sentence.[114] That the district court miscalculated the Guidelines is not reason to render the sentence unreasonable in the subjective view of procedural reasonableness. The Supreme Court could have adopted this same form of procedural reasonableness review. However, though miscalculations were not at issue in *Gall*, the Supreme Court used that case as an opportunity to explain the components of reasonableness review and, consequently, to answer the miscalculation question.[115] In doing so, the Court relied on reasoning that

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which the defendant was contesting, the Guidelines range would have been fifty-seven to seventy-one months. *Id.* The Fifth Circuit held that the district court's sentence of seventy months was still within the Guidelines range, and was, therefore, entitled to a presumption of reasonableness. *Id.* at 356.

In *United States v. Britton*, 225 F. App'x 219 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 149 (2007), the Fifth Circuit held that even if the district court miscalculated drug quantities, the sentence was presumed reasonable because it fell within the Guidelines range that would apply with the drug quantities claimed by the defendant. *Id.* at 222. The Fifth Circuit reached this decision without concluding that the district court would have come to the same sentence despite its miscalculation. *Id.*

113. *See* United States v. Guardiola, 247 F. App'x 552, 553 (5th Cir. 2007) (per curiam). The defendant "contend[ed] that the district court erred by [enhancing] his offense level for obstruction of justice." *Id.* Without determining whether there was a miscalculation, the Fifth Circuit stated that the defendant's "420-month sentence [fell] within the 360-month-to-life range that would have resulted had the district court not [enhanced] the offense level." *Id.* Therefore, the sentence was granted a presumption of reasonableness. *Id.* For a similar Fifth Circuit determination, see also *United States v. Nolasco-Gomez*, 247 F. App'x 563 (5th Cir. 2007) (per curiam). The Fifth Circuit found an error in the district court's calculation but decided that the presumption applied because the sentence fell within the correct range. *Id.* at 564. Though the court determined that the sentencing court said it would give the same sentence whether the problematic enhancement applied or not, rather than discussing whether the district court explicitly considered the § 3553(a) factors, the Fifth Circuit did not at all question whether the miscalculation affected the reasonableness of the sentence. *Id.*

114. *See* Table *supra* p. 128.

115. Gall v. United States, 128 S. Ct. 586, 594–97 (2007).

comports with psychology's understanding of reasonableness review,[116] while requiring the use of the Guidelines in such a way that is at odds with that psychological understanding of decision-making.

E. Gall *and the Real Meaning of Reasonableness Review*

Two years after unleashing reasonableness review, the Supreme Court seized the opportunity to clarify that standard of review in *Gall v. United States*.[117] In *Gall*, the Court held that circuit courts must review all sentences, despite their distance from the applicable Guidelines range, under a deferential abuse of discretion type of standard.[118] The Court made it very clear that reasonableness review was both a procedural and substantive review. The Court described procedural reasonableness as follows:

> [Circuit courts] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.[119]

It is only after procedural reasonableness has been determined that substantive reasonableness is considered.[120] The Court described substantive reasonableness review as a totality of the circumstances, abuse of discretion standard.[121] Explaining further, the Court stated that a court of appeals should give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify [the sentence]."[122]

In *Gall*, the Supreme Court placed reasonableness review in both the procedural/objective box and the substantive/subjective box. As far as procedural reasonableness is concerned, the *Gall* opinion endorses an objective view in which miscalculations can render the sentence unreasonable. If the procedural review were subjective (meaning considered from the district court's point of view), then the district court's genuine act of calculating the Guidelines and considering the § 3553(a) factors would be enough to render the sentence procedurally reasonable. This subjective sort of procedural reasonableness would allow for a sentence to be procedurally reasonable despite Guidelines miscalculations. However, in *Gall*, the Supreme Court quickly dismissed this possibility and, by doing so, made procedural reasonableness an objective standard.

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116. *See id.* at 596–98.
117. *Id.*
118. *Id.* at 597.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

Substantive reasonableness, on the other hand, falls into the substantive/subjective box. This is because the Court has now explained substantive reasonableness review as being a deferential abuse of discretion standard. This view of substantive reasonableness falls into the substantive/subjective box because the Court favors giving deference to a district court's sentence so long as the district court has given a "reasoned" decision that the § 3553(a) factors justified the sentence.[123] As indicated previously, the Court could have gone in several directions in fleshing out the reasonableness review standard.[124] When given the opportunity to give meaning to the reasonableness review standard, though, the Court decided to mix an objective procedural standard with a subjective substantive standard, all while keeping the Guidelines range as a factor to be calculated and considered by district courts.[125] Therefore, while the psychology of sentencing requires any meaningful procedural reasonableness review to be objective (because miscalculations indicate reliance on a biased anchor), this result, combined with the Court's choice to express the substantive component of reasonableness review as a subjective factor, necessitates a move away from the continued requirement that district courts calculate and consider the Guidelines range.

