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APPELLATE REVIEW OF SENTENCING DECISIONS

Carissa Byrne Hessick[*]
F. Andrew Hessick[**]

ABSTRACT

In Booker v. United States*, the Supreme Court granted district courts broad discretion in imposing sentences in an effort to create a sentencing scheme complying with the Sixth Amendment. At the same time, however, to achieve the sentencing uniformity intended by Congress, the Court authorized circuit courts to review sentences for reasonableness. These two objectives—requiring district court discretion and cabining that discretion through reasonableness review—are in tension with each other. This Article argues that, in an effort to satisfy these conflicting goals, the Court has in subsequent cases sacrificed the central functions of appellate review: error correction and lawmaking. It has undermined the error-correction function by permitting appellate courts to presume that within-Guidelines sentences are reasonable, and it has impaired the lawmaking function by directing appellate courts to defer to district courts' sentencing policy determinations. Moreover, the Court's failure to describe how to balance these two conflicting objectives, or even to acknowledge the conflict, has resulted in confusion in the circuit courts.*

* Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. J.D., Yale Law School. B.A., Columbia University.

** Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. J.D., Yale Law School. B.A., Dartmouth College. We would like to thank Mike Berch, Stephanos Bibas, Adam Chodorow, Brendan Crimmins, Dan Himmelfarb, Cynthia Lee, Dan Meltzer, Michael O'Hear, Zig Popko, Joan Steinman, Judy Stinson, and Doug Sylvester for their comments on earlier drafts. Thanks also to Kim McIntier for her helpful research assistance.

INTRODUCTION

The Supreme Court completely overhauled federal sentencing in *United States v. Booker*.[1] *Booker* held that the mandatory Federal Sentencing Guidelines violated the Sixth Amendment because they permitted maximum possible sentences to be increased based on judicial factfinding. To remedy the problem, the Court rendered the Federal Sentencing Guidelines advisory by severing the statutory provision making the Guidelines mandatory and directing district courts to impose sentences based on a balance of various factors listed in 18 U.S.C. § 3553(a).

One of the collateral consequences of the Court's remedy was a modification of the appellate standard of review for federal sentencing decisions. Before *Booker*, appellate courts generally reviewed sentencing determinations de novo. *Booker* held, however, that sentencing decisions would be reviewed for "reasonableness," an unusual, but not unknown, standard of appellate review. But deciding how reasonableness review ought to function in practice resulted in some confusion in the lower courts. Since *Booker* was decided in 2005, the Court has heard three additional cases to clarify the proper scope and content of appellate review. Despite the Court's work in these cases, confusion remains regarding appellate review of sentencing decisions.

This Article seeks to place appellate review of federal sentencing decisions in a broader context. By comparing the Court's sentencing decisions to standards of appellate review in other areas of law, we hope to understand better how appellate courts ought to review sentencing decisions. In making this comparison, however, several differences between ordinary appellate review and sentencing appellate review emerge. Some of these

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

differences appear to be simply the product of imprecision by the Supreme Court and circuit courts. Other differences, however, are attributable to the constitutional holding of *Booker*, which proclaimed that judicial fact-finding in connection with mandatory sentencing guidelines violates the Sixth Amendment jury trial guarantee in some circumstances. The Court's attempts to implement this constitutional holding, while at the same time preserving some meaningful level of appellate review to promote sentencing consistency, have led to deviations from ordinary principles of appellate review. The solution selected in *Booker* to remedy the Sixth Amendment problem was to render the Guidelines advisory and grant the district courts broad discretion in sentencing. But appellate review, by its nature, tends to restrict the discretion of district courts in future cases and, therefore, threatens to undermine the district court discretion necessary to *Booker*'s remedy. This conflict between the need for district court discretion and the Court's decision to retain appellate review has led the Court to abandon the core functions of appellate review—error correction and lawmaking—when necessary to preserve the remedy fashioned in *Booker*. The conflict has generated uncertainty in the appellate courts because the Supreme Court has failed to acknowledge these deviations.

This Article proceeds in three parts. In Part I, we give a brief historical overview of appellate review of sentences, including a short description of the Court's most recent decisions on the topic—*Rita*, *Gall*, and *Kimbrough*.[2] We analyze these decisions against the backdrop of ordinary principles of appellate review in Part II. We note a deviation from ordinary principles in the Court's endorsement of the appellate presumption of reasonableness for within-Guidelines sentences, as well as in the Court's determination that appellate courts must permit district courts to impose sentences on the basis of policy disagreements with the Federal Sentencing Guidelines.

In Part III we demonstrate that the differences between appellate review of sentencing decisions and appellate review in other areas of law is a direct consequence of the remedy selected by the Supreme Court in *Booker*. By attempting to afford district courts the discretion to increase or decrease sentences while, at the same time, attempting to ensure some uniformity through appellate review, the Court has muddied the waters for appellate courts. *Booker* increased district court discretion in order to avoid Sixth Amendment problems; but at the same time it sought to preserve uniformity through appellate review, which is by its nature a limitation on district courts. District court discretion and appellate review are fundamentally at odds with one another, and the Court has satisfied these

2. Rita v. United States, 127 S. Ct. 2456 (2007); Gall v. United States, 128 S. Ct. 586 (2007); Kimbrough v. United States, 128 S. Ct. 558 (2007).

contradictory goals by altering the rules of appellate review. At the same time, the Court has failed to recognize this tension or its effects. Instead, it has claimed that the reasonableness standard for reviewing sentences is identical to the abuse of discretion standard commonly employed by appellate courts, despite the fact that appellate review of sentences diverges from ordinary abuse of discretion review in several important respects. Part III describes the confusion that the Court's sentencing review cases have created, as well as the danger to the Court's institutional credibility that this apparent lack of candor may cause.

I. APPELLATE REVIEW OF SENTENCING DECISIONS

For the greater part of American history, appellate review of federal criminal sentences was non-existent in most cases.[3] Federal trial judges enjoyed near-unfettered freedom in their criminal sentencing decisions. The only limitation on the length of a sentence was that a trial judge could neither sentence above the maximum penalty specified by statute nor, when applicable, below the statutory minimum. An appellate court would reverse a sentence within the statutory range only in cases where the sentencing court based its decision on "material misinformation or . . . upon constitutionally impermissible considerations," such as race.[4] The unreviewability of criminal sentencing decisions led to growing dissatisfaction in the mid-twentieth century. Critics argued that unreviewability allowed sentences to vary wildly depending on the identity of the judge imposing the sentence, the temperament of the judge on a particular day, or unwarranted prejudices held by the sentencing judge.[5]

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3. *See* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); Dorszynski v. United States, 418 U.S. 424, 431 (1974) (noting "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 197 n.3 (1998) (explaining that an 1891 statute has historically been interpreted as stripping appellate courts of jurisdiction to hear appeals from federal criminal sentences); Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 259 (1962) (statement of Irving R. Kaufman, Judge, U.S. Court of Appeals for the Second Circuit) ("Prior to 1891, the old circuit courts had power to correct harsh sentences on appeal; and the power was exercised. But the language of the 1891 statute creating the new appellate courts was thought to 'repeal' that grant of authority; and since 1891 federal upper courts have generally denied themselves any power to revise sentences.").

4. United States v. Colon, 884 F.2d 1550, 1552 (2d Cir. 1989); *see also* Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 6 & n.19 (1997); Symposium, *supra* note 3, at 259 (statement of Irving R. Kaufman, Judge, Second Circuit Court of Appeals) ("A sentence will be vacated when a reviewing tribunal finds that it is based upon information which is so clearly incorrect or upon criteria so improper as to constitute a violation of the defendant's right to due process.").

5. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12–49 (1972); Symposium, *supra* note 3, at 265–66 (statement of Simon E. Sobeloff, Chief Judge, U.S. Court of

These concerns, among others, led to sweeping legislative sentencing reform in the 1980s. The Sentencing Reform Act of 1984 ("SRA")[6] drastically restricted the discretion of federal sentencing judges by creating a sentencing commission to develop binding rules—inaptly named guidelines—that limited available sentences in particular cases. The Federal Sentencing Guidelines assigned narrow sentencing ranges within the broader statutory sentencing limits. These Guideline ranges were based on a number of variables, including the circumstances surrounding the offense and the defendant's prior criminal convictions. The Guidelines provided for various adjustments to the sentencing range based on the specific facts of the case, such as the amount of drugs transported by a defendant found guilty of drug possession.[7] Under the SRA, judges were required to make factual findings to determine whether these adjustments applied. Judges were permitted to depart from the Guidelines (i.e., sentence outside the Guideline range) only in situations expressly identified by the Guidelines,[8] or where the sentencing judge found that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[9]

To ensure that district courts sentenced within the Guideline range, the Sentencing Reform Act provided for substantive appellate review of federal sentences. The SRA empowered the appellate courts to overturn any sentence that "was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."[10] It further granted the power to overturn any sentence that was "outside the applicable guideline range" and was "unreasonable."[11] The statute explicitly directed the appellate courts to affirm any sentence that was the result of a correct application of the Guidelines and was within the Guideline range.[12]

In 1996, the Supreme Court had an opportunity to examine appellate review under the SRA in *Koon v. United States*.[13] That case involved the appropriate standard of appellate review for departures from the Sentenc-

Appeals for the Fourth Circuit).

6. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, § 212(a)(2), 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

7. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2007).

8. *See id.* § 5K (identifying appropriate and inappropriate grounds for departure).

9. Sentencing Act of 1987, Pub. L. No. 100-182, § 3(1), 101 Stat. 1266 (codified at 18 U.S.C. § 3553(b)(1) (2006)); *cf.* STITH & CABRANES, *supra* note 3, at 101–03 (noting that this provision severely hampered district courts' ability to depart downward from the Guidelines even after *Koon* articulated the abuse of discretion standard).

10. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, § 213(e)(1), 98 Stat. 1837 (codified at 18 U.S.C. § 3742(f)(1) (2006)).

11. 18 U.S.C. § 3742(f)(2).

12. *Id.* § 3742(f)(3).

13. Koon v. United States, 518 U.S. 81 (1996).

ing Guidelines. The *Koon* Court held that departures should be reviewed for an abuse of discretion.[14] In adopting the abuse of discretion standard, the Court was careful to note that the "standard includes review to determine that the discretion was not guided by erroneous legal conclusions," such as whether a factor is a permissible basis for departure under any circumstances, and that "the court of appeals need not defer to the district court's resolution of the point."[15] Several years later, Congress effectively overruled the holding in *Koon*. In legislation that is commonly referred to as the Feeney Amendment, Congress specified that "the court of appeals shall review *de novo* the district court's application of the guidelines to the facts" for any sentence outside of the Guidelines range.[16]

At the same time that Congress was debating and adopting the Feeney Amendment, the Supreme Court began to question the constitutionality of certain sentencing regimes. In *Apprendi v. New Jersey*, the Court held that a statutory sentencing enhancement, which provided for an increase in the maximum sentence for the unlawful possession of a firearm from ten to twenty years imprisonment if the sentencing judge found that the defendant possessed the firearm to intimidate someone because of their race, violated the Sixth Amendment right to a jury trial.[17] The *Apprendi* Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[18] The Court extended this holding to mandatory sentencing guideline regimes in *Blakely v. Washington*.[19] The *Blakely* Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[20] Thus, if a mandatory sentencing regime limits a sentencing judge's discretion to a range narrower than the statutory range, and if a sentencing court may sentence above that range only if the judge

14. *Id.* at 97, 99. The Court went on to explain that Guidelines departures were permitted only in cases that were so unusual that they fell outside the "heartland" of cases. *Id.* at 98. The Supreme Court noted the "institutional advantage" that district courts have over appellate courts in deciding whether a particular case was "unusual enough for it to fall outside the heartland of cases in the Guideline" because deciding whether a case falls outside of the heartland requires a court to make "a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*

15. *Id.* at 100.

16. Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670 (2003) (codified at 18 U.S.C. § 3742(e) (2006)) (emphasis added). The amended statute also directed appellate courts to determine whether a district court's departure "is not justified by the facts of the case." 18 U.S.C. § 3742(e)(3)(B)(iii).

17. Apprendi v. New Jersey, 530 U.S. 466, 490–92 (2000).

18. *Id.* at 490.

19. 542 U.S. 296 (2004).

20. *Id.* at 303.

makes a particular finding, then the sentencing regime violates the Sixth Amendment.

Blakely threw the constitutionality of the Federal Sentencing Guidelines into doubt.[21] And less than a year later, in *United States v. Booker*, the same five justices who formed the majority in *Apprendi* and *Blakely* concluded, as expected, that the Federal Sentencing Guidelines ran afoul of the Sixth Amendment.[22] But in deciding on a remedy for the Sixth Amendment violation, the Court did something very surprising.

The *Booker* Court reiterated its position in *Blakely* that the Sixth Amendment forbids a sentencing scheme under which a factual finding by the sentencing judge is the only way to increase the offender's maximum possible sentence.[23] If a factual finding—other than a prior conviction—is required in order to increase punishment, then, as with any element of a crime, it must either be proved beyond a reasonable doubt to a jury or admitted by the defendant. One obvious way to remedy the constitutional problem—a way advocated by four justices in the majority for the constitutional holding—was to engraft onto the existing Guidelines system a Sixth Amendment "sentencing jury" requirement, under which any fact that is required to increase a defendant's sentence under the Guidelines would be proved to a jury beyond a reasonable doubt or admitted by the defendant.[24]

But rather than endorse a sentencing jury, Justice Ginsburg—one of the *Apprendi* five—broke ranks with the other members of the constitutional majority and joined the constitutional dissenters in fashioning an unusual remedy. The remedial majority elected to solve the Sixth Amendment problem by making the Guidelines advisory, rather than mandatory,

21. *See, e.g.*, *id.* at 323 (O'Connor, J., dissenting) ("The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government."); United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005) ("It would seem to follow, therefore, as the four dissenting Justices in *Blakely* warned . . . that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge."); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1475 (2005) (noting that *Blakely* "threw into doubt the validity of the federal sentencing guidelines and also those of many states"); *The Future of American Sentencing: A National Roundtable on* Blakely, 17 FED. SENT'G REP. 115, 121 (2004) [hereinafter *National Roundtable on* Blakely] (statement of Frank O. Bowman III, Professor of Law, Indiana University—Indianapolis) ("*Blakely* promises to bring down the federal sentencing structure.").

22. United States v. Booker, 543 U.S. 220, 245 (2005). The Court granted certiorari in *Booker* less than two months after rendering the decision in *Blakely*. *See* United States v. Booker, 542 U.S. 956 (2004) (granting certiorari on Aug. 2, 2004).

23. *Booker*, 543 U.S. at 245. In other words, *Booker* and *Blakely* do not hold that the Constitution forbids a judge from increasing a maximum available sentence; rather, their holding is that judicial factfinding cannot be the only way to increase the maximum available sentence. *Cf. National Roundtable on* Blakely, *supra* note 21, at 117 (statement of Michael R. Dreeben, Deputy Solicitor General, U.S. Dept. of Justice) ("If *Blakely* is about protecting the jury trial, then it's a very strange rule, because it allows legislatures to get out of the jury altogether by eliminating the guidance that they gave to the judge.").

24. *See Booker*, 543 U.S. at 272–73, 284–87 (Stevens, J., dissenting in part); *id.* at 313 (Thomas, J., dissenting in part) (expressing agreement with Justice Stevens' proposed remedy).

and so they excised the provision of the Sentencing Reform Act that made the Guidelines mandatory.[25] Such a solution avoids the constitutional problem identified in *Apprendi* and *Blakely* because a factual finding is no longer *required* to sentence above the Guideline range.

The Court also excised § 3742(e), the provision that set forth de novo appellate review of departures from the applicable Guidelines range.[26] Although the availability of appellate review did not itself violate the Sixth Amendment, the Court explained that it was necessary to excise the provision because it "contain[ed] critical cross-references to the (now-excised) § 3553(b)(1),"[27] which had required district courts to impose within-Guidelines sentences in most cases.

