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Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences

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APPELLATE REVIEW OF SENTENCE EXPLANATIONS: LEARNING FROM THE WISCONSIN AND FEDERAL EXPERIENCES

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I. INTRODUCTION

American courts traditionally have not supplied any meaningful appellate review of sentences.[1] Indeed, prior to the 1980s, the great majority of states did not give their appellate courts the *authority* to review the propriety of particular sentences; as long as the sentence was within (often very wide) statutory parameters and certain minimal constitutional requirements were satisfied, the trial court's sentencing decision was effectively beyond challenge, and the courts of appeals had no role to play.[2] Even in the few states authorizing a more active role for the appellate bench, sentencing decisions were only very rarely subject to thoughtful review.[3]

Although some prominent voices began to call for reform in the 1950s and 1960s,[4] proposals for more meaningful appellate review did not gain much traction until the 1970s and 1980s, when they were often linked to a broader effort to achieve greater uniformity in sentencing.[5] This broader effort resulted in the implementation of binding sentencing guidelines in at least six states and the federal system.[6]

Appellate review obviously plays a critical role in a mandatory guidelines system: it is the appellate courts, after all, that ensure compliance with the guidelines by lower courts. What is much less clear is how appellate courts might contribute to the sentencing process in jurisdictions that do not have mandatory guidelines. The question has become even more pressing since the United States Supreme Court's 2004 decision in *Blakely v. Washington*,

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1. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443 (1997).

2. *Id*. at 1443–44.

3. *Id*. at 1444.

4. *Id*. at 1446.

5. *Id*. at 1447.

6. Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post*-Blakely *Era*, 17 FED. SENT'G REP. 233, 239 n.3 (2005).

wherein the Court held that defendants have a jury-trial right with respect to fact-finding that increases their maximum punishment in a mandatory sentencing regime.[7] Such new procedural rights will surely discourage the adoption of mandatory sentencing guidelines in additional states. Indeed, the Sixth Amendment principle articulated in *Blakely* has already caused the federal system to shift from mandatory to nonbinding "advisory" guidelines.[8]

In this Article, I focus on one particular function that appellate courts might usefully perform in the modified federal system and in other jurisdictions lacking mandatory guidelines: that is, reviewing the adequacy of the explanations given by trial court judges to justify their sentencing decisions. A *de minimis* form of explanation review would ensure only that *some* explanation was offered on the record for the sentence imposed. I have in mind, though, a more rigorous form of review, in which appellate courts would insist on the identification of the considerations that played the most important role in the selection of the sentence, a discussion of how those considerations influenced the sentencing decision, and specific responses to any arguments made by the defendant for a more lenient sentence.

Such "explanation review" is conceptually distinct from substantive review of the sentence: the former asks whether the sentence *has been* adequately justified, while the latter asks whether the sentence *could be* adequately justified. To be sure, at the margins, explanation review can shade into substantive review, for an explanation cannot truly count as an explanation if some minimal standards of substantive rationality are not satisfied. It will not do for a judge to explain her sentence by saying, "I am sending you to prison for ten years because the Moon rose in Libra last night." Still, if rationality requirements are kept modest, explanation review can retain a methodologically distinct character from the sort of substantive review exemplified, for instance, by Eighth Amendment proportionality review.[9] Explanation review should thus be conceptualized as a species of procedural review[10]—bearing in mind that the substance/procedure distinction may have constitutional implications in this context, as substantive review of sentences is in tension with the *Blakely* principle.[11]

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7. 542 U.S. 296, 308, 313–14 (2004).

8. United States v. Booker, 543 U.S. 220, 245–46 (2005).

9. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003).

10. Nor is it the only conceivable form of procedural review. For instance, an appellate court might also consider whether the defendant was given adequate notice of and opportunity to be heard regarding the considerations that most affected the determination of his sentence.

11. Justice Scalia developed the constitutional analysis in his concurrence in *Rita v. United States*:

> Under such a system [in which trial courts, as a result of substantive review, lack full discretion to sentence within the statutory range], for every given crime

As a matter of formal doctrine, explanation review is already an accepted feature of the sentencing law in several jurisdictions.[12] But courts have struggled to give the explanation requirement coherent content, and few sentences are actually overturned on the basis of inadequate explanation.[13] As I have suggested elsewhere, the difficulties may stem, in part, from the courts' failure to appreciate what may be achieved through rigorous explanation review.[14]

Against this backdrop, my purposes in this Article are threefold. First, in Part II, I make the case for robust explanation review, identifying several useful purposes that are plausibly served by a systematically enforced explanation requirement. Second, in Parts III and IV, I describe and critique the explanation review jurisprudence in two specific jurisdictions. Although both jurisdictions, Wisconsin and the federal system, employ advisory sentencing guidelines, they illustrate two different extremes in the way that advisory guidelines may be handled in connection with explanation review. I will argue, in fact, that both approaches are flawed. Finally, in Part V, drawing on the best parts of the Wisconsin and federal case law, I propose a set of principles that may be used to give explanation review more precise and rigorous content.

II. THE CASE FOR EXPLANATION REVIEW

The functions potentially performed by explanation review fall into three categories: procedural justice, substantive justice, and transparency and information-sharing. Each category is examined separately below.

A. Procedural Justice

In the present context, procedural justice means treating the defendant

> there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment.

551 U.S. 338, 372 (2007) (Scalia, J., concurring in part and concurring in the judgment). Although the *Rita* majority rejected Justice Scalia's analysis in the context of a facial challenge, the Court did not preclude the possibility of as-applied challenges to the system of substantive review of sentences. *Id*. at 375.

12. *See, e.g.*, *Rita*, 551 U.S. at 356; State v. Gallion, 2004 WI 42, ¶ 28, 270 Wis. 2d 535, 678 N.W.2d 197; Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007); State v. O'Donnell, 564 A.2d 1202, 1205 (N.J. 1989).

13. *See, e.g.*, an "informational" provision appended to but not submitted for approval as part of MODEL PENAL CODE: SENTENCING § 7.ZZ cmt. k at 338 (Tentative Draft No. 1, 2007) [hereinafter MODEL PENAL CODE: SENTENCING] ("No state sentencing system with advisory guidelines has yet produced effective appellate-court scrutiny of trial-court penalties.").

14. Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 460–61 (2009) [hereinafter O'Hear, *Explaining Sentences*].

with respect throughout the process by which the sentence is determined and imposed, regardless of the severity of the punishment ultimately selected.[15] To some, it may seem perverse for a judge to go out of her way to provide respectful treatment to a person who has been found guilty of a crime and who is soon to suffer the just consequences. Yet, a considerable body of social psychological research suggests that respectful treatment during a legal decision-making process promotes (a) acceptance of the outcome of that process, regardless of the outcome's favorability; (b) perceptions that the legal authorities have legitimacy; and (c) a sense of obligation to obey the law in the future.[16] Thus, among other benefits, procedural justice in sentencing can advance the rehabilitation and crime-prevention ends of criminal law.[17] Moreover, respectful treatment helps to remind everyone involved that it is the defendant's conduct, not the defendant's person, that warrants condemnation; the defendant always retains his essential human dignity, which his fellow human beings are obliged to respect.[18] There is, in other words, an important ethical dimension to procedural justice.[19]

The social psychology research has identified several characteristics that can help to make a decision-making process "just" in the procedural sense.[20] Two, in particular, merit discussion. First, a decision maker enhances perceptions of procedural justice by displaying *neutrality*, that is, by providing reassurance that she "is unbiased, honest, and principled."[21] Second, a decision maker also enhances perceptions of procedural justice by exhibiting *consideration*, that is, by demonstrating that attention was actually paid to the arguments made by participants in the process, even if they were not ultimately found persuasive.[22]

Explanation review can thus advance the cause of procedural justice if it helps to ensure that sentencing judges provide reassurances of neutrality and consideration. To be sure, all sentencing judges likely perceive themselves to

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15. *See id.* at 476.

16. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420–22 (2008) [hereinafter O'Hear, *Plea Bargaining*].

17. *See id.* at 432–36 (discussing benefits of procedural justice to criminal justice system). The American Law Institute articulates a similar intuition in the tentative draft of MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2) cmt. o at 22 ("Even if a system of laws is built on morally sound precepts, and is well designed to further utilitarian goals, it fails if it cannot command the respect of those it governs.").

18. O'Hear, *Explaining Sentences*, *supra* note 14, at 476–77.

19. To the extent that victims participate in sentencing, they, too, ought to be treated in a procedurally just fashion for essentially the same reasons. *See* Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326–31 (2007).

20. *Id.* at 326–27.

21. O'Hear, *Plea Bargaining*, *supra* note 16, at 428.

22. *Id.* at 429.

be neutral and duly considerate of litigants' arguments. But, especially in the press of business in high-volume urban courtrooms, it is easy to imagine judges not giving much self-conscious attention to reassuring *others* of their neutrality and consideration. Yet, given the gulf of class, age, race, education, and other characteristics that typically separate defendants from judges, many defendants will surely approach sentencing with considerable skepticism that the court system is truly neutral and will pay attention to what they have to say. In this setting, appellate courts can play a helpful role by reminding sentencing judges to make explicit the aspects of their reasoning that enhance perceptions of respectful treatment.

With respect to neutrality, some of the particular concerns include perceptions that sentences may sometimes reflect racial or other improper forms of bias, personal vindictiveness, political grandstanding, or unconsidered emotional reactions to the crime. Judges may diminish these concerns by explaining their sentences by reference to general principles and by showing how those general principles justify the particular punishment imposed. Similarly, judges may enhance perceptions of neutrality by showing that their sentences are based on objective benchmarks.

Likewise, perceptions of consideration may be undermined by the sense that the judge has made up her mind before the defendant or the defendant's lawyer has had an opportunity to speak, or that the judge reflexively dismisses whatever is said by or on behalf of a defendant. Such concerns are likely allayed to the extent that the judge specifically responds to the major points made in the defendant's favor by explaining how each point influenced the sentence imposed or providing a reason why the point was not treated as a significant one.

In Part V, I will propose somewhat more detailed standards for explanation review that are intended to enhance perceptions of neutrality and consideration, but this should be sufficient for now to give a sense of how explanation review might contribute to procedural justice.

B. Substantive Justice

In sentencing, substantive justice has two dimensions. The first measures how well the sentence accomplishes the recognized purposes of sentencing. The basic federal sentencing statute, 18 U.S.C. § 3553(a), nicely captures the objective: "The court shall impose a sentence sufficient, but not greater than necessary, to achieve the purposes" of just punishment (retribution), deterrence, incapacitation, and rehabilitation.[23] This dimension, which I refer

23. A similar ideal is embraced in the American Bar Association's (ABA) STANDARDS FOR CRIMINAL JUSTICE § 18-6.1(a), at 219 (3d ed. 1994), and in the tentative draft of the American Law Institute's (ALI) MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2)(a)(iii), at 1.

to as "purpose-advancement" or "purposefulness," might be sufficient by itself, but for the fact that the purposes of sentencing are largely indeterminate. In any given case, different purposes might point in quite different directions.[24] And, even if the purposes were more consistent with one another or a system were devised for prioritizing purposes when they come into conflict,[25] the science and philosophy of punishment are not sufficiently advanced to translate a given set of offense and offender characteristics into a precise sentencing outcome.[26] I do not mean to say that purpose-advancement is a hopeless measure of justice; a due regard for purposes is apt to rule out the extremes of severity or lenience in many cases.

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24. For instance, while retribution theory tends to downplay the importance of criminal history and other offender characteristics, these factors will tend to play a much more important role in implementing incapacitative or rehabilitative purposes. This difference might matter a great deal to proportionality review in a range of different types of cases, such as those involving a defendant with a serious criminal history who commits a minor crime. This scenario, of course, was famously presented to the Supreme Court in *Ewing v. California*, in which a multiple-repeat offender received what was effectively a life sentence for shoplifting three golf clubs. 538 U.S. 11, 38–39 (2003) (Breyer, J., dissenting). As Justice Scalia suggested in a concurring opinion, the sentence seems hard to defend from the standpoint of retributive justice. *Id*. at 31–32 (Scalia, J., concurring). Yet, the Court nonetheless affirmed the sentence in the face of an Eighth Amendment proportionality challenge, with the plurality finding the sentence justifiable on grounds of incapacitation and deterrence. *Id*. at 32.