F. Kimbrough, *Substantive Reasonableness, and the Increasingly Problematic Role of the Guidelines*

While *Gall* was the case in which the Supreme Court first explained the meaning of substantive reasonableness review, it was in *Kimbrough v. United States*[126] that the Court truly animated substantive reasonableness. In *Kimbrough*, the Supreme Court held that the then-existing crack/powder cocaine sentencing disparity in the Sentencing Guidelines was advisory only.[127] Therefore, a sentencing judge may consider the disparity and find that, because of it, a within-Guidelines sentence would be "'greater than necessary' to serve the objectives of sentencing."[128] In coming to this conclusion, the Supreme Court went into a lengthy discussion of the then-existing 100-to-1 crack/powder cocaine sentencing disparity ratio, explaining that it was an example of a situation in which "[t]he [Sentencing] Commission did not use [an] empirical approach in developing the Guidelines sentences."[129] The Court further explained that it is now understood that crack and powder cocaine are chemically similar and "have the same physiological and psychotropic

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123. *Id.* at 602.
124. *See supra* notes 113–14 and accompanying text.
125. *Gall*, 128 S. Ct. at 597.
126. 128 S. Ct. 558 (2007).
127. *Id.* at 564.
128. *Id.* (quoting 18 U.S.C. § 3553(a) (Supp. V 2005)).
129. *Id.* at 567.

effects."[130] Additionally, the Court told of the Sentencing Commission's discovery that the amount of the sentencing disparity was unwarranted and of the Commission's repeated efforts to achieve a reduction in the crack/powder cocaine ratio.[131] Therefore, the Court ultimately found that "while [§ 3553(a)] still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'"[132]

At first blush it appears as though *Kimbrough* merely explains the strength of the deferential nature of the abuse of discretion standard set forth in *Gall*. In *Kimbrough*, the Court explained the subjective nature of substantive reasonableness by citing the propositions from *Rita* and *Gall* that it is the sentencing judge who has "'greater familiarity with . . . the individual case and the individual defendant'"[133] and is "therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case."[134] However, when viewed through the lens of the previous discussion on the psychology of decision-making, it becomes apparent that *Kimbrough* signifies much more. In *Kimbrough*, the Court still called for a "respectful consideration" of the Guidelines,[135] which requires district courts to maintain their task of properly calculating the applicable Guidelines range. The problem with allowing improper Guidelines calculations to lead to sentences that are presumed reasonable is that the district court has relied on a biased, miscalculated anchor in making its sentencing determination. The effect of *Kimbrough* is the acknowledgement that, at times, the Guidelines range, even when properly calculated, can result in a biased and faulty anchor because the range itself initially was improperly determined by the Sentencing Commission.

At least part of the reason that the Supreme Court allowed a presumption of reasonableness for within-Guidelines sentences and continued to uphold the requirement of calculating the Guidelines range was the presumption that there is something meaningful in the Guidelines ranges themselves. In *Rita*, the Supreme Court acknowledged that Congress has mandated that the Sentencing Commission endeavor to:

> provide certainty and fairness in sentencing, to avoi[d] unwarranted sentencing disparities, to maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of

130. *Id.* at 566.

131. *Id.* at 568–69.

132. *Id.* at 570 (citation omitted) (quoting United States v. Booker, 543 U.S. 220, 245–46 (2005)).

133. *Id.* at 574 (alteration in original) (quoting Rita v. United States, 127 S. Ct. 2456, 2469 (2007)).

134. *Id.* at 574 (quoting Gall v. United States, 128 S. Ct. 586, 597 (2007)).

135. *Id.* at 570.

> general sentencing practices, and to reflect, to the extent practicable [sentencing-relevant] advancement in [the] knowledge of human behavior.[136]

And, though the Court also explains that the Commission has made "a serious, sometimes controversial, effort to carry out this mandate,"[137] the decision in *Kimbrough* shows that, at least with regard to the cocaine Guidelines, the Commission failed in at least one of those duties—avoiding unwarranted sentencing disparities. In *Kimbrough*, the Supreme Court goes to great lengths to detail the reasons why the "Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions."[138] And though, in this instance, the Guidelines admittedly did not reflect the Commission's duty to avoid unwarranted sentencing disparities, the Supreme Court in *Kimbrough* still returned to the position that the Guidelines should serve as the "'starting point and initial benchmark'" for a district court's sentencing decision.[139]

By adopting a form of reasonableness review that has an objective procedural component as well as a subjective substantive component, while still holding onto the Guidelines as a frame of reference for sentencing, the Supreme Court is admitting that the properly calculated Guidelines range can serve as a faulty, untrustworthy anchor; but the Court still requires that district courts use that biased anchor as an initial benchmark for sentencing decisions. This reasoning runs afoul of the justifications for requiring an objective procedural reasonableness review in the first place. A sentence is procedurally unreasonable if a sentencing court miscalculated the Guidelines range. This is so because the court has used the wrong benchmark in making its sentencing determination. A correct benchmark must be used because the benchmark itself reflects a trustworthy and studied sentencing determination made by the Sentencing Commission. Therefore, it must follow that when it has been determined that the benchmarks sometimes do not reflect the Sentencing Commission's studied and trustworthy sentencing determination, then the justification for requiring reliance on that faulty benchmark fails.[140]

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136. Rita v. United States, 127 S. Ct. 2456, 2463 (2007) (alterations in original) (internal quotation marks omitted).