But in doing so, the Court did not abrogate appellate review of sentencing. To the contrary, the Court actually *expanded* appellate review to include not only departures—that is, sentences outside the Guidelines range—but all sentences, including those imposed within the Guidelines.[28] As the Court recognized, Congress's intent in enacting the Sentencing Reform Act was to increase sentencing uniformity, and rendering the Guidelines advisory directly undermined that intent. According to the remedial majority, appellate review would recover some of the uniformity[29] by allowing the circuit courts "to iron out sentencing differences" in the district courts.[30] In place of the excised de novo standard, the Court inferred a new standard,[31] holding that appellate courts should review sentences to determine whether they are reasonable with respect to § 3553(a), which sets forth a series of factors that district courts must consider in imposing a sentence.[32]

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25. *Id.* at 245 (majority opinion) (invalidating 18 U.S.C. § 3553(b)(1) (2006)).

26. *Id.* at 259.

27. *Id.* at 260.

28. Prior to *Booker*, appellate courts could review within-Guidelines sentences only to determine whether the district court had correctly calculated and applied the Guidelines. 18 U.S.C. § 3742(e)(2) (2006). The SRA specifically instructed courts of appeals to affirm correctly calculated within-Guidelines sentences. *Id.* § 3742(f)(3).

29. *Booker*, 543 U.S. at 263–64.

30. *Id.* at 263.

31. *Id.* at 260 ("[A] statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*.").

32. *Id.* at 261. 18 U.S.C. § 3553(a) (2006) provides, in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

The remedial majority's decision—and its creation of the reasonableness standard in particular—prompted several heated dissents.[33] In addition to complaints that the Court's remedy conflicted with congressional intent to create binding Guidelines,[34] the dissenters expressed doubt that the remedial majority had given appellate courts sufficient guidance about "how advisory Guidelines and 'unreasonableness' review will function in practice."[35] In response, the remedial majority maintained that reasonableness review was "already familiar to appellate courts"[36] because it was the standard that courts already applied "both on review of departures and on review of sentences imposed where there was no applicable Guideline."[37] According to the remedial majority, reasonableness review accounted for "16.7% of sentencing appeals" in 2002.[38] But that claim may have overstated appellate court familiarity with reasonableness review.[39] Pre-*Booker*, reasonableness review applied in only two situations. The first was when an appellate court was reviewing the extent of a departure from the Guidelines range—that is, the difference in length between the sentence imposed by a district court and the sentencing range mandated by the Guidelines. The district court's decision *whether* to depart from the Guidelines range was reviewed de novo.[40] Because many appeals of district

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .
(5) any pertinent policy statement 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.

33. The Court explained that it chose this standard based on inferences "from related statutory language, the structure of the statute, and the 'sound administration of justice.'" *Booker*, 543 U.S. at 260–61 (quoting Pierce v. Underwood, 487 U.S. 552, 559 (1988)).

34. *See, e.g.*, *id.* at 294–95 (Stevens, J., dissenting in part).

35. *Id.* at 311 (Scalia, J., dissenting in part). Justice Stevens also expressed concerns about the viability of such a review standard. *Id.* at 301 (Stevens, J., dissenting in part) ("How will a court of appeals review for reasonableness a district court's decision that the need for 'just punishment' and 'adequate deterrence to criminal conduct' simply outweighs the considerations contemplated by the Sentencing Commission?" (quoting 18 U.S.C. § 3553(a)(2)(A)–(B))).

36. *Id.* at 261 (majority opinion).

37. *Id.* at 262 (citations omitted); *see also id.* at 262–63 ("'Reasonableness' standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances—both on review of departures and on review of sentences imposed where there was no applicable Guideline . . . . That is why we think it fair . . . to assume judicial familiarity with a 'reasonableness' standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would what he calls the 'daunting prospect' of applying such a standard across the board." (quoting *id.* at 312 (Scalia, J., dissenting in part))).

38. *Id.* at 262.

39. *See id.* ("The Act has long required their use in important sentencing circumstances—both on review of departures and on review of sentences imposed where there was no applicable Guideline. Together, these cases account for about 16.7% of sentencing appeals.") (citations omitted).

40. *See* Lee, *supra* note 4, at 26–28. Prior to the decision in *Koon v. United States*, while the

court departures would have involved the propriety of a district court's decision whether to depart, it was misleading for the *Booker* Court to suggest that all departure appeals—which accounted for the vast majority of the 16.7% of sentencing appeals that were supposedly reviewed under the reasonableness standard—had been reviewed under that standard. The other category of reasonableness review cases that the remedial majority identified (offenses for which there is no applicable Guideline) does appear to have been reviewed for reasonableness.[41] But such cases account for a small fraction of all sentencing appeals—less than three percent[42]—and before *Booker* "the courts of appeals ha[d] not characterized the scope of review on revocation sentences in an entirely consistent fashion."[43]

In his *Booker* dissent, Justice Scalia also expressed concern that the remedial majority's reference to appellate court familiarity with the reasonableness standard "may lead some courts of appeals to conclude . . .

extent of a departure from the Guidelines was reviewed for reasonableness, most circuits reviewed a district court's decision *whether* to depart de novo. *See id.* (describing the "Pre-*Koon* Tripartite Standard of Review"—step one entailed de novo review of whether the aggravating or mitigating factors relied upon by the district court were appropriately considered as grounds for departure, step two entailed clear error review of factual determinations, and step three included review of "the direction and degree of the departure for reasonableness"). *Koon* purported to reject de novo review of sentencing decisions, *id.* at 29; however, the *Koon* Court also stated that legal questions—a category into which the appropriateness of a particular consideration as a reason to depart presumably falls—are essentially subject to plenary review under an abuse of discretion standard:

> Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo,* for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion. The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Koon, 518 U.S. at 100 (citations omitted); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1463 (2008) ("[R]eview of departures for 'abuse of discretion' in fact does not liberate sentencing judges to depart in a regime that by law limits departures. Since the Guidelines limited the allowable bases for departure, the 'abuse of discretion' standard amounted to something close to the usual judicial review for legal error.") (footnotes omitted); *infra* text accompanying notes 76–86 (explaining the different levels of deference under ordinary abuse of discretion review). And certainly after the adoption of the Feeney Amendment, decisions whether to depart were reviewed de novo. *See supra* text accompanying note 16.

41. Reasonableness was the applicable standard of review in appeals from terms of imprisonment as a result of revocation of supervised release, an issue for which there is no applicable Guideline. *See, e.g.*, United States v. Jones, 484 F.3d 783, 791 (5th Cir. 2007). Indeed, the *Booker* remedial majority explicitly referred to revocation of supervised release cases in arriving at its 16.7% figure. *Booker*, 543 U.S. at 262. While there is no Guideline governing the revocation of supervised release, the Commission has chosen to promulgate policy statements on the topic, which include advisory ranges of imprisonment. U.S. SENTENCING GUIDELINES MANUAL § 7B1.4, p.s. (2007). The courts of appeals have treated those ranges as advisory, rather than mandatory, and they have reviewed district court decisions deferentially. *E.g.*, United States v. Moore, 64 F. App'x 693, 696 (10th Cir. 2003) ("A district court must be aware of a policy statement, but it may easily depart from the range the statement suggests." (citing United States v. Lee, 957 F.2d 770, 775 (10th Cir. 1992))).

42. *See Booker*, 543 U.S. at 262 ("[A]t least 126 of 5,018 sentencing appeals involved the imposition of a term of imprisonment after the revocation of supervised release.").

43. United States v. Ramirez-Rivera, 241 F.3d 37, 40 n.4 (1st Cir. 2001).

that little has changed" in federal sentencing.[44] Appellate practice in the wake of *Booker* showed that this concern was well founded. Immediately following the *Booker* decision, courts of appeals regularly reversed sentences imposed outside of the Guidelines—especially sentences below the Guideline range—and almost never reversed a within-Guidelines sentence.[45]

Booker's failure to outline the precise contours of reasonableness review has required the Court's repeated intervention. In the two years following the decision in *Booker*, the Court revisited the appropriate standard of appellate review three times in an effort to clarify the scope and content of reasonableness review.

