

**THE INEVITABILITY OF DISCRETION: WHAT
PROponents OF PARENTING TIME GUIDELINES
CAN LEARN FROM THIRTY YEARS OF FEDERAL
SENTENCING GUIDELINES**

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*“It’s easier to build strong children than to repair broken men.”
– Fredrick Douglass*

ABSTRACT

For decades, the prevailing standard for a judge making a decision regarding parenting time has been “the best interest of the child.” That standard grants substantial discretion to the trial court judge – perhaps more discretion than in any other area of the law. Because the high degree of discretion may render inconsistent and unpredictable results, the standard has been widely criticized.

In the past half century, federal sentencing has undergone similar scrutiny. The Federal Sentencing Guidelines – “the most controversial and disliked sentencing reform initiative in U.S. history” – have substantially curtailed judicial discretion in an effort to achieve uniformity in sentencing. Several states have explored limiting judicial discretion in the area of parenting time by a mechanism appropriate for comparison to the federal sentencing guidelines – parenting time guidelines. Both involve “whole person” adjudication, and both purport to pronounce a result governing an individual’s future based on predetermined classifications and categories.

This Article advocates rejection of parenting time guidelines. Instead, modest limitations on the discretion afforded by the best interest standard cannot only address the concerns of its critics but also preserve a judge’s ability to make individualized case-by-case determinations regarding a child’s best interest. This Article makes its case by applying observations

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regarding the evolution of federal sentencing guidelines to the concept of parenting time guidelines. The development of the federal sentencing guidelines shows that a guidelines approach to judicial decision-making comes with significant sacrifice, likely to the guidelines' very purpose. Federal sentencing guidelines came with a sacrifice of the purposes of punishment, and parenting time guidelines will come with a sacrifice to the best interest of some children. Every family situation is different, and every child deserves the careful case-by-case deliberation of a judge as to the child's best interest.

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INTRODUCTION

For decades, the prevailing standard for a judge making a decision regarding parenting time¹ has been “the best interest of the child.” That standard grants substantial discretion to the trial court

1. Traditionally, when parents divorced or separated, the court would award “custody” of the child to one parent or the other. The parent who was awarded “legal custody” had the power to make decisions regarding the child’s welfare. The parent who was awarded “physical custody” was the parent with whom the child would reside post-separation, and the other parent would generally be granted “visitation” with the child. Today, courts and legislatures are moving away from using those terms and are instead using a set of terms that are more descriptive of the parent-child relationship than the traditional terminology. This Article will use the modern terminology. Specifically, the term “parenting time,” rather than the terms “custody” and “visitation,” will be used to refer to the period of time that each parent spends with the child. This Article will also use the more general term “separation” to include divorce and other scenarios in which a child’s parents separate. Such scenarios include parents who were not in any committed relationship prior to or after the child’s birth.

judge—more discretion than in any other area of the law.² Because the high degree of discretion may render inconsistent and unpredictable results, the standard has been widely criticized.³

In the past half century, federal sentencing has undergone similar scrutiny.⁴ Once upon a time, a federal judge used only his or her wisdom and judicial experience to sentence federal offenders.⁵ The Federal Sentencing Guidelines—“the most controversial and disliked sentencing reform initiative in U.S. history”⁶—have substantially curtailed that discretion in an effort to ensure uniformity in sentencing. The success or failure of the federal sentencing guidelines is a matter of continuing debate.⁷ As Judge Rosemary Barkett, United States Court of Appeals for the Eleventh Circuit, has said, “while a strictly code-based method of legal problem-solving might work to achieve predictability and some sort of uniformity, it does not always work to achieve justice.”⁸

Although the days of allowing a judge unfettered discretion to determine “the best interest of the child” should perhaps come to an end, no better alternative is clearly identifiable.⁹ Several states have explored limiting judicial discretion in the area of parenting time by a mechanism appropriate for comparison to the federal sentencing

2. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167 (1986) (“Family law . . . is characterized by more discretion than any other field of private law.”).

3. See, e.g., Joshua S. Press, *The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation*, 84 IND. L.J. SUPP. 47, 47–48 (2009) (discussing the problem of religious discrimination when courts apply the “best interest of the child” standard); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61–63 (1994) (arguing that the “best interest” standard is so “impossibly vague” that it invites the subjective bias of the adjudicating court as to race, class, and culture).

4. E.g., Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 43 (2006) (“Debates over the pros and cons of judicial sentencing discretion have now raged for decades.”).

5. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9–29 (Univ. of Chi. Press, 1998).

6. William H. Pryor, Jr., *Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 518 (2011) (quoting MICHAEL TONRY, *SENTENCING MATTERS* 72 (Oxford Univ. Press, 1996)).

7. See, e.g., Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2223–24 (2014).

8. Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 918 (2007).

9. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 282 (1975) (“My conclusion is hardly comforting: while the indeterminate best-interests standard may not be good, there is no available alternative that is plainly less detrimental.”), quoted in Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2019 n.62 (2014).

guidelines—parenting time guidelines. Both involve “whole person” adjudication,¹⁰ and both purport to pronounce a result governing an individual’s future based on predetermined classifications and categories. Parenting time guidelines are, generally, statutes or rules that precisely regulate a parent’s post-separation time with his or her child based upon the child’s age range. Such guidelines are an imprudent, albeit perhaps efficient, way of determining a child’s future.¹¹ Review of the evolution of federal sentencing guidelines shows that, even with the wealth of resources that was devoted to formulating those guidelines, and even after thirty years of experience with and revisions to the guidelines, use of guidelines in judicial decision-making has significant faults.

This Article urges proponents of parenting time guidelines to consider more modest alternatives before curtailing judicial discretion with a guidelines approach. Parenting time guidelines seek to severely limit judicial discretion by way of highly detailed substantive rules, as do federal sentencing guidelines. But less drastic alternatives could also curtail judicial discretion without sacrificing the individual case-by-case determinations that are necessary to ensure that the best interest of the child is protected.

This Article makes its case by applying observations regarding the evolution of federal sentencing guidelines to the concept of parenting time guidelines. Part I of this Article explains how the best interest of the child standard arose in response to prior presumptions; however, the best interest standard’s reliance on judicial discretion rather than on presumptions has been widely criticized, and alternative methods for determining parenting time have been attempted.¹² Parenting time guidelines are one attempt to combat use of judicial discretion. Part II explains parenting time guidelines as promulgated by a handful of states and illustrates that, while those guidelines seek to provide a parenting time schedule that is in the best interest of the child without reliance on judicial discretion, application is quite simply an impossible task.¹³ The futility of the task, combined

10. Mnookin, *supra* note 9, at 250–51.

11. See Dana E. Prescott, *The AAML and a New Paradigm for “Thinking About” Child Custody Litigation: The Next Half Century*, 24 J. AM. ACAD. MATRIMONIAL L. 107, 142 (2011) (“The notion that accurate and ethical historical standards exist in child custody cases is a wonderfully optimistic approach. This proposition, however, neglects an entire body of sociological, historical, anthropological, and economic theory concerning centuries of conflict and aggression between human beings.”).

12. See *infra* Part I.

13. See *infra* Part II.

with the problems that are created by the guidelines approach, should give pause to those who seek to implement parenting time guidelines. Problems resulting from a guidelines approach can be seen in the history of federal sentencing guidelines. Part III describes the federal sentencing guidelines and their evolution for background purposes.¹⁴ Part IV sets out several lessons that proponents of parenting time guidelines can learn from thirty years of experience with the federal sentencing guidelines.¹⁵ Finally, Part V makes a modest proposal: proponents of parenting time guidelines should implement less drastic limits on judicial discretion before resorting to a guidelines approach.¹⁶ Modest limitations on the discretion afforded by the best interest standard cannot only address the concerns of its critics but can also preserve a judge's ability to make individualized case-by-case determinations regarding a child's best interest.

I. FROM ANTIQUATED PRESUMPTIONS TO MODERN BEST INTEREST STANDARD

Parenting time guidelines are largely a response to concerns that the modern best interest standard allows for too much judicial discretion, allowing a judge to inject his or her personal biases and leading to unpredictable results.¹⁷ Before examining parenting time guidelines and their effectiveness as a remedy to the criticisms of the best interest standard, it is useful to consider how the best interest standard came to be. While parenting time guidelines seek to limit judicial discretion, the best interest standard arose because courts relied too heavily on presumptions and too little on their judicial discretion. It became apparent, however, that the needs of individual children should be carefully considered to ensure that their best interests were protected; hence, the exercise of judicial discretion allowed by the best interest standard became essential.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. See, e.g., Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 102 (2011).

A. *Presumption in Favor of the Father*

At common law, the general rule was that “the father ha[d] the paramount right to the control and custody of his children, as against the world.”¹⁸ Mothers, on the other hand, had no custodial rights.¹⁹ The presumption in favor of the father was premised on the English common-law notion that children were the property of their parents.²⁰ Because the father was legally entitled to full control over the marital property upon dissolution of the marriage, the father was also entitled to the custody of the children.²¹ Owing to these feudalistic beliefs, child-custody laws developed as a subset of property rights.²²

The father’s right to custody was considered absolute because the father was the master of the family, and he had an incumbent duty to provide for the care of the children.²³ Courts explained the father’s right as “springing necessarily from and being incident to the father’s duty to provide for [the children’s] protection, maintenance and education.”²⁴ In that sense, the underlying reason for the rigid presumption in favor of the father was the assumption that, because the father had a duty to provide for the children, their interest would be best served by placing them with their father.²⁵ The presumption in favor of the father persisted well into the late 1800s and, in some cases, the early 1900s.²⁶ But, owing to the confluence of the states’ invocation of the *parens patriae* doctrine and the dawn of the industrial revolution, which had a dramatic impact on the family unit, the empire of the father began to fall.

B. *Presumption in Favor of the Mother*

Although a fit father’s custodial right remained paramount to any right of the mother until the early 1900s, that right came to be seen

18. *Newsome v. Bunch*, 56 S.E. 509, 509 (N.C. 1907).

19. *Id.*

20. *E.g.*, J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

21. *See id.*

22. *See id.*

23. *See, e.g.*, *Taylor v. Keefe*, 56 A.2d 768, 769 (Conn. 1947).

24. *Newsome v. Bunch*, 56 S.E. 509, 509 (N.C. 1907).

25. *See* DiFonzo, *supra* note 20, at 214.

26. *See, e.g.*, *Ex parte Devine*, 398 So. 2d 686, 691 (Ala. 1981).

as less than absolute.²⁷ In the child-custody context, the equitable doctrine of *parens patriae*, which literally means “parent of the country,”²⁸ vested states with the power to intervene when parents had defaulted in effectively performing their parental duties.²⁹ More specifically, the *parens patriae* doctrine conferred jurisdiction on courts “to see to the protection and provide for the proper care of those who, from their tender years, were oftentimes helpless and undefended against cruelty and oppression.”³⁰ As *parens patriae*, states had a duty not only to protect children, but also to maximize their welfare and interests.³¹ Because the state’s interest in protecting the welfare of children was “so broad as to almost defy limitations,”³² the *parens patriae* doctrine afforded courts broad discretion to determine who would have custody of minor children.³³ Thus, judges could now “sidestep” the presumption in favor of the father.³⁴

In addition to the states’ invocation of the *parens patriae* doctrine, in the early 1900s, the industrialization of the American economy had a substantial impact on the family unit, especially with respect to parental roles and responsibilities. While men were becoming increasingly defined as the primary wage earners for the family, women were becoming increasingly identified as domestic experts.³⁵ This social confirmation of the mother as the primary caretaker gave way to a custodial preference in favor of the mother.

In light of society’s perspective that women were the primary caretakers of children, courts became more willing to award mothers custody of minor children. Judges began routinely acknowledging that young children required—and were entitled to—the care and attention that only a mother could provide.³⁶ The mother was exalted as “the softest and safest nurse of infancy.”³⁷ Having exalted the mother as “God’s own institution for the rearing and upbringing

27. See, e.g., *Ex parte Yahola*, 71 P.2d 968, 970 (Okla. 1937) (noting that a father’s statutory right to custody of minor children is not absolute; instead, that right “must at all times be qualified by considerations affecting the welfare of the child”).

28. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (“*Parens patriae* means literally ‘parent of the country.’”).

29. *In re Gault*, 387 U.S. 1, 17 (1967).

30. See *State v. Baird*, 19 N.J. Eq. 481, 485 (N.J. 1868).

31. See *Wear v. Wear*, 285 P. 606, 609–11 (Kan. 1930).

32. *In re Lippincott*, 124 A. 532, 533 (N.J. Ch. 1944).

33. See *Baird*, 19 N.J. Eq. at 485.

34. See DiFonzo, *supra* note 20, at 214.

35. *Id.*

36. See, e.g., *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921).

37. *Ex parte Devine*, 398 So. 2d 686, 689 (Ala. 1981).

of the child,” courts put a premium on placing children “in the hands of an expert.”³⁸ The pendulum of parental preferences had swung from the side of the father to the side of the mother.

This preference for awarding custody to the mother—commonly referred to as the “tender years” doctrine—dictates that “where a child is of such tender age as to require the care and attention that a mother is especially fitted to bestow upon it, the mother, rather than the father, is the proper custodian, unless, of course, for some reason she is unfit for the trust.”³⁹ Courts presumed that it was in the best interest of a young child to be with his mother so that the child could receive “the attention, care, supervision, and kindly advice, which arises from a mother’s love and devotion, for which no substitute has ever been found.”⁴⁰ Until the mid-1900s, the mother’s right to custody was largely uncontroverted.