25. To be sure, a jurisdiction implementing proportionality review *might* do as the ALI has done and emphasize retribution as the single most important purpose of sentencing. MODEL PENAL CODE: SENTENCING, *supra* note 13, § 7.ZZ cmt. g at 329–31. It is far from clear, though, that sufficient social consensus exists regarding retribution for a jurisdiction to implement and maintain such a one-dimensional form of proportionality review. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, *supra* note 23, § 18-2.1 cmt. at 10 ("The Standards' drafters recognized that there is no national consensus regarding the operative purposes of criminal sentencing."). Minnesota's experience with mandatory sentencing guidelines provides an interesting case study. Although the state's guidelines were designed to achieve retributive purposes, the appellate cases implementing the guidelines system quickly recognized a variety of exceptions based on rehabilitative concerns. Reitz, *supra* note 1, at 1487.

26. As stated in the draft report on pending revisions to the Model Penal Code,

> Even when a decisionmaker is acquainted with the circumstances of a particular crime, and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is *precisely x*. . . . Instead, most people's moral sensibilities, concerning most crimes, will orient them toward a range of permissible sanctions that are "not undeserved." Outside the parameters of the range, some punishments will appear clearly excessive to do justice, and some will appear clearly too lenient—but there will nearly always be a substantial gray area between the two extremes.

MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2) cmt. b at 5. Professor Paul Robinson contends that the demands of retributive proportionality are far more precise than the ALI admits. Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 10 (2003). As I have argued else, however, I believe that Robinson overstates the specificity of retribution. O'Hear, *Plea Bargaining*, *supra* note 16, at 440–42.

But I do mean to suggest that even the most thoughtful and well-informed attempt to advance purposes in a particular case is less likely to produce a single, discrete, best sentence than a range of roughly equally acceptable outcomes.

Given this indeterminacy, a second dimension of justice also becomes important: uniformity. This concept, too, is nicely expressed by the federal sentencing statute: "The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[27] Defendants (or, for that matter, victims and the general public) may have a hard time evaluating whether defendants' sentences are just in the purpose-advancement sense, but will often more readily be able to see whether their sentences are in line with sentences given to others who are similarly situated.[28] Indeed, resentment over sentence disparities has been recognized as a source of disciplinary problems in prisons.[29] By contrast, uniformity in sentencing promotes respect for the law and greater *ex ante* predictability in punishment, which may enhance the deterrent effects of criminal law and the fairness and efficiency of plea bargaining.[30]

Explanation review is capable of advancing justice in both the purposefulness and uniformity senses. This may seem a counterintuitive claim, for I have characterized explanation review as procedural, not substantive, in nature; yet, I am now suggesting that explanation review may have salutary substantive effects. The connection between substance and procedure here is established through the concept of cognitive bias. Psychological research demonstrates that certain common human tendencies often distort the exercise of judgment by causing decision makers to give too much weight to some considerations and not enough to others.[31]

Of particular concern for present purposes are cognitive biases that cause earlier received information to receive greater weight than later received information, even though the ordering of the information may have little to do with its actual relevance. For instance, there is the anchoring effect: a large

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27. 18 U.S.C. § 3553(a)(6) (2006). The uniformity objective has also been embraced in the ABA's STANDARDS FOR CRIMINAL JUSTICE, *supra* note 23, § 18-2.5(b), at 31, and in the tentative draft of MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2)(b)(ii), at 1–2.

28. O'Hear, *Plea Bargaining*, *supra* note 16, at 437–40, 442.

29. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 760, 773 (2006) [hereinafter O'Hear, *Original Intent*].

30. *See id.* at 769–70; Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 309, 312–13, 319–20 (2005).

31. For an overview of some of the literature on cognitive bias, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78, 1518–19, 1523–24, app. at 1548–50 (1998).

body of research indicates that "the articulation of a number—even an arbitrarily selected number—at the start of a decision-making process may play an important role in shaping the final outcome."[32] Thus, in sentencing, the initial articulation of a possible sentence length (say, in the form of a recommendation by an advisory guideline, a prosecutor, or a presentence investigation report) may cause that number to exert an important gravitational pull on the ultimate sentencing decision, even though it may not necessarily reflect adequate consideration of the full range of purposes of sentencing, the case-specific facts relevant to those purposes, or the sentences imposed on similarly situated defendants in other cases.

A similar source of bias is the phenomenon of belief perseverance: as people process new information, they generate theories about its meaning and significance; information received later then tends to be assimilated to the theory or discarded.[33] Consider how belief perseverance might play out in sentencing. The first information a judge receives about a case is apt to relate to the unjustified harm that the defendant has caused or threatened to cause; this will be the focus of the charging instrument, as well as the presentation of evidence at trial or (more frequently) the determination of whether there is a factual basis for the defendant's guilty plea. In the face of such information, the judge is apt to form a theory that the offense was a severe one and the defendant is a dangerous person.[34] Mitigating information (e.g., the defendant's difficult upbringing and economic circumstances, cognitive limitations, mental illness, family responsibilities, prior good works, and post-offense rehabilitative efforts) will typically have to wait for the sentencing process itself. Assimilated to an earlier formed theory of depravity, however, this information is easily discounted: for instance, the presentation of

32. Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After* Booker, 37 MCGEORGE L. REV. 627, 645 (2006); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515–19 (2004) (describing the anchoring effect). To be sure, it is important to realize that the strength of this and other forms of cognitive bias may vary considerably among different individuals and in different situations, and the results of laboratory studies (typically involving undergraduate students) should not be uncritically ascribed to highly educated decision makers operating in professional settings. Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72–73 (2002). Studies of judges, however, do indicate that judicial decisions are hardly immune from anchoring effects and other forms of bias. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19–29 (2007).

33. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 608–14 (2002).

34. Bail determinations may provide an early opportunity for a defendant or his lawyer to present more positive information, but these are often cursory affairs, Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1726–27 (2002), and may be overseen by a magistrate or a judge other than the one who will impose sentence.

difficulties in life may be seen as an attempt to shift responsibility for the offense to others; cognitive limitations and mental illness may be seen as support for the view that the defendant is a dangerously unstable person with poor prospects for rehabilitation; and post-offense rehabilitative efforts may be seen as insincere and self-serving. The information might be processed quite differently—perhaps in a more effective, purpose-advancing way—if simply presented in a different order.

Cognitive science thus provides reasons to doubt whether judges are fully taking into account all of the information that is available to them that is relevant to the determination of a purposeful, uniform sentence. Indeed, there are a number of other forms of cognitive bias that may also diminish the quality of sentencing outcomes, such as racial bias[35] and bias induced by highly emotional victim impact testimony.[36] Of course, to note tendencies toward cognitive bias is not to say that such biases routinely infect sentences. And one hopes that judges self-consciously seek to avoid bias and attend fully to all relevant information, and that defense lawyers, presentence investigation report authors, and even prosecutors take it upon themselves to highlight important information that might otherwise get lost in the cognitive shuffle. But, of course, judges, defense lawyers, probation officers, and prosecutors are often spread thin and may have little appreciation of the cognitive pitfalls. Given these realities, process requirements enforced by the appellate courts may make a helpful contribution.

More specifically, psychological research suggests that requiring people to explain the basis for their decisions tends to mitigate cognitive biases and lead to better consideration of the full range of available information.[37] This phenomenon may result in part from the fact that explaining decisions increases accountability,[38] which can "attenuate biases that arise from lack of self-critical attention to one's decision processes and failure to use all relevant

35. *See* BRENDA R. MAYRACK, WIS. SENT'G COMM'N, RACE & SENTENCING IN WISCONSIN: SENTENCE AND OFFENDER CHARACTERISTICS ACROSS FIVE CRIMINAL OFFENSE AREAS 3 (2007) (discussing research indicating that criminal justice actors perceive blacks to be "uniquely threatening" and linking "Afrocentric facial features" with longer sentences, even holding offense severity and criminal history constant); Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 106 (2006) ("[A]n emerging body of research on implicit bias suggests that racial stereotypes shape perceptions of the seriousness or dangerousness of particular situations and social problems . . . .").

36. Bryan Myers et al., *Psychology Weighs in on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 FED. SENT'G REP. 13, 14–17 (2006).

37. Guthrie et al., *supra* note 32, at 36–38 (discussing how explanation requirements often induce deliberation and reduce intuitive or impressionistic reactions that may be biased); Mitchell, *supra* note 32, at 134–35 (noting how explanation requirements may reduce certain gain/loss framing effects in choice).

38. Mitchell, *supra* note 32, at 135.

cues."[39] There are also benefits that may arise from requiring explanations to respond to the major arguments made by the parties: studies indicate that "directing experimental subjects to consider alternative or opposing arguments, positions, or evidence has been found to ameliorate the adverse effects of several biases, including the primacy or anchoring effect [and the] biased assimilation of new evidence."[40]

Such research suggests that appellate review of sentence explanations could help to ensure that the underlying decisions reflect more careful consideration of all of the available information bearing on purposefulness and uniformity. Again, Part V will suggest more specific legal principles to achieve these substantive justice goals.

C. Transparency and Information-Sharing Benefits

A thorough sentence explanation creates a permanent record of what the judge found to be important about the case and why. This information may be valuable in a number of respects. For instance, in a jurisdiction with substantive appellate review of sentences, a good record of the sentencing judge's views of the case may assist the appellate court by drawing its attention to what another judicial officer thought to be the most salient offense and offender characteristics.[41]

More generally, good explanations become a conduit by which the particular insights and experiences of trial court judges can pass to sentencing policy makers. Trial court judges occupy a unique position in the criminal justice system. Their perspective is more like that of a prosecutor or public defender than that of an appellate judge—inasmuch as they see many more criminal cases than appellate judges, and in much richer detail—but they do not have the limitations that come with the advocate's role. A trial court judge's position may thus provide important insights into such matters as the relative severity of different types of offenses, the effects of incarceration on defendants and defendants' families, the significance of apology, the structure of criminal organizations, and the exercise of discretion by police and prosecutors—all matters bearing on the selection of a just sentence. For these reasons, the framers of the Federal Sentencing Guidelines (Guidelines) system

39. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 265 (1999).

40. Mitchell, *supra* note 32, at 133.

41. Although the constitutionality of substantive review is questionable, *see supra* note 11, it remains a feature of sentencing practice in some jurisdictions. *See, e.g.*, Gall v. United States, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed . . . ."); IND. R. APP. P. 7(B) ("The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.").

recognized from the start the benefits of a robust feedback loop from the judiciary to the Sentencing Commission for the purpose of improving the Guidelines over time.[42] There seems no reason that state sentencing commissions, where they exist, could not also benefit from such a feedback loop.[43] Legislatures might also benefit from a rich record of trial court perspectives on sentencing.[44] So, too, would new judges whose own views of sentencing are not yet fully developed.

Finally, prosecutors and defense lawyers could also benefit from a richer record of judicial sentencing wisdom, if only to help them better tailor their presentations to the particular interests of individual judges. To be sure, there is much folk wisdom among practitioners about what different judges look for at sentencing, but folk wisdom is not infallible—think of that childhood game "telephone"—and new or infrequent criminal law practitioners may not have ready access to the folk wisdom.

D. Summary

The case for explanation review thus rests on a vision of the sentencing process as respectful, purposeful, uniform, and transparent. Nor is this vision an idiosyncratic one; as I have argued elsewhere, this vision animated the national sentencing reform movement that gathered steam in the 1970s and culminated in the adoption of the federal Guidelines in the 1980s.[45] As will be shown in the next Part, the Wisconsin Supreme Court has also embraced this vision in its explanation review cases.[46] Although explanation review

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42. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. ed. note (2006) (reprinting introductory note to original 1987 edition of the Guidelines Manual, at § 1A4(b): "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines . . . .").

43. Indeed, the ALI has embraced this ideal in the tentative draft of MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6A.05(5), at 102.

44. Ideally, policy makers would gain access to sentencing explanations through an agency, such as a sentencing commission, that would systematically collect and synthesize them. Even in the absence of such an agency, however, the feedback loop could still function through media coverage of high-profile sentencings and the publication of written sentencing opinions in case reporters.