One broad refinement made by those cases was to simply equate reasonableness review with the "familiar" abuse of discretion standard.[46] The post-*Booker* cases also established several doctrines unique to sentencing review. The first of the three cases, *Rita v. United States,* authorized the courts of appeals to adopt a "presumption of reasonableness" when reviewing sentences within the Guideline range.[47] The Court rejected the argument that the presumption was inconsistent with the remedial decision in *Booker* because it encourages district courts to "treat the Guidelines as presumptively appropriate,"[48] explaining that the presumption applies only at the appellate level.[49] The Court further explained that the presumption is not binding, does not place a burden of proof or persuasion on a particular party,[50] and does not have "independent legal effect."[51] Rather, the Court

44. *Booker*, 543 U.S. at 311–12 (Scalia, J., dissenting in part) (speculating that some courts may continue to "apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)").

45. An amicus in *Rita* reported the following statistics: of the 71 below-Guidelines sentences that were appealed, 60 were reversed; 7 out of 154 above-Guidelines cases were reversed; and only 1 out of 1,152 within-Guidelines sentences appealed by defendants was reversed for substantive unreasonableness (an additional 15 within-Guidelines sentences were reversed for procedural unreasonableness). Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 5–6, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754), 2006 WL 3742254; *see also Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) ("Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory."); Carissa Byrne Hessick & F. Andrew Hessick, Rita*,* Claiborne*, and the Courts of Appeals' Attachment to the Sentencing Guidelines*, 19 FED. SENT'G REP. 171, 174 (2007) (noting "a larger pattern of resistance by the courts of appeals to the Supreme Court's efforts to reconstruct the law of sentencing" in *Booker*). *But see* Stith, *supra* note 40, at 1446 ("It is true that appellate courts have affirmed most within-Guidelines sentences (and the relatively few instances of above-Guidelines sentences), while vacating most below-Guidelines sentences. But appellate decisions suffer from significant selection bias. The great majority of criminal sentences are not appealed by either side.").

46. Gall v. United States, 128 S. Ct. 586, 594, 597 (2007); *Rita*, 127 S. Ct. at 2465 ("[A]ppellate 'reasonableness' review merely asks whether the trial court abused its discretion.").

47. *Rita*, 127 S. Ct. at 2462.

48. *See* Brief for the New York Council of Defense Lawyers, *supra* note 45, at 23–24.

49. *Rita*, 127 S. Ct. at 2465.

50. *Id.* at 2463 ("[T]he presumption is not binding. It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest

explained, the presumption "simply recognizes the real-world circumstance that when the [sentencing] judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[52]

While *Rita* raised questions of appellate review when circuit courts sought to affirm district courts' sentencing decisions, the two other post-*Booker* cases involved rules adopted by the circuit courts to constrain the discretion of sentencing judges. The Court rebuffed those efforts in both cases on the ground that reasonableness review was equivalent to review for abuse of discretion.[53] In *Gall v. United States*, the Court rejected a rule adopted by several courts of appeals that required "'proportional' justifications for departures from the Guidelines range"—that is, they required a sentence "that constitutes a substantial variance from the Guidelines [to] be justified by extraordinary circumstances."[54] The Court explained that such a proportionality test was "not consistent" with the *Booker* remedy.[55] Instead, the Court declared, "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."[56]

The other case in which the Court chided the courts of appeals was *Kimbrough v. United States*. The issue there was whether a district court may impose a sentence outside the Guidelines range based solely on a policy disagreement with the treatment of crack cocaine by the Sentencing Commission. The Court held that district courts have the ability to sentence outside of the Guidelines range based on a disagreement with the crack cocaine guideline, suggesting that district courts are free to base their sentencing decisions on policy disagreements with the Federal Sentencing Guidelines.[57]

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they lose their case. Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge.") (citation omitted).

51. *Id.* at 2465.

52. *Id.* In a concurrence joined by Justice Ginsburg, Justice Stevens went beyond merely addressing the presumption of reasonableness at issue in *Rita*. Justice Stevens explained that "the new 'reasonableness' standard" identified in *Booker* was no different than the "the old abuse-of-discretion standard used to review sentencing departures" prior to the Feeney Amendment. *Rita*, 127 S. Ct. at 2470, 2471 n.2 (Stevens, J., concurring). He went on to note that, "Appellate courts must . . . give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion principles." *Id.* at 2473–74. And, with respect to the presumption of reasonableness, Justice Stevens cautioned that "*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable." *Id.* at 2474.

53. Gall v. United States, 128 S. Ct. 586, 594 (2007); Kimbrough v. United States, 128 S. Ct. 558, 576 (2007).

54. *Gall*, 128 S. Ct. at 591, 594.

55. *Id.* at 594.

56. *Id.* at 597.

57. *See Kimbrough*, 128 S. Ct. at 573–74.

Although the *Gall* and *Kimbrough* decisions rejected limitations on district court discretion and seemed to endorse a deferential standard of appellate review, both opinions contain language in tension with those holdings. In *Gall*, the Court purported to reject proportionality review, but it also stated that "it [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one."[58] And in *Kimbrough*, while stating that "as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,'"[59] the Court added that "closer" scrutiny may be warranted when a district court disagrees with a guideline that is the product of the Commission's expertise.[60] These portions of *Kimbrough* and *Gall* appear to allow for more searching appellate review of sentencing decisions than the extremely deferential review, endorsed in other portions of those opinions, that the Court adopted to avoid running afoul of the Sixth Amendment. As discussed in more detail below,[61] this contradictory language is representative of a larger conflict in the Court's appellate sentencing jurisprudence—the conflict between *Booker's* decision to grant district courts sentencing discretion but, at the same time, retain appellate review.

II. COMPARING REVIEW OF SENTENCING DECISIONS TO ORDINARY PRINCIPLES OF APPELLATE REVIEW

One of the ways in which the Court attempted to provide clarity to the law after *Booker* was to equate appellate review of sentencing determinations with ordinary abuse of discretion review. *Rita*, *Kimbrough*, and *Gall* proclaim that reasonableness review is no different from abuse of discretion review. But reasonableness and abuse of discretion are not, in fact, interchangeable. Rather, reasonableness is one species of abuse of discretion review.

Moreover, the principles articulated in the Court's post-*Booker* sentencing cases diverge in several respects from ordinary abuse of discretion review. In *Rita*, the Court endorsed an appellate presumption of reasonableness for within-Guidelines sentences, despite the fact that § 3553(a)—which is the substantive law governing both appellate and district court sentencing decisions—does not contain a preference for within-Guidelines sentences. Presumptions ordinarily exist only when the substantive law prefers a particular outcome. And in *Kimbrough* the Court departed from

58. *Gall*, 128 S. Ct. at 597.

59. *Kimbrough*, 128 S. Ct. at 570 (alteration in original) (quoting Brief for the United States at 16, Kimbrough v. United States, 128 S. Ct. 558 (2007) (No. 06-6330)).

60. *See id.* at 575.

61. *See infra* text accompanying notes 166–71.

ordinary abuse of discretion review in requiring appellate courts to defer to district court policy decisions. Policy determinations are legal determinations, and are thus ordinarily reviewed without deference.

A. Ordinary Principles of Appellate Review

Reasonableness is an unusual standard of review for reviewing district court rulings. While courts will sometimes evaluate the reasonableness of agency action,[62] reasonableness is not a standard under which appellate courts ordinarily review district court decisions. Typically, appellate courts review district court decisions under one of three standards: de novo, clear error, or abuse of discretion. [63] De novo review is generally reserved for questions of law,[64] and clear error review for factual findings.[65] Abuse of discretion applies to those decisions that call upon the district court to exercise discretion, such as when the law does not prescribe a rule of decision other than to direct a court to balance competing interests in rendering judgment. Abuse of discretion is a deferential standard; an appellate court's task is not to render a decision by reweighing the competing interests, but only to ensure that the district court's weighing was permissible.[66]

Although appellate courts had occasionally used a "reasonableness" standard prior to *Booker* when reviewing the extent of a departure or of-

62. *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 162 (1999) (describing "'substantial evidence' standard as requiring a court to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion'" (quoting Consol. Edison Co. of New York v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938))); ExxonMobil Oil Corp. v. Fed. Energy Regulatory Comm'n, 487 F.3d 945, 955 (D.C. Cir. 2007) ("Under the arbitrary and capricious test, our standard of review is 'only reasonableness, not perfection.'" (quoting Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin., 476 F.3d 946, 954 (D.C. Cir. 2007))); Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n, 397 F.3d 1004, 1009 (D.C. Cir. 2005) (Roberts, J.) (equating arbitrary and capricious with unreasonable); Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) (describing review under substantial evidence and arbitrary and capricious standards as involving inquiries into "reasonableness"). *But cf.* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 n.23 (1989) (indicating that reasonableness might be different from arbitrary and capricious).