137. *Id.*

138. *Id.* at 575.

139. *Id.* at 574 (quoting Gall v. United States, 128 S. Ct. 586, 596 (2007)).

140. It is true that the Supreme Court distinguishes the cocaine Guidelines from others because the cocaine Guidelines were not initially determined using the same sort of empirical evidence that was used for other Guidelines offenses. Kimbrough v. United States, 128 S. Ct. 558, 567 (2007). Instead, in setting the cocaine Guidelines, the Sentencing Commission used a weight-driven scheme. *Id.* However, this point is really of no consequence for several reasons. The first is that the Court explained that this departure from the empirical evidence was used for all drug offenses. *Id.* Therefore, at least with regard to drug offenses in particular, it is safe to say that the unwarranted disparity issue may still be implicated. Second, the Court's decisions have raised a question about the Guidelines' dependency. As a result, it is not entirely clear

Unfortunately, the Supreme Court resisted taking these logical steps in *Kimbrough*, and instead limited its observations to the cocaine Guidelines only. Given the Court's history with the Guidelines however, this result, though imprudent, is not surprising.

IV. THE DESIRE FOR FAMILIARITY AND THE NEED FOR CHANGE

Since *Booker*, the Supreme Court and lower courts have taken every opportunity to hold onto the pre-*Booker* ways of mandatory Sentencing Guidelines.[141] This strong addiction to the comfort of the sentencing Guidelines can be seen in the non-effect that the *Booker* decision had on federal sentencing.[142] Following *Booker*, circuit courts had the task of creating the look and feel of reasonableness review for themselves.[143] And it is no surprise that it began to look and feel very much like the circuits' pre-*Booker* practices.[144] It was easy for circuit court practices to remain relatively unchanged because district court sentencing practices did not change much after *Booker* either.[145] The Sentencing Commission has released data indicating that there have been only small changes in sentencing patterns since *Booker* was decided.[146] In the year following *Booker*, the median sentences imposed in most offense categories did not change significantly from their pre-*Booker* lengths.[147]

As Professor Douglas Berman has pointed out, "the modern history of federal sentencing reforms provides interesting and diverse examples of status quo biases at work."[148] Status quo biases are the "natural tendency of people to generally prefer things to say relatively the same."[149] And, as Professor Berman describes, we have seen this status quo bias in the reluctant move to

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whether there are ranges for other Guidelines offenses that are also faulty because of the method used to determine those ranges. Even the possibility of a Guidelines range that is faulty (not merely because it is not the best option in a particular defendant's instance, but because, as a general matter, it does not reflect a studied and dependable sentencing assessment), is problematic when calculation and consideration of the Guidelines ranges are required.

141. *See* Douglas A. Berman, Rita, *Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 21 (2007).

142. *Id.* at 21–22.

143. *See* Mullen & Davis, *supra* note 6, at 631.

144. *See id.* at 625.

145. *See* James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033, 1036, 1078 (2008).

146. *See* U.S. SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 75–76 & tbl.5 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter U.S. SENT'G COMM'N, FINAL REPORT]. For the Commission's other periodic data reports, see http://www.ussc.gov/bf.HTM.

147. *See* U.S. SENT'G COMM'N, FINAL REPORT, *supra* note 146, at 75–76 & tbl.5.

148. Berman, *supra* note 141, at 19–20.

149. *Id.* at 19 (citing William F. Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988)).

create and adopt the Federal Sentencing Guidelines, the Supreme Court's hesitance to completely do away with the Guidelines in *Booker*, and now, the district and circuit courts' implementation of post-*Booker* procedures that mirror the pre-*Booker* ways.[150] Even after *Gall* and *Kimbrough*, the Supreme Court continues to require the calculation of Guidelines ranges while continually diminishing the importance of those ranges. In June of 2008, the Supreme Court decided *Irizarry v. United States*, in which it held that district courts do not have to give parties notice when contemplating a variance from the recommended Guidelines range.[151] In coming to this decision, the Court made it clear that the Guidelines should remain a starting benchmark in sentencing decisions.[152] However, the Court also reasoned that, now that the Guidelines are advisory, "neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy'" that was the basis for the notice requirement under the mandatory Guidelines regime.[153] Just as the Supreme Court did through the combination of *Gall* and *Kimbrough*, in *Irizarry* the Court placed the Sentencing Guidelines on a pedestal of importance while handing district courts a stick to use in smashing them to near irrelevance. As *Gall*, *Kimbrough*, and *Irizarry* show, the familiar dependence on the seeming reliability of the Guidelines, coupled with the requirements of an advisory Guidelines regime, means that it must be time to consider a new role for the Sentencing Guidelines.

