

BREAKING DOWN THE MISPRISION WALLS:
LOOKING BACK ON
THE FEDERAL SENTENCING GUIDELINES,
AFTER *BOOKER*, THROUGH A BLOOMIAN LENS

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I. INTRODUCTION

It's an understatement to say that postmodern philosophy has not won the hearts of everyone in the legal world,¹ but postmodern philosopher Harold Bloom may yet have something to say about the Federal Sentencing Guidelines (Guidelines) as they functioned before the United States Supreme Court's recent decision in *United States v. Booker*.² In that decision, the United States Supreme Court, following up on its decision in *Blakely v. Washington*,³ held that the Guidelines are just that: guidelines. They are not binding on sentencing courts, and they are but one factor of all the factors listed in 18 U.S.C. § 3553(a) that a sentencing court must consider.⁴ That sounds simple enough, and in many respects, it is probably

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1. See James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1698 (1991). Professor Gordon has sarcastically summed up Critical Legal Studies, an application of postmodern philosophy in the legal realm, in the "following irrefutable syllogism": "Major Premise: Lots of cases could be decided either way. Minor Premise: I don't like the way a lot of cases have been decided. Conclusion: The law is a crock. Practical Application: Come the revolution." *Id.* Some people like it, though. See, e.g., Francis J. Mootz III, *Psychotherapeutic Practice as a Model for Postmodern Legal Theory*, 12 YALE J.L. & HUMAN. 299, 381 (2000) (noting the "positive characteristics of the psychotherapeutic model of critical legal theory"); Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 374 (1998) (discussing another professor whose work "is absolutely crucial to the continued evolution of critical legal theory, and it is from this perspective that her work stands as a positive example").

2. 543 U.S. 220 (2005).

3. 542 U.S. 296 (2004).

4. *Booker*, 543 U.S. at 227. "[T]wo provisions of the Sentencing Reform Act of 1984 . . . that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent." *Id.*; see also 18 U.S.C. § 3553(a) (listing factors a sentencing court must consider).

Actually, a good number of circuits consider the Guidelines not just another factor, but as a sort of "superfactor." Those circuits grant Guideline-range sentences a presumption of reasonableness on appeal. See *United States v. Buchanan*, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring) (listing circuits that have accepted and rejected presumption of reasonableness on appeal). There is also a difference of opinion among the circuits regarding whether a sentencing court should grant the Guidelines additional weight in the sentencing balance. Compare, e.g.,

a welcome decision for sentencing judges nationwide. But Bloom would argue that *Booker* is not simply a commonsense decision, but rather the culmination of twenty years of struggle and patricide among federal sentencing judges—literary patricide, that is, and in a way only postmodernists can imagine.

The fact is, despite whatever skepticism may swirl around the nebulous philosophical abstractions that crop up from time to time,⁵ law and literature share several core characteristics,⁶ and some scholars have found postmodern literary critical theory to be helpful in interpreting law.⁷ In

United States v. Zavala, 443 F.3d 1165, 1171-72 (9th Cir. 2006) (per curiam) (Guidelines are but one factor), with *United States v. Jimenez-Beltre*, 440 F.3d 514, 518-19 (1st Cir. 2006) (affirming sentence that gave substantial weight to Guideline calculation). *Booker* itself stated only that the Guidelines are to be considered. See *Booker*, 543 U.S. at 259-60.

5. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 247-58 (1988); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988); J.M. Balkin, *The Domestication of Law and Literature*, 14 LAW & SOC. INQUIRY 787 (1989); James Boyd White, *What Can a Lawyer Learn from Literature*, 102 HARV. L. REV. 2014 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)); Charles M. Yablon, *Grant Gilmore, Holmes, and the Anxiety of Influence*, 90 NW. U. L. REV. 236, 241 (1995) (noting the author's awareness "of all the questions that can and have been raised about the use of the techniques of literary criticism to analyze legal texts" and citing the aforementioned works to support that proposition).

6. See James Boyd White, *Law and Literature: "No Manifesto,"* 39 MERCER L. REV. 739, 751 (1988) ("Literature and law are both about reason and emotion, politics and aesthetics.").

7. See Philip N. Meyer, *Will You Please Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567-69 (1994) (noting that in such a case, literary critical theory serves as a hermeneutic for interpreting legal texts). Law is essentially a storytelling exercise, and hermeneutics, a "discrete school[] . . . in the law-as-story movement," rests on the notion that "because the interpretation of texts is central to both law and literature, the study of fiction may yield rules of interpretation that may profitably be used in writing and understanding constitutions, statutes, and judicial opinions." *Id.* at 569.

The application of critical theory to legal texts is an outgrowth of the "law and literature project." Bruce L. Rockwood, *The Good, the Bad, and the Ironic: Two Views on Law and Literature*, 8 YALE J.L. & HUMAN. 533, 533 (1996). That "project" is "a process of reading and comparing literary and legal texts for the insights each provides into the other, and whose combined force illuminates our understanding of ourselves and our society." *Id.* at 533 n.1. The application of law to literature is dynamic:

The law and literature project continues to expand in two directions. First, some scholars pursue the detailed study of specific texts and authors for the light they shed on the nature of law and its impact on our lives. Second, some engage in the systematic introspection required for the application of critical theory—to both fiction about legal issues and to the interpretation of legal texts as a form of literature—in an attempt to make a place for the law and literature movement within, or as a continuation of, modern and postmodern intellectual history.

Id. at 533. Specifically, the law and literature movement is divisible into two branches: law-in-literature and law-as-literature. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1988). "Law-in-literature considers literature 'about' legal subjects . . . and law 'about' literature (e.g., laws concerning defamation, obscenity, or copyright)." Kenji Yoshino, *What's Past Is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471, 473-74 (1994). The study of law-as-literature is the study of two related subjects: "the study of rhetoric in legal writing and the application of literary theory to the law." *Id.* at 473. For further discussion of the branches of law-as-literature, see Gretchen A. Craft, Note, *The Persistence of Dread in Law and*

particular, and most relevant to this Article, Bloom's "anxiety of influence" theory,⁸ or theory of misprision,⁹ holds that writers, in an effort to give their writings uniqueness and originality, misread earlier texts in the field in which those writers write, thereby clearing "imaginative space" for themselves.¹⁰ Legal scholars have applied Bloom's theory in a variety of

Literature, 102 YALE L.J. 521, 523-24 (1992). This Article will focus on the second branch of the law as literature movement: the application of critical theory to law, and, specifically, to the Guidelines. Yoshino's piece cites to both Weisberg's and Craft's piece for explanation of the law as literature inquiry, and is an excellent summary of Bloom's "anxiety of influence" theory; this Article will refer to it often. Yoshino, *supra* note 7, at 471.

8. See generally Yoshino, *supra* note 7.

9. See Richard M. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. COLO. L. REV. 525, 556 n.114 (1991) (noting that "[c]reative misreading, or misprision, is a term drawn primarily from poststructuralist literary criticism, and the practice has been most effectively advocated by Harold Bloom"). This Article will use the terms "misprision" and "misreading" interchangeably.

It is important to distinguish Bloom's misprision from misprision of felony, a common law offense of "criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him as will make the concealer an accessory before or after the fact." *State v. Wilson*, 67 A. 533, 533 (Vt. 1907). See Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1792 (1985) (noting that the Vermont definition is "common"). The majority view is that state common law misprision of felony "consisted of a failure to report a crime to the authorities plus an additional element—an evil intent or some positive act." *Id.* at 1793 (footnotes omitted).

As Bloom uses the term "misprision," it seems to carry little legal currency. He does equate "poetic misprision" to "poetic influence," suggesting that, if there is some connection between the legal and literary uses of the term, it may lie in the notion that one who commits misprision of felony somehow "influences" the commission of another crime. HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 5 (1973) [hereinafter BLOOM, ANXIETY]. It may also perhaps illustrate notions of interconnectedness—between predecessor and author or criminal and one who commits misprision of felony to hide the crime.

10. BLOOM, ANXIETY, *supra* note 9, at 5. Yoshino describes the theory as follows:

The theory claims that all poets (writers) grapple with the anxiety that everything they write is influenced by their powerful predecessors. In order to become great, Bloom asserts, poets must break free of this influence by conducting "strong misreadings" of their predecessors—that is, by subverting the meaning of their predecessors' texts in order to make their own contributions.

See Yoshino, *supra* note 7, at 473. Imagine the universe of literature on a given topic as *x*. If one author occupies that entire space, subsequent authors cannot ever be original. To create something original, subsequent authors must attack the occupied space rather than perform the impossibility of creating something new.

Though excellent, Yoshino's explanation of Bloom's theory may benefit from some refinement. It is not the case that all poets seek to misread predecessor texts. Rather, Bloom states that

his concern is only with strong poets, major figures with the persistence to wrestle with their strong precursors, even to the death. Weaker talents idealize; figures of capable imagination appropriate for themselves. But nothing is got for nothing, and self-appropriation involves the immense anxieties of indebtedness, for what strong maker desires the realization that he has failed to create himself?

BLOOM, ANXIETY, *supra* note 9, at 5. Even though not all poets or writers seek to overcome their ancestry, sentencing judges are poster children for anxious writers because their decisions carry precedential authority. Judges at war with binding statutory authority, as some sentencing judges

contexts,¹¹ and some have even noted that Bloom’s theory informs stare decisis¹²: in deciding cases, judges grapple with and ultimately misread other judges’ prior decisions, superimposing their own understanding of what they mean in an effort to bring order—or at least their concept of order—out of chaos.¹³ The originality of this Article is its application of

may be, find themselves enmeshed in a battle of authority versus authority. Judges are “strong” poets in the Bloomian sense. *See* discussion *infra* Part III.

11. *See* Yablon, *supra* note 5, at 241 (noting that the purpose of the article is to argue that Bloom’s “anxiety of influence” theory “may yield interesting insights into the way [Grant] Gilmore writes about Holmes”); Abner S. Greene, *Constitutional (Ir)responsibility*, 71 *FORDHAM L. REV.* 1807, 1809 (2003) (analogizing Bloom’s “anxiety of influence” theory with the author’s “theory of constitutional misreading,” which “explains how constitutional interpreters misread to create a continuity with the past that otherwise would not exist”); Michael Bacchus, *Strung Out: Legal Citation, The Bluebook, and the Anxiety of Authority*, 151 *U. PA. L. REV.* 245, 249 (2002) (arguing that “the rules governing the string cite serve to uncover a tension within legal scholarship: what [the author] call[s] (after Harold Bloom’s ‘anxiety of influence’) the ‘anxiety of authority’”) (footnote omitted); Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159, 188-90 (2002) (arguing that copyright law may be used as an “instrument of suppression” and citing to Bloom’s “anxiety of influence” theory to support that claim).

12. It is important here, however, to distinguish Bloom’s “anxiety of influence” theory from stare decisis—“[t]he doctrine stating that courts must adhere to precedent.” Yoshino, *supra* note 7, at 475. Indeed, “[u]nlike the anxiety of influence, the doctrine of stare decisis is prescriptive rather than merely descriptive. Whereas the anxiety of influence merely detects a relationship that already exists, stare decisis invents one by mandating that courts follow previous decisions.” *Id.* This Article does not primarily focus on courts’ obligation to follow precedent. Rather, it discusses the relationship between the Federal Sentencing Guidelines and an individual court’s reading—or misreading—of the Guidelines. Accordingly, this Article focuses on Bloom’s “anxiety of influence” theory and takes a descriptive approach to the relationship between courts and the Guidelines, seeking to describe what may occur when courts read the Guidelines rather than prescribe a procedure courts ought to follow when doing so. In another sense, it will predict what will happen if sentencing judges’ discretion is constrained.

13. Professor Yoshino notes that “[t]he theory of the anxiety of influence was first applied to law by Professor Paul Gewirtz in his article *Remedies and Resistance*.” Yoshino, *supra* note 7, at 477. *See* Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585 (1983). According to Yoshino, “David Cole subsequently explored the theory at greater length in his article *Agon at Agora: Creative Misreadings in the First Amendment Tradition*.” Yoshino, *supra* note 7, at 477. *See* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 *YALE L.J.* 857 (1986). “Cole’s thesis, in a nutshell, is that the Justices [of the United States Supreme Court] experience the ‘anxiety of influence’ when confronted with the text of their great legal predecessors; consequently, their opinions are ‘misreadings’ (in Bloom’s case) of those predecessors.” Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 *DUKE L.J.* 191, 254 (1991). Professor Abner S. Greene has written:

In his seminal work *The Anxiety of Influence*, Harold Bloom uses the term “misprision” to refer to a poet’s misreadings of influential texts, misreadings in the service of freeing the poet from the grip of the past. I believe that much of American constitutional law, as set down in Supreme Court opinions, as well as American constitutional theory . . . engage in a different sort of misreading. Rather than misreading to break from the past, American constitutional authors misread to create a false illusion of continuity, to free themselves from the grip of the present.

Greene, *supra* note 11, at 1825 (footnote omitted).

Bloom's theory of misprison to the pre-*Booker* Federal Sentencing Guidelines.

Here's what I mean. Before *Booker*, most judges and scholars viewed the Guidelines as restricting judges' sentencing discretion,¹⁴ while increasing prosecutors'¹⁵ sentencing discretion. Bloom's theory, if applied to interpretations of the Guidelines, reveals that some sentencing judges sought to break free of the Guidelines' influence over their decisions by conducting "strong misreadings" of the Guidelines as a "predecessor text" in an attempt to subvert their meaning and make a unique contribution,¹⁶ perhaps one more in conformity with judges' individual sense of justice and fairness.¹⁷ Indeed, sentencing judges arguably did so in several instances.¹⁸

14. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 97 (2003) (noting that "[t]he Sentencing Guidelines make plea bargaining a cause for concern . . . because they curtail the judge's discretion"); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992) ("The Guidelines Manual is a code of changing regulations that substantially constrain the wide ranges within which judges formerly exercised discretion.").

15. See Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS. 17, 19 (2003) (recognizing an "age of sentencing guidelines which simultaneously limit the discretion of sentencing judges while conferring greater outcome-producing power on prosecutors"); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 248-49 (2003) ("In addition to the broad discretion they enjoy at the time of charging, federal prosecutors also enjoy substantial discretion at the sentencing stage, for it also is 'the prosecutor's prerogative to recommend leniency under the Sentencing Guidelines' in the form of a downward departure.") (quoting Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L.J. 1229, 1233 (2001))).

Prosecutors also enjoy substantive criminal lawmaking power by deciding which crimes to prosecute. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479-81 (noting that prosecutors "enjoy de facto criminal lawmaking power"); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 762 (1999) (noting that "prosecutors can prevent the judiciary from ever passing on the statutory interpretations on which they rely"); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475-76, 1505-12 (1993); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. REV. 621, 699, 699 n.335 (2004) (citing the aforementioned sources for the proposition that "almost all of the power resides in the hands of the executive and its agent, the prosecutor"). By deciding which crimes to prosecute, prosecutors can also determine which sentences judges will hand down.

16. See *supra* notes 7-10 and accompanying text (explaining Bloom's "anxiety of influence" theory and the terms "predecessor text," "strong misreading," and "influence").

17. Daniel J. Freed has already argued that some judges have attempted to circumvent the Guidelines, noting that "[t]he Commission's tightening of 'loopholes,' combined with strict enforcement by courts of appeal hostile to departures, has increased the level of noncompliance in trial courts." Freed, *supra* note 14, at 1684. That nonconformity may manifest itself in several ways.

Many judges are conforming to the guidelines with a deep sense of distress: they believe Congress, not the courts, should remedy policy problems created by the Commission. Other judges are finding or acquiescing in alternative routes to justice in sentencing: some are choosing to risk reversal on appeal by "departing" upward or downward from the guideline sentence, as authorized by section 3553(b) of the SRA;

others are imposing reduced sentences in the wake of low-visibility negotiations between prosecutors and defense attorneys, effectively bypassing the applicable guidelines, mandatory penalties, and appellate court rulings.

Id. at 1686-87 (footnotes omitted). Freed argues that the motivation behind the noncompliance is not hard to understand. A sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice.

Id. at 1687.

This Article seeks to support Freed's assertions with a new and original spin (and perhaps with its own creative misreading): that the mechanism judges use to negate the perceived ill-effects of the Guidelines, in addition to the list of tactics Freed presents, is a classic Bloomian misreading of the Guidelines' recommendations. Also, in accord with Freed's theory about the reason for some judges' distaste for the Guidelines, this Article does not suggest that judges' misreadings of the Guidelines are born of an egocentric view of the judicial role or of any malicious intent to subvert the Guidelines. Rather, this Article assumes that judges engaging in Bloomian misreadings act out of sincere desire to achieve justice and fairness.

18. The best example is probably *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995). *See id.* at 41-43 (noting that the government in that case argued that the district court had misread U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.12 (1993) and stating that "the lower court turned the proper rule inside out"; noting also that the district court abandoned the Guideline based on its own interpretation of fairness under the facts of that case). *See also* *United States v. Pearce*, 191 F.3d 488, 494-95 (4th Cir. 1999) (noting defense counsel's "thinly veiled invitation to ignore completely the sentencing guidelines" and noting that "the court did nothing to discourage counsel or to indicate that it would not take into account" counsel's invitation). The district court-imposed sentence on review in the Second Circuit's decision in *United States v. Campo*, 140 F.3d 415 (2d Cir. 1998), is unique in that it actually fails to utilize what discretion the Guidelines gave the district judge. *See id.* at 418-19 (noting that the court committed the "unusual step of expressly abdicating the discretion that it has been duly entrusted by law to exercise").