63. *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS–STANDARDS OF REVIEW 3 (2007). A fourth standard of review is plain error, which applies when a party challenges a ruling that it failed to challenge below. *Id.* at 91.

64. *See id.* at 23. Courts also employ de novo review in certain limited contexts to factual findings, *e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 508 n.27 (1984) (First Amendment "constitutional facts"), and applications of law to fact, *e.g.*, Ornelas v. United States, 517 U.S. 690, 696–97 (1996) (findings of probable cause or reasonable suspicion).

65. *See* EDWARDS & ELLIOTT, *supra* note 63, at 19.

66. Because a court may reach a faulty decision based on an incorrect legal conclusion or factual finding, abuse of discretion has come to encompass review of factual and legal conclusions. In reviewing those conclusions, appellate courts employ the standards that usually apply to those conclusions—de novo for legal questions and clear error for factual findings. *Id.*; *see also In re* Babcock & Wilcox Co. 526 F.3d 824, 826 (5th Cir. 2008) (abuse of discretion entails reviewing "findings of fact for clear error and . . . legal conclusions de novo").

fenses for which there was no applicable guideline,[67] they often struggled with the meaning of that standard. Indeed, several circuits "expressly employed an 'abuse of discretion' analysis" as a proxy for reasonableness review.[68] It therefore seems a bit odd that, when the Court elected to impose a new standard of review in *Booker*, it chose this unusual standard without providing any real guidance about the content of that standard.

The sentencing scheme established by *Booker*—under which district courts impose sentences based on their weighing of the § 3553(a) factors—seems to involve the sort of discretionary judgment subject to abuse of discretion review. But *Booker* did not describe reasonableness review in terms of abuse of discretion. Instead, the Court stated only that an appellate court should evaluate whether a sentence "'is unreasonable' with regard to § 3553(a)."[69] The Court's failure to provide guidance on the content of reasonableness review led many circuit courts to treat reasonableness review as abuse of discretion review.[70] The Supreme Court eventually endorsed this position in *Rita* and *Gall*, stating that "the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."[71]

Equating reasonableness review with abuse of discretion poses the risk of muddying the law of sentencing review. The reason is that the two simply are not equivalent.[72] Certainly, Congress appears not to have viewed reasonableness and abuse of discretion as equivalent. There are many statutes directing courts to review particular types of decisions for abuse of discretion.[73] Especially given the prevalence of the abuse of discretion standard,[74] Congress's choice to use "reasonableness" in §

67. *See supra* notes 41–43 and accompanying text.

68. United States v. Ramirez-Rivera, 241 F.3d 37, 40 n.4 (1st Cir. 2001).

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

70. *See, e.g.*, United States v. Sindima, 488 F.3d 81, 85 (2d Cir. 2007) ("Reasonableness review is akin to review for abuse of discretion."); United States v. Fazio, 487 F.3d 646, 660 (8th Cir. 2007) ("Our reasonableness review is akin to the abuse of discretion standard."), *cert. denied*, 128 S. Ct. 523 (2007); United States v. Armendariz, 451 F.3d 352, 358 (5th Cir. 2006) ("[W]e conduct our reasonableness review through an abuse-of-discretion lens, paying particular attention to the specific reasons given for deviating from the Guidelines."). It is unclear whether the courts did so because they were more familiar with abuse of discretion review or because they could glean no distinction between reasonableness review and abuse of discretion.

71. Gall v. United States, 128 S. Ct. 586, 594 (2007) ("[T]he *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."); Rita v. United States, 127 S. Ct. 2456, 2465 (2007) ("Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review.").

72. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.21, at 4-135 (3d ed. 1999) ("It appears, therefore, that often an abuse of discretion standard in civil and criminal appeals should not be equated with a test for unreasonableness.").

73. *E.g.*, 2 U.S.C. § 1407(d)(1) (2006) (directing courts to vacate if decision is "arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law"); 5 U.S.C. § 706(2)(A) (2006) (same); 7 U.S.C. § 2(a)(1)(C)(v)(VI) (2006) (same).

74. Our research has not revealed any statutes outside the sentencing context that direct appellate

3742(e)(3) instead of "abuse of discretion" suggests that Congress meant to impose a standard qualitatively different from abuse of discretion.[75]

There is another reason not to treat reasonableness and abuse of discretion as equivalent: There is no single abuse of discretion standard. The abuse of discretion standard encompasses a number of different standards of review.[76] At one end are decisions over which the appellate courts give almost complete deference—for example, a district court's decision regarding when to schedule a trial.[77] At the other end are decisions affording almost no deference, such as a decision to issue a preliminary injunction, which an appellate court will hold to be an abuse of discretion if it thinks that the district court made a mistake in entering the injunction.[78] Between these two extremes is a range of standards of review of varying deference.[79] The reason for the various standards is that there are different

courts to review substantive decisions rendered by district courts for reasonableness.

75. This is not to say that the two standards of review cannot be similar. Reasonableness review could track abuse of discretion in several respects. For example, the law is settled that a court abuses its discretion not only if it inappropriately applies the law, but also if its decision is based on an error of law. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Reasonableness review likewise could logically have procedural and substantive components—a sentence may be unreasonable not only if it is unreasonable in length, but also if the district court made legal errors in imposing the sentence. *See Gall*, 128 S. Ct. at 597.

76. *See* EDWARDS & ELLIOTT, *supra* note 63, at 68 ("Abuse of discretion can thus be fairly characterized as cover[ing] a family of review standards . . . whose members differ greatly in the actual stringency of review.") (internal quotation omitted); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982) ("There are a half dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650–53 (1971); *see also* Calderon v. Thompson, 523 U.S. 538, 567 (1998) (Souter, J., dissenting) ("It is true, of course, that the variety of subjects left to discretionary decision requires caution in synthesizing abuse of discretion cases."); 1 CHILDRESS & DAVIS, *supra* note 72, § 4.21, at 4-135.

77. *See, e.g.*, Tolefree v. Cudahy, 49 F.3d 1243, 1244 (7th Cir. 1995) (discussing a "judge's untrammeled discretion over managerial and other ministerial details of the judge's work").

78. *See, e.g.*, United States v. Carney, 387 F.3d 436, 449 n.9 (6th Cir. 2004) ("An abuse of discretion occurs 'when the reviewing court is firmly convinced that a mistake has been made. A district court abuses its discretion . . . when it improperly applies the law . . . .'" (quoting Romstadt v. Allstate Ins. Co., 59 F.3d 608, 615 (6th Cir. 1995))); White v. Honeywell, Inc., 141 F.3d 1270, 1276 (8th Cir. 1998) ("[C]onsidering the totality of the circumstances, we respectfully disagree with the court's ultimate conclusion, find that a mistake has been made, and determine that the court abused its discretion in excluding the proffered statement."); Wilson v. Office of Civilian Health and Med. Programs of Unif. Servs., 65 F.3d 361, 363–64 (4th Cir. 1995) ("With respect to injunctive relief, '[w]hat we mean when we say that a court abused its discretion, is merely that we think that [it] made a mistake.'" (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 814 (4th Cir. 1991))) (alteration in original).

79. *See* 1 CHILDRESS & DAVIS, *supra* note 72, § 4.21, at 4-137 ("It could be said, then, that in run-of-the-mill discretionary calls, review applies differently by the context, facts, and factors."); Friendly, *supra* note 76, at 764. The difference in standards of review can have a substantial effect on the outcome of an appeal. Consider the issuance of a preliminary injunction, which is subject to the most rigorous form of abuse of discretion review. Even if the issuance of such an injunction was reasonable, an appellate court will deem it to be an abuse of discretion if the appellate court would not have issued the injunction in the first instance.

reasons for deferring to the decisions of the district court.[80] Sometimes the district court is better situated than the circuit court to resolve the issue because the evidence underlying the decision is not readily gleaned from the record.[81] Sometimes there is no general rule of decision either because the law provides no constraints on the district court's discretion[82] or because the decision depends on many divergent considerations that cannot easily be captured in a general rule.[83] And sometimes deferential review may preserve judicial resources by discouraging litigants from "pursuing marginal appeals."[84] When all these considerations point in favor of discretion—as is the case with managerial decisions such as when to set the date for trial—greater discretion is warranted;[85] by contrast, less deference is given when the various considerations point in different directions.[86]

Reasonableness review is *one type of* review on the abuse of discretion spectrum,[87] and it falls on the more deferential side of the scale.[88] Thus,

80. School Dist. v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 675 (7th Cir. 2002) ("[T]he actual amount of deference given the finding of a lower court or an agency will often depend on the nature of the issue."); Friendly, *supra* note 76, at 764–65; *see also* EDWARDS & ELLIOTT, *supra* note 63, at 70 ("[T]he bounds of discretion are determined, in significant part, by the reasons why discretion is delegated to district courts in the first place.").