A. What's Behind the Numbers?: The Calculation Process

To best appreciate the need for a new role for the Guidelines, it is useful to understand the current usage of the Guidelines. In order to calculate the applicable Guidelines range, several factors about the behavior of the defendant and the characteristics of the offense are given a prescribed numeric value.[154] Pretrial Services conducts an investigation of the defendant and the offense and presents the sentencing court with a Pretrial Services Investigation Report ("PSR" or "PSI") outlining all of these factors and adding their numeric values, the total of which is termed the "base offense level."[155] Once the base offense level is determined, a court can increase or decrease this number by a certain amount for various sentencing-enhancing and sentencing-decreasing factors.[156] The amount by which a base offense level can be increased or

150. *Id.* at 19–22.

151. Irizarry v. United States, 128 S. Ct. 2198, 2203–04 (2008).

152. *Id.* at 2202–03 (citing United States v. Gall, 128 S. Ct. 586, 596–97 (2007)).

153. *Id.* at 2202.

154. For example, first-degree murder earns a defendant a base offense level of forty three, while involuntary manslaughter involving criminally negligent conduct is assigned a base offense level of twelve. U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 12, §§ 2A1.1(a), 2A1.4(a)(1).

155. *Id.* §§ 1B1.1(b), 6A1.1(a).

156. *Id.* § 1B1.4.

decreased is determined by provisions in the Sentencing Guidelines.[157] The adjustments result in the "total offense level."[158] The PSR also indicates the offender's criminal history, which is given a numeric value called the "criminal history category."[159] The Sentencing Guidelines Manual provides a grid on which the criminal history score falls on one axis and the total offense level falls on the other.[160] The point on the grid where the applicable criminal history row meets the applicable offense level column provides the sentencing range suggested by the Sentencing Commission for that criminal history and offense level combination.[161]

The Guidelines calculation process asks sentencing judges to take the resulting range as reliable conclusions made by the Sentencing Commission without giving much information about the source of the numbers that determine the ranges, or why those ranges correspond to particular offender–offense combinations. In *Kimbrough*, the Supreme Court left room for district courts to disagree with Guidelines ranges that are systematically inconsistent with the § 3553(a) purposes of sentencing.[162] However, all a sentencing judge is equipped to do is depart from the applicable Guidelines range when it does not meet the sentencing requirements for the particular defendant before that judge.[163] There is no formal method by which judges, through the traditional calculation of the sentencing Guidelines, can asses how particular Guidelines ranges were developed and whether those methods are systematically dependable. In the Federal Sentencing Guidelines Manual, the Sentencing Commission explains that it determined the Guidelines ranges "by estimating the average sentences now being served within each category" and by "examin[ing] the sentence specified in congressional statutes, in the parole

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157. For example, acceptance of responsibility is one factor that can decrease a defendant's offense level by two levels pursuant to § 3E1.1(a) of the Sentencing Guidelines. *Id.* § 3E1.1(a). A defendant's offense level can be increased by two to four levels if that district court determines that the defendant played an aggravating role in the offense, pursuant to § 3B1.1 of the Sentencing Guidelines. *Id.* § 3B1.1. These are just some of the factors that can enhance or decrease a defendant's offense level.

158. *See id.* at ch. 5, pt. A, cmt.

159. The criminal history category is determined by adding the values of various factors, such as three points for each prior sentence of imprisonment exceeding one year and one month, two points for each prior sentence of at least sixty days, and two points if the defendant committed the instant offense while under any criminal justice sentence. *Id.* §§ 4A1.1(a)–(c).

160. *Id.* at ch. 5, pt. A, tbl.

161. For instance, an offense level of thirteen and a criminal history score of two results in a Guidelines sentencing range of fifteen to twenty-one months of imprisonment. *Id.*

162. Kimbrough v. United States, 128 S. Ct. 558, 575–76 (2007). In addition, during the *Gall* oral argument, Justice Breyer urged a definition of reasonableness that allows for judges to depart from the Guidelines "when they have something unusual and maybe occasionally when they think the guideline wasn't considered properly, and then the iterative process takes over, going back to the commission." Transcript of Oral Argument at 39, Gall v. United States, 128 S.Ct. 586 (2007) (No. 06-7949).

163. U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 12, § 5K2.0(a)(1).

guidelines, and in other relevant, analogous sources."[164] Although this method is said to apply to all of the Guidelines ranges, it does not explain the background of sentencing ranges in any particular offense. If judges are allowed to depart from sentencing ranges that systematically fail to carry out the § 3553(a) mandates, instead of merely being undesirable in an individual case, they must be given the tools to understand when such a problem exists. The crack/powder cocaine distinction was noticeable to district courts because it was a severe disparity against which several public defenders and civil rights advocates, among others, had been arguing for years.[165] However, it may be that there are other Guidelines provisions that are unfair and troubling, but to a less obvious degree.[166] *Kimbrough* leaves room for district courts to consider the implications of those Guidelines as well, and to adjust defendants' sentences accordingly.[167] However, there is no reliable means for a district court to know whether the Guidelines ranges for specific offenses have such defects.

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164. *Id.* § 1A1.1(4)(g).