45. O'Hear, *Original Intent*, *supra* note 29, at 752.

46. Similar ideals lie behind the tentative draft of MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2)(a), 1.02(2)(b)(ii), 1.02(2)(b)(viii), at 1–2 (embracing purpose-advancing sentencing, uniformity, and transparency as general purposes of sentencing provisions of the Model Penal Code). Not surprisingly, in justifying the requirement that departures from presumptive guidelines be explained, the tentative draft offers a similar set of reasons to those I have given for a more general explanation requirement. First, "[m]any flaws in reasoning, or insights otherwise hidden, come to light only through the effort of explanation." *Id.* § 7.XX cmt. e at 277. "Second, the requirement serves the goal of communication of each judge's reasoning process to other judges, and others in the sentencing system." *Id.* at 278. Third, the requirement facilitates appellate review of departure decisions. *Id.* "Finally, the requirement of a statement of reasons is intended to enhance the legitimacy of the sentencing process in the eyes of the offender, the victim, and the public." *Id.* at 279.

cannot guarantee that sentencing will always live up to the reformist vision, there are good reasons to think that rigorously enforced explanation standards can make a significant contribution to its realization.

III. THE WISCONSIN EXPLANATION REQUIREMENT

The Wisconsin Supreme Court first clearly embraced a sentencing explanation requirement in its 1971 decision in *McCleary v. State*.[47] *McCleary*, however, proved to have little practical effect.[48] Thirty-three years later, the court attempted to reinvigorate the explanation requirement in *State v. Gallion*.[49] Again, however, there is little evidence of any significant, sustained practical effects.[50] In this Part, I will identify weaknesses in the *McCleary* and *Gallion* opinions that have diminished the quality of explanation review in Wisconsin. Much of the difficulty in Wisconsin stems from the appellate courts' failure to insist on the use of objective benchmarks in explaining sentences. This failure was vividly confirmed by the Wisconsin Supreme Court's 2007 decision in *State v. Grady*,[51] in which the court affirmed that Wisconsin's advisory sentencing guidelines need not play any meaningful role in the determination and explanation of sentences. After assessing *McCleary* and *Gallion*, this Part thus concludes with a discussion of *Grady*.

A. McCleary

In some respects, *McCleary* was a visionary opinion, one that drew as much on the national sentencing reform movement as it did on Wisconsin precedent. In so doing, *McCleary* hitched Wisconsin's sentencing jurisprudence to some of the major objectives that drove the development of the Federal Sentencing Guidelines system, including the ideals of respectful, purposeful, and transparent sentencing. Yet, the ambitious purposes endorsed by *McCleary* were undermined by doctrinal vagueness and hesitancy at key points.

In *McCleary*, the sentencing judge imposed an indeterminate prison term of up to nine years on a check forger with no prior criminal history.[52] He cited the defendant's lack of remorse as a reason for not ordering probation, but, as the Wisconsin Supreme Court put it, the judge "made no attempt to explain why the near-maximum sentence was appropriate in the

47. 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

48. *See infra* note 70.

49. 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

50. *See infra* note 98.

51. 2007 WI 81, 302 Wis. 2d 80, 734 N.W.2d 364.

52. 49 Wis. 2d at 269–70, 182 N.W.2d at 516.

circumstances."[53] Because of the lack of explanation, the supreme court concluded that the sentencing judge had abused his discretion.[54] The supreme court then reduced McCleary's sentence to an indeterminate term of up to five years.[55] In settling upon this number, the court relied on the fact that five years was the maximum McCleary could have gotten under three sets of model sentencing guidelines prepared by national law reform organizations.[56]

Although *McCleary* plainly endorsed explanation review by the Wisconsin courts, the premise on which the case was decided—that the sentencing judge "gave *no* reason" for the sentence[57]—meant that the supreme court did not have to provide a fine-grained analysis of what it would take for an explanation to pass muster. But, through its lengthy reasoning and dicta, the *McCleary* court sent a variety of signals, not entirely consistent with one another, as to what it hoped to accomplish.

On the one hand, *McCleary* adopted an ambitious set of objectives for appellate sentencing review—objectives that were expressly borrowed from the national sentencing reform movement. Quoting the ABA's Approved Standards on Appellate Review of Sentences, the court specifically endorsed the following objectives:

> "(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
> (iv) to promote the development and application of criteria for sentencing which are both rational and just."[58]

The first and fourth of these objectives fit broadly under my heading of "purpose-advancing" sentencing, the second and third relate to the purposes of procedural justice, and the fourth embodies an aspect of the informational

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53. *Id*. at 270, 182 N.W.2d at 516.

54. *Id*. at 282, 182 N.W.2d at 522.

55. *Id*. at 291, 182 N.W.2d at 526.

56. *Id*. at 289, 182 N.W.2d at 525–26. The model guidelines were those contained in the Model Sentencing Act, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency; the Model Penal Code, prepared by the ALI; and the Standards Relating to Sentencing Alternatives and Procedures, prepared by the ABA. *Id*., 182 N.W.2d at 525.

57. *Id*. at 284, 182 N.W.2d at 523 (emphasis added).

58. *Id*. at 274–75, 182 N.W.2d at 518 (quoting STANDARDS ON APP. REVIEW OF SENTENCES § 1.2, at 7 (1968)).

benefits of explanation review.[59]

Despite such high aspirations, various aspects of the opinion made it unlikely that *McCleary* would actually have much sustained impact. For one thing, *McCleary* seemed to demand very little by way of explanation:

> [A]ll an appellate court can ask of a trial judge is that he state the facts on which he predicates his judgment, and that he give the reasons for his conclusion. If the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed.[60]

There is certainly no suggestion here that an explanation need be responsive to the parties' arguments, that the judge must discuss relevant benchmarks, or that sentences must be expressly related to any of the overarching purposes of punishment. Short of overt racism or another obviously impermissible form of discrimination, it is not clear how any explanation that referenced at least a few case-specific facts would actually fail the *McCleary* test.

McCleary's force was further diluted by the opinion's affirmation of a "'strong policy against interference with the discretion of the trial court in passing sentence.'"[61] Also in this vein, the court indicated that the appellate standard of review for sentences was the same deferential "abuse of discretion" standard used in some civil contexts.[62] Although the deference was not so limitless as to save McCleary's own sentence, the court's analysis of the facts particularly emphasized aspects of the sentencing judge's conduct

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59. In discussing these objectives, the *McCleary* court drew on reasoning that particularly emphasized the contributions an explanation requirement would make to the goals of purposefulness, uniformity, and information-sharing:

> "[T]he requirement that the sentencing judge articulate the basis for his sentence will assist him in developing for himself a set of consistent principles on which to base his sentences . . . .
>
> . . . .
>
> . . . Since determining what sentence to impose has nearly always been a matter of judicial discretion, few opinions have been written to explain sentences. The knowledge and wisdom of individual judges have thus died with them. Sentence review at least holds out the hope that the knowledge and wisdom of our experts will not die with them. It also holds out the hope that our system will be fairer and more equitable for that reason."

Id. at 280, 182 N.W.2d at 521 (quoting STANDARDS RELATING TO APP. REVIEW OF SENTENCES § 1.2(d) cmt. at 29 (Approved Draft 1968) (internal quotation marks and citation omitted).

60. *McCleary*, 49 Wis. 2d at 281, 182 N.W.2d at 521.

61. *Id*. at 276, 182 N.W.2d at 519 (quoting State v. Tuttle, 21 Wis. 2d 147, 150, 124 N.W.2d 9, 11 (1963)).

62. *McCleary*, 49 Wis. 2d at 277, 182 N.W.2d at 519–20.

that were unusual or easily avoided in future cases, to wit, the failure to offer *any* explanation for a sentence just below the statutory maximum of ten years and the reliance on a presentence investigation report prepared by "a new and inexperienced caseworker, who had, according to the record, no prior experience or training in probation work."[63]

Perhaps the greatest good that *McCleary* could have accomplished would have been if lower courts had regarded as a model the supreme court's own explanation for McCleary's modified five-year sentence, which was thoughtfully based on available benchmarks. One benchmark the court used was the statutory range:

> Since it is the role of the courts to find rationality in legislative enactments where possible, we must conclude that the legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation or lighter sentences were to be used in cases where the protection of society and the rehabilitation of the criminal did not require a maximum or near-maximum sentence. The legislature intended that individual criminals, though guilty of the same statutory offense, were not necessarily to be treated the same but were to be sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy.[64]

Taking these considerations into account, the court concluded that a sentence near the top-of-the-range benchmark was not warranted:

> Our review of the record . . . convinces us that this is a run-of-the-mine forgery case, less aggravated than many. None of the facts set forth in the presentence report or the entire record justifies a ten-year sentence. There is nothing in the record to show any tendency toward violence or a tendency to persist in criminal conduct.[65]

Interestingly, this conclusion that the case was "run-of-the-mine" was reached just two paragraphs after the opinion's author, Justice Heffernan, referenced his own fifteen years of experience as a prosecutor,[66] thereby implicitly suggesting a second sort of benchmark, that being the sentencing judge's own prior cases.

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63. *Id*. at 283, 182 N.W.2d at 522.
64. *Id*. at 275, 182 N.W.2d at 519.
65. *Id*. at 286, 182 N.W.2d at 524.
66. *Id*. at 285, 182 N.W.2d at 523.

Another set of benchmarks, as noted above, was supplied by the model sentencing guidelines developed by national organizations, all of which would have established a five-year maximum for McCleary.[67] The court treated this five-year level as the maximum sentence within the range of reasonableness, and then actually imposed the five years in deference to the trial judge's apparent desire to err on the side of a longer sentence for McCleary.[68]

In all of this (save, of course, for the final step of deferring to the lower court), the Wisconsin Supreme Court provided a thoughtful model for how a sentencing judge might combine case-specific factors, overarching purposes of sentencing, and objective benchmarks in arriving at an appropriately explained sentence. But, importantly, all of this analysis took place in the context of arriving at a modified sentence for McCleary *after it was already decided that his sentence had not been adequately explained*, not in the context of delineating mandatory features of the explanation requirement. Given the tendency of lawyers and judges to focus on what is truly required, it should be no surprise that *McCleary* had far less impact than the reformers of the early 1970s might have hoped.

B. Gallion

Thirty-three years later, the Wisconsin Supreme Court expressly sought to reinvigorate *McCleary* in *Gallion*. After quoting *McCleary*'s admonition that "'requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed,'"[69] the *Gallion* court observed:

> Those words are as true today as they were when they first appeared in *McCleary*. Yet, sentencing courts have strayed from the directive. Instead, for some, merely uttering the facts, invoking sentencing factors, and pronouncing a sentence is deemed sufficient. Such an approach confuses the exercise of discretion with decision-making.[70]

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67. *Id*. at 289–90, 182 N.W.2d at 525–26.

68. *Id*. at 290–91, 182 N.W.2d at 526.

69. State v. Gallion, 2004 WI 42, ¶ 1, 270 Wis. 2d 535, 678 N.W.2d 197 (quoting *McCleary*, 49 Wis. 2d at 281, 182 N.W.2d at 521).

70. *Gallion*, 2004 WI 42, ¶ 2. The court also quoted with approval similar criticisms from the intermediate court of appeals:

> "[T]he collective memory of the panel members assigned to this appeal could not produce any ready examples of cases since [*McCleary*] in which an appellate court overturned a sentence determination, absent the use of an improper factor or other illegality . . . .
>
> There appears to be some truth to the appellant's contention that a trial court that articulates the magic words 'seriousness of the offense,' 'character of the offender' and 'need to protect the public' will avoid any meaningful review of

After more than three decades of "mechanical" compliance with *McCleary*,[71] why did the Wisconsin Supreme Court attempt to reinvigorate the *McCleary* explanation requirement in *Gallion*? The answer, at least in part, seems to lie in the recent abolition of parole in Wisconsin. In the view of the *Gallion* court, the switch from indeterminate to determinate sentencing rendered *McCleary*'s mandates more urgent than ever because parole boards no longer "served as a check on sentencing courts' exercise of discretion."[72]

The more immediate cause of *Gallion*, though, was a fatal car collision that resulted from an intoxicated driver running a red light.[73] The driver, Gallion, pled guilty to homicide by intoxicated use of a motor vehicle and was sentenced to prison for twenty-one years.[74] On appeal to the Wisconsin Supreme Court, Gallion challenged his sentence on several grounds, including the adequacy of the explanation provided by the sentencing judge.[75]

Before addressing the specifics of Gallion's arguments, the supreme court first offered a lengthy, general discussion of the *McCleary* explanation requirement. Indeed, the court offered considerably more guidance, including somewhat more exacting legal standards, than did *McCleary* itself. Recall that *McCleary* demanded "facts" and "reasons," but suggested that the reasons would be deemed adequate as long as they did not indicate the consideration of legally improper factors. By contrast, in its desire to end "mechanical sentencing," the *Gallion* court required a more thorough explanation, including the following components:

> [Sentencing] courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.
>
> Courts are to identify the general objectives of greatest importance. These may vary from case to case. . . .