81. *See* Pierce v. Underwood, 487 U.S. 552, 559–60 (1988); *see also* Maurice Rosenberg, *Standards of Review*, *in* RESTRUCTURING JUSTICE 30, 32–33 (Arthur D. Hellman ed., 1990); Friendly, *supra* note 76, at 759 & n.39.

82. *See* United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981); Friendly, *supra* note 76, at 765–66. When the law provides no constraints, no decision of the district court can be considered an abuse of discretion, because there are no incorrect answers. *See* Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985) ("The scope of the district court's discretion is greatest when there is no strictly legal rule of decision, when there is no standard against which to compare the district court's decision."). This was essentially the situation with sentencing law before the Sentencing Reform Act. Although appellate courts reviewed sentences for abuse of discretion, the only constraint on the length of the sentence was that the sentence must fall within the range authorized by the statute. *See* United States v. Ely, 719 F.2d 902, 906 (7th Cir. 1983) (Posner, J.). Therefore, almost any sentence within that range was acceptable. On the other hand, where the law limits a court's discretion, a court of appeals may evaluate whether the district court's decision is the acceptable product of the consideration of those factors. *Id.*

83. *See Pierce*, 487 U.S. at 561–62 (stating that abuse of discretion review is appropriate when resolution of the issue depends on "'multifarious, fleeting, special, narrow facts that utterly resist generalization'" (quoting Rosenberg, *supra* note 76, at 662)). That is because a rule that inappropriately generalizes may lead to unjust results in future decisions. United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975) (Stevens, J.) (stating that deferential review is appropriate when determination depends on considerations that "are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the district judge's] ability to deal fairly with a particular problem than to lead to a just result").

84. Deference also reduces the appellate workload by discouraging litigants from "pursuing marginal appeals" and by freeing the courts of appeals from the task of weighing the evidence and facts in the first instance. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990).

85. Tolefree v. Cudahy, 49 F.3d 1243, 1244 (7th Cir. 1995) (discussing a "judge's untrammeled discretion over managerial and other ministerial details of the judge's work").

86. *See* Friendly, *supra* note 76, at 764–68.

87. *See* 1 CHILDRESS & DAVIS, *supra* note 72, § 4.21, at 4-132 (stating that, in defining abuse of discretion, some cases focus on reasonableness); *cf.* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 390 (7th Cir. 1984) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." (quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942))).

shifting from reasonableness review to abuse of discretion has the effect of going from the specific to the general and introducing ambiguity into the law.[89] Given the occasional lack of care exhibited by the courts of appeals in applying standards of review, the Court's direction to use the abuse of discretion standard may well eventually result in opinions stating that sentences should be reviewed for clear error, or some other standard that appears in abuse of discretion cases.[90]

If the Supreme Court did intend to replace the more specific reasonableness standard with the more general abuse of discretion standard, it should carry with it several consequences. It suggests, for example, that appellate courts should review factual findings for clear error[91]—as opposed to reasonableness[92]—and legal determinations de novo. But the benefits of importing the abuse of discretion standard into sentencing review are significantly limited because, as addressed in the next subpart, the Court has diverged from ordinary abuse of discretion principles in its sentencing review decisions.

B. Divergence in Sentencing Cases from Ordinary Appellate Principles

The Supreme Court has created various legal doctrines for sentencing review that diverge from the rules that ordinarily govern appellate review. Specifically, the Court has diverged from ordinary practices in endorsing a

88. 1 CHILDRESS & DAVIS, *supra* note 72, § 4.21, at 4-133; *see also* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (unreasonableness requires "greater certainty of error" than clear error).

89. And it thus conflicts with Holmes's observation that, "The tendency of the law must always be to narrow the field of uncertainty." OLIVER WENDELL HOLMES, THE COMMON LAW 101 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). Adding to the muddle is that reasonableness review is not the most common standard of review under the abuse of discretion standard. Abuse of discretion usually calls for more searching review than what reasonableness review is ordinarily thought to entail. According to the leading treatise on the matter, abuse of discretion review usually is more akin to review for clear error. 1 CHILDRESS & DAVIS, *supra* note 72, § 4.21, at 4-137 ("It could be said, then, that in run-of-the-mill discretionary calls, review applies differently by the context, facts, and factors, but that many times the actual level of deference boils down to one similar to that used for the clearly erroneous rule. As a general proposition, then, abuse of discretion deference is closer to a clear error test than to the jury review test of irrationality.").

90. For an example of a court's conflating different standards under abuse of discretion, see *United States v. Glenn*, 473 F.2d 191 (D.C. Cir. 1972), in which the court stated that a decision is an abuse of discretion if it is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* at 196 (internal quotations omitted).

91. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 ("A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.").

92. Establishing that factual findings in sentencing be reviewed for clear error rather than for reasonableness may be more useful for its psychological effect of confirming that sentencing is similar to other areas of the law than in affecting the outcome of a case. Factual findings are rarely reasonable but nevertheless clearly erroneous. But it is not always so. For an example where the different standards did have an effect, see *Dickinson v. Zurko*, 527 U.S. 150, 162–65 (1999), where the Federal Circuit concluded that a Board's finding that a patent was obvious because of prior art was clearly erroneous but not unreasonable.

presumption of reasonableness in *Rita* and in deferring to district court policy determinations in *Kimbrough*. *Rita*'s presumption of reasonableness diverges from ordinary appellate principles in that it is optional and it purports to have no legal effect. Even stranger is that the presumption of reasonableness creates a preference for within-Guidelines sentences at the appellate level, while prohibiting such a preference in the district courts. The rule adopted in *Kimbrough*, which requires appellate court deference to district court policy determinations, also represents a divergence from ordinary principles of appellate review. Moreover, such a rule is in conflict with abuse of discretion review, which, as discussed above, the Supreme Court has stressed is the appropriate standard of review for sentencing decisions.

1. Presumption of Reasonableness

In *Rita*, the Court held that courts of appeals may adopt a presumption of reasonableness for sentences within the Guidelines range.[93] However, the Court gave few details about the legal ramifications of the presumption.[94] Ordinarily, a presumption is a legal rule that allocates a burden of proof or persuasion.[95] But the *Rita* Court indicated that its presumption of reasonableness was not of that sort. [96] Instead, the Court stated that the

93. Although allowing a presumption of reasonableness for within-Guidelines sentences, the Court in *Gall v. United States*, 128 S. Ct. 586, 595 (2007), stated that a presumption of unreasonableness for sentences outside the Guidelines range would be unconstitutional. The Court did not explain its ruling, but instead stated that the government had conceded this point in *Rita v. United States*, 127 S. Ct. 2456 (2007). *Gall*, 128 S. Ct. at 595 (citing Brief for the United States at 34–35, *Rita*, 127 S. Ct. 2456 (No. 06-5754)). But the government conceded no such thing. The government stated that, "[e]ven if" the presumption of unreasonableness for outside of Guidelines sentences were inappropriate, it would have no bearing on the question in *Rita* of whether the presumption of reasonableness were appropriate. Brief for the United States at 34–35, *Rita*, 127 S. Ct. 2456 (No. 06-5754). It is not immediately clear why a presumption of unreasonableness is unconstitutional. The presumption would present a constitutional problem only if the district court could overcome the presumption solely by making factual findings at sentencing. But given the holding in *Kimbrough v. United* States, 128 S. Ct. 558, 570 (2007), that district courts can disagree with policy determinations, there is no obvious reason why the presumption of unreasonableness could not be overcome by policy arguments given by the district court.