State legislatures followed the courts’ lead. By the middle of the twentieth century, many states had codified the tender-years preference as a legal presumption to be applied in all child-custody cases.⁴¹ In states that had not statutorily announced the preference for the mother, the general rule observed by the courts was that, “all other things being equal . . . great weight should be given to motherhood [sic] as a factor in determining what is for the best interests of the child.”⁴² Absent a showing by the father that the mother was unfit, the position of the courts and legislatures was clear: “[T]he realm of motherhood may not be shattered during the tender years, even by the father.”⁴³

For the better part of the 20th century, mothers were consistently awarded custody of their young children—who were generally considered to be seven years or younger—while fathers were awarded only visitation rights.⁴⁴ Notwithstanding the tender-years presumption, it was permissible for fathers to be awarded custody of their older children, i.e., seven and older.⁴⁵ These gender-based presump-

38. *Hines v. Hines*, 185 N.W. 91, 92 (Iowa 1921).

39. *Hawkins v. Hawkins*, 121 So. 92, 92 (Ala. 1929).

40. *Hurt v. Hurt*, 315 P.2d 957, 959 (Okla. 1957).

41. See *Dunbar v. Dunbar*, 429 P.2d 949, 951 (Ariz. 1967); *Goodman v. Goodman*, 291 So. 2d 106-07 (Fla. Dist. Ct. App. 1974); *Trudgen v. Trudgen*, 329 P.2d 225, 226 (Mont. 1958); *Ferguson v. Ferguson*, 202 N.W.2d 760, 764 (N.D. 1972); *Earnst v. Earnst*, 418 P.2d 351, 354 (Okla. 1966); *Yager v. Yager*, 159 N.W.2d 125, 127 (S.D. 1968).

42. See, e.g., *Ettinger v. Ettinger*, 383 P.2d 261, 262 (N.M. 1963).

43. *In re Bopp*, 58 N.Y.S.2d 190, 209 (N.Y. App. Term 1944).

44. See *Ex parte Devine*, 398 So. 2d 686, 689 (Ala. 1981).

45. See, e.g., *id.* at 687-90; *Benal v. Benal*, 22 So. 3d 369, 373 (Miss. Ct. App. 2009).

tions, as well as the preference of awarding custody to one parent, persisted until the 1970s.⁴⁶

C. *Best Interest of the Child*

In the 1970s, the idea that a mother was presumptively entitled to custody simply by virtue of being the mother began to wane. In the wake of the civil rights era, courts began acknowledging that a mother and a father had equal rights when it came to the custody of their minor children. Accordingly, many states enacted statutes premised on gender-neutral views, requiring courts to consider all facts relevant to determining the best interest of the child and prohibiting courts from awarding custody to one parent over the other based solely on gender.⁴⁷

The purpose of the gender-neutral statutory provisions was “to put both parents on an otherwise equal plane in a child custody case, and thus remove a preference for the mother.”⁴⁸ Whether by product of statute or case law, a parent was “no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female.”⁴⁹ Although courts had held for decades that the child’s interests were best served by the mother and that she should be awarded custody absent exceptional circumstances, as one appellate court explained, “[the] better view is that the paramount consideration is always the best interest of the child.”⁵⁰ Thereafter, courts pronounced that child custody determinations “must be entirely on the basis of what is in the best interests of the child.”⁵¹

With the abolition of gender-based preferences, the “best interest of the child” became the standard for courts in making child custo-

46. *E.g.*, *Ex parte Devine*, 398 So. 2d at 692-95 (explaining that gender-based classifications involving fathers and mothers are unconstitutional); *Bazemore v. Davis*, 394 A.2d 1377, 1381 (D.C. 1978) (citations omitted) (reasoning that “what a child needs is not a mother, but someone who can provide ‘mothering’”).

47. *See, e.g.*, *Scolman v. Scolman*, 226 N.W.2d 388, 390-91 (Wis. 1975) (evaluating a Wisconsin statute that provided: “[i]n determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent”).

48. *Adams v. Adams*, 519 S.W.2d 502, 503 (Tex. Civ. App. 1975).

49. *McAndrew v. McAndrew*, 382 A.2d 1081, 1086 (Md. Ct. Spec. App. 1978).

50. *Delatte v. Delatte*, 358 So. 2d 974, 975 (La. Ct. App. 1978).

51. *Scolman*, 226 N.W.2d at 391.

dy determinations.⁵² All other considerations were inferior.⁵³ In evaluating the child's best interest, the ultimate tripartite inquiry considered the parent better qualified to raise the child of the marriage, the needs of the particular child, and each of the parties' relationship with the child.⁵⁴ The role of the court was to determine the best interest of the children based on the relative fitness and the ability of the competing parents to care for the children, keeping in mind the notion that the parents began on equal footing at the outset of child custody proceedings.⁵⁵ Neither parent had the burden of demonstrating which parent would serve the child's best interest; rather, the burden was placed upon the trial court.⁵⁶

Although gender-based preferences had been replaced, courts still lacked a clear-cut method for determining which parent would best serve the child's interests. Courts were often confronted with two parents who were equally fit; in those situations, judges often retreated to the preference for the mother.⁵⁷ In time, courts were directed to consider individual factors regarding the parent-child relationship in each case.⁵⁸

For example, in *Ex parte Devine*, the Alabama Supreme Court set forth a number of factors that trial courts were to consider in evaluating the best interest of a child.⁵⁹ The court explained that although the sex and age of the child were very important considerations, courts must go beyond those factors to consider the characteristics and needs of each child, including:

[The child's] emotional, social, moral, material[,] and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, in-

52. See, e.g., *Ex parte Devine*, 398 So. 2d 686, 696-97 (Ala. 1981) (reversing the lower court on the ground that the tender years presumption was unconstitutional and recognizing that the best interest of the child is the applicable standard).

53. *Id.*

54. See, e.g., *McAndrew*, 382 A.2d at 1085.

55. *Owen v. Gallien*, 477 So. 2d 1240, 1244 (La. Ct. App. 1985).

56. E.g., *DeYoung v. DeYoung*, 379 N.E.2d 396, 399 (Ill. App. Ct. 1978).

57. See, e.g., *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (discussing what is often referred to as the "tender years doctrine").

58. *Schindler v. Schindler*, 776 P.2d 84, 88 (Utah Ct. App. 1989) ("Because custody determinations are so fact-sensitive, there is no required set of conditions which the court must consider, but the applicability and relative weight of the various factors in a particular case lies within its discretion."); *McLeod v. McLeod*, 434 So. 2d 1238, 1239-40 (La. Ct. App. 1983) (explaining that the court must consider "all relevant matters" in determining the best interest of the child).

59. *Ex parte Devine*, 398 So. 2d 686, 696-97 (Ala. 1981).

cluding age, character, stability, mental[,] and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material[,] and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose.⁶⁰

Only by considering these individual factors, the *Devine* court concluded, would judges truly be able to consider the best interests of children in custody proceedings.⁶¹ This “best interest of the child” standard has prevailed for decades, despite being the subject of criticism.

D. Benefits and Criticisms of the Best Interest of the Child Standard and the Elusive Search for a Superior Alternative

One virtue of the best interest standard is that it focuses on the welfare of the child, rather than the “rights” of the parents.⁶² Moreover, the best interest standard recognizes that what is in the best interest of a child will vary from case to case. Thus, it allows a court to deliberatively craft a custody and visitation award—a “parenting plan,” to use the more modern terminology—rather than rely on presumptions based on the past that may or may not hold true in the future or presumptions based on other families’ dynamics that may or may not hold true for the family before the court.⁶³

The individualized-decision-making virtue of the best interest standard also subjects it to criticism. The best interest standard relies on judicial discretion, which tends to be less predictable than rules.⁶⁴ A primary concern is that the unpredictability of result that accompanies the best interest standard decreases the rate of pre-trial set-

60. *Id.* at 697.

61. *Id.*

62. Warshak, *supra* note 17, at 97.

63. *Id.* at 98–99.

64. *Id.* at 102–03.

tlement and increases psychologically harmful litigation.⁶⁵ Critics of the best interest standard are also concerned that the best interest standard allows the judge's personal biases to influence outcomes.⁶⁶

Accordingly, the search is on for a method by which a court can discern a parenting plan (for parents who cannot agree) that will further the best interest of the child but is also predictable and free from the judge's personal biases. Of course, determining the best interest of an individual child requires an individualized assessment,⁶⁷ while strictly rule-based decision-making precludes individualized assessment. Thus, the proposed remedies to the perceived problems to the best interest standard fall somewhere in between. The tension between judicial discretion and determinative rules has long been the subject of jurisprudential discussion,⁶⁸ and has been specifically debated in the context of parenting time.⁶⁹

In an effort to address the criticisms of the best interest standard, many proposals for reform have been offered, criticized, and some adopted. The primary caretaker presumption, for example, is a presumption that custody shall be awarded to whomever was the "primary caretaker" based on the pre-separation history of the parties.⁷⁰ Another example is the presumption that the child's time will be equally divided between the two parents' homes through a "joint

65. *Id.*

66. *Id.* at 104–05.

67. *Id.* at 89.

68. *E.g.*, Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 940 (1923) ("In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law – that is, on grounds and by a process prescribed in or provided by law. One must admit that the strict theory of the last century denied the first proposition, conceiving the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitively prescribed as such or exactly deduced from authoritatively prescribed premises. Happily, even in the height of the reign of that theory, we did not practise what we preached. Courts could not forget that they were administering justice, and the most that such a theory could do was to hamper the judicial instinct to seek a just result.").

69. *E.g.*, Mnookin, *supra* note 9, at 256, 282–83 (criticizing the "inherent indeterminacy" of the best interest standard but declining to identify any intermediate rules or standards that would satisfactorily resolve custody disputes); Glendon, *supra* note 2, at 1181–82 (criticizing the best interest standard and proposing a primary caretaker presumption to resolve the problem of unpredictability); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2261–64 (1991) (recognizing the shortfalls of the best interest standard but also the virtues of case-by-case determinations in the best interests of the child).

70. The primary caretaker presumption has its advocates and its critics. *E.g.*, Warshak, *supra* note 17, at 110–11 (listing arguments pro and con).

physical custody” arrangement.⁷¹ Yet another example is the approximation approach, which seeks to allocate to the parents the approximate proportion of time that they spent performing caretaking functions in the past.⁷²

This Article considers yet another proposed solution to the unpredictability of the best interest standard—parenting time guidelines. Parenting time guidelines are not a viable solution. Parenting time guidelines cannot remedy the unpredictability of the best interest standard; in many cases, the exceptions or caveats to parenting time guidelines will swallow the guidelines themselves.⁷³ Moreover, guidelines cannot further the best interest of the child. In the words of the District of Columbia Court of Appeals, “[a] norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations.”⁷⁴ While a judge with the facts of a particular family’s case may have difficulty constructing a parenting plan that is in the child’s best interest, there is little merit in the contention that a legislature or judicial committee that constructed a generic parenting plan with no particular child or family in mind can do so.⁷⁵ Thus, proponents of parenting time guidelines should proceed with caution before replacing the best interest standard with parenting time guidelines, as these guidelines do not remedy the perceived problems of the best interest standard.

II. PRESUMPTIVE PARENTING TIME GUIDELINES

Parenting time guidelines are statutes or rules, typically based on the child’s age range, that regulate a parent’s post-separation time with his or her child.⁷⁶ Those prescribed guidelines are generally

71. The joint physical custody presumption also has its advocates and its critics. *E.g., id.* at 111 (listing arguments pro and con).

72. *Id.* at 113. The approximation rule enjoys the backing of the American Law Institute, but also has its critics. *Id.* at 86, 88–89 (arguing thoroughly that the approximation rule is unlikely to improve on the best interest of the child standard).

73. *E.g., Schneider, supra* note 69, at 2283 (“[O]nce you establish an apparently flat rule like the primary caretaker standard, you immediately run into conflicting interests and arguments that can only be accommodated by writing ever more elaborate rules or conceding judges some discretion.”).

74. Warshak, *supra* note 17, at 98 (quoting *Bazemore v. Davis*, 394 A.2d 1377, 1383 (D.C. 1978) (en banc) (citations omitted)).

75. *Id.* at 113 (“No serious scholar believes that a custody rule will work best for all children. Rather the assumption is that such a rule will work best for most children.”).

76. Of course, there are countless scenarios that might involve two (or more) adults seeking an award of visitation, custody, or “parenting time” with a child. This Article does not purport to deal directly with the complexities that might arise in cases involving: psychologi-

presumed to govern the parent-child relationships post-separation unless the parties agree or a court determines otherwise. Presumptive parenting time guidelines of a handful of states are overviewed below.⁷⁷ As will be discussed further in later Parts, the argument against parenting time guidelines is not so much that any particular parenting time guideline is contrary to the best interest of any particular child.⁷⁸ Rather, the primary criticism of parenting time guidelines is that a court's reliance on them is likely to deprive a child of the individual case-by-case determination that is needed to protect a child's best interest.⁷⁹

A. *Indiana*

In response to concern about inconsistency in the way Indiana counties granted visitation rights,⁸⁰ the Indiana Supreme Court promulgated the Indiana Parenting Time Guidelines.⁸¹ The Indiana Parenting Time Guidelines presumptively apply to all child custody

cal parents, *see generally In re Davis*, 465 A.2d 614 (Pa. 1983) (addressing the complexities that arose in a child-custody action in which a married couple petitioned for custody of the six-year-old boy to whom they were not related but to whom they had been primary caretakers for the majority of his life); stepparents, *see, e.g., Kinnard v. Kinnard*, 43 P.3d 150, 151 (Alaska 2002) (affirming an award of custody to a stepparent); grandparents, *see, e.g., K.L. v. E.H.*, 6 N.E.3d 1021, 1031-32 (Ind. Ct. App. 2014) (reviewing the propriety of a trial court's order awarding visitation to a grandfather and explaining that these determinations essentially require the same intensive fact-finding process as in any other custody action); children of same-sex couples, *see Russell v. Bridgens*, 647 N.W.2d 56, 61, 65-66 (Neb. 2002) (Gerrard, J., concurring)(concluding that the trial court erred by entering summary judgment on a petition for custody because the court failed to consider the plaintiff, a lesbian, a parent under the *in loco parentis* doctrine in an appeal from an order invalidating the coparent adoption of a child by the woman and her same-sex partner); or children born as a result of *in vitro* fertilization, for example. While this Article perhaps speaks in terms of the more conventional – although perhaps diminishing in typicality – scenario – the scenario in which a child's mother and father are divorcing or separating – the arguments made here apply equally, if not more so, to any “nontraditional” parenting time dispute. It is precisely because there are so many different scenarios in which the child could be the subject of the parents' dispute that the presumptions themselves are not practicable.