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the sentence it imposes.

Id., ¶ 27 (quoting State v. Crouthers, No. 99-1307-CR, 2000 WL 336730, at *2 (Wis. Ct. App. Mar. 30, 2000)). For an unusual example of a pre-*Gallion* decision by the court of appeals that overturned a sentence on *McCleary* grounds, see *State v. Hall*, 2002 WI App 108, ¶¶ 19–21, 255 Wis. 2d 662, 648 N.W.2d 41. The same case also includes a concurring opinion that rebuked the trial court judge in unusually direct terms for repeated failures to provide adequate explanations of sentences and other rulings. *Id.*, ¶¶ 22–40 (Schudson, J., concurring).

71. *See Gallion*, 2004 WI 42, ¶ 26 (criticizing the "mechanical form of sentencing" that resulted from the "disconnect" between *McCleary*'s "principles as-stated and its principles as-applied").

72. *Id.*, ¶ 33.

73. *Id.*, ¶ 10.

74. *Id.*, ¶¶ 11, 13.

75. *Id*. ¶ 14.

> Courts are to describe the facts relevant to these objectives. Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.[76]

The vision is one of purpose-advancing sentencing: "In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives."[77] The *Gallion* court, moreover, insisted that the "linkage" between facts and purposes, on the one hand, and the sentence imposed, on the other, be stated on the record.[78] The court observed, "Allowing implied reasoning rather than requiring an on-the-record explanation for the particular sentence imposed lies at the heart of [*McCleary*'s] erosion."[79]

When I teach *Gallion* in my Sentencing class, I invoke the "underpants gnomes" from the television series *South Park*.[80] As they explain to the child-protagonists of *South Park*, the underpants gnomes have a three-step plan: (1) collect underpants, (2) [awkward silence], (3) profits. The plan is laughable, of course, because it is missing the most important and difficult part: the transformation of underpants into profits. The gnomes have an input (underpants) and a desired output (profits), but no idea how to connect them. *Gallion*, I think, is really criticizing Wisconsin sentencing courts for being underpants gnomes: they recite an input (case-specific facts and generic purposes of sentencing) and an output (the particular sentence imposed) without explaining how the input relates to the output. Something else besides facts and purposes must be stated before a sentence of, say, twenty-one years in prison can truly be said to have been explained.

How might the requisite linkage be established? In answering this question, the *Gallion* court had both a crucial insight and, perhaps, a failure of nerve. The insight relates to the use of benchmarks: "Because we recognize the difficulty in providing a reasoned explanation in isolation, we encourage [sentencing] courts to refer to information provided by others."[81] Note, though, how the court shifted from the mandatory language used elsewhere in the opinion to language of "encourage[ment]"—this is what strikes me as a failure of nerve. In elaborating on this point, the court continued to use

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76. *Id.*, ¶¶ 40–42 (citation omitted).

77. *Id.*, ¶ 46.

78. *Id.*

79. *Id.*, ¶ 50.

80. A video clip of the exchange, titled "The Underpants Business," can be viewed at http://www.southparkstudios.com/clips/151040. The entire episode, *South Park: Gnomes* (Comedy Central television broadcast Dec. 16, 1998), can be viewed at http://www.southparkstudios.com/episodes/103595/.

81. *Gallion*, 2004 WI 42, ¶ 47.

discretionary language: "Courts *may* . . . consider information about the distribution of sentences in cases similar to the case before it."[82] The court also noted the availability of advisory sentencing guidelines prepared for some offenses by the Wisconsin Criminal Penalties Study Committee.[83]

The court's failure to more forcefully insist on the consultation of benchmarks seriously undermined its effort to reinvigorate the *McCleary* explanation requirement, for it is not clear otherwise how a persuasive linkage may be articulated between sentencing inputs and outputs. As discussed above, the science and philosophy of sentencing are not adequately developed to generate some precise sentencing output given some particular set of offense and offender characteristics.[84] In the absence of a precise and reliable analytical process intrinsic to the recognized purposes of sentencing, it is hard to have confidence that any given sentence was arrived at in an objective, non-arbitrary fashion without some reference to benchmarks extrinsic to the purposes themselves.[85]

The *Gallion* court's most helpful gesture in this direction was to establish something of a rebuttable presumption in favor of probation. *Gallion* indicated that sentencing courts "should consider probation as the first alternative. Probation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense."[86] Probation thus became a generic benchmark for all cases. But this benchmark is of little value in the many cases in which probation is not on the table as a serious option, and the sentencing judge's real task is to select a substantial term of incarceration within a wide range (as in the *Gallion* case itself, where the judge could have selected any sentence up to forty years of confinement[87]).

Two possible explanations for the court's failure of nerve come to mind. First, the court may have been concerned about the limited availability of

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82. *Id*. (emphasis added).

83. *Id*.

84. *See supra* notes 24–26.

85. The American Law Institute makes a similar point in the tentative draft of MODEL PENAL CODE: SENTENCING:

> An inescapable difficulty, in any sentencing policy that incorporates moral intuitions or constraints, is that people of good faith often disagree about what justice demands in particular cases. Systemwide benchmarks for the determination of proportionate sanctions provide a useful starting point for reasoned case-specific analysis in the criminal courtrooms.

See MODEL PENAL CODE: SENTENCING, *supra* note 13, § 1.02(2) cmt. c at 10.

86. 2004 WI 42, ¶ 44.

87. *Id*., ¶ 74.

statewide benchmarks: the sentencing guidelines cover only eleven offenses,[88] while good statewide data on actual sentencing practices are hard to come by. But a variety of solutions to the problem are available. State guidelines might be consulted for the many offenses that are analogous to the eleven expressly covered.[89] Guidelines prepared by national organizations or agencies might be consulted, as the *McCleary* court itself had done. Likewise, guidelines from other states might also be consulted, such as the nationally well-regarded guidelines of Wisconsin's neighbor to the west, Minnesota.[90] The Wisconsin statutory maximum might also be employed as a benchmark, as *McCleary* had done. Additionally, as implicitly suggested by *McCleary*, a sentencing judge might reference her own prior cases,[91] as well as similar cases sentenced in the same county or reported in the published case law or in the media.

To be sure, all of these benchmarks are flawed in one way or another. But that does not mean they are totally unhelpful, particularly when multiple benchmarks all point roughly in the same direction. Recall, for instance, that all three model sentencing guidelines consulted by the *McCleary* court pointed to a maximum sentence of five years, which helped to convince the court that five years was at the top of the range of reasonability for McCleary's offense.

A second possible explanation for the court's failure of nerve lies in the court's desire to avoid overly formulaic, numbers-driven sentencing. As the *Gallion* court itself noted, "Individualized sentencing . . . has long been a cornerstone to Wisconsin's [sentencing] jurisprudence. [N]o two convicted felons stand before the sentencing court on identical footing . . . and no two cases will present identical factors."[92] Indeed, the Wisconsin Supreme Court was undoubtedly aware that the federal sentencing system, which had long been criticized for being too formulaic, had been specifically considered and rejected as a model for Wisconsin in the late 1990s.[93] Yet, the *Gallion* court could have more firmly embraced the use of objective benchmarks without transforming Wisconsin sentencing into anything closely resembling the disfavored federal system. More specifically, the court's mandate could have

88. Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT'G REP. 15, 16–17 (2002).

89. The tentative draft of MODEL PENAL CODE: SENTENCING also recommends such consultation of analogous guidelines for offenses not covered by the guidelines. *See* MODEL PENAL CODE: SENTENCING, *supra* note 13, § 7.XX cmt. i at 283.

90. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, *supra* note 23, at xxi–xxv (noting use of the Minnesota system as the model for the sentencing provisions of the ABA's *Standards for Criminal Justice*).

91. *Supra* note 66 and accompanying text.

92. 2004 WI 42, ¶ 48 (alteration in original) (internal quotation marks and citation omitted).

93. Hammer, *supra* note 88, at 16.

been framed, not in terms of conformity to any particular benchmark, but in terms of consultation of a range of benchmarks, with freedom on the part of the sentencing judge to reject any or all proposed benchmarks so long as some reason was given for the rejection.

Whatever the explanation for the court's failure of nerve, its effect became apparent in the second half of the *Gallion* opinion, in which the court shifted its attention from general principles to a specific consideration of the defendant's contentions. Where *McCleary* offered a model of thoughtfully explained sentencing, *Gallion* was guilty of the same shallow analysis for which it rightly criticized the state's lower courts.

The defendant's central contention was that his sentence was inadequately explained:

> [H]e contends that re-sentencing is required in light of the [sentencing] court's failure to describe the comparative weight given to the factors it identified, or to explain why the sentence constitutes the minimum amount of necessary confinement. Gallion complains, "almost any number of years in prison could be plugged in [the sentence imposed]." He further asserts that, "the court never stated how much incarceration was needed to accomplish rehabilitation/protection, or how, or why, 21 years of incarceration was needed . . . ."[94]

He complained, in short, that the sentencing judge in his case had been an underpants gnome.

The Wisconsin Supreme Court nonetheless affirmed. In reviewing the sentencing transcript, the court cataloged the sentencing judge's citation of purposes and case-specific facts. For instance, the supreme court observed,

> [T]he circuit court took into account the need to protect the public from Gallion and others like him. It determined that the defendant could best accomplish his rehabilitation in an institutional setting. The court also observed that society has an interest in punishing Gallion so that his sentence might serve as a general deterrence against drunk driving.[95]

The sentencing judge made similar case-specific findings with respect to retributive purposes.[96] But none of this is truly responsive to Gallion's contention that the same purposes and facts might have been cited in support of almost any sentence length. It is not at all obvious why the rehabilitative,

94. 2004 WI 42, ¶ 53.

95. *Id.*, ¶ 61.

96. *See id.*, ¶ 59 (discussing "gravity of the offense").

incapacitative, deterrent, and retributive purposes that were on the sentencing judge's mind could not have been equally well, or even better, served by a sentence of five years or forty years.

The explanation for Gallion's sentence would have been far more analytically satisfying—would have been more truly an "explanation"—had relevant benchmarks been invoked. Imagine, for instance, if the sentencing judge had said, in addition to his other conclusions regarding facts and purposes, something to the effect of:

> Gallion was convicted of a Class B felony. His criminal history, addiction, poor education and employment record, and failure to take advantage of earlier treatment opportunities justify his classification as a high-risk offender under the classification system used in the Wisconsin sentencing guidelines. The two available sentencing guidelines for other Class B felonies indicate a range of five to forty years and ten to forty years, respectively, for high-risk offenders. To be sure, these guidelines relate to different offenses, first-degree sexual assault and first-degree sexual assault of a child. But the offenses are analogous to homicide by intoxicated operation of a car in that all three are very serious crimes against the person. Gallion's crime is arguably more serious in that it necessarily involved a loss of life. On the other hand, his crime was something of a strict liability offense, which arguably requires less by way of bad intentions than the other two crimes. On the whole, I find the guidelines for the other Class B felonies to be helpful benchmarks in sentencing Gallion.
>
> Although Gallion's crime was a very serious one, in that a life was lost, we must remember that everyone who commits the same offense as Gallion is, by definition, responsible for the loss of a life. Within the group of homicide by intoxicated operation cases, I find nothing highly aggravated or mitigated about the severity of Gallion's offense, although the fact that Gallion was so far above the legal blood alcohol limit makes his conduct a little bit more aggravated than that of others. For a crime of midrange severity committed by a high-risk offender, the existing guidelines for Class B offenses call for a range of fifteen to thirty or ten to twenty-five years. The sentence of twenty-one years I have selected is just slightly above the midpoint of those ranges. This is appropriate for a case that is slightly aggravated relative to other cases in which the same offense was committed by a high-risk offender.