94. *See* John Playforth, *The Veil of Vagueness: Reasonableness Review in* Rita v. United States, 31 HARV. J.L. & PUB. POL'Y 841, 848 (2008) ("The majority offered almost no insight into what the presumption is or how it should operate.").

95. *See* BLACK'S LAW DICTIONARY 1223 (8th ed. 2004) ("A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.").

96. It is hardly surprising that the Court took pains to say that the presumption does not allocate burdens. Since the presumption arises only on appeal, it is intertwined with the standard of review. Burdens of proof and persuasion and standards of review are two distinct concepts that do not easily mesh. The Court made this point in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), in interpreting an ERISA provision, which states that a determination by plan sponsors is "presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A) (2000). The Court deemed the statute "incoherent" because it combined burdens of proof with standards of review. *Concrete Pipe*, 508 U.S. at 624–

presumption simply "reflects the fact that . . . both the sentencing judge and the Sentencing Commission . . . have reached the same conclusion as to the proper sentence in the particular case" and that this agreement "significantly increases the likelihood" that the sentence is reasonable.[97] Although the Court has, in other contexts, recognized permissive presumptions that allow but do not require particular inferences to be drawn,[98] those presumptions generally allow for the inference of a particular fact,[99] not the satisfaction of a legal standard, such as whether a sentence is reasonable.

Because it allows appellate courts to infer that within-Guidelines sentences are reasonable, the presumption has the effect of creating a bias at the appellate level towards particular substantive outcomes. Under the presumption of reasonableness, within-Guidelines sentences are more likely to be affirmed than non-Guidelines sentences. But the presumption of reasonableness is only an appellate substantive presumption. In other areas of law, appellate courts often prefer one substantive outcome over another when conducting abuse of discretion review. But that preference exists because the *substantive law* prefers that outcome.[100] In other words, a legal presumption puts a thumb on the scale in favor of a particular outcome at both the district court and circuit court levels. For example, although Federal Rule of Civil Procedure 15 grants district courts discretion over whether to allow amended pleadings, the refusal to allow an amendment is an abuse of discretion unless it is supported by a good reason, such as prejudice or bad faith.[101] Thus, an appellate court is more likely to over-

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25.

97. *Rita*, 127 S. Ct. at 2463 (emphasis omitted). The presumption of reasonableness is not the only example of a court deferring based on the agreement of two other entities. Another example is the "two-court rule," under which the Supreme Court will not review factual findings or interpretations of state law made by the district court and affirmed by the court of appeals. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 456–57 (1995); Frisby v. Schultz, 487 U.S. 474, 482 (1988); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 275 (1985). Unlike the presumption of reasonableness, however, the two-court rule does not prefer particular factual findings or interpretations; rather, it applies to all factual findings and interpretations, regardless of their substantive effect.

98. *See, e.g.*, Yates v. Evatt, 500 U.S. 391, 402 n.7 (1991), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62 (1991). Still, the term presumption is more commonly used in the context of a mandatory legal presumption. Thus, it is strange that the Court in *Rita* did not explain that it was creating a permissive presumption.

99. *See, e.g.*, *id.* (stating that a "permissive presumption" allows but "'does not require . . . the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one'" (quoting Ulster County Court v. Allen, 442 U.S. 140, 157 (1979))) (alteration in original); *see also* Transcript of Oral Argument at 29–30, *Rita*, 127 S. Ct. 2456 (No. 06-5754) (statement of Kennedy, J.) ("And when we talk about presumptions at the appellate level, that's actually a little strange in any event. You usually talk about presumptions as assisting us in finding a fact.").

100. *See* Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985) (Posner, J.); Friendly, *supra* note 76, at 768–70.

101. *See, e.g.*, Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008) (denial of request to amend is abuse of discretion unless the district court finds that the request to amend was made in bad faith, the party seeking to amend has already had an opportunity to amend, or allowing amendment would be futile or would lead to undue delay or prejudice the other party).

turn an order denying a motion to amend than one granting such a motion, but only because the substantive rule itself prefers that the district court grant such motions.

The presumption of reasonableness is not of this sort.[102] Section 3553(a) does not favor within-Guidelines sentences. If it did, district courts would be required to give more weight to the Guidelines than to the other § 3553(a) factors. Yet the Court has repeatedly stressed that district courts cannot do so.[103] Indeed, allowing district courts to adopt a presumption in favor of the Guidelines undermines the basis given by *Rita* for the presumption; if district courts were required to give more weight to the Guidelines, then a sentence would reflect not the district court's independent assessment of the § 3553(a) factors, but instead deference to the Commission.

The Supreme Court appeared to deny that the presumption creates a legal bias for within-Guidelines sentences, stating that the presumption has no "independent legal effect"[104] but merely reflects the reality that a within-Guidelines sentence is likely to be reasonable.[105] To demonstrate the conviction of its claim that the presumption would have little (or no) effect, the Court made the presumption optional, stating that circuit courts "may" choose to rely on the presumption and that the presumption is "non-binding."[106] But it is hard to accept that the presumption matters so little. If it did, circuits would not have adopted the presumption,[107] Victor Rita would not have challenged the presumption, and the government would not have defended it so vigorously. In any event, the presumption

102. *Cf.* United States v. Settles, 530 F.3d 920, 924 (D.C. Cir. 2008) ("[W]e recognize the surface incongruity of a system in which district courts cannot apply a presumption of reasonableness to a within-Guidelines sentence, while appellate courts can and do apply a presumption of reasonableness to a within-Guidelines sentence.").

103. *E.g.*, Gall v. United States, 128 S. Ct. 586, 597 (2007). *But see* United States v. Zamora-Solorzano, 528 F.3d 1247, 1251 (10th Cir. 2008) (upholding as reasonable a district court's decision to give the Guidelines "considerable weight").

104. Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

105. The Court stated that even those circuits that "declined to adopt a formal presumption . . . recognize that a Guidelines sentence will usually be reasonable." *Id.* (citing United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006); United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005)); *see also* United States v. Carty, 520 F.3d 984, 994 (9th Cir. 2008). Another possible explanation is that the Court recognized that there might be situations where the presumption would be inappropriate. But the usual way to avoid applying a presumption when the circumstances do not warrant it is to say that the circumstances rebut the presumption, not that the court has discretion to decline to apply the presumption.

106. It is odd that the Court granted review in a case involving a circuit split and then declined to resolve the split by holding that either approach is allowed. "Certiorari is usually granted to resolve differences in the circuits; but *Rita* appears to endorse differing treatment in different circuits." Posting of Carissa Byrne Hessick & F. Andrew Hessick to SCOTUSblog, Rita*: More for District Courts?*, http://www.scotusblog.com/wp/rita-more-for-district-courts (June 22, 2007, 12:23 EST).

107. *Cf.* Playforth, *supra* note 94, at 849 n.52 ("[T]he Court's understanding of the presumption differs from the understandings of the Fourth and Seventh Circuits that the presumption shifts the burden to the defendant.").

does have legal effect; it creates a shortcut allowing the courts of appeals to conduct a less-searching review of sentences that are within the Guidelines.

In this light, it becomes clear that making the presumption optional has important consequences. Ordinarily, courts do not have discretion over whether to apply a presumption.[108] If the facts triggering the presumption are met, the presumption applies, though it may be rebutted. Courts cannot decline, for example, to apply the common law presumption of death if a person has been absent for seven years, even though the presumption may be rebutted by evidence that the absentee is still alive.[109]

Making the presumption optional gives appellate courts leeway in determining how they will evaluate within-Guidelines sentences. It empowers the appellate courts, to some degree, to choose what standard of review they will apply in reviewing a within-Guidelines sentence. Courts that apply the presumption will view within-Guidelines sentences more deferentially; those that do not will give within-Guidelines sentences a closer look. Needless to say, that sort of disparity is not a usual feature of appellate review.

Moreover, the Court's conclusion that a sentence is extremely likely to be reasonable if it is within the Guidelines is a reason to require the presumption, not to make it optional.[110] Under the per se rule in antitrust, for example, there is an irrebuttable presumption that certain conduct that has a high "probability of anticompetitive consequences" violates the antitrust laws.[111] In deciding not to require the adoption of the presumption of reasonableness because there is a high probability that a court would find the sentence reasonable without the presumption, *Rita* turns the ordinary practice on its head.