Other cases feature an allegation of misreading on their face, but in the end, they simply evince a difference of opinion over a Guideline's meaning. It's tough to say if there's a "misreading." For instance, in *United States v. Parker*, a defendant failed to surrender to serve a sentence in violation of section 3146 of Title 18 of the United States Code. 146 F.3d 696, 697 (9th Cir. 1998) (Reinhardt, J., dissenting). Section 2J1.6(a)(1) of the Guidelines provides the base sentence. *Id.* The three-judge panel permitted an increase of the base sentence pursuant to section 4A1.1(d), which permits an enhancement where "the defendant [commits] the instant offense while under a criminal justice sentence." *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 2J1.6(a) (1996). Judge Reinhardt, in dissent from the panel's denial of a sua sponte request for rehearing en banc, argued that the panel misread section 4A1.1(d), contending that the purpose of that provision was to punish one who "commits a crime while under sentence," including failure to report under section 3146(a)(1), because such a failure manifests additional disregard for the law. *Parker*, 146 F.3d at 697 (Reinhardt, J., dissenting). In the case of section 3146(a)(2), Judge Reinhardt claimed, additional disregard for the law is already built into the base level mandated under section 2J1.6(a)(10), since "[e]very person committing that crime is already under sentence." *Id.* The effect of the panel's reading, according to Judge Reinhardt, is that defendants are subject to an enhancement every time they violate section 3146(a)(2). *Id.* Such a result obviates the purpose of the enhancement, sanctions "double counting" of sentences, and changes "the Guidelines themselves by establishing a different base level sentence than was determined by the Sentencing Commission." *Id.* The panel had defended double counting on the ground that the "enhancement and the base offense level 'serve unique purposes under the Guidelines.'" *Id.* (citing *United States v. Parker*, 136 F.3d 653, 655 (9th Cir. 1998)). But Judge Reinhardt claimed that double counting is always impermissible; it occurs when an enhancement increases punishment for a harm that was already incorporated into the base sentence and is contrary to Ninth Circuit precedent—at least before *Booker*. *Id.* at 698; *see* *United States v. Calozza*, 125 F.3d 687, 691 (9th Cir. 1995); *United States v. Alexander*, 48 F.3d 1477, 1492 (9th Cir. 1995). Determining which side of the *Parker* debate got it right would be well beyond the scope of this

Those misreadings raised substantial issues as to the lengths to which sentencing judges may go in distancing themselves from the text of the Guidelines.¹⁹ In many cases, there was no question, from a Bloomian perspective, that misprision occurred. Because misprisions had historically taken the form of subversions or misinterpretations of the text of a particular Guideline, the only issue was whether the misprision was politically legitimate.²⁰

Article and inconclusive at best, even though Judge Reinhardt's allegation of misreading is a shot across the panel's bow.

Similarly, in *United States v. Sharma*, the Third Circuit defended itself against allegations that it had misread U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 cmt. n.8(b) (1996) in a prior case by labeling those allegations as "nothing more than a disagreement with our interpretation of the application note." 190 F.3d 220, 227 n.4 (3d Cir. 1999). The Third Circuit articulated the disputed reading of Application Note 8(b) in *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), which utilized the Note to interpret section 2F1.1 as defining loss as "the amount of money the victim has actually ended up losing at the time of sentencing." *Id.* at 531. Again, as in *Parker*, an allegation of misreading appears on the face of the opinion, but whether an actual misreading occurred turns on an analysis of both sides of the case—something this Article is unequipped to do.

Note that, where a court opinion in question does not specify the edition of the Guidelines to which it refers, this Article will attempt to eyeball it and assume it refers to the edition in effect at the time of sentencing. Because the Guidelines are revised effective November 1 each year, that will mean that the Guideline citation in the Article will be to the year before sentencing occurred. See *United States v. Benitez-Perez*, 367 F.3d 1200, 1205 (9th Cir. 2004) (noting that courts refer to the edition of the Guidelines in effect unless ex post facto problems are present, in which case the edition in effect at the time the offense conduct transpired is used).

19. Undoubtedly, attorneys, both prosecuting and defending, have misread the Guidelines at least as much as judges, if not more, in an attempt to advocate for their clients. See, e.g., *United States v. Hauptman*, 111 F.3d 48, 52 (7th Cir. 1997) ("The government's response is to negotiate a plea agreement, based on a misreading of the federal sentencing guidelines, that if rubber-stamped by the judge might have resulted in a nominal punishment of a serious crime."); *United States v. Wihbey*, 75 F.3d 761, 777 (1st Cir. 1996) (noting that petitioners' argument "seems to be based on a misreading of the directive of commentary note 12 to § 2D1.1 of the guidelines"). Attorney misreadings may have a great effect on the law, as they provide the framework judges use in making decisions. Criminal prosecutors create law through charging decisions that survive on appeal. But because attorneys' misreadings are primarily in the interest of advocacy and not in creating law, this Article will focus only on judges' misreadings of the Guidelines.

20. The Bloomian perspective does not contemplate whether misreading predecessor texts is "right," "wrong," or legitimate. In the Bloomian worldview, texts are what they are—products of predecessors' influence—and misreading is necessary for a text to achieve greatness; because all writers want their texts to be great, or immortal, they misread past texts, right or wrong. The meaning of the original text does not arise in a vacuum, but rather is created by subsequent readings, rereadings, and misreadings. See Yoshino, *supra* note 7, at 473-74. In the legal context, however, distancing an interpretation from plain language and established meaning of a statute—in other words, misreading a statutory provision for whatever reason—may give rise to separation of powers concerns. Indeed, textualism, or reliance on the primacy of statutory text, is grounded in separation of powers terms:

[T]extualism should be understood as a means of implementing a central and increasingly well-settled element of the separation of powers—the prohibition against legislative self-delegation. Viewed in that light, textualism functions to preserve the integrity of the legislative process by stripping congressional agents of the authority to resolve vague and ambiguous texts of Congress's own making.

All of that changed on January 12, 2005, when the United States Supreme Court issued its decision in *Booker*.²¹ By holding that sentencing courts must consider the Guidelines but are not bound by them,²² *Booker* abolished sentencing judges' need to misread. Why go to the trouble of coming up with a principled, yet erroneous—consciously or otherwise—misreading of the Guidelines when you can simply craft your own sentence from the clay provided by 18 U.S.C. § 3553(a)? *Booker* brought an end to two eras—the era of prescribed sentencing, as well as the era of misreading the prescriptions themselves.

Booker may have cured sentencing judges of their need to misread the Guidelines, but an analysis of misreading will hopefully prove influential as Congress responds to *Booker*.²³ This Article accomplishes two principal things. First, it places judges' interpretations of the Federal Sentencing Guidelines in a Bloomian context,²⁴ establishing that sentencing judges, in

John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997). To some, adherence to statutory language gives legitimacy. See, e.g., Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 617 (2001) (noting that “the statutory language has unique claims to legitimacy”). On the other hand, though, it may very well be that “democratic legitimacy is measured not by the elimination of judicial discretion in statutory interpretation, but instead by the interpretive principles and default rules that shape and channel that discretion.” Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595 (1995). Whatever interpretative path one takes, it is clear that ignoring a statutory text's meaning (whatever that is), is per se illegitimate.

21. 543 U.S. 220 (2005).

22. *Id.* at 226-27.

23. It seems to be inevitable that Congress will attempt to pass sentencing laws that have the force of law, rather than suggestion. See, e.g., Richard Serrano, *Ashcroft Makes Plea for Sentencing*, L.A. TIMES, Feb. 2, 2005, at A17 (“Departing Atty. Gen. John Ashcroft, warning Tuesday that a recent Supreme Court decision could lead to more lenient treatment of violent offenders, called on Congress to enact tougher federal sentencing guidelines.”). In *Federal Judges: Back in the Game: Two Supreme Court Rulings on Federal Sentencing Have Raised More Questions Than They Answered*, Richard A. Stacey, a former administrative law judge and U.S. Attorney for the District of Wyoming, wrote:

Even the Supreme Court said that the ball is now in Congress's court. There is every indication that Congress is prepared to do whatever is necessary to prevent a return to the old system. Most likely, it will enact a series of mandatory minimum sentences for specific offenses under specific circumstances, in conjunction with something akin to California's “Three Strikes and You're Out” statute. By comparison to sentencing guidelines, both of these approaches are extremely inflexible and arbitrary.

DENVER POST, Jan. 23, 2005, at E-01. As described *infra*, the evil of the Guidelines was their mandatory character: they *required* a judge, not a jury, to find facts that would raise a defendant's sentence above the statutory maximum. See *Booker*, 543 U.S. at 233-34. Sentencing judges are free to engage in such factfinding at their discretion. See *id.* So Congress can't really override *Booker* by enacting “mandatory” guidelines in the form of statutes.

24. This may itself be a dangerous thing—more dangerous than any misreading judges perform. As noted *infra* Part II.A, Bloom's theory is postmodern in nature. That postmodernism, while perhaps proper in a literary context, may be quite undesirable in the legal context, as it undermines the possibility of determining the “right answer” the judicial inquiry requires. So while judges may face reversal on appeal and sin against the separation of powers if they commit

some instances, conducted Bloomian misreadings of the Federal Sentencing Guidelines and other federal sentencing statutes in an attempt to regain the discretion and latitude the Guidelines, as a predecessor text, took from them.²⁵ The mechanism by which sentencing judges distanced themselves from the Guidelines was, among other things, a literary exercise in misreading the Guidelines, as well as other sentencing statutes, as a predecessor text. Second, it establishes that law and literature, while siblings, are not twins. While appropriate in the literary context,²⁶ Bloomian misreadings run the risk of engendering serious problems when applied to the Guidelines. The crux of this Article is this: given sentencing judges' proven

Bloomian misprision, this Article's argument may do greater violence to the judicial system. Indeed, it may undermine the possibility of ever attaining a right answer.

To avoid that epistemological pitfall, this Article should be read (or misread) in the narrowest Bloomian light possible. In a sense, the reading this Article provides is not truly Bloomian, since it does not accept the epistemological underpinnings of that theory. Rather, it seeks merely to prove that judges misread the Federal Sentencing Guidelines in an attempt to regain lost discretion; Bloom's misprision theory merely provides a helpful heuristic theory for explaining that process.

This Article may also fall victim to another, unavoidable consequence. By applying a Bloomian reading of judges' interpretations of the Federal Sentencing Guidelines, this Article must also accept the fact that it too engages in misreadings, both of the Guidelines and of judges' interpretations of them. This Article may only defend itself on the ground that its interpretation is not a misreading, but is correct.

25. This Article imputes no malicious intent on the part of any judge in misreading, and does not implicate in the least that any judge, including the authors of the opinions cited in this section, have neglected their strict commitment to the rule of law. As Judge Marsha Berzon of the Ninth Circuit Court of Appeals testified during her hearing, "my role as a judge is not to further anything that I personally believe or don't believe." William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 154 (2001) (citing *Confirmation Hearing on Federal Appointments: 1999 Hearings Before the Senate Committee on the Judiciary, Part 1*, 106th Cong. 32 (2000) (statement of Judge Marsha Berzon)). Similarly, Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals, when asked whether he "decides how to rule based on his or her own personal preferences, divorced from precedent and other traditional tools of adjudication, and then manipulates the law to justify the result," answered:

No judge I know, liberal or conservative, acts in the manner described in [the] question. Most, if not all, judges do their very best to follow the law as they understand it, to respect precedent, and to use the traditional tools of adjudication. . . . We all frequently apply the law in ways we would prefer not to. I have sat on a host of cases in which, had I been imposing only a Solomonic sense of justice unconstrained by the Constitution, federal statutes, or precedent, I would have come to a different result than I was compelled to reach.

Howard Bashman, *20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit*, How Appealing, <http://20q-appellateblog.blogspot.com> (Feb. 2, 2004) (last visited March 1, 2004). This Article does not argue that judges engage in Bloomian misreadings of the Federal Sentencing Guidelines to advance any ideological goal, but rather as unconscious resistance to the constraints the Guidelines establish.

26. See *supra* notes 9-11 and accompanying text (explaining Bloom's theory of misprision). See also BLOOM, ANXIETY, *supra* note 9, at 5 (noting that Bloom's misprision theory is a "theory of poetry" aimed at "strong poets").

propensity to misread rigid sentencing rules, Congress may want to think twice before attempting to again constrain sentencing judges' discretion.²⁷

To accomplish those goals, Part II presents background on Bloom's "anxiety of influence" theory, a crash course in statutory interpretation (and misreading²⁸) and the history of the Federal Sentencing Guidelines, including how the Sentencing Reform Act²⁹ limited federal judges' sentencing discretion and *Booker* restored it—at least as far as we can yet tell. Part III applies Bloom's theory to the Guidelines, explaining generally how a hypothetical judge might misread the Guidelines to achieve a particular end. It then presents and summarizes cases in which sentencing judges may have misread the Guidelines. Part IV identifies the techniques, both Bloomian and statutory, that those judges employed in misreading the particular Guidelines at issue in those cases,³⁰ as well as three problems that such misreadings created under the pre-*Booker* Guidelines: (1) they were reversible error; (2) they violated the separation of powers doctrine; and (3) they were not politically legitimate. Those were real, substantial problems, and Bloom would argue that such misreadings were inevitable, given that Congress had elected to shackle sentencing judges to a rigid and

27. The flood of newspaper commentary that hit after the Court issued *Booker* is a testament that public sentiment opposes a return to a mandatory sentencing system. See, e.g., Laurence A. Benner, *Federal Sentencing Guidelines; A Return to the Rule of Reason*, SAN DIEGO UNION-TRIB., Jan. 26, 2005, at B7 (noting that "it would seem wiser for Congress to adopt a wait-and-see approach before once again engaging in the treacherous attempt to impose rigid uniformity"); Debra J. Saunders, *When Congress Plays Judge*, SAN FRANCISCO CHRON., Jan. 16, 2005, at C5 (noting that it's a "big problem" that Congress may step in and re-create a mandatory sentencing regime).

28. While the Guidelines may be discretionary, and misreadings dead, so long as there are statutes, there will be misreadings. The purpose of this section is to identify the most "legitimate" misreadings. It doesn't sanction misreadings, however, but merely states that if judges insist on misreading statutes, this is how they should do it.

29. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (2000)); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993). Also, the fact that Bloom's misprision theory is limited to literary pursuits does not exempt judges from its reach, since written words comprise judges' opinions just as much as books or poems.

30. This section does not, however, take the obvious next step: discussing in detail why *Booker* itself was a misreading. It avoids that step for several reasons. First, the court in *Booker* did not really interpret the Guidelines. Rather, it simply relied on the plain language of provisions in the Sentencing Reform Act that made the Guidelines mandatory and pointed out constitutional problems with that approach. Second, if this Article were to label any particular case a "misreading," it would fall into the trap of being a misreading itself. This Article does not purport to "read," let alone "misread," any case. When it must argue that a misreading occurs, the best it can do is to rely on appellate courts' proclamations of misreading. That is, of course, itself problematic, since appellate courts may misread just as well as district courts. But alas, post-modernism is a sticky business, and this difficulty highlights some of the inherent problems with a postmodern application of law and legal theory. See *supra* note 24; discussion *infra* Part II.A (explaining the difficulties of postmodern approaches). Finally, and perhaps most importantly, this Article declines to interpret *Booker* simply out of deference to other commentators; an invitation is extended to others to respond to, and "misread," this Article.

unforgiving sentencing structure. This Article concludes in Part V by recommending that Congress, as it returns to the issue of uniform sentencing, should keep in mind the inevitability of misreading and the problems it entails, eschewing rigidity in sentencing in favor of flexibility. The problems of misreading may be greater than the problems of flexibility.

II. OF ANXIETY AND MISREADINGS: BACKGROUND ON THE “ANXIETY OF INFLUENCE” AND THE HISTORY OF THE SENTENCING GUIDELINES, OR, HOW TO MISREAD A GUIDELINE

This Part briefly describes Harold Bloom’s “anxiety of influence” theory, provides a crash course in statutory interpretation, describes how to perform a misreading (and the best way to do so), outlines the history and purpose of the Federal Sentencing Guidelines, and gives a recap of the demise of the Guidelines as they were known before January 2005.

A. THE ANXIETY OF INFLUENCE

Harold Bloom formulated the “anxiety of influence” theory in four works³¹: *The Anxiety of Influence*,³² *A Map of Misreading*,³³ *Kabbalah and Criticism*,³⁴ and *Poetry and Repression*.³⁵ As noted,³⁶ the theory, in a nutshell, holds that writers misread predecessors’ work in a bid at clearing poetic space for their own writings, thereby allowing themselves to break free of the influence of their literary progenitors and create something truly original.³⁷ Though the creation of literature may seem a nonviolent endeavor, Bloom characterizes misprision as an Oedipal conflict between literary father and son, painting the author-predecessor relationship as that of a son slaying his father.³⁸

31. Yoshino, *supra* note 7, at 473.

32. BLOOM, ANXIETY, *supra* note 9.

33. HAROLD BLOOM, A MAP OF MISREADING (1975) [hereinafter BLOOM, MISREADING].

34. HAROLD BLOOM, KABBALAH AND CRITICISM (1975).

35. HAROLD BLOOM, POETRY AND REPRESSION: REVISIONISM FROM BLAKE TO STEVENS (1976).

36. See *supra* notes 7-10 and accompanying text (briefly explaining Bloom’s theory of misprision).

37. Yoshino, *supra* note 7, at 473.

38. See Note, *Originality*, 115 HARV. L. REV. 1988, 1991-92 (2002) (noting that Bloom’s theory holds that “[a] poet experiences Oedipal anxiety regarding his inevitable need simultaneously to imitate and to displace prior poets” and that “[i]f Roland Barthes proclaimed the death of the author, Harold Bloom fingered the author as the murderer of his literary fathers.”) (footnotes omitted); Yoshino, *supra* note 7, at 473 (noting that Bloom’s reference to Freud is itself a misreading).