This proposed explanation is not beyond criticism, and it is certainly not the only possible way to bring benchmarks to bear, but it does provide some meaningful linkage between the facts of the case and the sentence imposed, as the first half of the *Gallion* opinion indicated was necessary.[97]

In the end, it is hard to see how *Gallion* advanced much beyond *McCleary*. To be sure, *Gallion* helped a little by stating more clearly than its predecessor that explanations must identify which of the general purposes of punishment are being served by a sentence, and which facts were found relevant to determining what those specified purposes require. But the real criticism of pre-*Gallion* sentencing was not a failure to recite appropriate purposes and facts, but that purposes and facts were discussed in a mechanical way without clear linkages established to the sentence imposed. When it comes to addressing this problem, *Gallion* missed the mark by (a) failing to insist more forcefully on the use of benchmarks, which can contribute a great deal to making the requisite analytical linkages; and (b) affirming Gallion's sentence, despite the sentencing judge's apparent failure to do anything more than recite relevant purposes and facts.[98]

C. Grady

If the Wisconsin Supreme Court left any doubts about its disinterest in enforcing the consideration of benchmarks, those doubts were put to rest by its 2007 decision in *State v. Grady*.[99] In contrast to *Gallion*, *Grady* dealt with an offense, armed robbery, for which a sentencing guideline was available. Ample statutory authority existed in this context to enforce the explicit consideration of the guideline as a benchmark. Indeed, the relevant statutory language from section 973.017(2) of the Wisconsin Statutes (the sentencing court "shall consider" an applicable guideline) uses the exact same mandatory language found in the federal sentencing statute, 18 U.S.C. § 3553(a), which (as we shall see in the next Part) has been interpreted to require express

97. *Id.*, ¶ 46.

98. As might have been expected based on these aspects of *Gallion*, the decision has not had much discernible impact at the intermediate court of appeals level. I find only two instances in which the court of appeals has overturned a sentence under *Gallion* based on a trial court's failure to adequately explain an initial term of confinement. *See* State v. Nunez, No. 2004AP3347-CR, 2006 WL 627164 (Wis. Ct. App. Mar. 15, 2006); State v. Perkins, No. 04-0302-CR, 2004 WL 1925891 (Wis. Ct. App. Aug. 31, 2004). Both opinions are unpublished, which seemingly reflects a reluctance to encourage additional *Gallion* claims. The impression is strengthened by the court of appeals' opinion in an early post-*Gallion* case, *State v. Stenzel*, in which *Gallion* was treated almost disdainfully. 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20 ("While *Gallion* revitalizes sentencing jurisprudence, it does not make any momentous changes. . . . Having been reinvigorated, we now turn to Stenzel's arguments."). To be sure, a handful of additional court of appeals decisions overturn sentences on *Gallion* grounds, but these cases focus on matters other than the explanation originally given by a trial court for a term of confinement. *See infra* note 147.

99. 2007 WI 81, 302 Wis. 2d 80, 734 N.W.2d 364.

calculation and discussion of the guideline range.[100] Yet, the *Grady* court interpreted the "shall consider" mandate in such a feeble way that the consultation of benchmarks in guidelines cases need be no more meaningful than their consultation in non-guidelines cases.

The procedural history of *Grady* helps to make this point plain. After being convicted, Grady was sentenced to a twenty-year term of confinement.[101] During the hearing, no reference was made to the applicable sentencing guideline, and it appears that no guideline worksheet was actually filled out for Grady.[102] When the defendant filed a postconviction motion objecting to the judge's neglect of the guidelines, the judge denied the motion with a conclusory assertion that "the court considered the sentencing guidelines without explicitly identifying that fact and it is clearly apparent from the record that the court did so."[103]

In response to Grady's appeal of the ruling, the supreme court made several decisions that served to undermine the effect of the statutory "shall consider" language. First, the court flatly rejected Grady's contention "that a judge must complete any applicable sentencing guideline worksheet."[104] The worksheet sets forth the factors made relevant by the guideline and, if filled out, creates a record that the factors were, in fact, considered. Mandating that the worksheet be filled out would be in keeping with *Gallion*'s requirement of "an on-the-record explanation" in lieu of "implied reasoning."[105] Yet, the *Grady* court rejected such a mandate with little more than a conclusory invocation of the need to preserve "the exercise of discretion that is fundamental to sentencing,"[106] by which the court seems to have had in mind the freedom to "decid[e] the weight to be given to particular factors."[107] Here, the court seemed to conflate substance and procedure: to require sentencing judges to perform the procedure of filling out a guideline worksheet is not in derogation of their authority to decide how much substantive weight to give to the factors set forth in the worksheet. Although sentencing judges have also traditionally enjoyed some discretion with respect to sentencing procedure, an essential premise of both *McCleary* and *Gallion* is that this procedural

100. Two years after *Grady*, the Wisconsin legislature repealed the relevant language. 2009 Wis. Legis. Serv. 1021 (West).

101. 2007 WI 81, ¶ 9.

102. *Id*., ¶ 10.

103. *Id*., ¶ 11 (internal quotation marks omitted).

104. *Id*., ¶ 38. Copies of the full set of advisory guidelines worksheets are available at Wisconsin Sentencing Commission: Guidelines, http://wsc.wi.gov/section.asp?linkid=4&locid=10 (last visited June 21, 2010). Extensive excerpts are also available at Hammer, *supra* note 88, at 19–31.

105. State v. Gallion, 2004 WI 42, ¶¶ 49–50, 270 Wis. 2d 535, 678 N.W.2d 197.

106. 2007 WI 81, ¶ 38.

107. *Id*., ¶ 31.

discretion is not absolute, but must give way before the mandate of an adequate explanation. And the *Grady* court simply did not answer the question of why the explanation requirement requires the recitation of case-specific facts and objectives (per *Gallion*) but not the filling in of a two-page worksheet.

Second, the court rejected Grady's contention that the "shall consider" language requires that the guideline sentencing range be considered.[108] The court suggested that sentencing judges could discharge their obligation to consider the guideline by considering any of the five sections of the guideline worksheet, of which the chart setting forth the range was only one. But this seems a rather unnatural reading of what it means to "consider" the guideline, particularly when one appreciates that the range is the centerpiece of the guideline: the whole point of three sections of the worksheet is to help the judge determine what the range is, the fourth sets forth potential grounds for adjustment of the range, and the fifth is merely for recording the sentence imposed. The court also invoked separate statutory language indicating that judges need not impose a sentence within the range.[109] However, this once again conflates substance and procedure: the judge might consider the range (procedure) without selecting a sentence within the range (substance).

Finally, the court rejected Grady's contention that the sentencing judge was required to "explain both how the sentencing guideline fits the objectives of sentencing and how the sentencing guideline influences the sentence."[110] The court distinguished between *considering* a guideline (which is statutorily required) and *explaining* how the guideline influenced the sentencing calculus (which is not). On the other hand, the court might have reasonably read into the consideration requirement an implicit requirement that the consideration be put on the record, which would be the functional equivalent of the explanation Grady was seeking. Such an interpretation would mirror the court's earlier maneuver in *McCleary* of divining from the principle that sentencing is an act of discretion the procedural requirement that the sentence be explained so that appellate courts can ensure that discretion was, in fact, exercised.[111] By analogy, a consideration requirement implies that the consideration must be stated on the record so that an appellate court may ensure that the statutory duty was satisfied. Moreover, quite apart from the statutory duties, *McCleary* and *Gallion* provide an alternative basis for requiring an explanation of the role played by the guidelines. As *Gallion* put it, "[c]ourts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the

108. *Id*., ¶ 39.

109. *Id*., ¶ 41 (citing WIS. STAT. § 973.017(10m) (2003–2004)).

110. *Id*., ¶ 42.

111. McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971).

decision."[112] It appears that Grady may not have made the *McCleary–Gallion* argument,[113] but the court's failure even to mention *McCleary* or *Gallion* in connection with a defendant's claim that his sentence was not adequately explained does not bode well for the court's present commitment to the two cases or the explanation requirement they elaborated.[114]

IV. THE FEDERAL EXPLANATION REQUIREMENT

A decade ago, the Wisconsin and federal systems looked dramatically different: While Wisconsin retained a traditional indeterminate, discretionary, guidelines-less approach to sentencing, the federal system had abandoned parole and adopted binding guidelines, which were vigorously enforced by the intermediate courts of appeals.[115] The ensuing years, however, have witnessed considerable, though by no means complete, convergence between the systems. On the Wisconsin side, as noted in the previous Part, parole was replaced with determinate sentencing, advisory guidelines were adopted for eleven common offenses, and *Gallion* invited more searching appellate review of sentences. On the federal side, meanwhile, the United States Supreme Court's 2005 decision in *United States v. Booker* changed the federal Guidelines from mandatory to advisory and loosened appellate scrutiny of sentences.[116] Indeed, in both systems, the role of the guidelines is now controlled by identical statutory language: the judge "shall consider" the

112. State v. Gallion, 2004 WI 42, ¶ 43, 270 Wis. 2d 535, 678 N.W.2d 197.

113. *See* 2007 WI 81, ¶ 42 ("Grady does not argue that the court failed to satisfy its § 973.017(10m) obligation to state the reasons for its sentencing decision. His sole complaint relates to the sentencing court's failure to consider the applicable sentencing guideline.").

114. Post-*Grady* decisions in the court of appeals demonstrate how marginalized the guidelines have become. *See, e.g.*, State v. Porter, No. 2008AP343-CR, 2009 WL 260958, at *1 (Wis. Ct. App. Feb. 5, 2009) ("[W]e would affirm if the court simply stated, in any words, that its sentencing decision did include consideration of the applicable sentencing guideline."). The case law was divided, though, on the question of how to conduct harmless error analysis when the sentencing judge did not even make the minimal statement required by *Grady* that the guideline was considered. *Compare id.* at *2 ("[W]e cannot accept the State's argument that considering the same factors [as those set forth in the applicable guideline worksheet] renders the failure to consider a guideline harmless.") *with* State v. Davy, No. 2007AP851-CR, 2008 WL 2597574, at *2 (Wis. Ct. App. July 2, 2008) ("The court's approach to sentencing echoed the sentencing guidelines worksheet . . . . Therefore, the court's failure to refer to the guidelines at sentencing was harmless."). For reasons outlined below in Part V.A.11, I do not believe that harmless error analysis is appropriate in this context.

The harmless error issue is apparently mooted going forward in Wisconsin by the legislature's recent decision to repeal § 973.017(2)(a), 2009 Wis. Legis. Serv. 1021 (West), but the issue remains important for other jurisdictions that still require the consideration of sentencing guidelines.

115. Reitz, *supra* note 1, at 1466.

116. 543 U.S. 220, 245, 264–65 (2005).

guidelines when determining the sentence.[117]

Despite the increased similarity between the systems relative to a decade ago, post-*Booker* federal case law has ensured that significant differences remain. *Booker* itself was perhaps the high point of convergence, with *Grady* and the United States Supreme Court's 2007 decision in *Rita v. United States*[118] marking a new trend toward divergence. *Rita*, which drained the federal explanation requirement of much of its force, will be the main focus of this Part.

In light of *Grady* and *Rita*, while both the Wisconsin and federal systems are advisory guidelines systems, they present starkly contrasting ways that an advisory system can be implemented, and both approaches are flawed in their own distinct ways. As to the explanation requirement specifically, Wisconsin's vice is a failure to insist that explanations refer to available objective benchmarks. This failure has likely had adverse consequences from the standpoint of both *uniformity* (if sentencing judges were required expressly to address objective benchmarks, they would be at least marginally more likely to adhere to them,[119] which might reduce the incidence of outlier sentences) and *perceived neutrality* (if judges referenced objective benchmarks as influential on their sentencing decisions, they would reassure defendants that the sentences were not merely capricious or based on improper considerations).