77. *See infra* Part II.A-C; *see also* TEX. FAM. CODE ANN. § 153.252 (West 1995).

78. *See infra* Part II.A-D.

79. *See infra* Part IV.

80. *See* Daniel F. Donahue & Jeffrey Bercovitz, *Parenting Time Guidelines for Indiana's Children Proposed*, 44 RES GESTAE 24 (Aug. 2000).

81. IND. PARENTING TIME GUIDELINES (2013). Presumably the Supreme Court's authority to do so emanates from IND. CODE ANN. § 34-8-1-3 (West 1998) (“The supreme court has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana.”). Whether the authority to promulgate *procedural* rules extends to parenting time guidelines, which could arguably be classified as *substantive* rules, has not been addressed.

cases.⁸² The Indiana Guidelines are based on certain premises and assumptions. First, they are based on the premise that “it is usually in a child’s best interest to have frequent, meaningful[,] and continuing contact with each parent.”⁸³ Further, “[i]t is assumed that both parents nurture their child in important ways, significant to the development and well being of the child.”⁸⁴

While the Indiana Parenting Time Guidelines presumptively apply to all child custody cases, cases involving “family violence, substance abuse, risk of flight with a child,” or any other circumstances that might “endanger the child’s physical health or safety” or “impair the child’s emotional development” are beyond the reach of the Guidelines.⁸⁵ “High conflict parents” are not subject to the parenting time guidelines, as they are required to participate in parallel parenting.⁸⁶

However, in typical cases, which are subject to the Indiana Guidelines, the Indiana Parenting Time Guidelines set out the minimum parenting time to which the noncustodial parent is entitled.⁸⁷ While parents may agree to a noncustodial parent’s parenting time that is less than the minimum time set out by the Guidelines,⁸⁸ such a departure from the Guidelines “must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case.”⁸⁹ Likewise, a court may order parenting time that is less than the minimum time set out by the Guidelines, but must explain the departure or face reversal.⁹⁰

82. *Id.* at Preamble(C)(3) (“There is a presumption that the Indiana Parenting Time Guidelines are applicable in all cases.”).

83. *Id.* at Preamble.

84. *Id.*

85. *Id.* at Preamble(C)(1) (“In such cases one or both parents may have legal, psychological, substance abuse or emotional problems that may need to be addressed before these Guidelines can be employed. The type of help that is needed in such cases is beyond the scope of these Guidelines.”).

86. *Id.* § IV (“In parallel parenting, each parent makes day-to-day decisions about the child while the child is with the parent. With parallel parenting, communication between parents is limited, except in emergencies, and the communication is usually in writing.”).

87. *Id.* at Preamble.

88. *Id.* at Preamble(C)(3). The guidelines acknowledge that the “best parenting plan is one created by parents which fulfills the unique needs of the child and the parents.” *Id.* § II(A).

89. *Id.* at Preamble(C)(3). It may sometimes be difficult to determine whether parenting time that is different from the guidelines satisfies the guidelines’ minimum time requirements. *See, e.g., Guffey v. Guffey*, No. 36A01-1204-DR-171, 2012 WL 6719450, at *2 (Ind. Ct. App. Dec. 27, 2012) (“[A] mathematical purist may find the order provides somewhat less than standard overnights.”).

90. *See Haley v. Haley*, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002) (“Therefore, we remand to the trial court to enter a visitation order which either mirrors the Guidelines or to provide the

The Indiana Parenting Time Guidelines provide a specific parenting time schedule for a child, varying by the child's age: birth to four months; four months through nine months; ten months through twelve months; thirteen months through eighteen months; nineteen months through thirty-six months; three years through four years; five years and older; and adolescent and teenager.⁹¹ To illustrate the level of detail set out in the Indiana Parenting Time Guidelines, below is the allocation of parenting time to a noncustodial parent of an eighteen-month-old child:

- (1) Three (3) non-consecutive "days" per week, with one day on a "non-work" day for ten (10) hours. The other days shall be for three (3) hours each day. The child is to be returned at least one (1) hour before evening bedtime.
- (2) All scheduled holidays for eight (8) hours. The child is to be returned at least one (1) hour before evening bedtime.
- (3) Overnight if the noncustodial parent has exercised regular care responsibilities⁹² for the child but not to exceed one (1) 24 hour period per week.⁹³

The "scheduled holidays" referred to above are governed by no fewer than sixteen specific provisions, including specific visitation times for occasions such as Mother's Day – "Friday at 6:00 P.M. until Sunday at 6:00 P.M."⁹⁴ – and even Halloween – "on Halloween evening from 6:00 P.M. until 9:00 P.M. or at such time as coincides with the scheduled time for trick or treating in the community where the non-custodial parent resides."⁹⁵

parties with an order explaining the deviation from the Guidelines."); *see also In re Marriage of G.M. v. C.M.*, No. 35A04-0909-CV-523, 2009 WL 4981029, at *3 (Ind. Ct. App. Dec. 23, 2009) ("[W]e remand to the trial court to either enter an order pursuant to the Parenting Time Guidelines or enter an order which provides an explanation for the deviation."); *Flick v. Flick*, No. 69A05-0808-CV-477, 2009 WL 693155 (Ind. Ct. App. Mar. 16, 2009) ("We therefore reverse that part of the trial court's order setting forth parenting time for Ed, and remand for entry of an order setting forth parenting time in accordance with the Ind. Parenting Time Guidelines.").

91. IND. PARENTING TIME GUIDELINES § II(C)-(E).

92. The Indiana Parenting Time Guidelines do not define "regular care responsibilities." *See id.* § II(C)(3)(B).

93. *Id.*

94. *Id.* § II(F)(2)(A)(1).

95. *Id.* § II(F)(2)(C)(5) (providing custody for "the noncustodial parent in odd numbered years and the custodial parent in even numbered years").

B. Utah

Whereas in Indiana the Supreme Court has promulgated parenting time guidelines, in Utah, the legislature has codified advisory parenting time guidelines.⁹⁶ The Utah parenting time guidelines “shall be presumed to be in the best interest of the child” and set out the minimum parenting time that is generally to be awarded in the absence of agreement by the parties.⁹⁷ Similar to the Indiana parenting time guidelines, Utah’s guidelines are based on certain assumptions about children and parents. Utah assumes (1) that it is in the best interest of a child to have “frequent, meaningful, and continuing access to each parent;” (2) that each parent is “entitled to and responsible for frequent, meaningful, and continuing access with the child consistent with the child’s best interests;” and (3) that it is in the child’s best interest to have “both parents actively involved” in parenting the child.⁹⁸

Also similar to Indiana’s scheme, the Utah scheme recognizes that a mutually-agreed-upon parenting plan is preferable to a court-ordered parenting plan.⁹⁹ However, Utah does not require parents to provide a written explanation when their agreement deviates from the guidelines.¹⁰⁰ When parties do not mutually agree upon a parenting plan and a court is left to make the parenting time determination, the court must set out its reasons for *either adhering to or departing from* the guidelines.¹⁰¹ While the Utah guidelines are presumptively in a child’s best interest, the statute sets out fifteen criteria that justify a court’s variance from the guidelines, including situations involving danger to the child’s health or emotional development.¹⁰² Otherwise, the detailed advisory guidelines “shall be presumed to be in the best interests of the child.”¹⁰³

96. UTAH CODE ANN. §§ 30-3-32 to 40 (West 2014).

97. *Id.* § 30-3-34. The statements that the prescribed schedule is in the “best interest” of the child but, at the same time, is only the “minimum amount of time” seem contradictory.

98. *Id.* § 30-3-32(2)(b).

99. *Id.* § 30-3-33(1).

100. *See id.*

101. *Id.* § 30-3-34(3).

102. *Id.* § 30-3-34(2)(a)-(o).

103. *Id.* § 30-3-34(2). Parenting time that conforms with the statutory guidelines is “presumed to be in the best interests of the child” unless “a parent can establish . . . by a preponderance of the evidence that more or less parent-time should be awarded” under the statute’s criteria. *Id.*

Utah also provides for parenting time according to a child's age.¹⁰⁴ In contrast to Indiana's Supreme Court, however, Utah's legislature has determined that it is in an eighteen-month-old child's best interest to visit with his noncustodial parent according to the following schedule:

- (i) one weekday evening between 5:30 p.m. and 8:30 p.m. to be specified by the noncustodial parent or court; however, if the child is being cared for during the day outside his or her regular place of residence, the noncustodial parent may, with advance notice to the custodial parent, pick up the child from the caregiver at an earlier time and return him to the custodial parent by 8:30 p.m.;
- (ii) alternative weekends beginning on the first weekend after the entry of the decree from 6 p.m. on Friday until 7 p.m. on Sunday continuing each year;
- (iii) parent-time on holidays as specified in Subsections 30-3-35(2)(c) through (j).¹⁰⁵

Both the Utah legislature and Indiana's Supreme Court have set out holiday parenting time in detail.¹⁰⁶ However, in Utah, a noncustodial mother has parenting time on Mother's Day only from 9:00 a.m. to 7:00 p.m.¹⁰⁷ Halloween parenting time in Utah is from the time school is dismissed to 9:00 p.m. or from 4:00 p.m. to 9:00 p.m.¹⁰⁸

C. South Dakota

Pursuant to statutory directive, the South Dakota Supreme Court has promulgated standard parenting time guidelines.¹⁰⁹ In the absence of a mutual agreement by the parents, the South Dakota par-

104. *Id.* § 30-3-35 (regarding children five to eighteen years of age); § 30-3-35.5(3)(a) (regarding children under five months of age); § 30-3-35.5(3)(b) (regarding children five to nine months of age); § 30-3-35.5(3)(c) (regarding children nine to twelve months of age); § 30-3-35.5(3)(d) (regarding children twelve to eighteen months of age); § 30-3-35.5(3)(e) (regarding eighteen months to three years of age); § 30-3-35.5(3)(f) (regarding three to five years of age).

105. *Id.* § 30-3-35.5(3)(e).

106. *Id.* § 30-3-35(2)(c)-(j); IND. PARENTING TIME GUIDELINES § II(F).

107. UTAH CODE ANN. § 30-3-35(2)(j). Indiana allows the entire weekend. IND. PARENTING TIME GUIDELINES § II(F)(2)(A)(1).

108. UTAH CODE ANN. § 30-3-35(2)(g)(vi).

109. S.D. CODIFIED LAWS § 25-4A-10 (2015) ("The South Dakota Supreme Court shall promulgate court rules establishing standard guidelines to be used statewide for minimum noncustodial parenting time in divorce or separate maintenance actions or any other custody action or proceeding.").

enting time guidelines typically are *mandatory* and will be used as the parenting plan in all divorce, separation, or other custody actions.¹¹⁰ However, in accord with other states, under circumstances such as those involving child abuse or substance abuse, the guidelines do not automatically apply.¹¹¹

The South Dakota guidelines prefer that parents mutually agree upon a parenting plan.¹¹² The South Dakota guidelines favor children having reasonable time with their noncustodial parent because such an arrangement provides the greatest flexibility for the parents and children.¹¹³ If that is not possible, the guidelines call for the drafting of a detailed parenting plan to fit the needs of the particular parents and children.¹¹⁴ However, if parents are unable to reach an agreement, the South Dakota guidelines are mandatory and state the minimum parenting time for the noncustodial parent.¹¹⁵ Thus, the presumption that parenting time guidelines will apply is stronger in South Dakota than in Utah and Indiana.¹¹⁶ These guidelines also take effect earlier in South Dakota and bind the parties as soon as the plaintiff-parent initiates the proceeding.¹¹⁷

Like in Indiana and Utah, parenting time in South Dakota depends largely on the incremental age of the child.¹¹⁸ For comparative

110. *Id.* § 25-4A app. A (“If the parents are unable to agree on their own Parenting Plan, however, these Guidelines become mandatory and will be used as their Parenting Plan.” (citing *id.* §§ 25-4A-10, 11)).

111. *See generally id.* §25-4A at app. A, Parenting Guidelines § 1.16 (listing circumstances when a court may limit or deny parenting time such as child abuse, domestic abuse, threats of abducting or hiding the children, or other circumstances in which parents show neglectful, impulsive, immoral, criminal, assaultive, or other risk-taking behavior with or in the presence of the children”). Parenting time “*must not occur*,” however, when a parent is abusing substances. *Id.* § 1.16(C) (emphasis added); IND. PARENTING TIME GUIDELINES § Guidelines(C).