That Oedipal motif influences Bloom's exposition of the six tactics a writer can use to misread a predecessor.³⁹ First, a writer may attempt to correct errors in the preceding text.⁴⁰ Second, a writer may seek to fill in gaps in the preceding text.⁴¹ Third, the writer may seek to "demystify" the predecessor herself.⁴² Fourth, the writer may create a text that adopts a diametrically opposite position from that of the predecessor.⁴³ Fifth, the writer may rein in her talents in an attempt to make the predecessor's work—upon which the writer's work is of course based—seem like a lesser achievement by comparison.⁴⁴ Finally, the writer may seek to establish her

39. See BLOOM, ANXIETY, *supra* note 9, at 14-16; Yoshino, *supra* note 7, at 474. Yoshino specifically refers to these tactics as "rhetorical positions a poet's text can take in relation to that of his predecessor." Yoshino, *supra* note 7, at 474. See also BLOOM, MISREADING, *supra* note 33, at 96-97 (briefly listing the six tactics). In *A Map of Misreading*, Bloom presents a diagram of misprision that elaborates on the basic six tactics he presents in *The Anxiety of Influence*. *Id.* at 84. That diagram is too complex to be adequately presented in this Article, and at any rate does not illuminate this Article's discussion, but it usefully discusses the application of the six tactics, breaking each one down in terms of "[d]ialectic of revisionism," "[i]mages in the poem," "[r]hetorical trope," and "[p]sychic defense." *Id.*

40. Yoshino, *supra* note 7, at 474. Bloom refers to the correction of errors as "clinamen," or "swerving." *Id.*; BLOOM, ANXIETY, *supra* note 9, at 14, 19-45. Bloom notes that clinamen is poetic misreading or misprision proper A poet swerves away from his precursor This appears as a corrective movement in his own poem, which implies that the precursor poem went accurately up to a certain point, but then should have swerved, precisely in the direction that the new poem moves.

BLOOM, ANXIETY, *supra* note 9, at 14.

41. Bloom labels this tactic "tessera." Yoshino, *supra* note 7, at 474; BLOOM, ANXIETY, *supra* note 9, at 14, 49-73. Specifically, "[a] poet antithetically 'completes' his precursor, by so reading the parent-poem as to retain its terms but to mean them in another sense, as though the precursor had failed to go far enough." BLOOM, ANXIETY, *supra* note 9, at 14.

42. This is known as "kenosis." Yoshino, *supra* note 7, at 474 (noting that kenosis is an "emptying out, where the iconoclastic son demystifies the godlike father by showing him to be as fallible as the son"); BLOOM, ANXIETY, *supra* note 9, at 14-15, 77-92. With typical obscurity, Bloom defines kenosis as coming from the writings of St. Paul,

where it means the humbling or emptying-out of Jesus by himself, when he accepts reduction from divine to human status. The later poet, apparently emptying himself of his own afflatus, his imaginative godhood, seems to humble himself as though he were ceasing to be a poet, but this ebbing is so performed in relation to a precursor's poem-of-ebbing that the precursor is emptied out also, and so the later poem of deflation is not as absolute as it seems.

BLOOM, ANXIETY, *supra* note 9, at 14-15. Essentially, this principle holds that (a) all poets seek to humble themselves as Jesus, and (b) later poets will humble themselves slightly more than predecessor poets in an effort to show that the predecessor did not humble himself completely.

43. This is known as "daemonization." Yoshino, *supra* note 7, at 474 (noting that, in this case, "the successor adopts the antithesis of the precursor"); BLOOM, ANXIETY, *supra* note 9, at 15, 99-112.

44. This is known as "askesis." Yoshino, *supra* note 7, at 474 (noting that askesis refers to the process by which "the poet curtails his gift to truncate the precursor's achievement in a milder form of kenosis"); BLOOM, ANXIETY, *supra* note 9, at 15, 115-36. See *supra* note 42 and accompanying text (providing a definition of kenosis). While far from clear, askesis functions just as it is defined by Bloom, who defines askesis as:

[A] way of purgation intending a state of solitude as its proximate goal. Intoxicated by the fresh repressive force of a personalized Counter-Sublime, the strong poet in his

text as the preeminent authority on the subject, taking the predecessor's place as such.⁴⁵

Bloom's theory of misprision has postmodern undertones.⁴⁶ Postmodernism, while a difficult concept that resists definition in a paragraph, is susceptible to a few generalizations relevant to this Article. First, as a foundational matter, postmodernism accepts and incorporates the chaos inherent in human existence.⁴⁷ Second, as a matter of critical theory, postmodernism accepts the chaos inherent in literary texts; no word or series of words has a determinate meaning, and meaning is only conveyed through interpretation which is itself subject to interpretation.⁴⁸ Bloomian

daemonic elevation is empowered to turn his energy upon himself, and achieves, at terrible cost, his clearest victory in wrestling with the mighty dead.

BLOOM, ANXIETY, *supra* note 9, at 116. Bloom seems to define askesis as a form of literary suicide—the destruction of the self in the quest for originality. Bloom's cryptic prose underlines the usefulness of Yoshino's piece as a primer to Bloom's theories. See *supra* note 7 (extolling the virtues of Yoshino's article).

45. This is known as "apophrades." Yoshino, *supra* note 7, at 474 (noting that apophrades "reverses the father-son relationship" between the predecessor-father and the writer-son.); BLOOM, ANXIETY, *supra* note 9, at 15-16, 139-55. This principle is a little more complicated than it at first seems. It is not just that the later poet seeks to supercede the predecessor; that is impossible, since strong predecessors occupy the entire field of discourse. Instead, the effect of apophrades is that "the new poem's achievement makes it seem to us, not as though the precursor were writing it, but as though the later poet himself had written the precursor's characteristic work." BLOOM, ANXIETY, *supra* note 9, at 16. This effect is apparently accomplished by the later poet's intentional "holding" of his work up to the precursor. *Id.* See *supra* note 38 and accompanying text (describing the Oedipal underpinnings of Bloom's theory).

46. See Thomas, *supra* note 9, at 556 n.14 (noting that Bloom "has affinities with Derrida and the deconstructionist critics" and that his theory of misprision "is similar to the postmodernist art of appropriation, in which the artist engages with popular culture in order to draw it in a direction that has been temporarily suppressed or marginalized."). See *supra* note 24 (discussing why Bloom's theory may be dangerous to legal analysis).

47. David Harvey stated:

The most startling fact about postmodernism [is] its total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic But postmodernism responds to that fact in a very particular way. It does not try to transcend it, counteract it, or even to define the "eternal and immutable" elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.

DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 44 (1989) (cited in Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 546 (2000)).

48. Ruti G. Teitel, though speaking of "a postmodernist perspective on the law of religion," stated that "[a]cross disciplines, a postmodernist approach implies an understanding of indeterminacy. All is interpretation." Ruti G. Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 B.Y.U. L. REV. 97, 97-98 (1993). That indeterminacy may be one of the failings of postmodernism as an interpretative theory, as postmodernism "has yet to articulate a coherent analytic structure to center critique or address change. . . . If society is what 'happens in your head,' there can be neither facts nor lies because everything is subject to individual interpretation." Jennifer Lee, *Binary Determinations of Guilt or Innocence: Reading Between the Lines of People v. Du*, 37 COLUM. J.L. & SOC. PROBS. 181, 204-05 (2003). See Alan Hunt, *The Big Fear*, 35 MCGILL L.J. 508, 519 (1990) ("[P]ostmodernism is anti-foundational in the sense

misprision is postmodern in that it removes from a statement its linguistic meaning. For instance, according to Bloom, a judge's statement that a particular Federal Sentencing Guideline or statute means *x* cannot be taken to mean that the particular Guideline actually means *x* because the judge's statement reflects a struggle for originality, rather than an attempt to determine the Guideline's real meaning. Truth, in a linguistic or literary sense, is subsumed in interpretation, and interpretation, in turn, gives rise to a meaning determined by forces separate from, and beyond, truth. Such nihilism may not bode well for legal analysis, which, quite apart from literary criticism, demands a "right" answer.⁴⁹ A possible limitation on the extent of the epistemological destruction Bloom's misprision theory may wreak is that the scope of the theory seems confined to literary pursuits. The subtitle of the principal work labels misprision a "theory of poetry";⁵⁰ in the introduction to *The Anxiety of Influence*, Bloom takes great pains to limit the scope of his theory to poetry, and "major figures" in particular.⁵¹

that it denies the possibility of philosophy providing any epistemological guarantees for legal research, in particular, by undermining claims to tests of legal validity, rules of interpretation and the general positivistic quest for certainty, and if not certainty, then predictability."'). Indeed, postmodernism is grounded on four principles, all of which, to some degree, undermine the possibility of attaining knowledge:

- (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation.
- (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible.
- (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted.
- (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.

Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508-09 (1992).

49. See Joseph M. Farber, *Justifying Judicial Review: Liberalism and Popular Sovereignty*, 32 CAP. L. REV. 65, 98 (2003) (noting that "'preservationist' judicial review does not promote popular sovereignty, but that it is 'epistemically' justified as a means of finding the right answers to basic constitutional questions"). But see Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark about What Judges Think About the Issues*, 36 IND. L. REV. 719, 739 (2003) (noting that "significant" cases "are the cases where the basic tools of judicial decisionmaking do not lead to a single right answer").

Based on these considerations, the term "misreading" may be somewhat misleading, since the term "misreading" implies an incorrect reading versus a correct one—a concept that postmodernism, with its reluctance to accept anything as "correct" or "incorrect," would refute. But "misreading" is indeed the term Bloom uses, even from the very start of *The Anxiety of Influence*: "Poetic history, in this book's argument, is held to be indistinguishable from poetic influence, since strong poets make that history by misreading one another, so as to clear imaginative space for themselves." BLOOM, ANXIETY, *supra* note 9, at 5. On that ground, this Article will continue to use the term "misread" to describe judges' misprision of the Federal Sentencing Guidelines and federal sentencing statutes, in spite of its apparent contradiction with the theory's postmodern underpinnings.

50. See BLOOM, ANXIETY, *supra* note 9 (noting the subtitle of the work as *Theory of Poetry*).

51. Several passages illustrate this point:

That limitation may exempt scientific and quantitative disciplines from the grasp of Bloom's epistemological maelstrom.⁵²

Bloom's theory of misprision is essentially a cousin of other, more recognized jurisprudential theories. It is closely related to Dworkin's chain enterprise theory, "which likens common law judicial opinions to chapters in a chain novel."⁵³ Like authors contributing to a chain novel, a judge "does not write in a sterile ahistorical vacuum, but must conform his decision to previous decisions on similar issues. A judge deciding a case situates himself in the chain of legal history, and either extends precedent or distinguishes the present case from past decisions."⁵⁴ Indeed,

[a]ccording to Dworkin's theory, judges should reconcile legal precedent with the judge's notion of "the best political justification of that law." Thus, judges generally do not impose their subjective whims of the text, but draw on fit (a judge's responsibility to reconcile present cases with the past) and justification (political morality and integrity, which justifies a decision in the "best" possible way for the community).⁵⁵

Like Bloom, Dworkin recognizes that judges' decisions are influenced by those of prior judges, but unlike Bloom, Dworkin essentially sees the act of judging as being in concert, rather than in conflict, with prior authors.

Stanley Fish, though critical of Dworkin in several respects,⁵⁶ similarly speaks of authors' subjection to prior authors. Like Dworkin, he recognizes

This short book offers a theory of *poetry* by way of a description of *poetic* influence, or the story of intra-*poetic* relationships. One aim of this theory is corrective: to deidealize our accepted accounts of how one *poet* helps to form another. . . . My concern is only with strong *poets*, major figures with the persistence to wrestle with their strong precursors, even to the death.

Id. at 5-6.

52. This is not to say that the reach of Bloom's theory is limited to poetry, either. In fact, Bloom identifies Freud and Nietzsche as "the prime influence upon the theory of influence presented in" *The Anxiety of Influence*. *Id.* at 8. Freud and Nietzsche, obviously, were not poets. But it is relatively easy to see why the sciences should be exempt—rather than overcome the influence of predecessor texts, they, like the law, search for truth.

53. Marianne Sadowski, "Language is Not Life:" *The Chain Enterprise, Interpretive Communities, and the Dworkin/Fish Debate*, 33 CONN. L. REV. 1099, 1102 (2001). See generally Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982); Ronald A. Dworkin, *Law as Interpretation, in* THE POLITICS OF INTERPRETATION 249 (W.J.T. Mitchell ed., 1983).

54. Sadowski, *supra* note 53, at 1102.

55. *Id.* at 1103.

56. *Id.* (noting Fish's belief "that Dworkin falls prey to the twin taboos he tries hard to avoid—'pure objectivity' (discovering meaning that is objectively 'there') and 'pure subjectivity' (imposing one's own beliefs on the text)"); *id.* (further noting that Fish argues, unlike Dworkin, "that interpretation and creation are not binary oppositions which can so simply be opposed to each other, and that an act of creation always-already includes interpretation"). See generally

that “authors are constrained by the prior assumptions indoctrinated in them by their interpretive communities.”⁵⁷ Indeed,

Dworkin’s chain enterprise is similar to Fish’s interpretive communities in the sense that an author engaged in the chain enterprise already shares a notion of what it means to write a novel or a legal opinion. But where Dworkin argues that later authors are more constrained by the history of the chain than earlier authors, Fish contends that all authors are equally constrained, because earlier writers too must engage in interpretation to contribute their chapter.⁵⁸

In other words, Fish essentially agrees with Dworkin that because consistency in opinion is the overarching goal of the act of judging, judges are constrained by the opinions of other judges. Fish disagrees, however, that earlier judges feel less constraint than later judges, since all judges act knowing that continuity is the endgame.⁵⁹ Both Dworkin and Fish, however, see the act of judging as constructive, rather than destructive. Bloom’s theory, applied to law, would not recognize any continuity in the progress of law; it may look like continuity, and the law may have developed along a particular path, but it only did so because of the judges’ drive to be unique, not because they sought to bring their decisions into any kind of harmony with prior decisions. Quite the contrary, those judges, according to Bloom, attempt to figuratively kill their predecessors.

The postmodern nature of Bloom’s theory, however, makes it darn near impossible to talk about it without falling into Bloom’s trap. Bloom has constructed a theory that recognizes the dishonesty—intellectual, at least—of recognizing anything as an “original” creation; everything that’s created is really a derivative or outgrowth, or at least a distant cousin, of something that came before. Bloom would argue that anyone who, say,

Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

57. Sadowski, *supra* note 53, at 1103-04.

58. *Id.*

59. Fish’s theory has considerable application outside of the classroom. For instance, in *Laney v. Fairview City*, the Utah Supreme Court cited Fish’s theory for the proposition that a state should rely on its own history and precedent to determine the meaning of its constitutional provisions, even though other states may have verbatim provisions in their constitutions. 57 P.3d 1007, 1017 (Utah 2002). See *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1194 n.6 (10th Cir. 2005) (citing Fish to support the proposition that “media, or modes of expression, do not inherently convey a particular meaning, but generate meaning through the way they are used in particular settings”); *Westbrook v. Teton County Sch. Dist.*, 918 F. Supp. 1475, 1490 (D. Wyo. 1996) (referring to Fish’s notion of “interpretative communities”). All of these references cite Fish for the proposition that context is important when deciding the meaning of a statute or constitutional provision.

publishes an article discussing or applying his theory to sentencing judges' approaches to the Federal Sentencing Guidelines has, as his motivation, the clearance of poetic space and the pursuit of originality. The author will, therefore, somehow misread Bloom's theory, tweaking it in some way or another to fit his selfish artistic needs. Therein lies the genius of Bloom's theory: by creating a perspective that recognizes the begging, borrowing, and stealing that goes on in all discourse, Bloom has cleared his own poetic space in such a way as to insulate his own theory from the same action: he may misread others' texts, but anyone who misreads his sets off the deconstructionist sirens and alarms Bloom has built into his theory.

Other scholars have criticized the application of Bloom's theory to law, but in different ways.⁶⁰ Principally, some have argued that the original application of Bloom's theory to stare decisis "fail[s] to engage in a rigorous comparison of the applications of the anxiety of influence in both fields" and "exaggerates the similarities between the two fields by transferring the positive connotation subversion possess[ed] in literature to the law without qualification."⁶¹ Specifically, with reference to the second criticism, it has been argued that Bloom's theory does not translate from literature to law as well as argued: subverting prior texts may make one a good author, but misreading and subverting prior judicial opinions, at least consciously, makes one a bad judge.⁶² Those criticisms, indeed, strike at the heart of the matter: while relativism may provide an interesting way to approach literature, it may destroy law, which requires, at least in theory, a "right" answer. That tension, as well as impossibility of discussing a theory that, by its very nature, ridicules the inadequacy of discussing it, will underlie the rest of this Article's discussion.

B. A CRASH COURSE IN STATUTORY INTERPRETATION

Bloom's theory of misinterpretation often butts up against accepted legal theories of interpretation. Sentencing judges' misinterpretations of the Guidelines, while misinterpretations, nevertheless conform to at least one

60. See generally Yoshino, *supra* note 7.

61. *Id.* at 480. Yoshino derives these two criticisms from Richard Posner, who wrote: Although some fine scholarship has appeared, the extent to which law and literature have been mutually illuminated is modest. Some practitioners have exaggerated the commonalities between the two fields, paying insufficient heed to the profound differences between law and literature. In their hands literary theory, or particular works of literature, are contorted to make literature seem relevant to law, and law is contorted to make it seem continuous with literature. At the same time, important opportunities for mutual illumination have been overlooked.