The contrasting vice of the federal system is to place too much emphasis on the calculation of just one objective benchmark, the Guidelines sentence, to the detriment of both other, arguably more salient benchmarks and critical, purpose-driven evaluation of the appropriateness of the Guidelines sentence. The chief adverse effects here are in the areas of *purpose-advancement* (required to provide little by way of explanation beyond the Guidelines calculation, the sentencing judge may avoid much intellectual engagement with the overarching purposes of sentencing) and *consideration* (the sentencing judge can largely disregard defendants' arguments for below-Guidelines sentences).

Rita deserves much of the blame. Before considering what *Rita* had to say regarding explanation review, though, it will be helpful to review some of the basic contours of post-*Booker* federal sentencing:

- The sentencing decision is governed by 18 U.S.C. § 3553(a), which requires the judge to "consider" a number of factors, including the

117. 18 U.S.C. § 3553(a)(4) (2006); Wis. Stat. § 973.017(2)(a) (2007–2008).

118. 551 U.S. 338 (2007).

119. *See* O'Hear, *Explaining Sentences*, *supra* note 14, at 474–75.

traditionally recognized purposes of sentencing[120] and the recommended Guidelines range.[121]

- Post-*Booker* cases indicate that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . . [T]he Guidelines should be the starting point and the initial benchmark."[122]
- "[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable."[123]
- "After settling on the appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."[124]
- "If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. . . . [A] major departure should be supported by a more significant justification than a minor one."[125]
- Other than the Guidelines range, the other section 3553(a) factors need not necessarily be given an "explicit, articulated analysis" in all cases.[126]
- "[T]he appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error . . . . Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence . . . ."[127]
- "If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a

120. 18 U.S.C. § 3553(a)(2).

121. 18 U.S.C. § 3553(a)(4).

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

123. *Id*. at 49–50.

124. *Id*. at 50.

125. *Id*.

126. *See* United States v. Dean, 414 F.3d 725, 728–29 (7th Cir. 2005) (rejecting the defendant's argument that such analysis was required); *see also* United States v. Shan Wei Yu, 484 F.3d 979, 988 (8th Cir. 2007) ("It is not necessary for the district court to 'provide a mechanical recitation of the § 3553(a) factors' so long as it is 'clear from the record' that the court considered them.") (citation omitted); United States v. Cruz, 461 F.3d 752, 754 (6th Cir. 2006) ("[C]onsideration [of the § 3553(a) factors] need not be evidenced explicitly in some mechanical form.") (citation and internal quotation marks omitted).

127. *Gall*, 552 U.S. at 51.

presumption of unreasonableness."[128]

Before *Rita*, several circuits adopted an additional explanation requirement: if imposing a Guidelines sentence, the judge was required specifically to address nonfrivolous arguments made by the defendant for a sentence below the Guidelines range.[129] Although *Rita* did not categorically reject such a responsiveness requirement, the Court's analysis seemingly left little room for it to be rigorously enforced.

Rita was convicted of perjury and related offenses, producing a Guidelines range of thirty-three to forty-one months.[130] Rita then sought a downward variance based on three factors: (1) as a result of his career in law enforcement, he faced a risk of retribution from other inmates while in prison; (2) he was a decorated veteran of the Armed Forces; and (3) he suffered from a variety of medical conditions.[131] After Rita presented evidence and argument relating to these factors, the judge nonetheless chose to impose the Guidelines sentence.[132] He offered only a brief explanation of his decision: The court was "'unable to find that the [presentence investigation report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected.'"[133] The judge concluded, "'[I]t is appropriate to enter' a sentence at the bottom of the Guidelines range."[134]

When his case reached the Supreme Court, Rita presented a number of issues for review, but the only one of immediate interest was his argument that the sentencing judge did not adequately explain why Rita's arguments for a below-range sentence were rejected. And the Court did indeed recognize a need for appellate courts to ensure that the sentencing process was a reasoned one.[135] At the same time, the Court made clear that judges were not required to express their reasons, but might instead rely on context and inference to supply *implicit* reasoning:

> [W]e cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of

128. *Id*. (citation omitted).

129. *See* United States v. Sanchez-Juarez, 446 F.3d 1109, 1116–18 (10th Cir. 2006); United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006); United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006); United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).

130. Rita v. United States, 551 U.S. 338, 344 (2007).

131. *Id*. at 344–45.

132. *Id*. at 345.

133. *Id*.

134. *Id*.

135. *See id.* at 356 ("In the present context, a statement of reasons is important. The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.").

> brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; *sometimes it does not*; sometimes a judge simply writes the word "granted" or "denied" on the face of a motion *while relying upon context and the parties' prior arguments to make the reasons clear*. The law leaves much, in this respect, to the judge's own professional judgment.
>
> . . . [W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. *Circumstances* may well make clear that the judge rests his decision upon the [Sentencing] Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical.[136]

Even as to cases in which a colorable argument was advanced for a variance, the Court hedged its language to avoid implying a duty to address the argument expressly: "Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, . . . the judge *will normally* . . . explain why he has rejected those arguments."[137] Here, the Court seemed merely to describe what is usually done, avoiding the use of such words as "shall" or "must" that would connote some sense of obligation.

Thus, while the judge in *Rita* may not have done what other judges *normally* do, the lack of explanation did not violate any legal duty:

> We acknowledge that the judge might have said more. He might have added explicitly that he had heard and considered the evidence and argument; that . . . he thought the Commission in the Guidelines had determined a sentence that was proper in the mine run of roughly similar perjury cases; and that he found that Rita's personal circumstances here were simply not different enough to warrant a different sentence. But context and the record make clear that this, or similar, reasoning underlies the judge's conclusion.[138]

Instead of accepting such implicit reasoning, a better rule would require an express judicial response to nonfrivolous arguments for a below-Guidelines sentence. Such a rule would obviously advance procedural justice objectives[139] and achieve information-sharing benefits. The rule would also

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136. *Id*. at 356–57 (emphasis added).

137. *Id*. at 357 (emphasis added).

138. *Id*. at 359.

139. I say "obviously" because of the clear connection between responsiveness and the consideration dimension of procedural justice. There may also be other, more subtle procedural

further the goal of purpose-advancing sentencing: focusing greater attention on arguments for below-range sentences would help judges better appreciate when the Guidelines range is excessive relative to the purposes of § 3553(a). This might happen when the Guidelines fail to take into account some unusual, but important, feature of a particular case. Or it might happen when a governing guideline has been poorly designed and fails to effectively advance the purposes of sentencing even in routine cases. This is likely true, for instance, of the crack cocaine Guideline, which even the Sentencing Commission has concluded "fails to meet the sentencing objectives set forth by Congress in . . . the Sentencing Reform Act."[140] Moreover, although the crack cocaine Guideline has been a particular target of criticism for many years, other Guidelines may be similarly flawed.[141] In any event, if judges are required to attend more carefully to purpose-driven arguments, they are less likely simply to impose an unjustifiable Guidelines sentence because it is the path of least resistance.[142]

Although *Rita* undercut the responsiveness component of the federal

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justice benefits. Consider neutrality. Although adherence to the Guidelines might initially seem a reliable way to reassure defendants of objectivity in the sentencing decision, the Guidelines' orientation to easily quantified sentencing factors masks a number of potentially arbitrary exercises of discretion. For instance, if a defendant is prosecuted in federal court for committing a crime that is more routinely prosecuted in state court, the defendant may have a colorable argument that it would be arbitrary not to take state law into account in setting his sentence. Likewise, if a defendant could show that most other federal defendants convicted of the same crime, either on a national or a district-specific basis, received sentences below his Guidelines level, then the defendant might have a colorable argument that the actual practice-based norms should be taken into account as an alternative benchmark. To reject such colorable arguments without principled explanation is to leave the defendant with the sense that he has been singled out for unusually harsh treatment and hence to engender perceptions of non-neutrality. Finally, requiring responsiveness also promotes feelings of respect in another sense: showing the defendant that a Guidelines sentence has not simply been reflexively imposed reassures the defendant that his Sixth Amendment rights have not been violated by a de facto mandatory Guidelines system. O'Hear, *Explaining Sentences*, *supra* note 14, at 481–83.

140. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.

141. *See*, *e.g.*, Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT'G REP. 83, 83–86 (2008) (discussing flaws in child pornography sentencing Guidelines); Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 251–53 (2005) (summarizing various design flaws found throughout the guidelines) [hereinafter O'Hear, *Myth*]; Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 217–30 (2004) (providing critique of environmental sentencing Guidelines).

142. Imposing the Guidelines sentence has become the path of least resistance because of the interplay of *Rita* and *Gall*. *Gall* requires the sentencing judge first to calculate the Guidelines sentence, Gall v. United States, 552 U.S. 38, 49 (2007), and then justify any deviation from the Guidelines sentence, *id*. at 49–50. *Rita*, by contrast, permits the sentencing judge to impose the Guidelines sentence with little or no additional justification. 551 U.S. 338, 356–57 (2007). Additionally, the appellate presumption of reasonableness recognized in most circuits and approved by the Supreme Court, *Gall*, 552 U.S. at 50, ensures that the risks of reversal are very low as long as the Guidelines sentence is imposed.

explanation requirement, it does retain some life in some circuits post-*Rita*.[143] On the other hand, some of the intermediate federal courts of appeals have also imposed other limitations on the responsiveness rule that go beyond what *Rita* itself seemed to contemplate,[144] such as a requirement that defendants specifically object to explanation problems in the district court or face deferential plain-error review on appeal.[145] As I have argued elsewhere, such limitations operate as a trap for the unwary and inappropriately limit the usefulness of explanation review.[146]

V. PROPOSED RULES FOR EXPLANATION REVIEW

In this Part, I first propose a set of rules to guide explanation review by appellate courts in a system without mandatory sentencing guidelines. Next, I address various criticisms that might be made of the proposal.

A. The Rules

The following proposed rules attempt to meld together the most attractive features of explanation review in the Wisconsin and federal systems, with a particular eye to correcting what I perceive to be the major failings of *Gallion*, *Grady*, and *Rita*. I have addressed what seem to be the leading issues that have emerged from the explanation case law, but there are no doubt other issues that might arise that have escaped my attention.[147] Thus, I offer the

143. O'Hear, *Explaining Sentences*, *supra* note 14, at 470 n.72, 472 n.79; *see also* United States v. Harris, 567 F.3d 846, 853 (7th Cir. 2009) (vacating sentence based on inadequate explanation). As I have observed elsewhere, *Harris* presents a potentially useful way of distinguishing *Rita* and reinvigorating explanation review, at least in cases in which the sentence is a very long one and the defendant was not sentenced at the bottom of the range. Michael M. O'Hear, Seventh Circuit Case of the Week: Sentencing Judges, You've Got Some 'Splaining to Do, http://law.marquette.edu/facultyblog/2009/06/06/seventh-circuit-case-of-the-week-sentencing-judges-youve-got-some-splaining-to-do/ (June 6, 2009).

144. O'Hear, *Explaining Sentences*, *supra* note 14, at 470–71.

145. *See, e.g.*, United States v. Vonner, 516 F.3d 382, 385–86 (6th Cir. 2008) (en banc); United States v. McComb, 519 F.3d 1049, 1054 (10th Cir. 2007).

146. O'Hear, *Explaining Sentences*, *supra* note 14, at 471.

147. I focus here on explanations given for sentences of imprisonment. As the post-*Gallion* Wisconsin case law reveals, however, sentence explanation requirements can be extended beyond the specific context presented by *Gallion*. *See* State v. Cherry, 2008 WI App 80, ¶ 11, 312 Wis. 2d 203, 752 N.W.2d 393 ("Because the record does not reflect a process of reasoning before the trial court imposed the $250 DNA surcharge, we reverse that portion of the judgment and order."); State v. Ramel, 2007 WI App 271, ¶ 14, 306 Wis. 2d 654, 743 N.W.2d 502 ("[W]e do conclude that under *Gallion* some explanation of why the court imposes a fine is required."); *In re* Richard J.D., 2006 WI App 242, ¶¶ 11–12, 14, 297 Wis. 2d 20, 724 N.W.2d 665 (applying *Gallion* explanation requirement to juvenile dispositional orders); State v. Swiams, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452 (indicating that *Gallion* explanation requirement extends to reconfinement orders following revocation of extended supervision); State v. Nelson, Nos. 2005AP713-CR, 2005AP714-CR, 2006 WL 44079 (Wis. Ct. App. Jan. 10, 2006) (applying *Gallion* explanation requirement to resentencing). Whatever the merits of these decisions, I believe that explanation review of sentences

following list as a nonexhaustive starting point.