112. S.D. CODIFIED LAWS § 25-4A-25.

113. *Id.* § 25-4A app. A, Parenting Guidelines Introduction (maintaining that “when parental maturity, personality, and communication skills are adequate, the ideal arrangement” is when the parents voluntarily agree to a parenting plan).

114. *Id.* (“The next best arrangement is a detailed parenting agreement made by the parents to fit their particular needs and, more importantly, the needs of their children.”).

115. *See id.*

116. *Compare id.* (making guidelines mandatory where parents cannot reach an agreement) with IND. PARENTING TIME GUIDELINES Preamble(C)(3) and UTAH CODE ANN. § 30-3-34(3) (allowing a court to depart from the guidelines with explanation).

117. S.D. CODIFIED LAWS § 25-4A-11. When the plaintiff-parent files a summons and complaint for divorce, separation, or any other custody proceeding, South Dakota requires that the plaintiff-parent attach the standard guidelines to the summons and complaint. *See id.* When the plaintiff-parent properly serves the defendant, the guidelines then automatically become an order of the court notwithstanding the complications that might arise merely from the immediacy of the intrusion into the parent-child relationship. *See id.*

118. *See id.* § 25-4A app. A, Parenting Guidelines §§ 2-4.

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purposes, an eighteen-month-old child in South Dakota would be subject to any of the three “alternative parenting plans”:

- (1) Three custodial periods per week of up to eight hours each on a predictable schedule; or
- (2) [t]hree custodial periods per week of up to eight hours each on a predictable schedule in addition to one overnight per week; or
- (3) [c]hild spends time in alternate homes, but with significantly more time in one parent’s home with one or two overnights spaced regularly throughout the week.¹¹⁹

Regarding holidays for children under five years of age, the South Dakota guidelines encourage parents to alternate time with the children on major holidays.¹²⁰ Schedules for holiday parenting time with children older than five years are much more detailed.¹²¹ For example, the guidelines provide that a child shall be with his or her mother each Mother’s Day and with his or her father each Father’s Day from 9:00 a.m. to 8:00 p.m.¹²² Moreover, although South Dakota’s guidelines do not provide for Halloween parenting time as Utah’s and Indiana’s do, they do set out a schedule for approximately ten other holidays and special occasions.¹²³

South Dakota imposes several other rules on parents who are subject to the guidelines.¹²⁴ For example, when the custodial parent sends a supply of the children’s clothing with the children, the clothes “must be returned clean” with the children by the noncustodial parent.¹²⁵ During long vacations, the parent with whom the children are on vacation “is required to make the children available for telephone calls with the other parent at least every three days.”¹²⁶ For older children, the guidelines suggest that the parents provide the child with a cell phone “to facilitate [parental] communications” and establish an email account for communication with the other

119. *Id.* § 2.5. Arrangement (3) “requires an adaptable child and cooperative parents.” *Id.*

120. *Id.* § 2.8. Different holiday provisions than those discussed in this paragraph govern when the parents live more than 200 miles apart. *See id.* §§ 3.2–3.7.

121. *Id.* § 1.11.

122. *Id.* § 3.2.

123. *Id.* §§ 3.3–3.7.

124. *Id.* § 1.

125. *Id.* § 1.3.

126. *Id.* § 1.11.

parent, that “should likewise not be read or monitored by the other parent without court permission.”¹²⁷

D. *The Practical Futility of Parenting Time Guidelines*

While the primary purpose of this Article is to illustrate the shortcomings of parenting time guidelines by way of comparison to federal sentencing guidelines, this Article cannot ignore some basic practical problems with parenting time guidelines that are apparent from only a cursory review.

First, the difference between the parenting time guidelines from state to state is telling. Each state seems to represent that its scheme allows for parenting time that is in the best interest of the subject child.¹²⁸ But, apparently, what is in the best interest of a child in Indiana is not in the best interest of a child in Utah, for example.¹²⁹ The different parenting schedules for children in similar situations but from different states reveal the flaw in the guidelines: States simply cannot determine a parenting time schedule that is in the best interest of any given child.¹³⁰

Moreover, experts in the field do not believe that any presumption or one-size-fits-all approach to parenting time is feasible. In January 2013, the Association of Family and Conciliation Courts, the premier interdisciplinary association of professionals dedicated to the resolution of family conflict, convened a three-day Think Tank on Research, Policy, Practice, and Shared Parenting. The event culminated in a report on joint decision-making and shared parenting time.¹³¹ The Think Tank Final Report shows that experts in the field of “shared parenting,” which is a general term that the AFCC assigns to a combination of joint decision-making and shared parenting time, do not agree that any statutory presumption or one-size-

127. *Id.*

128. *E.g.*, UTAH CODE ANN. § 30-3-34(2) (providing “advisory guidelines” that “shall be presumed to be in the best interests of the child”).

129. *See supra* Part II.A and II.B (showing the regular parenting time for an eighteen-month-old child in Indiana and Utah, respectively, which differ significantly).

130. Proponents of the guidelines will argue that even though the parenting time guidelines themselves may not be in the best interest of the child, the fact that the guidelines exist furthers the best interest of the child by reducing conflict and litigation. Sanford L. Braver, Commentary, *The Costs and Pitfalls of Individualizing Decisions and Incentivizing Conflict: A Comment on AFCC’s Think Tank Report on Shared Parenting*, 52 FAM. CT. REV. 175, 177 (2014). For a response to that argument, see *infra* notes 222–24, 265–**66, and accompanying text.

131. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting – AFCC Think Tank Final Report*, 42 FAM. CT. REV. 152, 153 (2014) [hereinafter *AFCC Think Tank Report*].

fits-all approach to parenting time is feasible.¹³² While a minority supported a statutory presumption for a minimum parenting time, no optimal amount of time could be agreed upon.¹³³ That begs the question as to whether a statutory presumption of a minimum time that purportedly serves the best interest of the child is possible; if the experts cannot agree on what is the “best” minimum parenting time, then creating a presumption for a minimum amount of parenting time has no basis in research. Indeed, the experts agreed that “[t]here is no ‘one-size-fits-all’ shared parenting time.”¹³⁴ In fact, the report states that the current state of research in the field supports “no definitive conclusion” regarding what parenting time arrangement is optimal.¹³⁵

The participants also came to a consensus indicating that social science *will not be able to predict* what parenting time arrangement should be the presumption.¹³⁶ Research can provide a useful starting point as to what *might* be in the best interest of an individual child, but generalizations drawn from research cannot provide an accurate predictor of an outcome in an individual case.¹³⁷ The report recognizes that “we do not have a sufficient body of knowledge to recommend policy” regarding parenting time allocation.¹³⁸ While it is generally agreed that shared parenting is beneficial to children of parents in only moderate conflict, how much allocation is “best” is “yet unknown.”¹³⁹ Because determining the distribution of parenting time that is in the best interest of the child involves several shifting variables, like parents’ schedules and “family functionality,” parents should come to a mutual agreement or rely on “*individual-*

132. *Id.* at 154. “Statutory presumptions prescribing specific allocations of shared parenting time are unsupportable because no prescription will fit all, or even the majority of, families’ particular circumstances.” *Id.*

133. *Id.*

134. Maria P. Cagnetti & Nadya J. Chmil, *Shared Parenting – Have We Really Closed the Gap?: A Comment on AFCC’s Think Tank Report*, 52 FAM. CT. REV. 181, 185 (2014) (“Ultimately, it can be agreed that the most effective decision making about postseparation custody rights is case specific, as every child and every family have unique needs and circumstances.”).

135. *AFCC Think Tank Report*, *supra* note 131, at 154 (“[T]he current state of research supports no definitive conclusion about the impact of some overnights, frequent overnights, or no overnights, on long-term parent-child relationships and child well-being.”).

136. *Id.* at 165–68. The report also warned against misuse of research as it is proliferated for use in the political or adversarial environment to promote one particular view over another. *Id.*

137. *Id.* at 161 (explaining that “when aggregate-level research is applied as determinative of a specific case outcome, its value becomes compromised in the adversarial process”).

138. *Id.*

139. *Id.* at 161–62, 165.

ized judicial assessments.”¹⁴⁰ The consensus of the Think Tank Final Report was that parenting time determinations are “inescapably case specific,”¹⁴¹ and that a “template calling for a specified division of time imposed on all families” should be avoided.¹⁴²

Furthermore, the level of detail in the parenting time guidelines is problematic. While such details may be laudable when included in a parenting plan mutually agreed upon by separating parents as being in the best interest of their child and as allowing for family functionality, the level of detail imposed as a legal presumption raises problems. For example, under the Indiana Parenting Time Guidelines, the parent of a child from thirteen to eighteen months old will have regular parenting time with that child as follows:

- (1) Three (3) non-consecutive ‘days’ per week, with one day on a ‘non-work’ day for ten (10) hours. The other days shall be for three (3) hours each day. The child is to be returned at least one (1) hour before evening bedtime.
- (2) All scheduled holidays for eight (8) hours. The child is to be returned at least (1) hour before evening bedtime.
- (3) Overnight if the noncustodial parent has exercised regular care responsibilities for the child but not to exceed one (1) 24 hour period per week.¹⁴³

Yet, with a three-year-old child, the same parent will presumptively have the following parenting time:

- (a) On alternating weekends from Friday at 6:00 P.M. until Sunday at 6:00 P.M. (the times may change to fit the parents’ schedules);
- (b) One (1) evening per week, preferably in mid-week, for a period of up to four hours but the child shall be returned no later than 9:00 p.m.; and,

140. *Id.* at 162 (emphasis added).

141. *Id.* at 168. “Negotiations and determinations about parenting time after separation that involve third parties (e.g., mental health or legal professionals) are inescapably case specific.” *Id.*

142. *Id.* “Children’s best interests are furthered by parenting plans that provide for continuing and shared parenting relationships that are safe, secure, and developmentally responsive and that also avoid a template calling for a specific division of time imposed on all families.” *Id.* “In lieu of a parenting time presumption, a detailed list of factors bears consideration in each case.” *Id.*

143. IND. PARENTING TIME GUIDELINES § II(C)(3)(B).

(c) On all scheduled holidays.¹⁴⁴

What is the parenting time allocation to the noncustodial parent in that situation? And what if the parent's work schedule does not allow for that parenting time? Will the inability to comply with the guidelines that do not fit a family's situation result in post-separation litigation?

Some parenting time guidelines do recognize and make vague attempts to resolve those potential conflicts.¹⁴⁵ However, because it is easy to conceive of the countless family scenarios in which the guidelines will not be workable (best interest concerns aside), the exceptions to the rules will often swallow the rules. When the parenting time guidelines are unworkable for a given family's situation, the purported problems of the best interest standard that proponents of parenting time guidelines wished to resolve, return. And, at the same time, as discussed further below,¹⁴⁶ the very existence of the guidelines may reduce the likelihood that a useful parenting plan will be crafted for the parties and may actually increase post-separation litigation due to difficulty in complying and by empowering parents who are entitled to minimum time under the guidelines.

Comparable problems have been experienced in the realm of federal sentencing guidelines. Part III provides a brief overview of federal sentencing guidelines, including how they evolved and how they currently operate, in an effort to inform proponents of parenting time guidelines of the shortcomings of a guidelines approach to judicial decision-making.

144. *Id.* § II(D)(1).

145. Commentary to the Indiana Parenting Time Guidelines addresses the issue of multiple children of different ages with a presumption that "all children should remain together during the exercise of parenting time." *Id.* § II(B) cmt. 4. Of course, that presumption will sometimes come into conflict with the specific parenting time allocations provided by the guidelines. And, despite the presumption that siblings should enjoy parenting time together, sometimes other concerns trump that presumption. The commentary provides that "the standards set for a young child should not be ignored, and there will be situations where not all of the children participate in parenting time together." *Id.* Yet, "[o]n the other hand," sometimes the presumption will prevail: "[W]hen there are younger and older children, it will generally be appropriate to accelerate, to some extent, the time when the younger children move into overnight or weekend parenting time, to keep sibling relationships intact." *Id.*; see also UTAH CODE ANN. § 30-3-33 ("If the child is on a different parent-time schedule than a sibling . . . the parents should consider if an upward deviation for parent-time with all the minor children so that parent-time is uniform between school aged and nonschool aged children, is appropriate."); S.D. CODIFIED LAWS § 25-4A-10 ("[I]t usually makes sense for all the children to share the same schedule of parenting time with the noncustodial parent.").

146. See *infra* notes 222–24, 265–66, and accompanying text.

III. LONG STORY SHORT: FEDERAL SENTENCING GUIDELINES

This Article seeks to demonstrate the sacrifices necessary to achieve uniformity in the context of federal sentencing guidelines in order to illustrate that comparable sacrifices will likewise be necessary to achieve uniformity in the context of parenting time guidelines. To understand the lessons that proponents of parenting time guidelines can learn from thirty years of federal sentencing guidelines, background knowledge regarding federal sentencing guidelines is necessary. This Part provides that background.

The traditionally-recognized purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation.¹⁴⁷ The concept of retribution represents the moral justification for punishment; the offender is deprived of his freedom because he deserves it for having engaged in wrongful conduct.¹⁴⁸ The concept of deterrence reflects the idea that the threat of punishment will deter would-be offenders from committing crimes.¹⁴⁹ Incapacitation prevents an offender from committing additional crimes by imprisoning him.¹⁵⁰ Rehabilitation is the idea that a criminal offender can be reformed and become a productive member of society.¹⁵¹ There has historically been disagreement regarding which purposes of sentencing are most important and whether all of them are important.¹⁵²

Throughout much of the Twentieth Century, the rehabilitative ideal prevailed.¹⁵³ But some began to doubt what rehabilitation meant, whether it was achievable, and how it was to be achieved even if it was achievable.¹⁵⁴ In 1973, Judge Marvin Frankel, a former

147. *E.g.*, Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 414 (1992) [hereinafter Miller, *Purposes at Sentencing*].

148. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315-16 (2000).

149. *Id.* at 1316.

150. *Id.*

151. *Id.* at 1316-17; *see also* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 2 (1981) (“[T]he rehabilitative ideal is the notion that a primary purpose of penal treatment is to affect changes in the characters, attitudes, and behavior of the convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfactions of the offenders.”).

152. *E.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15-18 (1988).

153. *See* Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 757-58 (2006); *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).

154. *E.g.*, O’Hear, *supra* note 153, at 157-58.

federal district court judge, published *Criminal Sentences: Law Without Order* in which he admonished the “horrible” sentencing disparities he witnessed as a federal district court judge.¹⁵⁵ Judge Frankel urged Congress to resolve the problem through a “checklist of factors” that would provide judges with some objective method of determining sentences.¹⁵⁶ Frankel was concerned that the indignity suffered by a criminal offender receiving an unduly harsh sentence, or even a sentence without explanation, would result in the offender resenting the legal system, thus impairing the likelihood of his rehabilitation and also causing difficulty in the management of prisons.¹⁵⁷ Thus, although he directly attacked the disparity that resulted during the reign of the “rehabilitative ideal,” Judge Frankel nevertheless had concern for the individual offender and his rehabilitation. In his conception of uniformity, the rehabilitative purpose of sentencing was not forgotten.

In time, though, the concern for the individual offender gave way to the desire for uniformity. Yale Law School conducted workshops in 1974 and 1975, in which Judge Frankel participated, with the goal of producing a more concrete proposal for sentencing reform.¹⁵⁸ In the Yale workshop, a new concern came to the forefront: the concern that sentencing disparity threatened public respect for the rule of law.¹⁵⁹ At the same time as the Yale workshop, the Twentieth Century Fund assembled a Task Force on Criminal Sentencing.¹⁶⁰ The Task Force saw sentencing disparity as a threat to the deterrent effect of punishment. Without predictability about the fact or degree of their punishment, criminals would be willing to “play the odds.”¹⁶¹ The Task Force’s solution was presumptive sentences set out by a legislative scheme with little to no consideration for individual offender

155. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 21 (1973); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993) (“[Frankel’s] book, *Criminal Sentences: Law Without Order*, would thereafter earn him the title of ‘father of sentencing reform.’”).

156. FRANKEL, *supra* note 155, at 114.

157. O’Hear, *supra* note 153, at 760 (citing FRANKEL, *supra* note 155, at 42–44).

158. PIERCE O’DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM*, at xi–xii (1977).

159. *Id.* at 38, 58.

160. M.J. Rossant, *Introduction to THE TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING*, at vii (1976).

161. *Id.* at 4, 6–7.

characteristics.¹⁶² Here, the desire for uniformity began to cannibalize the desire to achieve the four traditional purposes of punishment.

Thus, although the Sentencing Reform Act that ultimately passed in 1984 gave homage to retribution, deterrence, and incapacitation, as purposes of punishment, and to a lesser degree, rehabilitation, uniformity was the stated primary goal.¹⁶³ The proponents of the Sentencing Reform Act envisioned that uniformity would be driven by purposes of punishment.¹⁶⁴ At the same time, the Sentencing Reform Act sought to achieve its primary goal of uniformity by severely limiting judicial discretion. The guidelines to be promulgated were to be mandatory and sentencing judges were to follow the guidelines in all cases except where there were “aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”¹⁶⁵

Although the Sentencing Reform Act purported to envision that the Sentencing Commission would construct guidelines based on the purposes of sentencing, that task proved impossible. As directed by the Sentencing Reform Act, the primary aim of the drafters of sentencing reform guidelines was uniformity, and that aim could be achieved only by severely limiting judicial discretion.¹⁶⁶ However, judicial discretion is necessary to achieve some purposes of sentencing. Because the drafters had divergent philosophical views on the purposes of punishment,¹⁶⁷ because a guidelines system that considers too many factors becomes unmanageable,¹⁶⁸ and because of the reality of political compromise, the guidelines were finally set by using historical sentencing data¹⁶⁹—*not* by considering what sentence

162. *Id.* at 20–21.

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

164. *See* O’Hear, *supra* note 153, at 773 n.128 (quoting S. REP. NO. 98-225, at 67) (explaining that “the Committee has not favored one purpose of sentencing over another”).

165. 18 U.S.C. § 3553(b) (2012).

166. *E.g.*, Hamilton, *supra* note 7, at 2210 (“[R]educing judicial discretion is the primary means to achieve the expected ends.”).

167. Breyer, *supra* note 152, at 15–18.

168. *Id.* at 13 (“The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes. The punishment system becomes much harder to apply as more and more factors are considered, and the probability increases that different probation officers and judges will classify and treat differently cases that are essentially similar. Accordingly, it becomes harder to accurately predict how these factors will interact to produce specific punishments in particular cases.”).

169. The Commission created sentencing ranges based on typical past sentencing practice by an analysis of 10,000 actual cases. *Id.* at 7 n.50.

would accomplish the four goals of sentencing.¹⁷⁰ Thus, the final product was “quite different from the idealized version of the Guidelines which were initially envisioned.”¹⁷¹

Under the sentencing guidelines, the sentencing judge first¹⁷² assigns the crime an offense level. This phase involves identifying the base offense level,¹⁷³ which ranges from one to forty-three and increases with the seriousness of the offense and the harm involved.¹⁷⁴ For example, first-degree murder is assigned a base offense level of forty-three,¹⁷⁵ and forgery is assigned a base offense level of six.¹⁷⁶ The base offense level may be increased or decreased to the final offense level by adjusting for specific offense characteristics¹⁷⁷ and other related considerations, such as age of the victim¹⁷⁸ and the offender’s acceptance of responsibility.¹⁷⁹

Second, the sentencing judge assigns the offender to one of six criminal history categories.¹⁸⁰ Once the offense level and criminal history category are identified, the judge can determine the guideline range by locating the point on the Sentencing Table at which the offense level and criminal history category intersect.¹⁸¹ Under the mandatory guidelines, if the judge wished to depart from the guidelines sentence, he could do so only if there were aggravating or mitigating circumstances not adequately taken into account in formulating the guidelines.¹⁸²

From the time Congress promulgated the Federal Sentencing Guidelines in 1987 until *United States v. Booker* was decided in

170. *Id.* at 8–25.

171. *Id.* at 2.

172. Before the sentencing judge takes action, in most cases, a probation officer completes a pre-sentencing report. U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2014) (“The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless . . .”).

173. *Id.* § 1B1.1(a)(2).

174. *Id.* § 2.

175. *Id.* § 2A1.1(a).

176. *Id.* § 2B1.1(a)(2).

177. *Id.* § 1B1.1(a)(2).

178. *Id.* § 3.

179. *Id.* § 3E1.1.

180. *Id.* § 4.

181. *Id.* § 5.

182. 18 U.S.C. § 3553(b)(1) (“[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . .”). Today, a judge has more discretion. *See infra* notes 188–90 and accompanying text.

2005,¹⁸³ federal judges were *mandated* to impose a sentence within the guideline range.¹⁸⁴ But not all federal judges subscribed to the guidelines' ideal of uniformity in sentencing.¹⁸⁵ The downward departure mechanism of the guidelines provided judges with a limited opportunity – within the scheme of the guidelines – to exercise discretion and consider the purpose of sentencing.¹⁸⁶ Sentencing practices indicate that judges often resorted to this mechanism rather than rigidly adhering to the guidelines' sentence.¹⁸⁷ The phenomenon of guideline circumvention also indicates judges' resistance to rigid adherence to the guidelines. Where “departure is an open and explained deviation” from the guidelines, circumvention is “a form of covert manipulation of the guidelines sentencing process . . . [perhaps] motivated by a good faith desire to reach a ‘just’ sentence.”¹⁸⁸ As judges departed from the guidelines, Congress and the Sentencing Commission devised new ways to limit their discretion.¹⁸⁹

The ebb and flow from congressional limitation on discretion and judicial reclamation of discretion continues. As mentioned previously, in 2005, the Supreme Court in *Booker* made the guidelines advisory rather than mandatory.¹⁹⁰ Today, judges generally *begin* the sentencing determination with the guidelines' sentence¹⁹¹ but also “shall impose a sentence sufficient, but not greater than necessary,

183. *United States v. Booker*, 543 U.S. 220, 232 (2005) (stating that “[t]he Guidelines as written . . . are not advisory; they are mandatory and binding on all judges” but severing the provision of the Sentencing Reform Act that made the guidelines mandatory, rendering them advisory).

184. *Id.* at 233–34.

185. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1237 (2004) [hereinafter Miller, *Domination & Dissatisfaction*] (“Judicial displeasure with the guidelines has been present since their inception.”).

186. *Id.* at 1226–27.

187. *See id.* at 1228–29.

188. O’Hear, *supra* note 153, at 785–86 (quotation in original).

189. For example, the PROTECT Act of 2003 sought to significantly curtail judicial departures. *See* Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 N.C. J.L. & TECH. 203, 217 (2012) [hereinafter Osler, *The Promise of Trailing-Edge Sentencing Guidelines*] (“Another sad result [of sentencing reform] has been the continuing and destabilizing struggle between judges, the Sentencing Commission, and Congress, which has been fought like a tug of war with the rope being dragged first towards uniformity, then towards judicial discretion, and then back again in a pit of mud.”).

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

191. *Gall v. United States*, 552 U.S. 38, 49 (2007) (“A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . The Guidelines are the starting point and the initial benchmark.”).

to comply with the purposes” of sentencing,¹⁹² and they may not presume that the guidelines’ range is reasonable.¹⁹³ Perhaps not surprisingly, many have observed that, with the recent triumphs for judicial discretion, sentencing disparities have resurfaced.¹⁹⁴ In 2013, only half of federal sentences were within the guidelines’ range.¹⁹⁵ In short, the uniformity that the guidelines sought to achieve at the outset—at the expense of individualized justice—may not be achievable.

The purpose of this Part was to provide background on the development of federal sentencing guidelines so that observations could be made and applied to parenting time guidelines in the next Part. The development of the federal sentencing guidelines shows that a guidelines approach to judicial decision-making comes with significant sacrifice. The federal sentencing guidelines were conceived in response to a perceived problem: lack of uniformity in sentencing. In setting out to formulate a plan for reform, reformers began by considering the purposes of punishment. But those purposes of punishment, particularly those that necessitate consideration of individual characteristics, ultimately had to give way to accommodate the primary objective of uniformity.¹⁹⁶

192. 18 U.S.C. § 3553(a). Those stated purposes appear to correspond to the four traditional purposes of sentencing:

- (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.

Id. Concomitantly, the court is directed by § 3553(a) to consider “(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.” *Id.*

193. *Gall*, 552 U.S. at 50.

194. *E.g.*, Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1315 (2014) (demonstrating the interjudge disparities have doubled since the federal sentencing guidelines became advisory).

195. Hamilton, *supra* note 7, at 2224.

196. *E.g.*, Miller, *Purposes at Sentencing*, *supra* note 147, at 434 (“Observers who acknowledge that Congress recognized the role of just deserts, deterrence, and incapacitation often claim that Congress removed rehabilitation as a goal of sentencing when it passed the Sentencing Reform Act. Indeed, this assertion may be the most common of all assertions about purposes, along with the related claim that the guidelines system concerns the offense, not the offender,

Of course, there are some benefits of uniformity to be gained at the expense of the purposes of sentencing.¹⁹⁷ Assuming that the federal sentencing guidelines accomplish some purposes of sentencing, and assuming that there are also benefits to uniformity, the question becomes whether those benefits outweigh the sacrifice of purpose that is made by imposing federal sentencing guidelines. There is significant disagreement as to whether the sacrifices were worth the benefit of uniformity and even whether uniformity can be achieved by the federal sentencing guidelines.¹⁹⁸ That disagreement is not the subject of this Article, however. Instead, this Article explores the sacrifices necessary to draft federal sentencing guidelines for purposes of illustrating that comparable sacrifices will likewise be necessary to draft parenting time guidelines. Thus, proponents of parenting time guidelines would do well to learn from the thirty years of experience with federal sentencing guidelines and consider whether the unavoidable sacrifices that must result from a guidelines regime are tolerable. The following Part of this Article sets out to demonstrate those lessons.

IV. WHAT PROPONENTS OF PARENTING TIME GUIDELINES CAN LEARN FROM THIRTY YEARS OF FEDERAL SENTENCING GUIDELINES

Federal sentencing guidelines and parenting time guidelines both aim to achieve uniformity and predictability by limiting judicial discretion, and both involve determinations about the future of individuals. Sacrifices were necessary to achieve the objectives of federal sentencing guidelines; similar sacrifices will likewise be necessary to achieve the objectives of parenting time guidelines. This Part presents lessons that proponents of parenting time guidelines can learn from thirty years of experience with federal sentencing guidelines.

To create federal sentencing guidelines, the Sentencing Commission had to abandon a traditional purpose of sentencing and remove

and makes such offender characteristics as age, employment, family responsibilities, drug dependence, and community standing inapplicable or irrelevant to sentencing.”).