POSNER, *supra* note 5, at 13-14.

62. *Id.* at 13-14.

general category of statutory interpretation. Though there are myriad ways of interpreting a statute,⁶³ current statutory interpretation focuses on three principal theories: textualism, intentionalism, and purposivism.⁶⁴ Scholars label these theories “foundationalist” because they attempt to provide an objective heuristic that will interpret all statutes.⁶⁵ This section briefly discusses and defines these three theories of statutory interpretation, in preparation for our reference to those theories later in the analysis of misreading techniques.

1. *Textualism*

A textualist⁶⁶ approach to statutory interpretation derives a statute’s meaning primarily from its language.⁶⁷ Textualists hold that courts, in interpreting statutes, should look to the ordinary meaning of the statute’s terms, rather than to external sources such as legislative history or policy.⁶⁸ While adherence to the statutory text is the norm, textualism permits judges

63. Charles Gardner Geyh, *Courts, Congress, and the Constitutional Politics of Interbranch Restraint*, 87 GEO. L.J. 243, 249 (1998). Professor Geyh has commented on the “stunning range of competing interpretative approaches” to statutory interpretation:

William Eskridge and Cass Sunstein’s calls for revitalizing canons of construction; Hart and Sack’s public interest theory; Frank Easterbrook, Richard Epstein and Jonathan Macey’s disparate versions of public choice theory; positive political theory as developed by an eclectic array of scholars in different disciplines; Justice Scalia’s textualist theory; and the “contextualist approach”—the name Professor Katzmman assigns to the dominant approach employed by judges and legislators.

Id. While all these approaches have found their way into statutory interpretation and legal scholarship, this Article will view Bloomian misprision only through the lens of textualism, intentionalism, and purposivism.

Strictly speaking, the Federal Sentencing Guidelines are not statutes, but theories and techniques of statutory interpretation are still applicable to them. *See, e.g.*, John J. DiChello, Note, *Crossing Textualist Paths: An Analysis of the Proper Textualist Interpretation of “Use” Under Section 3B1.4 of the United States Sentencing Guidelines for “Using” a Minor to Commit a Crime*, 107 DICK. L. REV. 359, 362 (2002).

64. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990). In the interest of simplicity, this Article will refer only to these theories of statutory interpretation and exclude the others, which are mostly variants of these principal three.

65. *Id.* at 324-25.

66. The “current textualist wave” is also known as “new textualism.” 591 PLI/TAX 641, 663 (2003).

67. *See* Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 393 n.1 (1996) (“Textualism is a theory of statutory interpretation holding that the meaning of a statute is controlled by the statute’s text, rather than by policy arguments, legislative history, or most other extrinsic sources.”).

68. *See* Bradley C. Karkkainen, “Plain Meaning”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401, 405 (1994) (noting that the “most familiar and recurrent theme” in the statutory analysis of Justice Scalia—an ardent textualist—is that “the Court should look first to the plain meaning of the statutory text rather than seeking guidance from legislative history”).

to consult legislative history and intent where the statutory language is ambiguous.⁶⁹ Where the statutory language is clear, though, textualism requires judges to rely on it.⁷⁰ Also, judges taking a textualist approach to statutory interpretation will abandon even unequivocal statutory commands when adherence to those commands would produce an absurd result.⁷¹ If statutory language produces such an absurd result, textualism permits delving into legislative history and the purpose of the statute.⁷² Textualism does afford some flexibility, though. Even ardent textualists will not only consider word usage within the statute in question, but in other statutes as well. Such a textualist will also consider how different interpretations of words will affect the interactions between different statutory schemes.⁷³ Essentially, so long as it is statutory text, it is fair game for statutory interpretation.

Textualism is grounded in separation of powers concerns.⁷⁴ Textualists argue that because the legislature, not the courts, has statute-enacting

69. See Kelly J. Hartzler, Note, *Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class*, 38 VAL. U. L. REV. 217, 247 (2003) (“[I]f two people could reasonably interpret the statutory language to mean different things, the language is ambiguous and the inquiry must continue into other textual aids.”).

70. See *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”).

The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute’s language is plain, “the sole function of the courts is to enforce it according to its terms.” (Citation omitted).
Id. at 241.

71. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003). A result is “absurd” when it is “so contrary to perceived social values that Congress could not have ‘intended’ it.” *Id.* In some cases, therefore, even textualism invokes Congressional intent. The absurdity doctrine has received widespread and long support. See *id.* at 2388-89 (noting that “[f]rom the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.”). But see *id.* at 2419 (noting that “the Court, in recent years, has only infrequently invoked this doctrine to disturb a clear statutory text”).

72. See *id.* at 2394 (noting that “if a particular application of a clear statute produces an absurd result, the Court understands itself to be a more faithful agent if it adjusts the statute to reflect what Congress would have intended had it confronted the putative absurdity”); William B. Barker, *Statutory Interpretation, Comparative Law, and Economic Theory: Discovering the Grund of Income Taxation*, 40 SAN DIEGO L. REV. 821, 848 (2003) (“Traditional interpretation only delves into purpose where the plain meaning is unclear or applying it would produce an absurd result.”)

73. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990). See also *United Savings Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.”).

74. Brian D. Galle, *Can Federal Agencies Authorize Private Suits under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 186-87 (2003). Interpreting a statute beyond its

power, courts exceed the bounds of their powers by departing, even in the slightest degree, from statutory language.⁷⁵ In turn, textualism gives effect to the voice of the people by limiting the judicial inquiry to a consideration of the text created by popularly-elected representatives; judges are, therefore, prevented from supplanting the popular will with their own.⁷⁶

In spite of those claims to legitimacy, textualism is not without critics.⁷⁷ Criticisms of textualism include the observations that statutes are often more ambiguous than textualists admit⁷⁸ and that, in so many words, the judiciary is imperfect and needs all the help it can get in interpreting statutes.⁷⁹ Anti-textualists also note that since a judge may have the option of choosing between several word meanings, she may choose one that conforms to her policy perceptions, just as textualists argue an intentionalist or purposivist may do; in that sense, legislative history narrows the field of

text—the only portion voted on by Congress and signed by the President—may be an unconstitutional violation of the separation of powers.

According to textualists, the separation of powers embodied in the Constitution limits proper judicial attention to the semantic dimension of a statutory text. That is, because laws may not have binding effect unless they have been passed by both houses of Congress, either with the President's agreement or by a supermajority of both houses, courts unconstitutionally expand a law's reach when they insert elements that could not command such widespread support.

Id. Textualists generally cite Article 1, section 7 of the Constitution as support for their separation of powers argument, which sets forth the bicameralism and presentment requirements for lawmaking. See U.S. CONST., art. 1, § 7, cl. 2; Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1115 (2003).

75. See Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 324 (2001) ("The legislature, not the judiciary, is given the power to pass statutes. The courts must interpret statutes, not rewrite them, lest the judiciary invade the legislative power.").

76. See Rai, *supra* note 74, at 1115 (noting the textualist argument that "requiring adherence to text addresses separation-of-powers and democratic legitimacy concerns by preventing judges from advancing their own policy preferences, as contrasted with those of the legislature").

77. For a good summary of criticisms leveled against textualism, see Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 826-29 (2002). See also *supra* notes 73-76 (identifying sources cited within Mank's work). Listing every criticism that scholars and judges have leveled at textualism would be inordinately cumbersome and beyond the scope of this Article.

One non-criticism of textualism is the mere fact of its formalism. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of U.S. Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (Amy Gutmann ed., 1997) (noting that "[o]f all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic!") (emphasis omitted).

78. See Mank, *supra* note 77, at 827.

79. See Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 808 (2002) ("As a criticism of textualism, the textualist argument that the statutory text should be the only authoritative source . . . is not very persuasive given the fallibility and inherent imperfection of the Court and the federal judiciary in general.").

potential word meanings from which a judge may choose.⁸⁰ Also, textualism's defense of the separation of powers doctrine carries less weight where Congress has delegated policymaking authority to federal courts.⁸¹

2. *Intentionalism*

Simply put, intentionalism is the judicial effort to give effect to Congress's intent in passing a statute.⁸² Intentionalists inquire into how the enacting legislature would decide the case at bar, and legislative history, such as committee reports, speeches on the congressional floor, and other sources are fair game.⁸³ Textualists argue that intentionalist interpretations of statutes do not enjoy the same legitimacy as textualist interpretations, but as noted, intentionalists may direct the same criticism at textualists.⁸⁴

3. *Purposivism*

Purposivism refers to the judicial attempt to give effect to the purpose of the statutory provision at issue—to allow the statute to accomplish what it was designed to accomplish, rather than what the language of the statute says or what Congress intended in enacting it.⁸⁵ Rather than identify a specific legislative intent behind a statute, purposivism takes a more holistic approach to statutory interpretation, seeking to interpret a statute so as to

80. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 281-82 (1998). Maureen Cavanaugh has also stated:

Critics of Justice Scalia's "new textualism" argue that this method is subject to the same criticisms leveled by its proponents against intentionalism: it offers no more determinate results in hard cases than any other method and contributes little to the legitimacy of the judicial process because of its lack of candor. Textualists who argue for "plain meaning" interpretation lose their claim to greater objectivity when they wage in a battle of the dictionaries, opportunistically engage in structural or linguistic arguments, and selectively rely on canons of statutory interpretation.

Cavanaugh, *supra* note 20, at 597-98.

81. See Rai, *supra* note 74, at 1116 (noting antitrust law as one such example).

82. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) ("Intentionalism refers to the use of a variety of tools, including legislative purpose and legislative history, in an effort to determine the intent of the legislature when it included a particular word or phrase in a statute."); Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011, 1014 n.5 (1988) (noting that "[i]ntentionalism" refers to theories of interpretation that treat the original author's intent or understanding as the goal and criterion of correct interpretation" and distinguishing the term from "originalism").

83. Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 297 (2003).

84. See *supra* notes 77-80 and accompanying text.

85. O'Hear, *supra* note 83, at 298.

allow the provision to substantively fit comfortably in a web of rules and provisions.⁸⁶

C. A CRASH COURSE IN STATUTORY MISREADING

Having discussed Bloomian misinterpretation and statutory interpretation, this section will put them together, turning subversive and describing how to misread a statute. In its simplest form, the recipe for a good misreading is nothing more than a little of Harold Bloom's theory, combined with the theory of statutory interpretation of your choice. In other words, a "misreading" need only tweak, ever so slightly, the meaning of a particular word in the statute, the assumed intent of the statute, or the presumed purpose behind the statute. If that tweak deviates from prior interpretations of the statute, or even the "correct" meaning of the statute, congratulations—you've misread the statute.

But now that you know how to misread a statute, you should be aware that not all misreadings are the same. Different strategies produce different results. Just like statutory interpretation in general, think of misreadings as an inverted funnel. At its narrowest point, misreadings may focus on the text—the narrowest kind of misreading. Intentionalist and purposivist misreadings are increasingly broad and stray ever so much more from the text of the misread statute. But what's the difference? Why elect one over the other?

"Textualist misreadings" are misreadings in every sense of the word,⁸⁷ but adhere more closely to the separation of powers doctrine, which is the foundation of textualism itself and gives the misreading greater democratic and political legitimacy.⁸⁸ Specifically, since the legislature has the role of enacting law and the judiciary the role of interpreting the law, the separation of powers doctrine is violated when a judge exceeds her interpretative role and strays from the text, effectively enacting a new statute from the courtroom rather than the legislative chamber.⁸⁹ Because intentionalist and purposivist misreadings are not grounded in at least a misreading of statutory text, they have a much weaker claim on political legitimacy.

86. See Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 32 (1997) (noting that purposivism is "an attempt to integrate the law coherently and harmoniously into the legal system as a whole").

87. Such misreadings certainly are possible, and may have occurred in some circumstances. See *supra* note 18 for two examples and explanations of cases that present the possibility of textual misreadings—arguments over the meaning of specific words in specific Guidelines, with allegations of misreading on their face.

88. See *supra* notes 74-76 and accompanying text.

89. See *supra* note 75, 76 and accompanying text (discussing the legislative role of enacting statutes).

How do “textualist misreadings” work? From a textualist perspective, a judge’s role is to give effect to the meaning of statutory language as opposed to congressional intent or statutory purpose.⁹⁰ Textualism’s definition of the “correct” meaning of a statutory word or phrase, however, may seem somewhat counterintuitive. It seeks only to attribute a meaning to a word that: (a) the word may bear, and (b) does not produce absurd results.⁹¹ It permits recourse to legislative history to interpret the ambiguous, but the focus is always on the meaning of the word, not Congress’s intent. Accordingly, a judge seeking to misread a particular Guideline has some interpretive latitude simply by virtue of the fact that most statutes are ambiguous in some way or another. By exploiting a textual ambiguity, a misreading judge may execute her misreading and nevertheless render a “textualist” reading—one that purportedly adheres to the separation of powers doctrine.⁹² Similarly, statutory interpretations focusing on statutory text claim greater legal and political legitimacy by virtue of the fact that they limit lawmaking to elected representatives.⁹³ It stands to reason, therefore, that misreadings based on the text can similarly claim at least a portion of that legitimacy. Finally, while an intentionally errant interpretation of a textual component may not survive appellate review, textual misreadings, at least, stand a fighting chance on appeal because they rely on plausible, though incorrect and result-oriented, interpretations of textual components.

But that raises a pressing question. If judges are bound by statutory language in performing their misreadings, are they really regaining lost discretion? In other words, what is the point of engaging in Bloomian misreadings of the Guidelines in an attempt to regain the discretion

90. See *supra* Part II.B.1 (explaining textualism).

91. See Manning, *supra* note 71, at 2390. See also *id.* at 2394 (noting that “if a particular application of a clear statute produces an absurd result, the Court understands itself to be a more faithful agent if it adjusts the statute to reflect what Congress would have intended had it confronted the putative absurdity”); Barker, *supra* note 72, at 848 (“Traditional interpretation only delves into purpose where the plain meaning is unclear or applying it would produce an absurd result.”).

92. See Hartzler, *supra* note 69, at 247. (“[I]f two people could reasonably interpret the statutory language to mean different things, the language is ambiguous and the inquiry must continue into other textual aids.”).

93. See *supra* notes 73-76 and accompanying text. Some, however see the judicial act as one that inherently creates law, whether or not a judge adheres to statutory text:

New Textualism is based on a highly formalistic understanding of the separation of powers doctrine where governmental powers are strictly compartmentalized and the judiciary is required to act solely as the faithful agent of the legislature. . . . Since there can be no interpretation of a statute without the creation of law, New Textualism’s claim of superiority on that basis fails and the legitimacy of a court “making” law is recognized as an integral part of the judiciary’s interpretive function.

Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 165-67 (2004).

Congress took from federal judges by enacting the Sentencing Reform Act if those misreadings are themselves confined by the text of the Guidelines? There may be no answer to this question,⁹⁴ perhaps explaining why misreading judges sometimes entirely abandon the text of the Guidelines and relevant sentencing statutes when making their determinations, relying instead on misreadings of the intent and purpose of the statute.⁹⁵

D. A BRIEF GUIDE TO THE FEDERAL SENTENCING GUIDELINES

1. *History and Discretion*

In 1984, President Ronald Reagan signed the Sentencing Reform Act (SRA),⁹⁶ which established the Federal Sentencing Commission.⁹⁷ The next year, in 1985, President Reagan appointed seven people to the Commission.⁹⁸ In turn, the Commission, under statutory mandate,⁹⁹

94. Given this difficulty, there may be another avenue for misreading: misreadings of facts. Sentencing judges may consider focusing their misreadings on the facts of a particular case rather than on the law, distinguishing cases on their facts in an attempt to create new niches and nuances in sentencing law. Such factual misreadings would avoid the self-defeating nature of textual misreadings, and it would be less likely that judges engaging in factual misreadings would be overturned on appeal, since findings of fact are reviewed for clear error instead of de novo. *See* Part III.E (noting the standards of review). As opposed to textual and factual misreadings, there may be even a third way to misread: nontextual misreadings, or avoiding the text entirely in the name of fairness. *See infra* Part III.C.2. Such misreadings are, of course, not constrained by anything.

Factual misreadings are not unknown to judges. In *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (1928), Justice Cardozo “selected and shaped the facts to support his conclusion that the railroad was not liable.” James D. Gordon III, *Cardozo’s Baseball Card*, 44 STAN. L. REV. 899, 906 (1992) (reviewing RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990)). By doing so, he “made the accident seem unforeseeable, which prepared the way for Cardozo’s denial that the railroad had been culpably negligent.” *Id.* Cardozo himself said that “one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement.” Benjamin Nathan Cardozo, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 339, 341 (Margaret E. Hall ed., 1947).

Factual misreadings, though, are subject to attack on the ground that they are simply dishonest. Much of the law is clearly up for interpretation, but in most cases, the facts are not. Indeed, they may be the only definite thing about a case. While the facts of some cases are unclear and subject to interpretation, integrity, even more than intellect, must play a role in shaping the law.

95. *See infra* Part III.B (providing examples of misreadings); Part III.C (discussing misreading techniques).

96. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (2000)); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993). Also, the fact that Bloom’s misprision theory is limited to literary pursuits does not exempt judges from its reach, since written words comprise judges’ opinions just as much as books or poems.

97. *See* 28 U.S.C. § 991(a) (1993 & Supp. 2005) (also setting forth the composition of the Commission and appointment procedures).