1. A Sentence That Has Not Been Adequately Explained Constitutes an Abuse of Discretion and Is Subject to Reversal on That Ground

This principle was advanced by *McCleary* and *Gallion*, and is consistent with the post-*Booker* federal law.[148] (Of course, Wisconsin and federal law differ when it comes to defining what constitutes an adequate explanation.) Providing defendants with a potential remedy on appeal helps to ensure that lower courts comply with explanation norms.

2. The Sentencing Court Must Specify the Principal Purpose or Purposes of the Sentence

This principle is derived from *Gallion*.[149] Consistent with the ideal of purposeful sentencing, judges should be required to frame their sentence explanations by reference to overarching objectives of sentencing. Focusing attention on purposes in this way should help to ensure that sentences can indeed be justified as purpose-advancing.[150] For present purposes, I do not mean to advocate for one particular purpose or set of purposes, but rather take as a given that the potential purposes have been specified elsewhere (in the federal system, for example, at 18 U.S.C. § 3553(a)(2)). Assuming that the jurisdiction has endorsed more than one potential purpose, the overriding purpose(s) may vary according to the needs of the case, as *Gallion* indicated.[151]

This principle deviates from the federal system, where, under *Rita*, sentencing judges need do little more than calculate the Guidelines sentence in most cases.[152] Thus, the intermediate federal appellate courts have rejected arguments that sentencing judges must explain all sentences by reference to the § 3553(a)(2) factors.[153] The federal approach to explanation review, which emphasizes guidelines over express analysis of purposes, is especially problematic because the federal Guidelines are not grounded in the traditional purposes of sentencing.[154] A jurisdiction with more explicitly purpose-advancing guidelines might appropriately place less emphasis on case-by-case judicial analysis of purposes.[155]

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of imprisonment should be the highest priority. *See infra* Part V.B.1.

148. *See supra* note 142.

149. *See* State v. Gallion, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197.

150. This principle may also advance the neutrality goal inasmuch as the purposes of sentencing constitute facially neutral (albeit largely indeterminate) bases for the sentence.

151. *Gallion*, 2004 WI 42, ¶ 41.

152. *See* O'Hear, *Explaining Sentences*, *supra* note 14, at 469.

153. *See, e.g.*, United States v. Dean, 414 F.3d 725, 728–29 (7th Cir. 2005).

154. O'Hear, *Original Intent*, *supra* note 29, at 780.

155. The ALI, for instance, embraces such a model of explicitly purpose-advancing guidelines

3. In Explaining How a Purpose Is Advanced by a Particular Sentence, the Court Must Identify the Case-Specific Facts on Which It Relies and Indicate How They Relate to the Purpose

This principle, too, is derived from *Gallion*.[156] Judges should not simply offer a rote recitation of purposes, but ought to devote real thought to how the relevant purposes play out in the case at hand. The judge may not simply say, "I am sentencing you to ten years in prison to protect the community from being victimized by you again," but should also add, for instance, "Your three prior felony convictions and the fact that you committed the present crime while on parole indicate to me that you are likely to reoffend if released again any time soon." A detailed explanation, in this sense, helps to ensure that sentences truly are purpose-driven and to reassure defendants that they are not being sentenced on the basis of caprice or improper considerations. The fact-based explanation can also help appellate courts to determine if there has been clearly erroneous fact-finding and to conduct substantive review. Finally, the analysis of how to implement purposes of punishment can educate policy makers and others regarding trial-court perspectives on criminal justice.

4. For Prison Sentences, the Explanation Should Make Clear Both Why a Sentence of Probation Was Rejected and Why a Materially Shorter Term of Confinement Would Not Have Adequately Accomplished the Relevant Purposes of Sentencing

Gallion clearly endorsed the first part of this principle, that is, explaining why probation was rejected,[157] but was less clear about the latter. On the one hand, the court stated, "[I]f a [sentencing] court imposes jail or prison, it shall explain why the *duration* of incarceration should be expected to advance the objectives it has specified."[158] On the other hand, the court also acknowledged,

> We are mindful that the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect [sentencing] courts to explain, for instance, the difference between sentences of 15 and 17 years.[159]

Moreover, the fact that the court did not respond effectively to Gallion's own argument that "almost any number of years of prison could be plugged

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in the tentative draft of MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6B.03 cmt. a at 179.

156. 2004 WI 42, ¶ 42.

157. *Id*., ¶¶ 21, 25, 44.

158. *Id*., ¶ 45 (emphasis added).

159. *Id*., ¶ 49.

in"[160] also tends to undermine the extent to which *Gallion* can be read to require explanation for material, incremental increases in sentence length. Yet, it should go without saying that, for defendants, there is a profound difference between, for instance, five years and twenty-five years in prison. Such differences should be explained no less than the decision to sentence the defendant to prison in the first place.

The real difficulty with this principle is how to identify the line of materiality. I would agree with the *Gallion* court, for instance, that the difference between fifteen and seventeen years is not so great as to warrant specific explanation. As a somewhat arbitrary, but reasonably workable, dividing line, I would suggest a rule of thirds: the judge should be required to explain why a sentence one-third less than the sentence imposed was not adequate in light of the relevant purposes of sentencing. Thus, for instance, the judge in *Gallion* would not have been required to explain why a sentence of twenty-one years was imposed instead of eighteen, but would have been required to justify twenty-one over fourteen.

5. If There Is an Applicable Advisory Sentencing Guideline, the Court Must Determine What Range Is Recommended by the Guideline, Unless the Court Expressly Finds that the Benefits of Calculating the Guideline Range Do Not Warrant the Costs

On the whole, this principle is meant to endorse the federal over the Wisconsin approach to advisory guidelines.[161] I have already noted the neutrality and uniformity benefits of using objective benchmarks in sentencing,[162] and a guideline range, where one is available, seems an obviously important benchmark to consult. On the other hand, calculating a range may sometimes require a judge to resolve complex legal or factual disputes. If the judge has some other benchmark in mind that is clearly more salient (for instance, if the circumstances of the case are so aggravated that the judge is committed to imposing a sentence at or near the top of the statutory range regardless of what the guideline recommends), then the judge might appropriately decide not to bother with the complex guideline questions. Likewise, if a guideline question appears to be a close one, but will not have a large effect on the ultimate guideline recommendation, the judge might simply split the difference without unduly undermining the goal of principled sentencing based on objective benchmarks.[163]

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160. *See supra* notes 94–96 and accompanying text.

161. For advisory guidelines systems, the tentative draft of MODEL PENAL CODE: SENTENCING also requires that sentencing judges "consult the sentencing guidelines carefully and accurately." *See* MODEL PENAL CODE: SENTENCING, *supra* note 13, § 7.XX cmt. i at 284.

162. *See supra* note 119 and accompanying text.

163. Even the federal courts have recognized that it may not be necessary to resolve all

6. If the Sentence Is Outside an Applicable Advisory Guideline Range, the Court Must Explain Why the Sentence Chosen Is Believed to Advance the Relevant Purposes of Sentencing Better than the Guideline Sentence

Like the previous principle, this one more closely follows the federal approach than Wisconsin's, although it is not intended to embrace all of the limitations on non-Guidelines sentences that have appeared in the post-*Booker* jurisprudence.[164] As long as the sentencing judge offers a reason that is rationally related to one or more of the purposes of sentencing, that reason should suffice. The reason might rest on something unusual in the case not taken into account in the guideline, on a principled policy disagreement with the drafters of the guideline, or on a justifiable conclusion that some other objective benchmark must also be taken into account. To demand much more than this would be to move nominally advisory guidelines far down the path toward mandatory, which (among other potential difficulties) might raise significant Sixth Amendment issues. But to fail to demand *any* explanation for a non-guideline sentence (as Wisconsin does) seems to sacrifice the neutrality and uniformity values embodied in a guideline system without much countervailing benefit. It also undermines the feedback loop that might lead to better guidelines.[165]

7. If the Sentence Is Within the Applicable Advisory Guideline Range, the Court Must Expressly Address Any Nonfrivolous Arguments Made by the Defendant for a Sentence Below the Range and Explain Why the Arguments Were Rejected

This principle represents a rejection of *Rita*, and instead adopts the approach suggested by the Seventh Circuit in the pre-*Rita* case *United States v. Cunningham*.[166] The principle is intended to address the concerns that *Rita* may lead in some cases to the mechanical imposition of an unjustifiably harsh

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Guidelines issues now that the Guidelines are advisory. *See, e.g.*, United States v. Sanner, 565 F.3d 400, 405–06 (7th Cir. 2009).

164. *See, e.g.*, Gall v. United States, 552 U.S. 38, 50 (2007) ("[A] major departure should be supported by a more significant justification than a minor one."). Additionally, it remains unclear how much authority federal district court judges have to impose a sentence outside the applicable range because of a policy disagreement with the Guidelines. Although the Supreme Court authorized such variances in the crack cocaine context in *Kimbrough v. United States*, 552 U.S. 85, 101–02, 111 (2007), some lower courts have suggested that the authority is essentially limited to crack cases, *see, e.g.*, United States v. Vega-Castillo, 540 F.3d 1235, 1239 (11th Cir. 2008) ("*Kimbrough* dealt only with certain Guidelines—those that, like the crack cocaine Guidelines, 'do not exemplify the Commission's exercise of its characteristic institutional role.'") (quoting *Kimbrough*, 552 U.S. at 109).

165. For similar reasons, the tentative draft of MODEL PENAL CODE: SENTENCING also requires an explanation for departures even from advisory guidelines—indeed, the tentative draft goes further by requiring that the explanations be in writing. *See* MODEL PENAL CODE: SENTENCING, *supra* note 13, § 7.XX cmt. i at 284–86.

166. 429 F.3d 673, 679 (7th Cir. 2005).

guideline sentence, or at least to perceptions of such a reflexive approach.

8. The Court Must Specifically Identify What Benchmark or Benchmarks Were Used in Setting the Sentence and Why They Were Believed to Be Relevant

I assume here that the overarching purposes of sentencing are sufficiently indeterminate that a specific sentence cannot rationally be selected without reference, conscious or unconscious, to a benchmark of some sort, even if it is only the judge's recollection of sentences that she has previously imposed in similar cases. Consistent with the goal of reassuring defendants that sentencing occurs in a neutral fashion, the benchmarks used should be expressly identified. Appropriate benchmarks might include the recommended range from an applicable or analogous sentencing guideline (potentially including guidelines from other jurisdictions or national organizations, as were consulted in *McCleary*[167]), the statutory sentencing range (in the sense that unusually mitigated cases should be sentenced near the bottom of the range, unusually aggravated cases near the top, and typical cases somewhere in between), data on actual sentencing practices (which might be considered at a local, state, or national level[168]), sentences imposed on codefendants, and sentences imposed on the same defendant in earlier cases.

Other benchmarks of potential value include the recommendations of probation officers and lawyers. Practice varies from jurisdiction to jurisdiction as to whether presentence investigation reports are routinely prepared by probation officers, and, when they are prepared, whether they include sentencing recommendations. Where available, a recommendation by a thoughtful, experienced probation officer may constitute a neutral

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167. McCleary v. State, 49 Wis. 2d 263, 289–90, 182 N.W.2d 512, 525–26 (1971).

168. In many jurisdictions, it is difficult to find reliable state and local data, which might lead by default to consultation of national data collected by the federal government. Data on sentences in federal court are available in easily searchable form at the web site of the Bureau of Justice Statistics' Federal Justice Statistics Resource Center, http://fjsrc.urban.org/ (last visited June 22, 2010). Federal data on sentencing in state courts is less detailed, but still potentially useful as a benchmark. The data are summarized in regular reports issued by the United States Department of Justice's Bureau of Justice Statistics, which can be downloaded from Crime & Justice Electronic Data Spreadsheets: Corrections, http://bjs.ojp.usdoj.gov/content/dtdata.cfm#corrections (last visited June 22, 2010).