197. See *infra* Part IV.C.

198. See Miller, *Purposes at Sentencing*, *supra* note 147, at 418 (suggesting that sentencing should be based on groups of offenders, rather than a case-by-case basis in order to reduce sentencing disparities); see also O’Hear, *supra* note 153, at 751 (discussing the dual paradigms of sentencing; predictability and purpose); Yang, *supra* note 194, at 1334–35 (noting that the increase in judicial discretion since *Booker* and lower standards of appellate review have significantly increased sentencing disparities).

from the calculus individual offender characteristics.¹⁹⁹ In the context of federal sentencing guidelines, benefits achieved by uniformity may be worth the sacrifice of individualized justice. However, in the context of parenting time, the benefits of uniformity are weak, if they exist at all. They are not sufficient to justify the sacrifice of individualized justice that parenting time guidelines require.

Furthermore, the guidelines approach can undermine the credibility of the judicial system. Where a guidelines approach results in judicial decisions that are counter to a judge's perception of justice in a particular case, judges may feel compelled to find ways to circumvent guidelines to achieve justice. On the other hand, other judges may simply conform to prescribed guidelines without careful deliberation, leading individual litigants to feel that the system is unfair. Whether a judge rebels or conforms, a guidelines approach may undermine the judicial system. Lastly, the success of federal sentencing guidelines depends on a continuing dialogue between the Sentencing Commission and the judiciary, and offenders being entitled to meaningful post-sentencing review. Proponents of parenting time guidelines should consider both whether it is feasible to implement continual review of the parenting time guidelines and whether post-litigation review of the best interest of the child is needed.

A. *The Sentencing Commission Had to Abandon a Traditional Purpose of Sentencing to Create Sentencing Guidelines; Drafters of Parenting Time Guidelines Will Likewise Have to Sacrifice the Purpose of Parenting Time*

While federal sentencing reform began with all four traditionally recognized purposes of punishment in mind, the federal sentencing guidelines that ultimately resulted are merely a "rough approximation" of what "might" accomplish the purposes of sentencing.²⁰⁰ Likewise, parenting time guidelines can, at best, achieve only a *rough approximation* of what *might* be in a child's best interest.

199. O'Hear, *supra* note 153, at 774 (noting that "there is good reason to believe that . . . the sentencing reform legislation contemplated a steadily decreasing role for offender characteristics").

200. Rita v. United States, 551 U.S. 338, 350 (2007) (emphasis added) ("Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.").

As discussed previously, before the 1970s the rehabilitative purpose of punishment prevailed in America.²⁰¹ The hope was that a criminal offender's punishment would "effect changes in [his] characters, attitudes, and behavior" and thus contribute to his "welfare and satisfaction," resulting in him becoming a productive member of society.²⁰² Over time, however, the goal of rehabilitation succumbed to the goal of uniformity.²⁰³ Whether or not rehabilitation is a legitimate or achievable purpose of punishment, it can not be accommodated by a system with a concurrent goal of uniformity.

Rehabilitation, more so than any of the other purposes, must consider the individual characteristics of the offender. Thus, rehabilitation as a purpose of punishment is most in conflict with the goal of uniformity in sentencing;²⁰⁴ logically, as an individual offender's characteristics are taken into consideration, his sentence is more likely to vary from the sentence of a different individual offender who committed the same crime.²⁰⁵ It is widely recognized today that the Sentencing Commission abandoned its mandate to consider the purposes of punishment in drafting the sentencing guidelines.²⁰⁶ The evolution of federal sentencing guidelines demonstrates that the reformers never found a way to reconcile the tension between the need for uniformity and the rehabilitative aspect of sentencing.²⁰⁷ Even though the Sentencing Commission was statutorily mandated to consider all purposes of punishment, including rehabilitation, it was not possible to construct guidelines that would accommodate those purposes.²⁰⁸

201. O'Hear, *supra* note 153, at 757-58.

202. *Id.* at 757.

203. *See generally supra* Part III.

204. *See* O'Hear, *supra* note 153, at 757-58 (offering a more thorough description of the reason for the decline of the rehabilitative ideal).

205. *See, e.g.,* Breyer, *supra* note 152, at 13 ("The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes.").

206. *E.g.,* Miller, *Purposes at Sentencing*, *supra* note 147, at 419 ("Since their introduction in 1987, however, the federal sentencing guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing. This is contrary to Congress' intent as expressed in the Act. The failure of the Commission and the courts to incorporate and advance these purposes underlies many of the system's critics' strongest complaints."); Miller, *Domination & Dissatisfaction*, *supra* note 185, at 1216 (stating that it is "widely noted, the Commission explicitly sidestepped its obligation to take purposes of punishment seriously").

207. *See supra* Part III.

208. Miller, *Purposes at Sentencing*, *supra* note 147, at 419-20.

Significant for proponents of parenting time guidelines is the logical truth that a guidelines regime cannot accommodate the purpose of the guidelines if the purpose of the guidelines relates to concern for individuals: decision-making by guidelines is not workable for “whole person”²⁰⁹ adjudication. If parenting time guidelines aim to achieve the same result for similar cases, they must necessarily sacrifice consideration of individual characteristics of the parties involved, undermining the very purpose of parenting time—to achieve the best interest of the child.²¹⁰

It is not possible to draft parenting time guidelines that stay true to their purpose—the best interest of children—because the best interest of a child will vary according to the individual characteristics of not only the child but also a plethora of other factors that vary from one family situation to the next. It is unlikely that the best interest of a child will be achieved by a legislatively predetermined parenting time schedule that governs simply because that child falls within a certain age category. The evolution of federal sentencing guidelines teaches that guidelines—by their very nature—cannot accommodate purposes when those purposes include concern for an individual.

B. To Draft Federal Sentencing Guidelines, the Sentencing Commission Had to Remove from the Calculus Individual Offender Characteristics; Parenting Time Guidelines Are Likewise Unable to Accommodate Meaningful Consideration of Individual Characteristics

To draft guidelines with any chance of achieving uniformity, it was logically necessary for the Sentencing Commission to eliminate from the equation the factors that would vary significantly from one offender to the next. Such factors are those that are the most personal to the individual offender—the more personal and individualistic the inquiry, the more the result will vary from offender to offender.

In this regard, the Sentencing Reform Act identifies certain offender characteristics and directs the Sentencing Commission as to whether those offender characteristics may be considered in constructing the guidelines or allowing a sentencing judge to depart

209. Mnookin, *supra* note 9, at 251.

210. *E.g.*, AFCC *Think Tank Report*, *supra* note 131, at 171 (“The think tank participants broadly agreed that the child’s best interests, including health, safety, and welfare, are the paramount considerations in decision making and parenting time determinations.”).

therefrom.²¹¹ Neither race, sex, national origin, creed, religion, nor socio-economic status may be considered in determining a sentence; they are “forbidden factors.”²¹² The Act identifies as discouraged factors the offender’s education, vocational skills, employment record, family ties and responsibilities, and community ties, stating that those factors are generally inappropriate for consideration.²¹³ Age, mental and emotional condition, and physical condition of the offender may be relevant in a particular case, but only if they are present to an “unusual degree” that “distinguishes the case from the typical cases covered by the guidelines.”²¹⁴ Appropriate offender characteristics for consideration are his role in the offense, his criminal history, and his dependence on criminal activity for his livelihood.²¹⁵

While some of those offender characteristics are appropriately removed from the calculus in determining a just sentence for a particular offender, the point is that removal of many of these factors was necessary to achieve the goal of uniformity.²¹⁶ Proponents of parenting time guidelines should take note of this obvious truth – to draft guidelines, it was necessary to eliminate from the calculus the personal characteristics of an offender because it is the personal characteristics of the offender that result in lack of uniformity.

But, those are the very type of characteristics that should and must be taken into consideration in constructing parenting time – the personal characteristics of the child and the parents involved in the determination. If it is conceded that characteristics such as education, vocational skills, employment, record, family ties and responsibility, and community ties are relevant in a parenting time determination, it must also be conceded that there must logically be variance from one parenting time determination to the next. If the mental, physical, and emotional condition of parents and children are relevant in parenting time determinations, there must logically be variance from one parenting time determination to another. Par-

211. 28 U.S.C. § 994(d) (2006).

212. *Id.*; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, Introductory Cmt. (2014).

213. 28 U.S.C. § 994(e); U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (“Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”). However, “[m]ilitary service may be relevant” if the service is “present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” *Id.*

214. 28 U.S.C. § 994(d); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, Introductory Cmt.

215. 28 U.S.C. § 994(d).

216. O’Hear, *supra* note 153, at 774–75.

enting time guidelines simply cannot achieve uniformity of result because of, again, the logical truth that family situations vary from one to the next and require well-reasoned case-by-case judicial determination if the result sought is the best interest of the child at issue.²¹⁷

Where it may be appropriate to eliminate those individual characteristics in the context of federal sentencing guidelines for the sake of uniformity, it is not appropriate to eliminate those characteristics from consideration in parenting time determinations. Because individual characteristics must be considered, the idea of uniform parenting time guidelines is simply impractical. The type of factors that are likely to be important in determining what parenting time allocation is in the best interest of a child are the very factors that have been forbidden from consideration under the guidelines scheme, largely because such factors do not accommodate uniformity in sentencing.

C. Benefits of Uniformity in the Sentencing Context May Be Worth the Sacrifice of Individualized Justice, but Any Benefits of Uniformity in the Parenting Time Context Do Not Outweigh Its Costs

Proceeding on the modest premise that parenting time guidelines at best are a rough approximation of what might be in the best interest of an individual child, the next question is whether *other* benefits of the parenting time guidelines justify relying on them despite the doubt that they further a child's best interest. Uniformity in federal sentencing via the federal sentencing guidelines purportedly accomplishes: (1) deterrence through predictability; (2) the defendants' perception of fairness; and (3) public confidence in the judicial system.²¹⁸ Those benefits perhaps outweigh the costs of sacrificing individualized justice in the context of sentencing. However, in the context of parenting time, those benefits of uniformity are weak, if they exist at all. They are not sufficiently significant to justify the sacrifice of individualized justice that parenting time guidelines require.

First, one benefit of uniformity, predictability, affects deterrence in the sentencing context. But the benefit of predictability in the parenting time context is doubtful. Without uniformity in sentencing,

217. See, e.g., AFCC Think Tank Report, *supra* note 131, at 153.

218. O'Hear, *supra* note 153, at 770.

offenders view the criminal justice system as a game of chance.²¹⁹ In contrast, where there is uniformity in sentencing, and sentences are swift, certain, and severe, they are more likely have the desired deterrent effect that is one purpose of sentencing.

Some contend that predictability is a benefit of parenting time guidelines. When separating parents cannot predict how the judge will decide, conflict and litigation are complicated and extended.²²⁰ Parenting time guidelines allow parents to predict, at least more accurately than if there were no guidelines, what parenting time a court will likely allocate to the parents in the absence of an alternative agreement by the parents. The assumption is that, because of this predictability, parents will be more likely to reach a settlement and thus avoid psychologically harmful litigation.²²¹

However, the opposite may be true. For example, guidelines may empower a parent who has a detrimental impact on the child by creating the expectation that he has a statutory right to a certain amount of parenting time; in that way, guidelines may ultimately increase the incidents and intensity of litigation.²²² Further, the absence of default parenting time guidelines allows the parties more freedom to negotiate with their particular situation in mind;²²³ guidelines could simply serve to identify the “weaker” party in negotiation and thus inhibit good faith negotiation of a parenting plan that is in the best interest of the child.²²⁴

Further, while the defendant’s perception of fairness is a benefit of uniformity in the sentencing context, parenting time guidelines are unlikely to enhance the parties or the public’s perception of fairness.

219. *Id.*

220. Braver, *supra* note 130, at 177.

221. *E.g.*, Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981) (“[T]here is an urgent need in contemporary divorce law for a legal structure upon which a divorcing couple may rely in reaching a settlement.”).

222. Thomas J. Walsh, *In the Interest of a Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes*, 85 MARQ. L. REV. 929, 963 (2002) (“[A] parent who has otherwise had a negative impact on a child may be given a renewed sense of power. That is, when preparing his or her parenting plan, a parent who has a motive other than the best interests of the child may see the parenting plan legislation as simply an opportunity to exercise those rights rather than as an opportunity to help the child.”); *e.g.*, Adamson v. Adamson, No. 55A05-1310-DR-485, 2014 WL 2095344, at *7 (Ind. Ct. App. May 19, 2014) (discussing a situation where conflict between the parties was exacerbated due to father’s “aggressiveness in pursuing right of first refusal under the Indiana Parenting Time Guidelines”).

223. Schneider, *supra* note 69, at 2278–79.

224. *Id.* Professor Schneider discusses several other well-reasoned responses to the argument that rules enhance the likelihood of settlement. *See id.*

The idea that two defendants who committed the same crime shall receive the same sentence appeals to an inherent sense of fairness and justice. In contrast, the idea that all parents will have the same time with their children does not; it should be intuitive, as the experts agree,²²⁵ that every family situation is different. The complexities in parenting time decisions make it difficult if not impossible to identify which cases should be decided similarly.

If a defendant believes his sentence to be higher than an offender who committed the same crime, he will perceive the system to be unfair, and the offender's attitude toward the legal system makes prison management difficult.²²⁶ But, where a father is awarded different parenting time than a parent in another case, he is not likely to perceive the system as unfair because of the disparity. Instead, he is more likely to perceive the system as unfair if his parenting time was predetermined by a legislature with no knowledge of his particular circumstances. A mechanical application of parenting time guidelines would likely produce a "sharp sense of injustice," based on a perception that cases that are *different* are being treated *the same*.²²⁷ A parent would likely believe that a decision so personally important to him or her should be decided with full attention to all the facts. He is unlikely to believe that application of a predetermined guideline to his unique and very personal facts is just.²²⁸

Likewise, where uniformity is important in the federal sentencing context to promote the public's confidence in the justice system, uniformity in the context of the parenting time allocation may well have the opposite impact. Where there is a lack of uniformity in sentencing—where two similar defendants are convicted for the same crime but receive widely divergent sentences—the public's confidence in the judiciary is undermined. Thus, the uniformity that sentencing guidelines can provide prevents the demise of the public's confidence in the judiciary and thus the power of the judiciary. In contrast, where a judge applies a "justice by numbers" approach to parenting time determinations, as discussed previously, the litigants will feel that they have not been treated fairly and, hence, the public's confidence in the judiciary is likely to be undermined.