98. *See* 131 CONG. REC. S11,401 (Sept. 12, 1985) (setting forth nominations); 131 CONG. REC. S133,376 (October 16, 1985) (confirming nominees).

promulgated the Federal Sentencing Guidelines.¹⁰⁰ Five years after President Reagan signed the SRA, it survived a constitutional challenge to Congress's delegation of legislative power to the Commission.¹⁰¹

The "policies and practices" that the SRA directed the Commission to implement were intended to ensure that the purposes of sentencing, as set forth in Title 18, section 3553(a)(2) of the United States Code, are met; to assure "certainty and fairness in meeting the purposes of sentencing"; to avoid disparities among similarly situated defendants; to maintain flexibility in sentencing; and to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."¹⁰² Those goals achieved greater significance, however, when read in the broader context of the purpose of the Guidelines themselves. Prior to the Guidelines' enactment, judges enjoyed wide discretion in sentencing.¹⁰³ That discretion, however, was widely seen as producing disparity and dishonesty in some cases, as well as leniency in others, all possibly stemming from forbidden purposes.¹⁰⁴ The SRA and the Commission intended the Federal Sentencing Guidelines to limit that discretion by providing "commensurate and uniform punishment."¹⁰⁵ Hence, the SRA's directive to implement

99. 28 U.S.C. § 991(b) (1993) (noting that "[t]he purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system . . .").

100. Current and past editions of the Guidelines may be found at www.uscc.gov/guideline.htm.

101. See *Mistretta v. United States*, 488 U.S. 361, 373-74 (1989) (setting forth a brief history of past delegation jurisprudence and concluding that "[i]n light of our approval of these broad delegations, we harbor no doubt that Congress' [sic] delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

102. 28 U.S.C. § 991(b).

103. See, e.g., *United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. New York*, 337 U.S. 241 (1949); Adam Shane Caleb Ford, Comment, *Three Shots Into a Black Santa That May Unwittingly Start an Overhaul of America's Criminal System: Apprendi v. New Jersey and the Restructuring of the Federal Sentencing Guidelines*, 12 SETON HALL CONST. L.J. 249, 251-52 (2001) ("Prior to the promulgation of the Sentencing Reform Act . . . and the resulting Federal sentencing guidelines . . ., judges had virtually unlimited discretion to sentence a defendant within the generally broad legislatively created range of sentences.").

104. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990). Nagel further notes:

For decades, empirical studies repeatedly showed that similarly situated offenders were sentenced, and did actually serve, widely disparate sentences. Furthermore, the disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant's race, sex, or social class. For a system claiming equal justice for all, disparity was an inexplicable yet constant source of embarrassment.

Id. at 883-84.

105. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 254 n.263 (2003). Professor Luna seems to express doubt as to whether the Guidelines have achieved that goal, noting that the Guidelines were

certain, fair, and flexible sentencing cannot be understood in a vacuum, but rather as a product of a perceived need in federal sentencing.

Just as the Guidelines limited judges' sentencing discretion, they may have raised prosecutors' power over the sentencing process.¹⁰⁶ That increased discretion has taken at least two forms. First, because the Guidelines did not substantially change plea bargaining practices,¹⁰⁷ prosecutors could use the Guidelines as a bargaining chip in plea bargaining, thereby gaining wide power over the sentencing process beyond the Guidelines' constraints.¹⁰⁸ Second, prosecutors could control sentencing by first choosing what they feel is an appropriate sentence, and then charging the defendant with the corresponding crime.¹⁰⁹ Of course, prosecutors possessed both of those powers before the enactment of the SRA, but the fact that the SRA removed discretion from judges, while maintaining prosecutors' discretion, suggested that the SRA strengthened prosecutors' hands with respect to sentencing.

2. *The Statutory Sentencing Framework Pre-Booker*

The SRA mandated¹¹⁰ that the Guidelines include five components.¹¹¹ First, they had to provide sentencing judges guidance as to whether the applicable sentence should include probation, fine, or imprisonment.¹¹² Second, they had to provide guidance as to the appropriate monetary

intended to limit "the discretion of criminal justice actors through an intricate system of (supposedly) commensurate and uniform punishment." *Id.*

106. See Barkow, *supra* note 14, at 34 ("There has been a barrage of criticism of mandatory minimums and sentencing guidelines for limiting the discretion of judges and increasing the power of prosecutors.").

107. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 925-26 (1991). Alschuler notes that "the guidelines and Justice Department policy statements do impose some ambiguous limitations on plea bargaining," but that "the political power of prosecutors and the fear of swamping the courts have largely immunized plea bargaining—the most important part of the sentencing process—from sentencing reform." *Id.* at 926.

108. See *id.* at 925-26.

109. See Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 7 (2003) (noting that "[i]t is . . . characteristic of federal sentencing guidelines [to] giv[e] prosecutors tremendous discretion in charging, which then influences the sentence received.").

110. Do not be put off by the use of the past tense in this and other sections. It is not at all clear whether the Federal Sentencing Commission will continue to exist if Congress elects to create uniform statutory sentencing laws. The Sentencing Reform Act is no longer what we thought it was. Accordingly, much of what we knew about sentencing is in the past, hence, the use of the past tense.

111. 28 U.S.C. § 994(a)(1) (2000). For a secondary source summary of the framework of the Federal Sentencing Guidelines, see John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility under the Guidelines*, 59 BROOK. L. REV. 551 (1993).

112. 28 U.S.C. § 994(a)(1)(A).

amount of the fine, the appropriate length of the prison term, or the appropriate length of probation.¹¹³ Third, the Guidelines had to aid in determining whether a prison sentence should include post-release supervision, and if so, for how long.¹¹⁴ Fourth, the Guidelines had to aid the sentencing judge in determining whether multiple prison sentences, if handed down, should run consecutively or concurrently.¹¹⁵ Finally, the Guidelines had to provide guidance as to whether the defendant should be restrained from frequenting certain kinds of places or prohibited from “associating unnecessarily” with certain, specific people, or whether the defendant should reside at a community correctional facility.¹¹⁶

The Sentencing Commission was also responsible for promulgating sentencing ranges consistent with Title 18 of the United States Code.¹¹⁷ Title 18, in turn, prescribed a series of factors that sentencing judges must consider in handing down a sentence within the mandated sentencing range. Those factors included, among others, the nature of the offense, the need for the sentence to reflect the offense’s seriousness, and available sentences.¹¹⁸ For sentences requiring imprisonment, the maximum term could not exceed the minimum term by twenty-five percent of the minimum or six months, whichever is greater; though life imprisonment is a viable maximum if the minimum term requires thirty years of imprisonment or more.¹¹⁹

To apply the Federal Sentencing Guidelines before *Booker*, a sentencing court had to apply a sentence within the range specified by the Sentencing Commission, unless the court finds aggravating or mitigating circumstances that the Commission did not take into account in formulating the Guideline.¹²⁰ To determine whether the Commission adequately took an issue into account in formulating a Guideline, a court had to consider only the Guidelines, policy statements promulgated by the Commission, and the Commission’s official commentary.¹²¹ A court could impose an “appropriate sentence” in the absence of a pertinent Guideline, so long as it

113. *Id.* § 994(a)(1)(B).

114. *Id.* § 994(a)(1)(C).

115. *Id.* § 994(a)(1)(D).

116. *Id.* § 994(a)(1)(E). These restraints come from 18 U.S.C. section 3563(b), paragraphs (6) and (11), to which section 994(a)(1)(E) explicitly refers. *Id.*

117. *Id.* § 994(b)(1).

118. 18 U.S.C. § 3553(a)(1)-(3) (2000). Section 3553 was found to be unconstitutional as applied in *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1186 (D. Haw. 2004).

119. 28 U.S.C. § 994(b)(2) (2000).

120. 18 U.S.C. § 3553(b).

121. *Id.*

reflects due regard for the purposes of appropriate sentencing¹²² and consistency with other sentences.¹²³

Sentencing judges could also depart downward or upward in certain circumstances.¹²⁴ By far, the most common downward departure stems from a defendant's cooperation with governmental investigations into others' criminal activities, for instance, by turning informant;¹²⁵ substantial assistance to authorities constitutes half of all departures.¹²⁶ Even though

122. Section 3553(a)(2)(A)-(D) states that a sentencing court must consider the need for the sentence imposed; (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2)(A)-(D). This provision reflects the four generally-accepted purposes of criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. See Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 14-15 (2003) ("Most experts separate the goals of punishment into four dominant theories: incapacitation, deterrence, rehabilitation, and retribution.").

123. 18 U.S.C. § 3553(b)(1).

124. See Recent Legislation, *Criminal Law—Federal Sentencing Guidelines—Congress Amends the Sentencing Guidelines in an Attempt to Reduce Disparities—Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (Protect) Act*, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.), 117 HARV. L. REV. 751, 752 (2003). Sections 5K2.10 to 5K2.13, and 5K2.16, are policy statements that enumerate permissible reasons for downward departures. See generally U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K2.2, 5K2.10-5K2.16, 5K2.19, 5K2.23, 5K2.31 (2003); see § 5K2.10 (wrongful provocation); *id.* § 5K2.11 (avoiding "perceived greater harm"); *id.* § 5K2.12 (coercion or duress); *id.* § 5K2.13 (diminished mental capacity); *id.* § 5K2.16 (voluntary disclosure); § 5K2.19 (aberrant behavior); *id.* § 5K2.23 (time served); *id.* § 5K3.1 (participation in early disposition programs); *id.* § 5K1.1 (assistance to government).

A sentencing judge may also depart upward for several reasons. See *id.* § 5K2.2 (severe physical injury of victim); *id.* § 5K2.3 (severe psychological injury to victim); *id.* § 5K2.4 (abduction or unlawful restraint of victim); *id.* § 5K2.5 (property of victim damaged or lost); *id.* § 5K2.6 (weapon or dangerous instrumentality involved in offense); *id.* § 5K2.7 (disruption of governmental function); *id.* § 5K2.8 (unusually heinous or brutal crime); *id.* § 5K2.9 (crime designed to mask another offense); *id.* § 5K2.14 (crime endangers national security); *id.* § 5K2.17 (crime involving a high-capacity, semiautomatic firearm); *id.* § 5K2.18 (gang-related crimes). A sentencing judge may take into account dismissed and uncharged conduct in departing upward. *Id.* § 5K2.21.

Certain departures are forbidden. See *id.* § 5K1.2 (forbidding upward departure for refusal to aid governmental investigations); *id.* § 5K2.0(d) (forbidding upward departures based on protected characteristics); *id.* § 5K2.19 (forbidding downward departures for post-sentencing rehabilitative efforts); *id.* § 5K2.22 (limiting downward departures available to defendants convicted of crimes against children and sex offenses).

In all cases, a judge must provide specific written reasons for departures. *Id.* § 5K2.0(e). Even though downward departures are generally subject to judicial discretion, that discretion is, in turn, subject to mandatory minimums. See David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 225 (2004).

125. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

126. See Zlotnick, *supra* note 124, at 225 (2004) ("About fifty percent of all departures are for such substantial assistance."). A sentencing court may only depart below the sentencing range

downward departures were generally at a judge's discretion, that discretion was subject to mandatory minimums.¹²⁷

E. THE DEMISE OF THE GUIDELINES

The Guidelines commenced their slow and painful demise in 2000, when the United States Supreme Court handed down its decision in *Apprendi v. New Jersey*.¹²⁸ There, the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."¹²⁹ Four years later, in *Blakely v. Washington*,¹³⁰ the Court applied that standard to strike down a provision in Washington's sentencing scheme that allowed judicially-found facts to factor into a sentencing enhancement.¹³¹ The Court held that such a procedure violated the appellant's Sixth Amendment right to a trial by jury.¹³² While the *Washington* procedure struck down in *Blakely* closely paralleled the federal procedure of judicial factfinding in upward departures, *Blakely* did not touch the Federal Sentencing Guidelines. *Booker* did.

Specifically, in *Booker*, the Supreme Court held that requiring a sentencing court to find facts that would elevate a defendant's sentence above the statutory maximum violated the defendant's Sixth Amendment right to trial by jury, and it concluded that two provisions of the SRA, sections 3553(b)(1) and 3742(e), were "incompatible with [the Court's] constitutional holding."¹³³ Section 3553(b)(1), in essence, made the Guidelines mandatory.¹³⁴ The Court held that this particular provision was

for substantial assistance to governmental investigation on motion from the prosecution. *See id.* (noting that "departures based on cooperation allow a judge to go below a mandatory minimum but require a government motion").

127. *See id.*

128. 530 U.S. 466, 497 (2000).

129. *Id.* at 490.

130. 542 U.S. 296 (2004). *Blakely* also defined the "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303.

131. *Id.* at 299-300.

132. *Id.* at 313 ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours." (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE CONSTITUTION 343 (1769))).

133. *United States v. Booker*, 543 U.S. 220, 233-34, 245 (2005).

134. 18 U.S.C. § 3553(b)(1) (2004). The text of that provision, before the Supreme Court's decision, read:

Except as provided in paragraph (2), the court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately

unconstitutional because mandatory factfinding contravened the rule set forth in *Apprendi v. New Jersey*—where this whole mess really started.¹³⁵ Section 3742(e), which pertains to judicial review of sentencing decisions, was unconstitutional “for similar reasons.”¹³⁶ The Court sought to preserve the rest of the SRA, and applied the doctrine of severability¹³⁷ to simply excise those two provisions.¹³⁸ As the Act stands now, it “requires a

taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. *In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.* In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).

Id. (emphasis added).

135. *See Booker*, 543 U.S. at 259. Specifically, Justice Breyer wrote:

As the Court today recognizes in its first opinion in these cases, the existence of § 3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision—namely the provision that makes “the relevant sentencing rules . . . mandatory and imposes binding requirements on all sentencing judges”—the statute falls outside the scope of *Apprendi*’s requirement.

Id. (citations omitted).

136. *Booker*, 543 U.S. at 260. 18 U.S.C. § 3742(e) read:

Upon review of the record, the court of appeals shall determine whether the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is outside the applicable guideline range, and
 - (A) the district court failed to provide the written statement of reasons required by section 3553(c)
 - (B) the sentence departs from the applicable guideline range based on a factor that—
 - (i) does not advance the objectives set forth in section 3553(a)(2); or
 - (ii) is not authorized under section 3553(b); or
 - (iii) is not justified by the facts of the case; or
 - (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
- (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(e).

137. *See, e.g.,* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 232-33 (2004). Generally, portions of a statute that offend the Constitution are severable from the rest of the statute unless the offensive portion of the statute is so intertwined with the rest of the statute that severing it would eviscerate the statute. *Id.*

138. *Booker*, 543 U.S. at 267-89. The other option, of course, was to simply require a separate jury trial for sentencing when the factfinding would raise the defendant’s sentence beyond the statutory maximum. *Id.* at 246.

sentencing court to *consider* Guidelines ranges,” but allows “the court to tailor the sentence in light of other statutory concerns.”¹³⁹

While it is clear that the Guidelines are no longer mandatory,¹⁴⁰ debate now rages about exactly how much deference sentencing judges should give the Guidelines. On one hand, the United States District Court for the District of Utah, in *United States v. Wilson*,¹⁴¹ gave a great deal of deference to the Guidelines and stated that it would deviate from them only for “clearly identified and persuasive reasons.”¹⁴² On the other hand, though, other courts have stated their intent to avoid giving much deference to the Guidelines.¹⁴³ Of course, the former camp reads *Booker* as restoring only a little sentencing discretion, while the latter camp reads it as restoring a whole lot of discretion.

III. ACHIEVING MISREADING: HOW JUDGES AND ATTORNEYS MISREAD THE SENTENCING GUIDELINES

This section provides a hypothesis: federal sentencing judges who are bound by the Federal Sentencing Guidelines misread those Guidelines in an attempt to regain the discretion the SRA took away. It then provides examples of such misreadings. After providing those examples, it explores the techniques federal judges employed to misread the Guidelines and discusses the dangers inherent in those misreadings.

A. THE HYPOTHESIS

Before *Booker*, many federal judges had been critical of the Federal Sentencing Guidelines.¹⁴⁴ Those criticisms ranged from complaints that the

139. *Id.* at 245 (emphasis added).

140. *See id.*

141. 355 F. Supp. 2d 1269 (D. Utah 2005). The court’s February 2005 decision was actually a resolution of a motion to reconsider its prior disposition of the case in light of *Booker*. *Id.* at 1270. The court’s statement that it would accord the Guidelines strong deference was actually first made in the first resolution of *Wilson*. *Id.* The motion to reconsider was made in light of the holdings of other courts, which had stated their intention to not give the Guidelines such strong deference. *See id.* at 1270-71, 1271 n.5.

142. *Wilson*, 355 F. Supp. 2d at 1272 (quoting *United States v. Booker*, 543 U.S. 220, 220 (2005)).

143. *See id.* at 1271 (discussing cases refusing to give a great deal of deference to the Guidelines). *See also* *United States v. Ranum*, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005) (noting that, “under *Booker*, courts must treat the guidelines as just one of a number of sentencing factors”); *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); *United States v. West*, 383 F. Supp. 2d 517 (S.D.N.Y. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005). As noted *supra* note 4, similar debates now rage regarding the presumption of reasonableness on appeal and the weight to be given the Guidelines when sentencing.