165. *See, e.g.*, David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 72 (2003) (identifying the crack/powder cocaine sentencing disparity); *see also* Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing In Transition*, 19 FED. SENT'G REP. 291, 291–93 (2007) (explaining the history of the crack sentencing controversy).

166. Since the Supreme Court in *Kimbrough* opened the door for attacks on various Guidelines ranges for lacking empirical bases, the National Federal Defender Sentencing Resource Counsel has begun a special project, *Deconstructing the Guidelines*, designed to give defense attorneys a tool to argue that certain Guidelines themselves fail "properly to reflect § 3553(a) considerations, reflect[] an unsound judgment, [do] not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless." *See* Deconstructing the Guidelines, http://www.fd.org/odstb_SentencingResource3.htm#DECONS; *see also* OFF. DEFENDER SERVS., FEDERAL PUBLIC DEFENDER'S OFFICE SENTENCING RESOURCE MANUAL: USING STUDIES & STATISTICS TO REDEFINE THE PURPOSES OF SENTENCING 1 (2008), *available at* http://www.fd.org/odstb_SentencingResource3.htm#DECONS (compiling "useful resources that federal defense attorneys can consult when drafting sentencing memoranda and making oral arguments for sentences below the advisory guideline range").

167. In *Kimbrough*, the Supreme Court declined to answer the question of whether a sentencing judge may vary from the Guidelines based "solely on the judge's view that the Guidelines range 'fails to properly reflect §3553(a) considerations.'" Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007)). However, I am concerned not with the situations where the judge disagrees with the Guidelines policy solely based on his own view, but when, as in *Kimbrough*, the judge's disagreement is based on statistics and studies (and perhaps the future acknowledgement by the Commission) revealing the error in the Guidelines treatment of an offense. This is the position taken by federal District Judge Nancy Gertner in *United States v. Haynes*, a case in which she sentences a defendant to the below-Guidelines sentence of time served, finding that the harms of incarceration would be against sound sentencing policy in that defendant's case. United States v. Haynes, 557 F. Supp. 2d 200, 207 (D. Mass. 2008).

B. When the Numbers are Wrong: The Trouble With Using the Guidelines in Their Traditional Form

If the only justification for the continued requirement that the Guidelines range be calculated and considered is that the Court, because of its status quo bias, is hesitant to let go of a familiar sentencing instrument, then it hardly seems a reasonable aspect of reasonableness review. Of course, the Court has said all along that the Guidelines serve the purpose of facilitating sentencing uniformity among districts and circuits.[168] However, in *Kimbrough*, the Court recognized that "some departures from uniformity [are] a necessary cost of the remedy" adopted in *Booker*.[169] To hold onto the potentially faulty Guidelines as a benchmark for the sake of uniformity is just as procedurally unsound as allowing miscalculations to be the basis of a reasonable sentence. The Supreme Court already dismissed miscalculations as unreasonable, and, while it may not be that all of the Sentencing Guidelines ranges are faulty, *Kimbrough* leaves open the possibility that the Sentencing Commission, at least sometimes, gets it wrong.[170] *Booker* allows judges to sentence outside the Guidelines range when the judge determines that the Sentencing Commission got the range wrong regarding that particular defendant before the court.[171] However, *Kimbrough*'s admission that sometimes the Guidelines range can be unreliable for an entire group of offenders presents a situation in which the necessary sacrifice of uniformity by repositioning the Guidelines should be acceptable.

One could argue that, even if there are faulty Guidelines ranges for the crack cocaine offenses, it does not mean that the Guidelines are biased anchors as a whole. Although such an argument is merited, the problem remains that it is not made apparently clear to a sentencing judge which set of offense ranges carries a high versus a low indicia of reliability as determined by the method used by the Commission in reaching those sentencing results. In *Kimbrough*, the Supreme Court admitted that the sentencing ranges for *all* drug offenses were developed by using a weight-based standard rather than an empirical standard based on sentences being imposed at that time.[172] The Court blamed this weight-based standard for the crack/powder cocaine sentence disparity in the Guidelines as they were at the time of the *Kimbrough* decision.[173] So, the same disconnect between the pre-reform crack sentences and the purposes of sentencing potentially exists for all drug offenses as applied to all drug offenders. Further, though the Court focused on the weight-based standard as

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168. *See Kimbrough*, 128 S. Ct. at 573.
169. *Id.* at 574.
170. *See id.* at 575.
171. *See* United States v. Booker, 543 U.S. 220, 259–60 (2005).
172. *Kimbrough*, 128 S. Ct. at 566–67.
173. *Id.* at 567–68.

a basis for the unwarranted crack/powder cocaine disparity,[174] the Court opened the possibility that even empirically based ranges can be dismissed in the way the crack cocaine Guidelines can if it can be argued convincingly that those ranges were developed in a manner that is inconsistent with the § 3553(a) sentencing purposes.[175] Therefore, blind reliance on the properly calculated Guidelines ranges as trustworthy anchors should be rethought.