225. See AFCC *Think Tank Report*, *supra* note 131, at 185.

226. O'Hear, *supra* note 153, at 763–64 (explaining that the perception of inmates that their sentences had been imposed in a random and unjust way by a "tyrannical system sanctioned by law" has "impaired effective prison administration and offender rehabilitation").

227. Schneider, *supra* note 69, at 2273–74.

228. *Id.*

Whether parenting guidelines actually accomplish the goal of ensuring the best interest of a child is as debatable as the question of whether sentencing guidelines actually accomplish the goals of sentencing a defendant. However, where sentencing guidelines offer benefits by way of uniformity, those benefits—predictability, perceived fairness, and public confidence—do not have the same value in the context of parenting time. Thus, the sacrifices made for the sake of uniformity outweigh any benefits of uniformity.

D. Some Federal Judges Reacted to the Sentencing Guidelines' Restraint on Their Discretion by Rebellious for the Sake of Justice; Parenting Time Guidelines May Compel Family Court Judges to Circumvent Those Rules to Achieve the Best Interest of the Child

Federal sentencing guidelines “are the most controversial and disliked sentencing reform initiative in U.S. history.”²²⁹ The guidelines dehumanize judges, reducing them to “the last worker in the sentencing assembly-line.”²³⁰ Moreover, as a long-time supporter of the guidelines ultimately concluded, strict application of the guidelines “too often produces bad outcomes in individual cases and sometimes in whole classes of cases.”²³¹

For some sentencing judges, it did not take much time to conclude that federal sentencing guidelines would produce bad outcomes in individual cases. And they did not quickly abandon their long-standing tradition of exercising judicial discretion in sentencing²³² and succumb to their newly ascribed role of “automaton.”²³³ Sentencing practices indicate that judges did not subscribe to the guidelines’ ideal of uniformity;²³⁴ instead, they found ways around the guidelines to achieve a sentence that they, in the exercise of their judicial discretion, deemed just.²³⁵ Both the increase in downward de-

229. Pryor, *supra* note 6, at 518 (quoting MICHAEL TONRY, SENTENCING MATTERS 72-73 (1996)).

230. Hamilton, *supra* note 7, at 2222-23.

231. Pryor, *supra* note 6, at 518 (quoting Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005)).

232. E.g., Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 525 (2007).

233. Hamilton, *supra* note 7, at 2221, 2257 (observing that the guidelines were an “invitation for insurrection”).

234. Miller, *Domination & Dissatisfaction*, *supra* note 185, at 1237-38.

235. Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J.L. & PUB. POL’Y 167, 168 (2010) [hereinafter Osler, *Sentencing as an Expression of*

parture rates²³⁶ and the phenomenon of guideline “circumvention” evidence this judicial reaction to the guidelines.²³⁷ When judges will not conform to the guidelines regime, the goal of uniformity is not achievable.²³⁸ Instead, inter-branch criticism and resentment abound,²³⁹ and the system itself fails.²⁴⁰ “Any ‘guideline’ system where most sentences are outside the guidelines (some visible, some invisible) is a system where both honesty and uniformity are unlikely to exist and may be impossible to assess.”²⁴¹

A family court judge, who has for decades been afforded great discretion to determine the best interest of a child, may likewise reject the guidelines regime when application of parenting time guidelines does not comport with what he perceives to be in the best interest of the child. Judges (good ones) need to feel that they have thoughtfully deliberated before declaring judgment.²⁴² These judges are likely resort to the “exceptions” to the parenting time guidelines to pronounce a result that is consistent with his or her independent determination of the most just result. They may feel compelled to find ways, perhaps not within the established guidelines scheme, to achieve a just result for the real individuals appearing before them.

If the judge is mandated to achieve the best interest of the child, but is simultaneously advised to stay within the parenting time guidelines, it is likely that he or she will find himself or herself, more often than not, “departing” from the parenting time guidelines, as have many federal judges under the federal sentencing guidelines. This is true because it is also true that every child, par-

Natural Law] (observing that the significant number of downward departures illustrates judges’ natural impulse toward mercy for the “complex people who come and stand before them, awaiting a sentence”).

236. Miller, *Domination & Dissatisfaction*, *supra* note 185, at 1237.

237. O’Hear, *supra* note 153, at 785–86.

238. Hamilton, *supra* note 7, at 2229 tbl. 1 (“The goal of a proportional system became self-defeating when the actors’ whose decisions were required to achieve that objective rebelled.”).

239. *Id.* at 2256 (“In demanding uniformity, the guidelines ha[ve] unwittingly fostered resentment and criticism, while at the same time in trying to reduce disparity, the guideline system has likely managed to merely exacerbate it.”).

240. Osler, *Sentencing as an Expression of Natural Law*, *supra* note 235, at 189–91 (explaining that, because judges, as insiders, can “subvert the written law” – the sentencing guidelines – without open dialogue, that key feature of open democracy that might prompt changes in the guidelines is lost).

241. Miller, *Domination & Dissatisfaction*, *supra* note 185, at 1227; see generally Osler, *Sentencing as an Expression of Natural Law*, *supra* note 235.

242. Hamilton, *supra* note 7, at 2258.

ent, and family situation is unique.²⁴³ The history of federal sentencing guidelines teaches that judges will deviate from prescribed guidelines to achieve justice.²⁴⁴

When judges find it necessary to continually depart from the guidelines to achieve the underlying purpose of the guidelines, one must question both the validity and the usefulness of the guidelines. Judges must find ways to circumvent or manipulate the law to achieve a just result, and the animosity between the judiciary and the legislative (or other) body that purports to restrain the judges' discretion with guidelines. This result serves no one, and proponents of guidelines should pause to consider whether the guidelines are an effort in futility that will do more harm to the judicial branch than good to the children the judges are to protect. As one federal judge wrote of the guidelines: They "have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result."²⁴⁵ Parenting time guidelines would likely have the same effect on some conscientious family court judges.

E. Some Judges Reacted to the Federal Sentencing Guidelines' Restraint on Their Discretion by Complying at the Expense of Justice; Some Family Court Judges May Similarly Sacrifice the Best Interest of a Child to Comply with Parenting Time Guidelines

The federal sentencing guidelines purport to allow judges to consider all purposes of sentencing in constructing a sentence, including rehabilitation. Yet, as has been explained previously, the sentencing guidelines themselves belie the contention that a judge can consider the purposes of sentencing and always sentence within the

243. See generally *AFCC Think Tank Report*, *supra* note 131, at 182 (discussing how courts should make decisions concerning parenting arrangements based on the specific and unique needs of individual children). And it is more true in the context of parenting time guidelines because the salient considerations regarding parenting time are the precise type of factors that call for variance from one case to the next yet are left out of the calculus for purposes of sentencing. See *supra* Part IV.B.

244. Osler, *Sentencing as an Expression of Natural Law*, *supra* note 235, at 172 ("Do [judges] allow their senses of what is just to overwhelm the directives of those restrictions – do they break from the leash? . . . [T]he answer is yes, despite significant incentives to stay within the lines.").

245. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (alteration in original) (quoting a survey respondent) (internal quotation marks omitted) (citing Questionnaire Survey from Judge Jack B. Weinstein to Eastern and Southern Districts of New York Judges (Feb. 24, 1992)).

guidelines.²⁴⁶ In the previous Part, this Article examined the downside of judges *rebellling against* the guidelines to achieve a just sentence. This Part considers the downside of judges *conforming to* the guidelines, ceding their discretion to the guidelines drafters.

Consider the hypothetical sentencing judge who always adheres to the sentencing guidelines, never varying: he is happy to serve as “the last worker in the sentencing assembly line.”²⁴⁷ This type of judicial decision-making should be as troubling as judicial decision-making that involves “too much” discretion.²⁴⁸ The result may be a “conception of formal equality that should be as disquieting as the formal inequality that came before [it].”²⁴⁹ Absolute uniformity is no more just than the absolutely discretionary sentencing criticized by Judge Frankel. One scholar noted that Congress could, for example, achieve absolute uniformity by imposing a mandatory five-year sentence for every federal crime.²⁵⁰ Uniformity would be achieved, but at the expense of any reasonable conception of justice or of achieving the purposes of sentencing.²⁵¹

Our legal system values a judge’s use of discretion. In the federal system, judges are given lifetime appointment so that they can exercise judicial discretion without fear of political backlash from the people or the other branches of government. These judges are chosen *for* their ability to exercise discretion appropriately. Even assuming that judges are granted a certain amount of discretion within the federal sentencing guidelines, the guidelines’ deleterious effect on the appropriate use of judicial discretion is apparent. “The danger of the Guidelines . . . lies in their very usefulness.”²⁵²

For example, even though the guidelines are now advisory, and even though judges are instructed to consider all purposes of sentencing,²⁵³ a judge has an incentive to sentence within the guidelines

246. See *supra* Part III.

247. Hamilton, *supra* note 7, at 2222.

248. See Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 421 (2006) (“For it is only when the court decides to follow the guidelines’ advice that there is reason to fear that the district judge has . . . not exercised the sort of independent reasoned judgment at sentencing that is essential to legitimate judicial fact-finding at sentencing for constitutional purposes.”).

249. Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 273 (2005).

250. *Id.* at 274–75.

251. *Id.*

252. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge’s Perspective*, 30 SUFFOLK U. L. REV. 1027, 1030 (1997).

253. 18 U.S.C. § 3553(a).

range to avoid reversal on appeal.²⁵⁴ In other words, he has a disincentive to make a downward departure or award a sentence that is outside of the guidelines scheme, even where a departing sentence is more just.²⁵⁵ Most courts of appeals will presume that a sentence within the guidelines range is reasonable.²⁵⁶ A reversal creates more work for the sentencing judge; he will have to resentence the defendant.²⁵⁷ It also communicates a failure on the part of the sentencing judge,²⁵⁸ perhaps harming his or her reputation and opportunities for higher (or continued) judicial office.²⁵⁹

Also significant is the concept of anchoring, a type of cognitive bias. Studies show that decision-makers tend to “rely heavily on one piece of information and fail to make rational adjustments.”²⁶⁰ Statistics from sentencing reform show that, when given the option of imposing a presumptively correct sentence, without having to bother with examining external evidence to see if there is a justification for upward or downward departure, some judges tend to default to the presumptively correct sentence.²⁶¹

The mere existence of parenting time guidelines may similarly discourage judicial reasoning. Judges may be less likely to listen fervently to the facts of individual cases to ensure that the best interest

254. Osler, *The Promise of Trailing-Edge Sentencing Guidelines*, *supra* note 189, at 210.

255. This is perhaps good news for those who seek uniformity at the expense of the purposes of sentencing. However, for those who prefer that all purposes of sentencing be achieved with each sentence, the incentives and disincentives for the judges should be disturbing.

256. *Rita v. United States*, 551 U.S. 338, 341 (2007).

257. Yang, *supra* note 194, at 1290 (citing Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994) (describing anecdotal evidence that lower court judges dislike being reversed on appeal because reversals affect their professional reputation, chances of advancement, and judicial power); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 129-30 (1980) (discussing reasons why the possibility of appellate reversal constrains judges).

258. Osler, *The Promise of Trailing-Edge Sentencing Guidelines*, *supra* note 189, at 210.

259. Yang, *supra* note 194, at 1290.

260. *Id.* at 1292 (citing Birte English et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 190-92 (2006) (presenting experimental results showing that experienced legal professionals chose to issue significantly higher criminal sentences when previously confronted with a randomly high rather than a low anchor)).

261. Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 523 (2014) (“It is hardly surprising that the United States Sentencing Guidelines still act as a hulking anchor for most judges.” (citing Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 449 (2011) (“The robust research on cognitive biases and framing effects suggests that judges do commit cognitive errors while sentencing and that sentencing baselines anchor sentences.”))).

of the child is protected. Instead, judges may be tempted to simply reference a table, chart, or statute drafted by those who have never heard from the parties, with no regard to the best interest of the child. Furthermore, while the typically deferential standard of review on appeal provides little incentive to a family court judge to “get it right” even now, a family court judge will face even less of a likelihood of reversal on appeal if he adheres to the parenting time guidelines.²⁶²

Thus, as with sentencing guidelines, the judge will have a disincentive to implement an “outside of guidelines” parenting plan, and may be less willing to even consider it. A particular point of concern here is relationships involving domestic violence. It is widely understood that, when a family situation involves domestic violence, the case necessitates case-by-case consideration and presumptive guidelines are not appropriate.²⁶³ Because the judge is less likely to have closely observed a family’s situation, the fact that a case involves domestic violence—and thus is not a candidate for guidelines—may go unnoticed.²⁶⁴

The concept of anchoring should also concern proponents of parenting time guidelines. In the case of overworked state court judges who hear family law cases, the temptation to simply award the parenting time prescribed by the guidelines will be too great.²⁶⁵ The guidelines will inherently deter well-reasoned judicial decision-making that focuses on the best interest of the child and replace it with rote, but no doubt efficient, application of preconceived guidelines. Judges should be vigilant to exercise their authority to depart where it is warranted.²⁶⁶ Yet, the very existence of guidelines, espe-

262. *E.g.*, *Haley v. Haley*, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002) (reversing trial court’s order and remanding the case because trial court deviated from Indiana Parenting Time Guidelines without explanation). Perhaps the trial court judge will explain his deviation next time, or perhaps he will simply conform to the guidelines regardless of the child’s best interest.