For reasons that I have suggested elsewhere, it is preferable to rely on local sentencing law and practice—even in federal court—for crimes that are essentially local in character, which would include most routine street crime. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal–State Sentencing Disparities*, 87 IOWA L. REV. 721, 753–63 (2002). By focusing attention on the use of benchmarks in sentencing, explanation review in the appellate courts might spur the collection of good, local sentencing data by the courts, prosecutors' offices, or public defender agencies. In the absence of such data, national data may still be of some benchmarking value.

benchmark that is capable of advancing purposefulness and uniformity values.[169]

Likewise, practice varies with respect to recommendations by prosecutors and defense lawyers. Their recommendations, of course, do not carry the presumptive neutrality of a probation officer's. Procedural justice concerns should thus make judges wary about giving much weight to prosecutor recommendations, particularly when they deviate substantially from those of defense counsel. Even when the prosecutor and defense counsel agree, judges might appropriately decide not to go along with the deal, for the deal may reflect what is convenient for the lawyers more than what best advances the interests of purposeful, uniform sentencing. On the other hand, experienced, thoughtful lawyers may have much to contribute to the fashioning of a substantively just sentence. For that reason, lawyer recommendations should not be rejected out of hand as an appropriate benchmark.

9. If the Defendant Offers a Benchmark that the Court Rejects, the Court Must Explain Why the Benchmark Was Determined Not to Be Appropriate

This principle parallels the earlier requirement that arguments for a below-guidelines sentence should be expressly addressed.

10. If the Defendant Makes Any Nonfrivolous Arguments for Lenience, the Court Must Identify Which Arguments Were Found to Have Merit, What Role Those Arguments Played in the Selection of the Sentence, and Why the Remaining Arguments (If Any) Were Found Not to Have Merit

This principle, like the previous one, requires responsiveness to defendants' arguments. It is added as something of a catchall, recognizing that some arguments for lenience may not be framed as requests for a below-guidelines sentence or as proposals for a particular benchmark.

11. Explanation Challenges Should Not Be Subject to Harmless Error Analysis on Appeal

If the only purpose of explanation review were to ensure substantively good sentences, then it might make sense to employ harmless error analysis, that is, to affirm poorly explained sentences if the factors neglected in the

169. For an example of a case that reversed a sentence in part for the failure of the sentencing judge to explain why he imposed a sentence that far exceeded the recommendation of the probation officer, see *State v. Hall*, 2002 WI App 108, ¶¶ 15–17, 255 Wis. 2d 662, 648 N.W.2d 41. Without discussing *Hall*, the Wisconsin Supreme Court apparently limited its reach in *State v. Taylor*, 2006 WI 22, ¶¶ 29–30, 289 Wis. 2d 34, 710 N.W.2d 466, in which the court affirmed the sentence despite the fact that the trial court "did not explicitly state why, in its discretion, it added six more years of initial confinement onto the [presentence investigation report] recommendation." On the other hand, *Taylor* was limited on its own terms to pre-*Gallion* law, *id.*, ¶ 17 n.9, leaving open the possibility that a similar case would be decided differently today.

explanation were unlikely to influence the outcome. (I say "might," because, even just with a view to the substantive quality of the sentence, harmless error analysis may give too much room for the cognitive biases discussed above to operate at the appellate level, too[170]—that is, the sentence imposed below may unduly condition the appellate court's evaluation of what constitutes a just sentence.) But the purposes of explanation review also encompass procedural justice and information sharing. In light of those purposes, something is lost with a poorly explained sentence even if there is no good reason to think the outcome would have been altered by the unaddressed considerations. To send a clear message to sentencing judges about the importance of good explanations, poorly explained sentences should be vacated and remanded for resentencing without regard to harmless error.[171]

B. Addressing Potential Objections

1. Excessive Transaction Costs

Robust explanation requirements make the courts do more work. As with any incremental process requirement, it is fair to ask whether the benefits warrant the additional transaction costs. Unfortunately, such questions do not lend themselves to straightforward answers, because the benefits of incremental process (procedural justice effects, substantively higher-quality decisions, and enhanced transparency) are so difficult to quantify. What can be done with a bit more confidence is to evaluate whether the trade-offs seem in line with the trade-offs we accept as to other procedural protections.

Viewed this way, the transaction costs of mandatory explanation do not seem excessive. The explanation could be delivered orally in open court at the same time that the sentence is imposed; there would be no routine need for additional proceedings.[172] Sentencing hearings already regularly include statements by defendants, defense counsel, prosecutors, and judges. To demand more consistently thorough remarks by judges is not likely to result in a large increase in the amount of time sentencing hearings take. The sort of explanation contemplated by my proposed principles need not be voluminous or scholarly—the core of the sentencing analysis from *McCleary* that I have

170. *See supra* Part II.B.

171. As discussed above, the Wisconsin courts struggled with harmless error questions in connection with the former statutory requirement that sentencing judges consider the guidelines. *See supra* note 114.

172. There would, of course, be additional proceedings in cases in which sentences are vacated for inadequate explanation. I believe there is sufficient clarity and deference in my explanation review principles, however, that sentencing judges should be able to satisfy them without great difficulty. Thus, reversal at the appellate level will not necessarily be a common occurrence even if explanation standards are rigorously enforced. Moreover, it should be remembered that reversal on explanation grounds only requires a resentencing; the defendant's conviction is not affected.

proposed as a model occupies about three pages of the Wisconsin Reports.[173] Certainly, the level of effort would be much less than federal judges must routinely expend on Guidelines calculations alone.

An appropriate analogy might be to victim impact statements, which have become an accepted part of the sentencing process in recent years, notwithstanding the additional transaction costs they impose.[174] New participation rights for victims at sentencing are intended to achieve similar procedural justice goals to those that undergird the explanation requirement.[175] Another good analogy would be to the standard colloquy and recitation of warnings in connection with guilty pleas,[176] or to the filing of *Anders* briefs by court-appointed defense counsel in cases in which counsel does not see viable grounds for an appeal.[177] As with the explanation requirement, these procedures involve modest incremental transaction costs that are justifiable on the basis of enhancing perceptions of procedural justice and establishing additional protections against substantively unjust outcomes.

We should also bear in mind the importance of the liberty interests at stake in sentencing decisions. Our constitutional due process jurisprudence properly recognizes that the need for reliable decision making is at its zenith when the individual interests at stake are most important.[178] The logic of this jurisprudence should make us particularly hesitant to reject explanation review on the basis of mere transaction costs. If need be, though, distinctions might be drawn based on the relative severity of the liberty deprivation. For instance, explanation review might be limited to cases in which the defendant was sentenced to more than a year of confinement.

2. Pro-Defendant Bias

I have framed my proposal as a set of principles that a defendant might

173. McCleary v. State, 49 Wis. 2d 263, 288–291, 182 N.W.2d 512, 524–26 (1971).

174. *See, e.g.*, State v. Gallion, 2004 WI 42, ¶ 64, 270 Wis. 2d 535, 678 N.W.2d 197 (discussing victim rights under Wisconsin law); Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'G REP. 5, 5 (2006) ("[Victim impact evidence] has become a staple in federal death penalty trials . . . .").

175. *See, e.g.*, Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENT'G REP. 36, 38 (2006) (discussing victims' rights to allocute at sentencing in terms of respect for the dignity of the crime victim).

176. *See, e.g.*, FED. R. CRIM. P. 11(b) (outlining federal procedure for accepting a guilty plea and ensuring that it is knowing and voluntary).

177. Anders v. California, 386 U.S. 738, 744 (1967).

178. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that loss of liberty when parole is revoked constitutes a "grievous loss" that warrants due process protections).

invoke on appeal, but not the state. Structuring explanation review this way reflects both a desire to limit transaction costs and the central concern I have with defendant perceptions of respectful treatment. The state's interests in respectful treatment seem much less threatened by the sentencing process, as the state does not labor under the stigma and relative powerlessness of the convicted defendant. Additionally, for reasons suggested in Part II, I suspect that cognitive bias dynamics are more likely to push sentences in the direction of greater severity than greater lenience;[179] this asymmetry, too, might justify asymmetric explanation rights.

Still, I appreciate that the state may have concerns that judges will systematically gravitate to more lenient sentences merely to minimize their explanation obligations. Other forms of accountability (e.g., judicial elections), as well as judges' internalized sense of obligation to vindicate public and victim interests, may serve to allay concerns of a pro-defendant bias. If not, recognizing parallel explanation rights for the state (e.g., requiring judges to explain themselves when they reject prosecution arguments for a sentence above the guidelines range) might be accomplished without a large increase in transaction costs. For instance, experience with post-*Booker* sentencing appeals in the federal system shows that the government has been far more selective than defendants in challenging sentences.[180]

3. Too Much/Too Little Support for Guidelines

To someone accustomed to working in the federal system, my proposal might be seen as providing too little weight for sentencing guidelines: I have deliberately rejected the aspects of the current federal system that make imposing the guidelines sentence the path of procedural least resistance.[181] Of course, giving more weight to the guidelines might better serve uniformity values. Additionally, the system might be perceived as more neutral to the extent it more consistently followed guidelines based on objective factors, as opposed to individual judges' determinations of which sentencing purposes to emphasize and how to implement them.

To someone accustomed to working in the system of Wisconsin or a similar state, the reverse criticism might be made: simply by requiring that guidelines ranges be calculated in each case, my proposal will result in the guidelines having greater influence than if they could be effectively ignored (as permitted by *Grady*). If the guidelines themselves are poorly designed to

179. *See supra* text accompanying notes 33–34.

180. *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.56 & 56A (2009), http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm (showing 6,470 sentencing appeals by defendants in fiscal year 2009, and only 64 by the government).

181. *See supra* note 142.

achieve the purposes of sentencing, then greater adherence to the guidelines may undermine the goal of purpose-advancing sentencing. Moreover, having invested the effort to determine a guidelines range, the sentencing judge may be less inclined to give full consideration to defendants' arguments for lenience that are not based on guidelines factors.

By articulating the argument from each direction, we can see there is a certain amount of tension among some of the values that my proposal is intended to advance. With respect to procedural justice, for instance, neutrality values favor a system that emphasizes a limited number of objective factors, but such a system impedes purpose-advancing sentencing and provides judges with less room to give meaningful consideration to the full range of arguments that might be made for lenience. A focus on uniformity values may lead to similar trade-offs.

In the end, all of the competing values seem important ones, and I have accordingly attempted to give each some meaningful weight in the sentencing process, locating a space roughly halfway between the Wisconsin and federal systems. The best answer, though, may vary somewhat from jurisdiction to jurisdiction, based on, among other considerations, the quality and structure of the available sentencing guidelines. A system like the federal system, with guidelines that are exceptionally rigid and crude,[182] should be especially wary of the consideration and purposefulness costs that arise from giving too much weight to the guidelines. On the other hand, a system like Wisconsin's, with much more flexible guidelines,[183] will lose much less by giving greater weight to its guidelines. Ironically, *Grady* might have been a good decision in the federal system, while *Rita* might have been a good decision in Wisconsin.

VI. CONCLUSION

Many sentencing judges, perhaps the great majority, consistently offer thoughtful explanations for their sentences—explanations that help to reassure each defendant that his judge was neutral and attentive to the arguments made for lenience, and that the sentence imposed was intended to accomplish some good purpose and to avoid unwarranted disparities. But, while this may be the norm, there are also plenty of sentences like the ones in *McCleary* and *Rita*, in which the judge's decision about sentence length seems reflexive and thoughtless. Through rigorous explanation review, appellate courts can help to ensure both the appearance and the reality of better reasoned, more respectful sentences.

As the Wisconsin Supreme Court discovered after *McCleary*, however, it is one thing for a high court to endorse explanation review and quite another

182. *See* O'Hear, *Myth*, *supra* note 141, at 250–51.

183. *See* Hammer, *supra* note 88, at 16–17 (describing Wisconsin guidelines).

for such review to be conducted in a manner that actually affects sentencing practice. If courts are convinced of the value of explanation review, the standards should be articulated more precisely and forcefully than was done in *McCleary* and *Gallion*. Drawing on the most attractive features of explanation review in the Wisconsin and federal systems, I have suggested a preliminary set of eleven principles that would give more specific content to the explanation requirement. Aspects of these principles are open to debate—on the margins, I may demand too much of sentencing judges, or not quite enough. But it is to be hoped that, regardless of how some of the specific questions are resolved, the nation's appellate courts will more consistently demand sentence explanations that befit decisions of such enormous gravity.