V. A MORE REASONABLE WAY: REPURPOSING THE GUIDELINES FROM BENCHMARK ANCHOR TO RELIABLE RESOURCE

The psychology of decision-making reveals that once a judge calculates the Guidelines range, she will be influenced by that range, even if she ultimately decides to impose a sentence that falls outside of it. However, if the Supreme Court would do away with the requirement that sentencing courts calculate the Guidelines as a first step, then there will be less risk that sentences will be influenced by faulty anchors that do not reflect the § 3553(a) goals of sentencing. Of course, some may argue that this will result in the type of pre-Guidelines lack of sentencing uniformity that the Guidelines were developed to combat. To avoid losing uniformity completely, the sentencing purposes found in the § 3553(a) factors can serve as the initial benchmark that all district courts use as a frame of reference in their sentencing decisions. The relevant factors would include: (1) any pertinent policy statement issued by the Sentencing Commission; (2) the need to avoid unwarranted sentencing disparities; (3) the need to provide restitution to victims; and (4) the requirement to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate

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174. *See id.* at 571.

175. There is a large body of work criticizing the Federal Sentencing Guidelines as too harsh and reflecting an overreliance on incarceration, or as creating, rather than alleviating, sentencing disparity, or both. *See, e.g.*, Anthony M. Kennedy, Associate Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (observing that because federal sentences are often too long, "[t]he Federal Sentencing Guidelines should be revised downward," and that "[i]n too many cases, mandatory minimum sentences are unwise and unjust"); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 59–65 (1998) (discussing the Guidelines' role in increasing average sentences); MICHAEL TONRY, SENTENCING MATTERS 78–79 (1996) (explaining the shortcomings of the Guidelines); Harris, *supra* note 165, at 71–72 (discussing disparities in sentencing); James P. Lynch, *A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis*, 79 J. CRIM. L. & CRIMINOLOGY 180, 198 (1988) (explaining disparities in imprisonment rates among different countries); Eugene D. Natali, *The Probation Officer, Bean Counting and Truth in Sentencing*, 4 FED. SENT'G REP. 102, 102 (1991) (suggesting methods for amending the Guidelines to increase predictability and reduce disparity); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1948 (1988) (criticizing the Sentencing Commission for the lack of persons experienced in federal sentencing among its members); Aaron Rappaport, *The State of Severity*, 12 FED. SENT'G REP. 3, 3 (1999) (examining the role of sentencing purposes).

deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.[176] Rather than being used as a numeric benchmark, these sentencing factors will act as guiding purposes for all sentencing decisions. Therefore, procedural reasonableness will not hinge on a district court properly calculating the Guidelines range, but rather on that court considering the relevant § 3553(a) factors and explaining how the sentence imposed relates to those factors. One may then ask what purpose the Sentencing Guidelines will serve at all. This approach does not require throwing the Sentencing Guidelines away completely, but suggests that the Guidelines be given a new place in sentencing determinations.

The new advisory status of the Guidelines calls for a change in the format and usage of the Guidelines. As it stands, the Sentencing Guidelines continue to be presented in the same format that they had in their mandatory days. In *Rita*, the Supreme Court acknowledged that "[t]he Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process."[177] Thus, when judges impose sentences, the Court envisions a process in which "[t]he Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly."[178] Because the Court has recognized that the Guidelines should evolve, *Kimbrough* signals a time at which such evolution is quite appropriate. We have already seen a bit of this in the new cocaine Guidelines.[179] However, even those revised Guidelines are simply new numbers set within the existing Guidelines grid format.[180] Now that the Guidelines are only supposed to carry advisory weight, there is no necessary reason for the Federal Sentencing Guidelines to continue to retain the format that it had while in its mandatory glory. Instead, the Guidelines should be

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176. *See* 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

177. Rita v. United States, 127 S. Ct. 2456, 2464 (2007).

178. *Id.*

179. On November 1, 2006, the U.S. Sentencing Commission's crack cocaine sentencing amendment to the Sentencing Guidelines went into effect. The amendment will affect seventy percent of federal crack cocaine cases, and reduce those sentences by an average of fifteen months, though the crack penalties are still stiffer than powder cocaine penalties. The amendment was made retroactive on December 11, 2007. Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/PRESS/rel121107.htm; FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT CRACK AMENDMENT RETROACTIVITY (2008), *available at* http://www.famm.org/Repository/Files/web_crack_FAQs_1_29_08.final_version%5B1%5D.pdf.

180. *Compare* U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 12, § 2D1.1(c) (2007's drug quantity table), *with* U.S. SENT'G COMM'N, GUIDELINES MANUAL § 2D1.1(c) (1995) (1995's drug quantity table).

revamped to take on a more advisory appearance that will have the effect of being an advisory resource, rather than influential anchors.