144. *See, e.g.*, Fred Rodgers, *Actions of the ABA House of Delegates at Its Annual Meeting in San Francisco, CA*, 32 COLO. LAW. 71, 71 (Oct. 2003) (noting the comments at an ABA function made by United States Supreme Court Associate Justice Anthony Kennedy “which proved quite

Guidelines have not produced the uniformity in sentencing they were intended to produce¹⁴⁵ to calls of unnecessary complexity¹⁴⁶ to cries of general unfairness,¹⁴⁷ but the complaint that most concerns this Article was that the Guidelines improperly limit judges' discretion in handing down sentences.¹⁴⁸ It is not seriously in doubt that many federal judges, district and appellate, resented how the Guidelines curbed their discretion—not for their own sake, but for the sake of fairness and economy in sentencing.¹⁴⁹

Though the general judicial distaste for the Guidelines' limitations on sentencing discretion pre-*Booker* is not seriously in doubt, the important question, from a jurisprudential point of view, is what judges did about it. From a Bloomian perspective, that distaste for or resentment of the limits the Guidelines placed on judges' sentencing discretion was not really distaste or resentment at all, but anxiety: the Guidelines were a predecessor text that limited federal judges' ability to create a truly original sentence,

frank and critical of federal sentencing guidelines"); J.M. Lawrence, *Judge Riled by Guidelines Won't Take Criminal Cases*, BOSTON HERALD, June 28, 2001, at 12 (noting federal judge Edward F. Harrington's 2001 vow to no longer hear criminal cases "as a protest against federal sentencing guidelines"); Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing*, 87 CORNELL L. REV. 1259, 1275 n.108 (2002) (noting federal judge Lawrence Irving's 1990 retirement over mandatory minimums); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39, 57 n.5 (2002) (noting how North Carolina called its sentencing provisions "sentencing structures" rather than "sentencing guidelines" because "the newly created federal sentencing guidelines were uniformly unpopular among judges and lawyers in the state"); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 180-83 (1995) (noting that the original Guidelines provoked widespread disapproval from many federal judges).

145. *United States v. Harrington*, 947 F.2d 956, 967 (D.C. Cir. 1991). "We continue to enforce the Guidelines as if, by magic, they have produced uniformity and fairness, when in fact we know it is not so." *Id.*

146. See Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 444 (2002) (noting that "[t]he legal intricacies of the Federal sentencing guidelines have long been noticed . . . by federal judges who often bemoan Guideline sentencing as a complicated and time-consuming process").

147. See Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 454 (1994-95) (noting a former federal appellate judge's statement about the Guidelines: "They have set such atrocious and unfair statutory minimum sentences that the result is there is often no relationship between the sentence received and the crime involved").

148. See, e.g., Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines"*, 4 FED. SENTENCING REP. 129, 132, 133 n.12 (1991) (discussing a survey noting that a common sentencing complaint among federal judges was the removal of discretion) (cited in Barkow, *supra* note 14, at 34 n.6); Berman, *supra* note 146, at 444 (noting that "[t]he legal intricacies of the Federal sentencing guidelines have long been noticed . . . by federal judges who often bemoan Guideline sentencing as a complicated and time-consuming process that unduly limits the discretion needed to impose just sentences"). Berman cites *United States v. Swapp*, 719 F. Supp. 1015, 1026 (D. Utah 1989), and *United States v. Justice*, 877 F. 2d 664, 666 (8th Cir. 1989), as examples of judicial distaste for the Guidelines.

149. See *supra* Part II.D (describing how the SRA removed sentencing discretion from federal judges).

tailored to individual circumstances and, therefore, of the utmost fairness.¹⁵⁰ If federal judges indeed felt that Bloomian anxiety and loss of sentencing discretion, Bloom's theory of misprision would hold that those judges, when interpreting the Federal Sentencing Guidelines, would misread the Guidelines in an attempt to regain lost discretion and latitude in sentencing. In other words, they would seek to break free of the influence of the Guidelines as a predecessor text, viewing the Federal Sentencing Commission as a predecessor author that must, in an Oedipal or Bloomian sense, be slain.¹⁵¹ It is well established that judges felt and have acted on Bloomian anxiety in other contexts¹⁵²: did they feel it in the context of the Federal Sentencing Guidelines?

This Part demonstrates that such misreadings of the Federal Sentencing Guidelines—and figurative slayings of the Federal Sentencing Commission—did occur. It begins by presenting examples of sentencing judges' misreadings of the Federal Sentencing Guidelines and other sentencing statutes. It then identifies the techniques the judge in that case—and other judges—used in misreading the Guidelines.

B. EXAMPLES OF CREATIVE MISREADING IN FEDERAL SENTENCING JURISPRUDENCE

This section describes three cases in which a sentencing judge misread the Federal Sentencing Guidelines. This is not an exhaustive list of such decisions; rather, these decisions were selected for inclusion in this section because they present unusually clear examples of misreadings—and in some cases, abandonments—of the Guidelines.

1. *United States v. Muniz*

The First Circuit's decision in *United States v. Muniz*¹⁵³ dealt with a drug dealer, Muniz, caught in a DEA-run sting.¹⁵⁴ Muniz pled guilty to

150. See *supra* note 10. The possibility may also exist that the need for originality exists at some subliminal, psychological level. As noted, this Article does not argue that judges intentionally misread the Federal Sentencing Guidelines to attain result-oriented jurisprudence.

151. See *supra* Part II.A (noting the Oedipal undertones of Bloom's theory). See *supra* note 10 for an explanation of why judges are unique candidates to be "strong poets" in Bloom's misprision theory.

152. See *supra* notes 10-12.

153. 49 F.3d 36 (1st Cir. 1995). Interestingly, at the outset of the First Circuit's decision in *Muniz*, Judge Selya alluded to judges' distaste for the Federal Sentencing Guidelines, stating that "[f]or better or worse, the days are long since past when federal district judges wielded virtually unfettered discretion in sentencing criminal defendants. The sentencing guidelines are controversial—but they have the force of law and, therefore, command the allegiance of the courts." *Id.* at 37.

154. *Id.* at 37-38.

“possessing cocaine, intending to distribute it, . . . conspiracy to distribute, . . . and aiding and abetting.”¹⁵⁵ Muniz had promised government officials at least five kilograms of cocaine, but ended up delivering less.¹⁵⁶ For purposes of sentencing under the Guidelines, however, the government sought to hold Muniz “accountable for five to fifteen kilograms of cocaine, thus triggering a ten-year minimum mandatory sentence on the conspiracy count.”¹⁵⁷ The government pursued that course even though Muniz didn’t actually deliver five kilograms.¹⁵⁸

Application Note 12 to section 2D1.1 of the Federal Sentencing Guidelines applied.¹⁵⁹ The 1993 version of that Note stated that

[i]n an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce

155. *Id.* at 38 (citations omitted).

156. *Id.*

157. *Id.* See 21 U.S.C. § 841(b)(1)(A)(ii) (2000) for the statutory provision detailing the mandatory minimum in this case. See *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) (“In drug-trafficking cases under the sentencing guidelines, sentences are largely quantity-driven.”). The government also contended that “a five-year minimum mandatory sentence applied to the other count under 21 U.S.C. § 841(b)(1)(B)(ii).” *Muniz*, 49 F.3d at 38.

It is important to note that mandatory minimum cases are not driven, or at least not entirely, by the Guidelines, but by statute. Mandatory minimums exist independent of the Guidelines. For a discussion of those differences, see Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 257-58 (2002); Paul D. Borman, *The Federal Sentencing Guidelines*, 16 T.M. COOLEY L. REV. 4 (1999). Even so, “[t]hrough sometimes viewed as independent of the guidelines, mandatory minimum sentences are technically incorporated as part of the guidelines through § 5G1.1.” Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, FED. SENTENCING REP., Mar.-Apr. 1994, at 1 n.3 (specifically discussing the role of drug quantity in sentencing—the same issue as in *Muniz*). Berman notes that the Second Circuit has held that “mandatory minimum sentences . . . are applied under, not outside of, the sentencing guidelines.” *Id.* (quoting *United States v. Madkour*, 930 F.2d 234, 235 (2d Cir. 1991)). *Muniz* is included in this section for two reasons. First, this Article seeks to prove that sentencing judges misread sentencing statutes as well as the Guidelines. Second, the dispute in *Muniz*—and the appellate court’s rebuke—revolved around the misreading of Application Note 12 to § 2D1.1, regardless of the presence of mandatory minimums in the analysis. See *Muniz*, 49 F.3d at 39 (noting that the “key to unlocking the drug quantity puzzle” was found in Application Note 12). Also, specific to *Muniz*, the First Circuit noted that “[a] five-year difference in the minimum mandatory sentence depended on whether . . . three kilograms did or did not figure in the drug quantity attributable to Muniz.” *Muniz*, 49 F.3d at 39.

158. *Muniz*, 49 F.3d at 38 (“The government reiterated that Muniz should be held responsible for at least five kilograms of cocaine because he agreed to deliver that amount to the undercover agent.”).

159. See *Muniz*, 49 F.3d at 39 (noting that the parties agreed that Application Note 12 applied). It should be noted that the Application Notes in the Federal Sentencing Guidelines are not mere suggestions, or even “guidelines” in the colloquial sense. Rather, it is binding so long as it is not “inconsistent with the Constitution, a federal statute, or the guideline itself.” *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1137 (11th Cir. 2004) (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.¹⁶⁰

The First Circuit's generally-applied interpretation of Note 12 required that "the amount of drugs under negotiation must be considered" in setting a minimum mandatory penalty unless "the defendant did not intend to produce the additional quantity of narcotics" and "lacked the capacity to do so."¹⁶¹ The district court, however, apparently recognizing that Muniz intended to produce the extra two to three kilograms of cocaine, nevertheless sentenced Muniz based on the amount of cocaine actually delivered.¹⁶² To justify that sentence, the sentencing judge stated that he had grown up "in an era where you sentence under the specific terms of the indictment"; the judge so stated, in spite of his recognition, that "the law [provides] that if an intention is made to produce further kilograms and that the defendant is capable of so doing, that enters into the calculus . . . and I have to so find."¹⁶³ After arguments by Muniz's counsel, the judge stated that a "fair

160. *Id.* at 39 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.12 (1993)). Application Note 12 currently reads, in pertinent part:

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. . . . If, however, the defendant establishes that he or she did not intend to provide, *or* was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide *or* was not reasonably capable of providing.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 n.12 (2003) (emphasis added).

161. *Muniz*, 49 F.3d at 39 (citing *United States v. Pion*, 25 F.3d 18, 25 (1st Cir. 1994)).

162. *Id.* at 40. The judge's finding that Muniz intended to produce the extra two to three kilograms of cocaine, and that Muniz was capable of doing so, is not particularly clear from the opinion. At one point during Muniz's sentencing hearing, the judge stated that he was "constrained to find that [Muniz] intended to do it and was capable of so doing." *Id.*

As far as misreadings go, the sentencing judge's misreading was not particularly artful. Rather than misread the Guideline itself as a matter of law, he could simply have "misread" the facts, considering some facts while ignoring others. If the judge had taken the latter approach, his misreading would have been subject to review under a "clearly erroneous" standard rather than the *de novo* standard applied to questions of law. *See infra* Part IV.A (discussing standards of review); *supra* note 94 (noting that factual misreadings may avoid many of the problems of such broad misreadings). Specifically, if the sentencing judge would simply have found that Muniz either did not intend to deliver the additional drugs or was not capable of doing so, rather than finding that he was both willing and able and then ignoring the Guideline, it would have been much easier for the sentencing court to justify its decision. The appellate court specifically stated that it approached the government's contentions "mindful that a district court's findings of fact at sentencing are reviewed deferentially under the 'clearly erroneous' standard. However, the court's interpretation of the guidelines and its application of rules of law to the discerned facts are reviewed *de novo*." *Muniz*, 49 F.3d at 41.

163. *Muniz*, 49 F.3d at 40.

sentence” would be based on the amount of cocaine actually delivered rather than the amount promised, reasoning that

[t]his man doesn’t appear to have any record whatsoever. He doesn’t appear to have made significant amounts of money in this business of cocaine trafficking. I cannot believe that he’s a major dealer, and it’s unconscionable for me to impose a sentence of ten years on this individual. I think five years is a fair and just sentence, and that will be the sentence imposed.¹⁶⁴

On appeal, the government’s contention of error was three-pronged. It contended that the district court erred: (1) in not including the extra three kilograms of cocaine that Muniz had intended to deliver; (2) in finding that Muniz lacked either intent or capability to deliver the extra drugs; and (3) in misreading the applicable legal standard.¹⁶⁵ Specifically, the government contended that the district court had “obviously misread application note 12, or otherwise misapplied the law, in not attributing the weight [of the extra three kilograms of cocaine] under negotiation to Muniz for sentencing purposes.”¹⁶⁶

The long and the short of the *Muniz* decision is that the First Circuit, recognizing that the proceedings were “riddled with error,”¹⁶⁷ vacated the defendant’s sentence and remanded to the district judge for a new sentencing hearing.¹⁶⁸ It is not the holding in *Muniz*, though, that makes it an interesting case, but the rationale the district judge used in sentencing Muniz and the First Circuit’s reaction to that rationale. The First Circuit, even after noting that its opinion adequately explained the rationale behind its decision to vacate and remand,¹⁶⁹ commented on the “larger issue” of the district judge’s blatant ignorance of the Guidelines, taking great pains to point out that “[i]t is vital to the rule of law that congressional commands, so long as they are constitutionally appropriate, be honored.”¹⁷⁰

164. *Id.* This provides an example of a misreading of a sentencing statute, as the mandatory minimum in this case for this offense was ten years, not five. *See* 21 U.S.C. § 841(b)(1)(A)(ii) (2000) (prescribing a ten-year mandatory minimum sentence for this offense).

165. *Muniz*, 49 F.3d at 40-41.

166. *Id.* at 41.

167. *Id.* at 43.

168. *Id.*

169. *Id.* at 42.

170. *Id.* at 42-43. The First Circuit also pointed out three other cases in which it had rebuked district judges for not following the Guidelines. *Id.* *See, e.g.*, *United States v. Bennett*, 37 F.3d 697 (1st Cir. 1994); *United States v. Norflett*, 922 F.2d 50 (1st Cir. 1990); *United States v. Williams*, 891 F.2d 962 (1st Cir. 1989). *See also* *United States v. Campo*, 140 F.3d 415 (2d Cir. 1998).

Muniz provides perhaps the clearest and best example of a Bloomian misreading of the Guidelines. The district judge, acknowledging the rule, ignored it while commenting on the increased fairness his decision held. From a Bloomian perspective, the Guidelines—a predecessor text—limited the judge’s ability to render the type of fair sentence he desired. Because the judge, of course, believed himself to be within the rule of law, to which all judges adhere,¹⁷¹ his rationale for ignoring the Guidelines contained the implicit but paradoxical premise that the act of ignoring the Guidelines was somehow reconcilable with the Guidelines, that the Guidelines could not possibly sanction such an unfair rule. Essentially, the trial judge misread the Guidelines; if Bloom’s theory that a misreading is an Oedipal “slaying” of the author of a predecessor text, the trial judge notched an impressive body count.¹⁷² Under a Bloomian reading, that slaying was an attempt to regain discretion to render a fair ruling rather than the one the Guidelines mandated.¹⁷³

171. See *supra* note 25 (noting that judges seek to uphold the law as it exists and not as they perceive it should be).

172. An alternative and equally plausible argument would be that the judge simply ignored the pertinent Guideline, rather than misread it.

173. Specifically, the sentencing judge in *Muniz* adopts Bloom’s fourth technique—that of adopting a position diametrically opposed to that of the predecessor text. See *supra* note 43 and accompanying text (noting the process of daemonization). The relevant interpretation of Application Note 12 to section 2K1.1 required the sentencing judge to consider the amount of drugs promised in a drug deal if the defendant was capable of delivering the drugs and intended to do so. *United States v. Muniz*, 49 F.3d 36, 40 (1st Cir. 1995). The sentencing judge, though, considered only the amount of drugs delivered, thereby adopting a position diametrically opposed to the position the Guidelines adopt. *Id.* at 40.

Also, this misreading, like all others, adopts Bloom’s sixth technique, seeking to establish its text as the preeminent authority on the subject, supplanting the predecessor Guideline text and making it seem as though the sentencing judge composed the predecessor Guideline. See *supra* note 45 and accompanying text for a discussion of apophrades. That bid at dominance comes at two levels. First, because the law accords judicial decisions precedential authority, judges seek to assume authority by rendering authoritative decisions interpreting the Guidelines. See Cecilia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 TUL. L. REV. 151, 171-72 (2003) (“Case law . . . goes together with judicial greatness and creativity, with a sense of individual judicial responsibility for discovering and shaping the law by deciding cases which become a source of general binding rules, partly by virtue of the visible reasoning by which the result is reached.”). Interestingly, Wasserstein recognizes the “creative role” judges play in deciding cases. Indeed, “case law argument has very strict modes of operation and expansion, designed to guarantee that judges will not overstep their creative role (notably the art of distinguishing cases and the distinction between *ratio decidendi* and *obiter dicta*.” *Id.* at 172. Second, by rewiring applicable Guidelines and statutes, the sentencing judge places herself in the precise position the preceding author occupied—that of the United States Sentencing Commission, to which Congress delegated its rulemaking authority. See *infra* Part IV.B (discussing the separation of powers doctrine and legislative functions); see *supra* Part II.D.1 (discussing the genesis of the Commission). Sentencing judges’ misprisons thereby allow them to assume the Commission’s place, fostering at least an illusion that “[they] had written the precursor’s characteristic work.” BLOOM, ANXIETY, *supra* note 9, at 16. See *supra* note 45 (discussing the complexity of the apophrades principle and the later poet’s assumption of the predecessor’s place and authority). Admittedly, the analogy here is not precise, since misreading

2. *United States v. Campo*

*United States v. Campo*¹⁷⁴ presents the interesting circumstance of a district judge who misread the Guidelines to absolve himself of discretion rather than to gain lost discretion. In that case, defendant Campo, a government informant,¹⁷⁵ pled guilty to eight counts of bank fraud and aiding and abetting cocaine distribution.¹⁷⁶ In so doing, he joined two other co-conspirators who had participated in the scheme.¹⁷⁷ In exchange for Campo's plea, the government agreed to file a motion under section 5K1.1 of the Federal Sentencing Guidelines allowing the court to reduce Campo's sentence to a level below the applicable Guidelines range if it determined that Campo cooperated fully and substantially with the government investigation.¹⁷⁸ The government filed the section 5K1.1 motion, but also submitted a letter to the court explaining that Campo had breached a previous cooperation agreement.¹⁷⁹ Accordingly, the government's section 5K1.1 motion did not recommend a specific subrange sentence.¹⁸⁰ When counsel for one of the co-defendants argued that it would be unfair for the district judge to not impose a subrange sentence simply because the government had not recommended one, the district judge responded that while he, too, thought it was unfair, he "ha[d] no obligation . . . to do

sentencing judges do not literally foster the illusion that they, or even the judiciary, wrote the Federal Sentencing Guidelines. That would be clearly wrong, and the apophrades would fail. Rather, they assume the place and the authority of the predecessor—the legislature—in judicially rewriting the Guidelines.