263. *E.g.*, IND. PARENTING TIME GUIDELINES (noting that guidelines are “not applicable to situations involving family violence”).

264. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 190 (2014).

265. It has been posited that judges *do not want to* make parenting time decisions and will avoid it where they can. *See Braver, supra* note 130, at 177 (“[Judges] care little that the settlement or mediation process might lead to arrangements that the parents have clearly been pressured into and neither thinks fits their family, as long as the judges themselves do not have the responsibility.”).

266. Saris, *supra* note 252, at 1062.

cially regarding parenting time, could discourage a judge from conscientiously doing his or her job; this is an “ominous turn.”²⁶⁷

F. The Success of Federal Sentencing Guidelines Depends on a Continuing Dialogue Between the Sentencing Commission and the Judiciary; Parenting Time Guidelines Should Likewise Evolve in Response to Feedback

It has always been understood that the federal sentencing guidelines are not static but will evolve over time. To ensure that the guidelines remain relevant, they are continually reviewed and modified by the Sentencing Commission.²⁶⁸ The Commission receives input at least annually from the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders.²⁶⁹ The Sentencing Commission monitors when courts depart from the guidelines and their reasons for doing so, and “refines” the guidelines accordingly.²⁷⁰

To ensure that parenting time guidelines are fulfilling their purposes, the guidelines should likewise incorporate a mechanism for continual review that includes input by judges, attorneys, and parents who are actually dealing with the guidelines. Any problems observed in the application of the guidelines should be remedied by modification of the guidelines. However, some states may not have the resources for such a continuing dialogue. Additionally, where parenting time guidelines are promulgated by statute, it is not likely that the legislative process will efficiently or effectively respond to the need for revision.²⁷¹

267. See Walsh, *supra* note 222, at 963 (describing the turn to presumptions as an “ominous” turn).

268. 28 U.S.C. § 994(o), (p); see *Mistretta v. United States*, 488 U.S. 361, 369–70 (1989) (“We note, in passing, that the monitoring function is not without its burden. Every year, with respect to each of more than 40,000 sentences, the federal courts must forward, and the Commission must review, the presentence report, the guideline worksheets, the tribunal’s sentencing statement, and any written plea agreement.”); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(d) (listing twenty-nine amendments promulgated in response to evolving sentencing concerns).

269. 28 U.S.C. § 994(o).

270. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b).

271. See, e.g., Schneider, *supra* note 69, at 2245 (“[T]he longevity of the best-interest standard in the face of so much hostility may be partly explained by the inability of legislators to agree on a replacement for it.”).

In addition to the mechanisms in place to ensure legitimacy of the guidelines themselves, the federal sentencing system provides an individual criminal defendant with mechanisms to assess the legitimacy of his sentence after it is imposed. A criminal defendant is entitled to a review of his sentence on appeal.²⁷² He also has an opportunity to petition for post-conviction relief, perhaps more than once.²⁷³

In contrast, the mechanisms that would allow for review of whether an initial parenting time allocation is in the best interest of a child are questionable at best. Appellate review of a parenting time determination is highly deferential to the family court judge's decision.²⁷⁴ In addition, once the parenting time determination is made, short of a report to authorities, the child has no opportunity for "post-sentencing" review of whether his or her best interest is being furthered by the parenting time guidelines.²⁷⁵

In the meantime, his or her parents are governed by a rigid parenting time schedule to which they did not agree, which may cause continuing dispute. When parties are governed by myriad of details that have not been crafted to fit the realities of their own family situation, they may find it difficult or even impossible to comply.²⁷⁶ A parent who is aggrieved by another parent's failure or inability to comply with those detailed provisions may repeatedly return to court to litigate against the noncompliant parent. Thus, post-separation conflict and litigation may well escalate to the detriment of the child.²⁷⁷ This post-separation conflict is a critical factor in a child's psychological and social welfare.²⁷⁸ Without some post-

272. See generally 18 U.S.C. § 3742 (2003).

273. See generally 28 U.S.C. § 2255 (2005).

274. See Glendon, *supra* note 2, at 1169.

275. See Schneider, *supra* note 69, at 2244.

276. See AFCC Think Tank Report, *supra* note 131, at 170 ("[E]xplicit time prescriptions [may] lock unwilling parents into unremitting conflict.").

277. It will be useful here to be reminded of which parents are subject to the mandatory minimum parenting time guidelines: not the parents who were able to reach an agreement on parenting time. One commentator on the AFCC's Think Tank Report, a psychologist who has worked in family and criminal courts for four decades, pointed out that the "parents who enter the justice system to litigate about child custody or access have passed the point where shared parenting should be presumed or even encouraged," and that they have, merely by asking the judge to decide, "communicate[d] an inability for one or both parents to work together in the best interest of their children." Jaffe, *supra* note 264, at 187-88.

278. See, e.g., John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005). Exposure to conflict can result in problems such as perpetual emotional turmoil, depression, substance abuse, and educational failure. *Id.* at 101.

determination review mechanism, the court will have the opportunity to assess whether the parenting time guidelines are consistent with the best interest of the child in a particular case (or are contrary to his or her best interest) only if one of the parents decides to return to court or authorities are called.²⁷⁹ Thus, non-adversarial post-litigation assessment of whether the parenting guidelines are actually furthering the best interest of a child is needed.²⁸⁰

Proponents of parenting time guidelines should consider whether it is feasible to implement continual review of the parenting time guidelines and also whether post-litigation review of the best interest of the child is needed. Federal prisoners are afforded those benefits; children should receive at least the same. "It is easier to build strong children than to repair broken men."²⁸¹

V. A MODEST PROPOSAL

The best interest standard is criticized largely because it allows free exercise of judicial discretion. Thus, the argument goes, results of cases are unpredictable. Because results are unpredictable, parties are less likely to settle and more likely to engage in psychologically harmful litigation.²⁸² Judicial discretion is also criticized because it purportedly allows personal biases of the judge to influence outcomes.²⁸³

On the other hand, completely eliminating judicial discretion in favor of predetermined rules is not possible; no predetermined rules will address every situation.²⁸⁴ Exceptions will have to be made; circumstances will arise that cannot have been foreseen. At some point in the decision-making process, the exercise of judicial discretion will be necessary to resolve a dispute.²⁸⁵ It is simply inevitable. Professor Carl E. Schneider wrote beautifully of the need for discretion

279. See *AFCC Think Tank Report*, *supra* note 131, at 167 (explaining that "postseparation parenting policy should ensure a process for reassessing postseparation parenting arrangements because they often evolve in unpredictable ways").

280. *Id.*

281. Widely attributed to Frederick Douglass.

282. *E.g.*, Warshak, *supra* note 17, at 102-03.

283. *Id.* at 104-05.

284. *E.g.*, Schneider, *supra* note 69, at 2244-45 (explaining that use of judicial discretion may be necessary in some contexts—and is necessary in the area of child custody—simply because rules cannot be written). Furthermore, the would-be rule makers often cannot agree on what the rules should be. *Id.*

285. See, *e.g.*, Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 435 (2013) ("Another lesson is that courts and policymakers should not squelch discretion simply because it seems lawless. At least some discretion is ineradicable.").

almost twenty-five years ago. His observations are particularly relevant to evaluating parenting time guidelines as a replacement for judicial discretion:

[R]ules have drawbacks and can malfunction, and discretion is often the most attractive answer to such failures. These failures of rules are of several kinds. Sometimes rulemakers fail to anticipate all the problems a rule is written to solve. Discretion can fill the gaps in rules. Sometimes two or more rules simultaneously apply but dictate conflicting results. Discretion can permit the decisionmaker to resolve the conflict in the way that best accommodates all the interests involved. Sometimes a rule will, applied to a particular case, produce a result that conflicts with the rule's purpose. Discretion can allow the decisionmaker to promote that purpose. Sometimes a rule will, applied to a particular case, produce a result that conflicts with our understanding of what justice requires. Discretion can allow the decisionmaker to do justice. And sometimes the circumstances in which a rule must be applied are so complex that a rule simply cannot be written that works effectively. Discretion frees the decisionmaker to deal with that complexity.²⁸⁶

The question is not whether to decide parenting time based on rote application of predetermined rules or presumptions on the one hand, or unbridled judicial discretion on the other. Instead, the goal is to find the ideal balance of discretion and rule that will allow some predictability of result and eliminate unwanted bias, but will also allow flexibility to accommodate the needs of the parties before the judge, specifically the best interest of the children at issue.²⁸⁷ While unbridled judicial discretion is certainly not desirable,²⁸⁸ parenting time guidelines are a step too far toward the "rules only" end of the spectrum.

286. Schneider, *supra* note 69, at 2247.

287. *Id.*; see also Berman & Bibas, *supra* note 4, at 43 (observing that, although the debate over judicial discretion in sentencing has raged for decades, the debates "obscure the consensus that sentencing must balance individualized justice and systematic consistency").

288. "No one seriously argues that judges at sentencing ought to have unlimited authority to select any sentence from probation to death for any crime. Likewise, no one seriously argues that judges at sentencing ought to have no opportunity whatsoever to consider the particular nature of a crime and the particular characteristics of an offender." Berman & Bibas, *supra* note 4, at n.13.

In considering what limitations on judicial discretion might achieve the proper balance between discretion and rules, it is worth recognizing inherent limitations on a judge's discretion, of which there are said to be "a thousand."²⁸⁹ One limitation on discretion lies in the fact that the judge has been selected by those who decided to entrust him or her with decision-making authority.²⁹⁰ For judges without lifetime tenure, their discretion is less than unfettered given that they will have to face reappointment, retention, or reelection and thus will be answerable for their decisions. Judges are also limited by social norms and by their legal training.²⁹¹ They are further constrained by the fact that they will be subject to criticism by their colleagues, their local bars, or even scholars.²⁹² Judges are also subject to disciplinary proceedings for misbehavior.²⁹³ They are limited by procedural rules regarding how to conduct proceedings.²⁹⁴ Their discretion is further limited by the prospect of appellate review. The standard by which an appellate court reviews a family court's decision, however, often affords an extreme degree of deference to the trial courts. Thus, the limitation imposed by appellate review is relatively weak in the parenting time context.

In addition to the few procedural limitations discussed above, substantive rules of law—at varying level of detail—constrain judicial discretion. In the parenting time context, that substantive rule of law is usually the best interest of the child standard. However, because the best interest standard allows a significant amount of discretion, its limitation is also relatively weak. Thus, while judicial discretion is restrained by perhaps "a thousand limitations," the limitations of substantive rules and appellate review in the context of parenting time are relatively weak constraints.

Parenting time guidelines seek to suddenly and severely limit judicial discretion by way of highly detailed presumptive substantive rules—for example, a rule that prescribes three hours of parenting time on Halloween. Before severely limiting judicial discretion with parenting time guidelines, reformers should consider restraints that are more temperate.

289. Schneider, *supra* note 69, at 2252 (quoting B. CARDOZO, *THE GROWTH OF THE LAW* 61 (1924)).

290. *Id.* at 2252–53.

291. *Id.* at 2253–54.

292. *Id.* at 2254–55.

293. *Id.* at 2259.

294. *Id.*

An adjustment to the standard of appellate review could curtail judicial discretion without sacrificing the individual case-by-case determinations that are beneficial aspects of the exercise of judicial discretion in the parenting time context.²⁹⁵ The highly deferential standard that prevails today allows an appellate court little room to correct a poor trial court decision. Further, to facilitate appellate review of decisions, a trial court should be required to explain its decisions. Requiring an explanation to allow meaningful appellate review should compel trial courts to engage in reasoning before reaching a decision, reduce the likelihood of improper bias contributing to the decisions, allow reversal when improper factors are considered, and help develop predictable rules. Simply modifying the standard of review on appeal and requiring family court judges to explain the basis for their decision in their orders could address the concerns of the critics of the best interest standard²⁹⁶ without foregoing the primary benefit of the best interest standard – individualized decision-making for the best interest of the child.

CONCLUSION

Unfettered judicial discretion to determine “the best interest of the child” may well lead to unpredictable results and may allow a judge to inject improper bias into his or her decision-making. Thus, perhaps that discretion should be curtailed. But parenting time guidelines go too far.

The development of the federal sentencing guidelines shows that a guidelines approach to judicial decision-making comes with significant sacrifice, likely to their very purpose. Federal sentencing guidelines came with a sacrifice of the purposes of punishment, and parenting time guidelines will come with a sacrifice to the best interest of some children. Every family situation is different, and every child deserves the careful case-by-case deliberation of a judge as to what future parenting arrangement is in his or her best interest. Rote application of parenting time guidelines will deprive a child of a judge’s careful deliberation. And the children who need it most

295. *Id.* at 2293 (“To reach a satisfactory balance between discretion and rules, appellate courts may need to be modestly more active.”).

296. *Id.* at 2249 (“[O]bliging the decisionmaker to explain a discretionary decision is a useful way of limiting his discretion.”); *see also* Berman & Bibas, *supra* note 4, at 43–44 (“Discretion is not pernicious if exercised well, but illegitimate factors are more likely to influence decisions when discretion is hidden and impervious to external scrutiny.”).

are the very children who will not receive it—those whose parents cannot reach an agreement.

Thus, proponents of parenting time guidelines should reconsider the guidelines approach. Modest limitations on the discretion afforded by the best interest standard can address the concerns of its critics but also preserve a judge's ability to make individualized case-by-case determinations regarding a child's best interest.