The Sentencing Commission has been given the duty to collect and examine sentencing results.[181] This can be done in many ways, which means that there are multiple forms that advisory Sentencing Guidelines can take. One possibility is to reinvent the Guidelines so that they are focused not on calculations, but on reporting the percentages of frequency at which various lengths of sentences are being imposed in federal courts across the country for specific crimes. There are several sources that advocate the use of statistics in sentencing decisions, especially as such data has increasingly been used with success in other disciplines.[182] Currently the Sentencing Commission collects data on federal sentencing practices across districts, but this data is tied to the Sentencing Guidelines and gives information such as the number of sentences falling outside or within the Guidelines range in various districts.[183] A new use of the Guidelines would be to present statistics on how often judges are imposing particular sentences for particular crimes. Therefore, there would be no requirement that district courts calculate offender and offense characteristics to determine a specific range of sentences. Rather, the sentencing judge, after considering the § 3553(a) factors and selecting a sentence, can look to the Guidelines' national sentencing statistics as a check on the judge's own conformance to national sentencing trends without the initial anchoring bias that a calculation would cause.[184]

In addition to collecting sentencing statistics, the Sentencing Commission can carry out its mandate to "examine" these statistics by providing information on how the sentences being imposed in the various districts relate

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181. 28 U.S.C. § 995 (2000).

182. *See* Paul J. Hofer & William P. Adams, *Using Data For Policymaking, Litigation, and Judging*, 16 FED. SENT'G REP. 8, 8 (2003) ("The progress made in fields like medicine by using data wisely reinforces the belief that public policy and legal decision making would also benefit from empirical research."); *see also* Ruback & Wroblewski, *supra* note 38, at 757 (explaining that there are limits to human decision-making ability despite individuals' belief that they can make correct decisions, and therefore, statistics provide a superior method of decision-making).

183. For further explanation of the Sentencing Commission's current data-collection function, see Robert W. Sweet, D. Evan van Hook & Edward V. Di Lello, *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 FORDHAM L. REV. 927, 945–47 (1996) (explaining that the Commission act as a clearinghouse for data and uses that data "to present a historical picture to Congress and to the Commission to aid these bodies in making law and policy."). See also the Sentencing Commission's quarterly updates, which are available at http://www.ussc.gov/bf.htm.

184. This is similar to the Sentencing Information System (SIS) currently used by the High Court of Scotland as an alternative to sentencing guidelines. The SIS provides sentencing patterns for cases that match the factors input to the system by the user. For a description of this system, see Hofer & Adams, *supra* note 182, at 12. *See also* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 369 (2003) (mentioning the use of statistics in Scotland's sentencing system). Another possibility is to use the new statistical Guidelines as an appellate tool only by which reviewing courts will decide whether the sentence is too out of line with those being imposed across the district as to warrant further explanation or reversal.

to the success of carrying out the relevant § 3553(a) factors. One criticism of the use of statistics is that statistics carry with them the need for interpretation.[185] With its resources, the Sentencing Commission is in a great position to not only collect sentencing data, but to explain whether the sentences being imposed are having the desired effects on crime in those districts. This would give sentencing courts much more reliable information in making decisions about whether to impose a sentence that is consistent with the majority of sentences being imposed for that offense, or whether the particular case before them warrants a different sentence.[186] In such a system, the Sentencing Guidelines will be truly advisory as they become one of many resources that can guide a district court to a reasonable sentence.[187]

With this new approach, the Guidelines would become more of a sentencing resource, rather than a starting anchor that would influence a judge's initial thoughts about a reasonable sentence. On review, then, the circuit courts would still apply an objective procedural review to determine whether the district court considered the relevant § 3553(a) factors and gave reasons for the sentence. The only difference would be the lack of any requirement that the Guidelines range be calculated. Then the circuit courts would apply the same deferential abuse-of-discretion form of substantive reasonableness by determining whether the reasons given by the district court for the sentence imposed comport with the § 3553(a) factors considered.[188] Therefore, as *Gall* sets forth, the objective procedural review and subjective substantive review would remain as the meat of reasonableness review.[189] Furthermore, the goal of uniformity balanced with judicial discretion, though taking another form,

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185. Hofer & Adams, *supra* note 182, at 8.

186. This seems similar to the use of sentencing data that Judge Michael Marcus of the Circuit Court of Multnomah County, Oregon suggests for revisions to the Model Penal Code's sentencing provisions when he advocates for

> the need for empirical validation for sentencing assumptions [that] arises from the reality that with rare exception, judges, however well intended, have no sufficient direction, training, data or information about what works on which offenders, and are encouraged by sentencing culture to rely on wildly diverse and often incorrect ideology, whim, sentencing folklore, and repeated guesswork to determine sentences.

Michael Marcus, *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 WHITTIER L. REV. 295, 303 (2007) (footnote omitted).

187. There are and have been several resources that can aid a judge in making a sentencing determination. Paul Hofer and William Adams point to a few of those resources, including the Bureau of Justice Statistics' SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (annual statistical report that is available in print and online at http://www.ojp.usdoj.gov/bjs/sourcebook.htm). *See* Hofer & Adams, *supra* note 182, at 9.

188. There is still considerable confusion among the circuits about what this abuse of discretion standard really means for the proper role of appellate courts. Though further discussion is best had in a subsequent article, I agree with the position taken by the First Circuit that substantive reasonableness review is satisfied when the district court has given "a plausible sentencing rationale and a defensible result." United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008) (citing United States v. Jiménez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006)).