174. 140 F.3d 415 (2d Cir. 1998) (per curiam).

175. *Id.* at 416.

176. *Id.* at 416-17.

177. *Id.* at 416.

178. *Id.* Section 5K1.1 of the Guidelines stated in 1996:

Upon motion of the government stating that the defendant who made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1996).

179. *Campo*, 140 F.3d at 417.

180. *Id.*

anything about it.”¹⁸¹ The judge alluded to the fact that the government’s failure to recommend a specific sentence stemmed from the policy of the U.S. Attorney’s Office for the Eastern District of New York to not make such recommendations, and preferred instead to let the section 5K1.1 motion stand on its own.¹⁸² The judge stated that

[t]he government has been taking this unfair position for twenty-two and a half years, as long as I have been on the bench. When I was a prosecutor 40 years ago, we stood up before a judge and said this man deserves this because he’s done thus and so. Or this man has done nothing and he deserves that. There is not a man or woman in the prosecutor’s office who has the guts to do it today. . . . They first used to tell me it was a departmental policy. I went down and talked to the department and they said there is no such policy. What am I supposed to do?¹⁸³

The Assistant U.S. Attorney handling the government’s case against Campo refused the judge’s requests for a specific recommendation, and the court granted the government’s section 5K1.1 motions on behalf of two of the defendants, sentencing them to five years of probation, including six months of time in a halfway house or some other home confinement.¹⁸⁴ The court sentenced Campo, however, to six years of imprisonment on the first seven counts, five years on count eight, and five years on the aiding and abetting count, all to be served concurrently and followed by five years of supervised release—and all without the benefit of a 5K1.1 departure.¹⁸⁵ Campo appealed.¹⁸⁶

The Second Circuit, in reviewing the district judge’s rationale, noted that it is “legal error for a court to take the unusual step of expressly abdicating the discretion that it has been duly entrusted by law to exercise.”¹⁸⁷ When all was said and done, the Second Circuit vacated the district court’s

181. *Id.*

182. *See id.* at 417, 419-20 (noting the U.S. Attorney’s Office policy).

183. *Id.* at 417.

184. *Id.*

185. *Id.* at 417-18.

186. *Id.*

187. *Id.* at 418-19. In making that conclusion, the Second Circuit relied on 18 U.S.C. § 3742(a)(1), which states that “[a] defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—(1) was imposed in violation of law.” 18 U.S.C. § 3742(a)(1) (2000). The court also cited *United States v. Adeniyi*, 912 F.2d 615, 619 (2d Cir. 1990), to support its position that failing to even consider the government’s section 5K1.1 motion was a “violation of law.” Interestingly, the district judge did not react against the sentencing Guidelines per se, but against the federal sentencing regime as a whole. His error was not in a misinterpretation of a particular Guideline, but in his failure to consider a particular motion he was bound by law to consider.

judgment and remanded the case to the district court for resentencing with express instructions that another judge take the case, to preserve “the appearance of impartiality,”¹⁸⁸ and that the sentencing judge consider the government’s section 5K1.1 motion.¹⁸⁹

Though the district judge’s refusal to acknowledge his statutorily-bestowed discretion lessened rather than augmented his discretion, his refusal is nevertheless a Bloomian misreading. The judge clearly had a strong opinion about the U.S. Attorney’s Office policy of not recommending a subrange sentence in section 5K1.1 motions, and he, therefore, refused to consider the government’s motion.¹⁹⁰ According to the Second Circuit, however, the federal sentencing regime required the judge to consider the government’s section 5K1.1 motion, even though that motion was, in that judge’s opinion, incomplete.¹⁹¹ Reacting against the authority the Guidelines imposed, the district judge ignored the rules of sentencing, effectively rereading (or misreading) federal sentencing law to give it the effect he desired.¹⁹² That judge reacted against the federal sentencing scheme as he would a predecessor text in an attempt to create an original—or, in the Second Circuit’s view, “unusual”—reading.¹⁹³ Even though the judge’s decision, on its face, seemed to relinquish discretion, a Bloomian reading might hold that he was, by relinquishing that discretion, paradoxically attempting to regain lost discretion; in other words, the judge wanted to gain discretion to relinquish discretion.¹⁹⁴

3. *United States v. Pearce*

Quite different from refusing discretion entirely, the district judge whose decision the Fourth Circuit reviewed in *United States v. Pearce*¹⁹⁵ claimed a “rare instance” of “total discretion” in sentencing pursuant to a section 5K1.1 motion.¹⁹⁶ Defendants Pearce and Chapman pleaded guilty

188. *Campo*, 140 F.3d at 420.

189. *Id.* at 419.

190. *Id.* at 417.

191. *Id.* at 418-19.

192. *Id.*

193. *Id.*

194. As in *Muniz*, the sentencing judge adopts Bloom’s fourth technique and adopts a position diametrically opposed to the predecessor text. Here, the sentencing judge required the prosecution to make a specific recommendation of a subrange sentence even though section § 5K1.1 contains no such requirement. *Id.* at 417, 419. Also, the sentencing judge sought to supplant the predecessor Guideline’s authority.

195. 191 F.3d 488 (4th Cir. 1999).

196. *Id.* at 490.

to conspiracy to distribute cocaine.¹⁹⁷ As part of their plea agreement, they helped the government in other cases, and, pursuant to its end of the deal, the government filed a section 5K1.1 motion for downward departure.¹⁹⁸ At Pearce's sentencing, Pearce's attorney made what the circuit court described as a "thinly veiled invitation for the court to ignore completely the sentencing guidelines," alluding to the golden years when judges "had the discretion to look somebody in the eye" and make their own sentencing determination; the attorney stated that he had heard each federal judge for the District of South Carolina speak of such times.¹⁹⁹ According to the Fourth Circuit, the court agreed with counsel and stated that it had "total discretion," contending that Pearce's sentencing was "one of the rare instances that a federal judge has discretion, which the Congress has completely removed from federal judges."²⁰⁰ Based on that "total discretion," the sentencing court heard evidence of Pearce's success in a drug rehabilitation program, of his negative drug tests, of his status as a "'good father,' a 'good husband,' and a 'hard worker,'" and of the fact that the offenses that made Pearce a career offender had occurred more than ten

197. *Id.* at 489. The defendants were convicted under 21 U.S.C. section 846, which makes "[a]ny person who attempts or conspires to commit any offense defined in this subchapter . . . subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2000).

198. *Pearce*, 191 F.3d at 489-90. See *supra* note 178 for the full text of § 5K1.1 of the Federal Sentencing Guidelines.

199. *Pearce*, 191 F.3d at 494. The full text of the attorney's statements, as rendered by the Fourth Circuit, is as follows:

I have heard from all of the judges [of the District of South Carolina] that used to be on the bench prior to the [sentencing] guidelines. I have heard each one of them speak of a time when they had discretion, when they could look at a man in the eye and look at his family and look at what he had done since he had been arrested and whether he has tried to make his life better, make the lives of people around him better, whether or not he had worked, whether or not he had provided assistance to the government, look at all that.

At that time, judge, before 1987, before guidelines, you know, the judge had the discretion to look somebody in the eye—if it wasn't a mandatory minimum sentence, they had to look somebody in the eye and say, I think this person is someone who has successfully flourished under the structure of home detention. And you could give them home detention, without having to worry about guidelines and sentencing commissions and things like that.

That's where we are, Judge, and that's why we are asking you today to consider the family history of [Pearce]. . . . That's why we are asking you to look at what he has done recently. . . .

We ask you to consider that Judge, just like you could prior to sentencing guidelines.

Id.

200. *Id.* at 495 (quotations omitted). This statement must have contained some tongue-in-cheek quality; it seems humorous that a judge would acknowledge that Congress removed discretion from federal judges and then claim the very authority Congress took away, all in the same sentence.

years earlier.²⁰¹ The government recommended a three-step downward departure for his assistance to the government, which would have placed him in the range of 120 to 150 months in prison, but the sentencing judge granted Pearce's requested 24-step departure, sentencing him to ten months in prison, half of which was to be served in a halfway house.²⁰²

The Fourth Circuit first condemned Pearce's attorney's statements, stating that "[r]eminding a sentencing judge of the 'good ole days' when judges did not have 'to worry about guidelines and sentencing commissions and things like that' was without question an inappropriate argument."²⁰³ The court then stated that, given the district court's "permissive response" to that argument, it could "only conclude that the court improperly based its decision in substantial part on factors unrelated to Pearce's assistance to the government"²⁰⁴—an improper result given the Fourth's Circuit's rule that, in considering section 5K1.1 downward departures, a court may only consider the extent of the defendant's aid to the government.²⁰⁵

Here, the district judge reacted to Pearce's attorney's invocation of the "good ole days" of full judicial discretion in sentencing. The Fourth Circuit implied that the attorney's reference to those days appealed to the judge, who then imposed an improper reading—a misreading—on section 5K1.1 of the Guidelines to allow himself to take into account factors other than Pearce's assistance to the government. Again, as in the other cases

201. *Id.* at 490-91.

202. *Id.*

203. *Id.* at 494-95.

204. *Id.* at 495.

205. *Id.* (noting the Fourth Circuit's rule that a sentencing court "may only take into account factors relating to the nature, extent, and significance of the defendant's assistance"). To support that conclusion, the Fourth Circuit relied on the background commentary to section 5K1.1, which states:

A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. . . . The court may elect to provide its reasons to the defendant *in camera* and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. backg'd. (1996) (emphasis in original). Application Note 2 states that "[t]he sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility." *Id.* § 5K1.1 cmt. n.2. Based on these passages, the Fourth Circuit's conclusion that it is improper for a sentencing judge to take into account factors other than assistance to government. Section 5K1.1 authorized downward departures only on the basis of governmental assistance; it mentions no other avenue. Additionally, it specifically states that downward departures for assistance to authorities should be considered independently of acceptance of responsibility. *Id.* Clearly, the Commission intended governmental assistance to be its own analysis.

discussed in this section, the strong implication from the Fourth Circuit's opinion is that the sentencing judge misread section 5K1.1 in an attempt to regain the discretion Congress removed from federal judges in enacting the SRA.²⁰⁶

C. TECHNIQUES FOR MISREADING

Having established that Bloomian misreadings of the Guidelines did occur, and that those misreadings were aimed at regaining lost judicial discretion and achieving greater fairness (which the Guidelines, in the judges' minds, presumably prevent),²⁰⁷ this section details the techniques that those sentencing judges used in misreading the Guidelines. It addresses both Bloomian and statutory misreading techniques.

1. Bloomian Misreading Techniques

Of the six techniques an author may use to misread a prior text,²⁰⁸ judges who misread the Guidelines may have employed several, possibly at once. Of those techniques, they utilized the fourth technique—that of adopting a position diametrically opposed to that of the predecessor text—often.²⁰⁹ For example, in *Muniz*, the relevant interpretation of

206. From a Bloomian perspective, as in the previous two cases, the sentencing judge sought to adopt a position opposite that of the Guidelines. Here, the sentencing judge considered factors other than the defendant's assistance to the government in ruling on the prosecution's section 5K1.1 motion for downward departure, even though that section grants such departures only for governmental assistance. *Pearce*, 191 F.3d at 490-91, 495. It also seeks to supplant the predecessor Guideline's authority.

207. While the three sample cases presented above are "textbook" examples, it is surely not the case that they are the only three examples. It would be cumbersome and boring indeed to list every instance in which a judge has misread the Guidelines in an attempt to regain lost discretion and right a perceived wrong, and this Article will not do so. Nevertheless, misreadings weren't exactly uncommon, either. For instance, in *United States v. Andrews*, the Fifth Circuit Court of Appeals addressed a case in which a sentencing court supported its decision to depart upwardly by 120 months with the proclamation that the relevant Guidelines were "completely out of whack" and the observation that the sentence the Guidelines imposed—fifteen months in prison—would have "violate[d] the Court's t'aint right doctrine." 390 F.3d 840, 843-44 (5th Cir. 2004). While the sentencing court acknowledged that its invocation of the "t'aint right doctrine" "probably [wasn't] a real technical legal finding," the Fifth Circuit stated:

We exercise the power of reassignment because of this judge's brazen antagonism to both the tenets of the guidelines and to [the appellant], as indicated during the sentencing proceedings. This is far from the first time we have had to reverse this judge for blatantly electing to ignore the plain language of the guidelines. Accordingly, we remove the district judge from this case because he has breached the barrier between the rule of law and the exercise of personal caprice.

Id. at 844, 851 (citations omitted).

208. See *supra* Part II.A (discussing Bloom's misprision theory and listing six ways in which an author may misread a predecessor text).

209. See BLOOM, ANXIETY, *supra* note 9, at 15, 99-112; see also note 43 and accompanying text (noting the process of daemonization).

Application Note 12 to section 2D1.1 required the sentencing judge to consider the amount of drugs promised in a drug deal if the defendant was capable of delivering the drugs and intended to do so.²¹⁰ Quite the contrary, the sentencing judge considered only the amount of drugs actually delivered,²¹¹ thereby adopting a position diametrically opposed to the position the Guidelines adopted. Similarly, in *Campo*, the sentencing judge required the prosecution to make a specific recommendation as to a subrange sentence,²¹² even though section 5K1.1 contains no such requirement.²¹³ Finally, in *Pearce*, the sentencing judge considered factors other than the defendant's assistance to the government in ruling on the prosecution's section 5K1.1 motion for downward departure,²¹⁴ even though the Guideline granted such departures only for governmental assistance.²¹⁵ In a Bloomian-Oedipal context, each departure from the Guidelines was a rebellion against the predecessor-father text, an attempt for sentencing judges to define themselves—in other words, to create originality—in contravention of the text of the Guidelines.

While staking out opposing positions, each misreading simultaneously sought to establish its text as the preeminent authority on the subject, supplanting the predecessor Guideline text and making it seem as though the sentencing judge composed the strong predecessor—the Guidelines.²¹⁶ That bid at dominance came at two levels. First, because the law accords judicial decisions precedential authority,²¹⁷ judges sought to assume authority by rendering decisions with precedential authority. Second, by rewriting applicable Guidelines and statutes, the sentencing judge placed herself in the precise position the preceding author occupied—that of the legislature, or the Sentencing Commission.²¹⁸ The judge's misprision, thereby, allows her to assume the legislature's, or the Commission's, place,

210. *United States v. Muniz*, 49 F.3d 36, 39 (1st Cir. 1995).

211. *Id.* at 40.

212. *United States v. Campo*, 140 F.3d 415, 417 (1998).

213. *Id.* at 419.

214. *United States v. Pearce*, 191 F.3d 488, 490-91 (4th Cir. 1999).

215. *Id.* at 495.

216. *See supra* note 45 and accompanying text (discussing apophrades).

217. *See Fassberg, supra* note 173, at 171-72 (“Case law . . . goes together with judicial greatness and creativity, with a sense of individual judicial responsibility for discovering and shaping the law by deciding cases which become a source of general binding rules, partly by virtue of the visible reasoning by which the result is reached.”). Interestingly, Wasserstein recognizes the “creative role” judges play in deciding cases. Indeed, “case law argument has very strict modes of operation and expansion, designed to guarantee that judges will not overstep their creative role (notably the art of distinguishing cases and the distinction between *ration decidendi* and *obiter dicta*.” *Id.* at 172.

218. *See discussion infra* Part IV.B (discussing the separation of powers doctrine and legislative functions).

fostering at least an illusion that “[they] had written the precursor’s characteristic work.”²¹⁹

Just as important are the proposed misprision techniques that judges did not apply to misread the Guidelines. Misreading sentencing judges did not seek to correct the Guidelines, since misreading judges believe that the very concept of mandatory sentencing is errant;²²⁰ they did not want to rehabilitate the Guidelines but to eliminate them entirely. That strategy is evident in *Muniz*, *Campo*, and *Pearce*, where the sentencing judges ignored the Guidelines entirely. For the same reason, misreading judges did not seek to fill in gaps in the Guidelines’ text.²²¹ Nowhere in the judicial canon did misreading sentencing judges attack the predecessor itself²²²—in this case, the legislature that enacted the SRA. Likewise, misreading sentencing judges did not rein in their creative, judicial abilities in an attempt to make the Guidelines look like a lesser work²²³—if anything, those judges reveled in their creative abilities.