189. Gall v. United States, 128 S. Ct. 586, 597 (2007).

would not be lost. If the Supreme Court would take the steps to do away with the Guidelines calculation requirement, then perhaps Congress could be prompted to revise the Guidelines so that they are still relevant to sentencing decisions.

VI. CONCLUSION

By mandating the creation of the Sentencing Guidelines, Congress sought to achieve honesty, uniformity, and proportionality in sentencing.[190] While uniformity can certainly be achieved through the current form of the Guidelines, it does not necessarily mean that what results is the sort of uniformity that is desired. In achieving uniformity, Congress specifically sought to "narrow[] the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders."[191] In *Kimbrough*, the Supreme Court, following the Sentencing Commission's lead, admitted that achieving uniformity in order to reduce disparity in sentencing was not achieved in the cocaine sentencing ranges.[192] Rather, the Guidelines resulted in larger than warranted disparities among crack and powder cocaine offenders that were truly more similarly situated than the sentencing policies reflected.[193] This result also undermined Congress's goal of proportionality, because it was admitted by the Sentencing Commission that crack sentences were lengthier than necessary.[194] As claimed, this admission lends credence to arguments that other ranges provided by the Sentencing Guidelines might well be suspect, though there is no reliable method to alert district courts to situations in which the Guidelines ranges themselves are founded on faulty principles. Such a situation also undermines Congress's goal of keeping sentencing honest because district courts will rely on faulty ranges, and circuit courts will stamp the resulting sentences with presumptions of reasonableness if they fall within the Guidelines range that is not itself honestly reasonable. Once this possible faultiness of the Sentencing Guidelines is acknowledged, those who stand by the constitutionality of the *Booker* remedy and those who argue that the remedial opinion failed to address the Guidelines' constitutional dilemma alike can agree that there is value in rethinking the Guidelines' current role.

As psychology teaches, the same reasoning that supports not allowing Guidelines miscalculations to lead to procedurally reasonable sentences should apply to properly calculated Guidelines ranges that are based on faulty sentencing policy. Because of the anchoring effect, calculating Guidelines ranges will always influence the ultimate sentence in some manner. One way

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190. U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 12, § 1A1.1 ed. n.

191. *Id.*

192. Kimbrough v. United States, 128 S. Ct. 558, 568 (2007).

193. *See id.*

194. *Id.*

to remove that bias is to do away with the requirement that district courts calculate the Guidelines range before sentencing a defendant.[195] Of course, there are difficulties in implementing the statistical formulation of the Guidelines proposed in this Article. For one, it is unclear how the transition to the statistical model will take place. For a time, the statistics collected by the Sentencing Commission will reflect sentences imposed by courts that have calculated the applicable Guidelines range and considered that range before sentencing, as *Booker* requires. Therefore, if the argument is that the sentencing ranges presented in the Guidelines may be biased, then the statistics on sentencing trends will reflect reliance on faulty Guidelines ranges. Further, many (if not most) district court judges feel uneasy about determining sentences without referring to Guidelines ranges because the Guidelines have been around in some form for the entirety of their judicial careers.[196] Additionally, there are obstacles implicit in the use of statistics, such as people's general resistance to using them.[197] However, despite these difficulties, the point remains the same. A new, truly advisory Guidelines role would be truer to *Booker*'s view of the Sentencing Commission's duty to research the sentencing landscape and "revis[e] the Guidelines accordingly."[198] Now that the Supreme Court has defined reasonableness review to have a procedural component while also allowing a sentence to be substantively reasonable even if the district court imposes a sentence that reflects that judge's reasonable disagreement with a Guidelines' policy, the time for revising the role of Guidelines is certainly here. As everything about federal sentencing jurisprudence changes, it becomes increasingly unreasonable for the Sentencing Guidelines to stay the same.

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195. For all of the reasons discussed in this Article, I believe that the best course of action would be for district courts not to be required to calculate the Guidelines range at all. However, I recognize that in order to get rid of the requirement that district courts calculate the Guidelines range all together, 18 U.S.C. § 3553(a) would have to be amended to delete § 3553(a)(4), which requires that the sentencing court consider the Guidelines range. *See* 18 U.S.C. § 3553(a)(4) (Supp. V 2005). This can be done through legislative action. However, the Supreme Court could take the first step by at least doing away with the requirement to *begin* the sentencing determination with the Guidelines calculation.

196. *See* Gertner, *supra* note 14, at 525, 537 (explaining that, post-*Booker*, judges have shown little fondness for departing from the Guidelines partially because of feelings of institutional incapacity).

197. This tendency is known as "availability bias." For an explanation, see Ruback & Wroblewski, *supra* note 38, at 755.

198. United States v. Booker, 543 U.S. 220, 264 (2005). See also Transcript of Oral Argument at 35, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949), in which Justice Scalia argues that using the Guidelines as a criterion of sentencing is not using them in an advisory manner.