2. *Statutory (or Nonstatutory) Misreading Techniques*

While these cases seem strikingly disparate factually and procedurally, they have one thing in common: none of the three sentencing judges felt particularly bound by the text of the applicable sentencing Guidelines or statutes. In *Muniz*, the district judge, recognizing the First Circuit’s interpretation of Application Note 12 of section 2D1.1, nevertheless departed from the text of that Note in the name of fairness to the defendant.²²⁴ In *Campo*, the court read a requirement that the prosecuting attorney recommend a specific subrange sentence, even though section 5K1.1—the

219. BLOOM, ANXIETY, *supra* note 9, at 16. *See supra* note 45 (discussing the complexity of the apophrades principle and the later poet’s assumption of the predecessor’s place and authority). Admittedly, the analogy here is not precise, since misreading sentencing judges do not literally foster the illusion that they, or even the judiciary, wrote the Federal Sentencing Guidelines. That would be clearly wrong, and the apophrades principle would fail. Rather, they assume the place and the authority of the predecessor—the legislature—in judicially rewriting the Guidelines.

220. *See supra* Part II.D and notes 110-23 (discussing how the SRA removed discretion from sentencing judges and how sentencing judges resent that removal).

221. *See supra* note 41 and accompanying text.

222. *See supra* note 42 and accompanying text.

223. *See supra* note 44 and accompanying text. Of note, however, is the reaction of the sentencing court in *Campo*, who sought to make a point about the Guidelines by failing to exercise the little discretion they granted him. *See Campo*, 140 F.3d at 418-19. In that sense, the sentencing judge did reign in his creative abilities, but not necessarily to make the Guidelines look like a lesser work. Rather, he appeared to do so in rebellion to the U.S. Attorney’s office policy.

224. *United States v. Muniz*, 49 F.3d 36, 40 (1st Cir. 1995). It should be noted, again, that the Application Notes in the Federal Sentencing Guidelines are not mere suggestions, or even “guidelines” in the colloquial sense. Rather, they are binding so long as they are not “inconsistent with the Constitution, a federal statute, or the guideline itself.” *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1137 (11th Cir. 2004) (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

applicable Guideline—contains no such requirement.²²⁵ Finally, in *Pearce*, the sentencing judge took factors other than governmental assistance into account when considering a section 5K1.1 downward departure in contravention of that section’s Application Notes and after defense counsel’s stirring recollection of the “good ole days” of unrestricted judicial discretion in sentencing.²²⁶ While it is certainly possible that a judge may have misread a Guideline merely by ascribing different meanings to words or phrases in the text,²²⁷ and the judges in those cases were not totally detached from Guideline language, these cases provide examples of sentences that were barely even grounded in the Guidelines.

Thus, the misreadings in *Muniz*, *Campo*, and *Pearce* cannot be considered “textualist” misreadings, or misreadings based on haggling over the meaning of the text.²²⁸ While textualism as a theory of statutory interpretation encompasses a broad range of textual analysis,²²⁹ it’s hard to say that a particular approach is “textualist” when it ignores the text altogether. The sentencing judges’ decisions in *Campo* and *Pearce* ignored the text of the applicable provisions, and in *Muniz*, the sentencing judge departed wholly from the applicable text *after* correctly reciting what the text stated.²³⁰ The *Muniz*, *Campo*, and *Pearce* decisions are not intentionalist either, since none of the three made any attempt at ascertaining the intent of the legislature or the Commission, past or present. Nor were they purposivist in nature: no judge tried to divine the purpose the relevant Guideline or based his misreading on it. Indeed, no theory of textual interpretation

225. *United States v. Campo*, 140 F.3d 415, 417-18 (2d Cir. 1998).

226. *United States v. Pearce*, 191 F.3d 488, 494-95 (4th Cir.1999).

227. For a discussion of two cases, *United States v. Parker* and *United States v. Sharma*, that provide potential examples of such misreadings, see *supra* note 18. *Parker* and *Sharma* present examples of misprision that are not as blatant as the ones presented in *Muniz*, *Campo*, and *Pearce*. Rather than involve situations where sentencing judges simply abandoned the Guidelines, they involve disagreements—even reasonable disagreements—over the meaning of particular words in the Guidelines, all accompanied by allegations of misreading. Misreading may have gone on in those cases, but it’s tough to say for sure.

228. For a discussion of the difference between misreadings that debate word meaning and misreadings that, while tangentially grounded in text, actually end up ignoring the text, see *supra* note 18.

229. See Eskridge, *supra* note 73, at 660-63 (discussing Justice Scalia’s methodology of looking to one statutory framework to determine the meaning of a word found in another, distinct framework).

230. *United States v. Muniz*, 49 F.3d 36, 40 (1st Cir. 1995) (noting how the sentencing judge articulated his obligation to consider cocaine offered rather than only the cocaine actually delivered, so long as the defendant intended to deliver the cocaine and was capable of doing so, ruled that the defendant both intended to deliver and could deliver the extra cocaine, and then sentenced the defendant based only on the cocaine delivered).

seems to fit;²³¹ the judges departed from the text entirely in each case.²³² Rather, the sentencing judges in *Muniz* and *Pearce* were persuaded by fairness to the defendant.²³³ In *Campo*, the judge was making a statement about the U.S. Attorney's office policy.²³⁴ Thus, it appears that there is even a *third* type of misreading—the nontextual misreading, as opposed to a misreading of text using a tool of statutory interpretation or a misreading of facts.

IV. WHAT WE CAN LEARN: THE PROBLEMS WITH MISREADING

These judicial misreadings had serious real-world consequences, some common to all deviations from statutory text, others unique to misreadings of the Federal Sentencing Guidelines. Specifically, misreading the Guidelines subjected a judge to appellate reversal and violated the principle of separation of powers by disrupting the allocation of sentencing authority and allowing judges to legislatively rewrite the Guidelines. Those sins left those misreadings without any political legitimacy. This Part addresses each consequence in turn. The long and the short of it is this: these misreadings and their consequences made up the world in which we lived prior to *Booker*, and it may very well be the world we live in if Congress decides to create a mandatory sentencing scheme. Sentencing judges have already misread one scheme; they can, and very well may, misread another.

A. REVERSIBLE ERROR

Judges who misread Guidelines pre-*Booker* likely committed reversible error, since the SRA allowed—and still allows, for that matter—for appeals of sentencing decisions in limited circumstances.²³⁵ Specifically, a defendant can appeal if the sentence was “imposed in violation of law,” “imposed as a result of an incorrect application of the sentencing guidelines,” or if it exceeds the Guidelines’ sentencing range under some

231. For the sake of simplicity, this Article assumes that textualism, intentionalism, and purposivism are the three principle theories of statutory interpretation. That may be an oversimplification, but it is substantially correct.

232. It cannot be argued that the judges believed that the “purpose” of the Guidelines and statutes they misread was to increase judicial sentencing discretion. It is clear to all, including judges, that the SRA was designed to do just the opposite. See *supra* Part II.C.

233. See *Muniz*, 49 F.3d at 40 (noting how the sentencing judge thought it would be more fair to sentence the defendant based only on the amount of cocaine delivered); *United States v. Pearce*, 191 F.3d 488, 494-95 (4th Cir. 1999) (noting the defense attorney’s pleas, which the sentencing judge apparently accepted, at considering the defendant’s total character).

234. *United States v. Campo*, 140 F.3d 415, 417-18 (1998) (noting the sentencing judge’s belief that he did not have to even consider the prosecution’s 5K1.1 motion if the prosecution did not make a specific sub-median recommendation).

235. 18 U.S.C. § 3742 (2000).

circumstances.²³⁶ The government can appeal a sentence under essentially the same circumstances.²³⁷ It can also appeal if the sentence was “imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.”²³⁸ Generally speaking, though, sentences were not appealable unless they resulted from an error in calculation or a violation of law.²³⁹ If an appellate court found that the sentence was imposed as a violation of law or by an incorrect application of the relevant Guidelines, it had to remand the case for further proceedings with whatever instructions it deemed appropriate.²⁴⁰ If the sentence fell outside the range, and was either not accompanied by a statement or is unreasonable, the appellate court had to state specific reasons for its decision and remand for further proceedings.²⁴¹ Of course, sentences are now reviewed for reasonableness only.²⁴²

Based on that statutory framework, appellate courts reviewed—and still review—questions of fact against a clearly erroneous standard and questions of law *de novo*.²⁴³ In other words, basic standards of review still apply. The term “clearly erroneous” has been subject to much debate; the United States Supreme Court defines a clearly erroneous finding as one supported by some evidence, but nevertheless gives the reviewing court, “on the entire evidence . . . the definite and firm conviction that a mistake has been committed.”²⁴⁴ *De novo* review, of course, is nondeferential.²⁴⁵ Review of discretionary rulings involves utilizing an abuse of discretion standard of review,²⁴⁶ a term which has been ambiguously read to resemble

236. *Id.* § 3741(a).

237. *Id.* § 3742(b)(1)-(3).

238. *Id.* § 3742(b)(4).

239. Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 2 (1997).

240. 18 U.S.C. § 3742(f)(1).

241. *Id.* § 3742(f)(2).

242. *Booker*, 543 U.S. at 261.

243. Lee, *supra* note 239, at 11-14.

244. *Id.* at 12 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Lee notes one appellate decision that defines clearly erroneous as “a decision [that] strike[s] us as more than just maybe or probably wrong; it . . . strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Id.* (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

245. *Id.* at 13.

246. *Id.* at 18 (“For questions involving discretionary rulings by the trial courts, appellate courts utilize an abuse of discretion standard of review.”). Misreadings in departure cases were slightly more complicated. In *Koon v. United States*, the Supreme Court held that appellate courts reviewing a sentencing court’s decision to depart from the Guidelines should apply an abuse of discretion standard of review, which includes “review to determine that the [use of judicial] discretion was not guided by erroneous legal conclusions.” 518 U.S. 81, 98-100 (1996). But the PROTECT Act of 2003 partially overruled *Koon*. In cases where the sentence was outside the applicable sentencing range and the district court either failed to provide a written statement or

the clearly erroneous standard, as well as the *de novo* standard.²⁴⁷ Review of mixed law and fact questions is a mixed bag of rules.²⁴⁸ The fact that sentences are now reviewed for “reasonableness” sounds a lot like review for abuse of discretion, suggesting that *Booker*, in large part, returned lost sentencing discretion to the judiciary.

No matter which standard of review is applied—*de novo* or abuse of discretion—sentencing judges who misread the Guidelines will likely be reversed on appeal. If even the abuse of discretion standard will catch and overturn erroneous legal interpretations, a misreading judge runs the risk of reversal, particularly where an appellate court reviews *de novo*. From a Bloomian perspective, it would appear that reversal is the mechanism by which an authority even stronger than the sentencing judge supplants the sentencing judge’s newfound, but fleeting, originality and discretion. Fortunately, appeals provide a check on misreading sentencing judges—misreadings may cost time and money to fix on appeal, but they are fixable.

B. VIOLATION OF THE SEPARATION OF POWERS PRINCIPLE

The possibility of reversal was, in reality, a minimal problem stemming from misreadings of the sentencing Guidelines. In fact, rather than signaling a problem, it likely signaled that the system was working, that appellate courts would catch and remedy deviations from the procedure. Unfortunately, though, reversal was the least of our worries. Judicial misreadings of the Federal Sentencing Guidelines also violated the separation of powers

based its departure on impermissible factors, an appellate court reviewed the sentencing court’s decision *de novo*. See Zlotnick, *supra* note 124, at 231-32; Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401, 117 Stat. 650 (2003).

Koon seemed to base its initial conclusion on the premise that the abuse of discretion standard applied only to findings of fact in sentencing. 518 U.S. at 99-100 (noting district courts’ special factfinding proficiency). The Court, however, noted that “whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court’s resolution of the point.” *Id.* at 100. Nevertheless, the Court continued, “little turns . . . on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction . . . a district court by definition abuses its discretion when it makes an error of law.” *Id.*

247. Lee, *supra* note 239, at 18-19. See, e.g., *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985) (noting that a trial court’s ruling will not be “disturbed unless we have a ‘definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors’”) (internal quotations and citations omitted); *Pearson v. Dennison*, 353 F.2d 24, 28 n.6 (9th Cir. 1965) (noting that abuse of discretion simply means that the district court “made a mistake”). Lee cites both these cases and notes that the latter definition of abuse of discretion is not common. Lee, *supra* note 239, at 19 n.107. Of course, review for abuse of discretion encompasses review for error, so the latter definition is perfectly correct. See *United States v. Porter*, 145 F.3d 897, 905 (7th Cir. 1998).

248. Lee, *supra* note 239, at 14-18.

principle²⁴⁹ in at least two ways. First, as noted, Congress intended the SRA to curtail federal judges' sentencing discretion.²⁵⁰ To that end, it delegated legislative power to the United States Sentencing Commission, giving that body power to promulgate sentencing guidelines and regulations.²⁵¹ Congress's enactment of the SRA resulted not only in decreased judicial sentencing discretion, but increased prosecutorial discretion, since prosecutors may effectively choose which sentence a defendant receives by electing to prosecute the defendant for a particular crime.²⁵² In short, Congress, in enacting the SRA, specifically allocated sentencing authority, giving more discretion (and authority)²⁵³ to prosecutors and the Sentencing Commission, and taking authority away from federal judges. By attempting to regain that lost discretion, federal judges reallocate that sentencing discretion and perform a legislative function in violation of the separation of powers principle.²⁵⁴

249. This Article uses the term "separation of powers" to refer to "the division and allocation of power among the three branches of the federal government." Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 600 (2001). It also refers to the relationships between the branches:

This structure recognizes two main relationships among the three branches. First, each branch is largely given a separate task within the government: The legislature is to make law, the executive is to enforce law, and the judiciary is to decide cases. Second . . . each branch is given sufficient power to check abuses of power by the other branches.

Id. See also Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000) ("Separation of powers refers to a theory about the appropriate allocation of governmental authority among the institutions of the national government."). The separation of powers doctrine is derived from myriad sources. One potential source is the Federalist Papers. See Arch T. Allen III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2051 n.7 (1999) (citing FEDERALIST No. 51) (explaining the separation of powers principle and noting that "Madison's eighteenth century writings continue to be a relevant source of modern separation-of-powers dialogue"). Also, the structure of the Constitution gives rise to the principle. See Magill, *supra*, at 1132 (noting that traces of the doctrine of separation of powers "are evident in the Constitution: Articles I, II, and III refer to three different types of governmental powers and allocate them to three different institutions with separate personnel"). The Constitution, of course, does deviate from the "pure" separation of powers doctrine in the form of checks and balances. See *id.*

250. See *supra* Part II.B.

251. See generally *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that Congress's delegation of legislative authority to the Sentencing Commission was constitutional). The issue in that case "was not whether the Sixth Amendment forbade judge sentencing, but rather whether the nondelegation and separation of powers doctrines forbade anything less than absolute and monolithic discretion by sentencing judges." Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 972-73 (2003).

252. See *supra* notes 10, 51-55 and accompanying text (explaining how the Federal Sentencing Guidelines tipped the balance of sentencing discretion in prosecutors' favor).

253. This assumes that sentencing discretion and sentencing authority are synonymous.

254. In such cases, judges are essentially recreating the SRA, and thereby violating the separation of powers principle, "usurping the legislative function" by "constructing a statute rather than rendering judgment." Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1195 (2000) (discussing separation of powers violations in the context of constitutional road

In addition to usurping the SRA's allocation of sentencing discretion, sentencing judges who misread the Guidelines essentially rewrite individual sentencing provisions. For instance, in *Campo*, the sentencing judge read into section 5K1.1 a requirement that prosecutors make specific subrange sentencing recommendations—a requirement the Sentencing Commission did not include.²⁵⁵ In the SRA, Congress gave the Sentencing Commission, not the federal courts, the authority to draft sentencing guidelines;²⁵⁶ federal courts cannot do so. Federal judges who effectively rewrite the Guidelines in their misreadings, therefore, violate the separation of powers doctrine.

C. NO POLITICAL LEGITIMACY

Finally, because statutory interpretations that deviate from the plain meaning of statutory text have decreased political legitimacy,²⁵⁷ misreadings do too. Judges who depart, consciously or unconsciously, from the text of Guidelines appropriate power that Congress delegated to the Sentencing Commission, not to the judiciary. People vote for individual members of Congress and, thereby, at least implicitly, endorse their actions; federal judges never even sit for retention election.

V. CONCLUSION

While not all sentencing judges misread the Guidelines, and those who did probably did not do so in a conscious effort to subvert congressional intent and appropriate lost sentencing discretion, the fact remains that it did happen, and more often than many might be comfortable admitting. Those misreadings were not without consequences: not only did they subject sentencing judges to reversible error, but they violated the separation of powers principle and lacked any accountability to those who actually voted in the Congress that created the SRA. As Congress prepares to address the aftermath of the Supreme Court's *Booker* decision, it may do well to keep the pre-*Booker* world—one fraught with salacious stuff like literary

maps). “[T]he enactment of statutes remains the quintessential legislative function.” William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1075 (1999).

255. See *supra* Part III.B.2 for a discussion of *Campo*. See *supra* note 178 for the complete text of section 5K1.1.

256. See *Mistretta v. United States*, 488 U.S. 361 (1989) (discussing and approving Congress's delegation of legislative power to the United States Sentencing Commission, an executive branch agency).

257. See *supra* Part II.B (discussing the variety of available methods of statutory interpretation and noting that textualism, or adherence to the language of a statutory text rather than its purpose or the intent behind it, carries more political legitimacy). A lack of political legitimacy is, as noted above, closely tied to the separation of powers principle. *Id.*

patricide and open rebellion against constitutional authority—in mind, attempting to strike a balance between uniformity in sentencing and the very real likelihood that sentencing judges will react negatively to another attempt to rob them of discretion.