Rita augmented the courts of appeals' power to choose the level of scrutiny by not providing any guidance for when the presumption should be applied. What is more, the *Rita* Court did not specify whether the optional status of the presumption means that it may be adopted on a circuit-by-circuit or case-by-case basis.[112] The Court's failure to identify any fac-

108. This is not an absolute rule. As noted above, courts have recognized permissive presumptions in other contexts. *See supra* notes 98–99 and accompanying text.

109. Fuller *ex rel*. Estate of Cornwell v. AFL-CIO, 328 F.3d 672, 674 (D.C. Cir. 2003).

110. *See* PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 1309 (5th ed. 2005) ("The most common reason for the recognition of a presumption is a strong probability that the presumed fact is true.").

111. *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 37 (2006). Of course, unlike the presumption of reasonableness, the per se rule is a substantive presumption. However, that difference does not undermine the point that a presumption is appropriate when the presumed fact is extremely likely to be true.

112. That *Rita* made the presumption non-binding suggests that the Court intended a case-by-case approach because it allows an appellate court to reject the presumption in any given case. But as discussed *infra*, the Ninth Circuit, in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008), disagreed with this view, rejecting the presumption wholesale.

tors relevant to determining whether to apply the presumption leaves the circuit courts with broad discretion to invoke the presumption when they see fit.[113] The circuit courts themselves have likewise not identified appropriate factors relevant to determining whether to employ the presumption. The only court to have addressed the issue following *Rita* is the Ninth Circuit.[114] In *United States v. Carty*, the Ninth Circuit, sitting en banc, declined to adopt a presumption of reasonableness, explaining that the presumption is unnecessary because a Guidelines sentence is likely to be found reasonable without the presumption.[115] But this reasoning applies to all within-Guidelines sentences and therefore suggests that the presumption is not applicable for *all cases*.[116] The Ninth Circuit's reasoning therefore is difficult to square with *Rita*'s decision to allow courts to adopt the presumption.[117] Thus, to this point, no court has identified the salient considerations for determining whether to apply the presumption in a particular case.

There are several situations where a presumption of reasonableness for a within-Guidelines sentence would seem to be inappropriate. One is where a district court concludes that the case before it is typical and, without weighing the § 3553(a) factors, imposes a Guidelines sentence by merely relying on the Commission's determination that the Guidelines sentence is a proper sentence in the typical case.[118] In that situation, the

113. *Rita*'s failure to provide any legal standards does not mean that there should not be standards. Courts have power to render judgment according to law. Even when courts have discretion, they cannot decide to act on whim. *See, e.g.*, Martin v. Franklin Capital Corp., 546 U.S. 132, 139–40 (2005); United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (discretion gives a court power to act according "not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles"). Although there are exceptions to the rule, those exceptions tend to involve decisions about jurisdictional matters, such as the Supreme Court's decision whether to grant certiorari, not situations where, as with the presumption of reasonableness, the discretionary decision affects a party's substantive rights.

114. Before *Rita*, seven circuits had adopted the presumption, and four circuits had rejected it. Rita v. United States, 127 S. Ct. 2456, 2462 (2007). Those circuits have not changed their law in light of *Rita*—though that may be due to litigants not seeking such a change—and they have not provided any discussion of *Rita*'s decision to make the presumption optional.

115. *Carty*, 520 F.3d at 994 (9th Cir. 2008) ("A 'presumption' carries baggage as an evidentiary concept that we prefer not to import. An appellate presumption, in any event, does little work; even in jurisdictions where reasonableness is presumed, the presumption is not binding, it does not shift the burden of persuasion or proof, and it lacks 'independent legal effect.'").

116. *Id.* at 996 (Silverman, J., concurring) (chastising the majority for declining to adopt the presumption "not just in *this* case, but in *all* cases in this circuit").

117. *Cf. id.* at 997 ("With all due respect, it does not matter that the majority thinks that a presumption of reasonableness on appeal carries too much 'baggage,' as they put it. What matters is what the Supreme Court thinks, and the Supreme Court thinks that 'the appellate court *may*, but is not required to, apply a presumption of reasonableness.'" (quoting Gall v. United States, 128 S. Ct. 586, 597 (2007))).

118. Unfortunately, part of the Court's opinion in *Rita* could conceivably be read as endorsing the presumption in such circumstances. *See Rita*, 127 S. Ct. at 2468 ("Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical.").

district court has not concluded based on its independent judgment that the sentence is appropriate under § 3553(a), but instead has deferred to the Commission's determination.[119] Likewise, the presumption should not apply if a district court imposes a Guidelines sentence based not on its independent determination that a Guidelines sentence reflects an appropriate weighing of the § 3553(a) factors, but instead on its desire to be affirmed by the court of appeals.[120] *Rita* acknowledged that the district courts might be more inclined to impose Guidelines sentences in circuits that have adopted the presumption.[121] But the Court failed to explain how the presumption would be valid in those situations, and it is difficult to see how the presumption would be valid, at least under the justification given by the Court.[122]

The presumption also should not apply when the district court disagrees with the Guidelines, but nevertheless imposes a within-Guidelines sentence based on the particular facts of the case. For example, suppose the Guidelines prescribe a range of 100–110 months. Suppose further that the district court thinks that the Guidelines are too harsh and that the appropriate range in the average case is 50–60 months; however, the court concludes that this defendant deserves a higher than ordinary sentence, and so, based on the specific facts of the case, the court imposes a sentence of 100 months. In that situation, the sentence is a result of the district court's determination that the case is atypical. And because the case is atypical, presumably the Commission would have determined that a Guidelines sentence is inappropriate. In that circumstance, the district court would essentially be imposing a non-Guidelines sentence that happens to fall within the Guidelines range.

Finally, the presumption should not apply when the Guidelines range itself is not the product of a balance of the § 3553(a) factors.[123] In that

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119. *See* United States v. Jones, 531 F.3d 163, 170 (2d Cir. 2008); *see also* United States v. Phinazee, 515 F.3d 511, 522–23 (6th Cir. 2008) (Merritt, J., dissenting) ("[T]he sentence for Phinazee is beyond the pale of reason. . . . [I]n light of the sentencing judge's reasonable statement to Phinazee from the bench that based on considerations of 'rehabilitation' and 'incapacitation' alone, Phinazee deserved only a short sentence. But the sentencing judge then turned around and said that based on 'retribution' and 'general deterrence,' the judge felt bound to 'defer to the pronouncements of the Sentencing Commission.' . . . This deference by the judge and the panel majority is contrary to my understanding of the law post-*Blakely* and *Booker*.") (citations omitted).

120. Of course, in most cases where a district court imposes a Guideline sentence to avoid reversal, there is unlikely to be clear evidence of that motivation. The only evidence is likely to be the absence of a substantial analysis of the district court into the § 3553(a) factors.

121. *Rita*, 127 S. Ct. at 2467 ("Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences.").

122. *See supra* text accompanying note 97.

123. *Cf.* Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."). Oddly, the Court suggests that the Guidelines range is most likely to be reasonable when the range was a result of the Sentencing Commission's empirical process. This is odd not only because

situation, the Commission's recommended sentencing range is no different than a sentencing range proposed by a man on the street. And just as an agreement between the district court and the man on the street does not warrant the presumption of reasonableness, so too the agreement between the district court and a guideline that is not the product of a § 3553(a) balance does not warrant deference.[124]

2. Policy Determinations and Other Legal Questions

One of the basic features of abuse of discretion review is that, although courts of appeals review factual findings and applications of law to fact deferentially, they review purely legal determinations de novo. In *Kimbrough*, however, the Supreme Court indicated that this feature of abuse of discretion review does not always apply to sentencing review.[125]

Derrick Kimbrough was convicted of conspiring to distribute more than 50 grams of crack. Under the Guidelines, a crack offense carries the same penalty as an offense involving 100 times as much powder cocaine.[126] Thus, had Kimbrough's offense been for a comparable amount of powder cocaine, his Guidelines range would have been only 97–106 months, rather than the 228–270 months he faced. The district court refused to impose a within-Guidelines sentence based on its conclusion that the disparity between cocaine and crack was unwarranted and sentenced Kimbrough to 180 months of imprisonment.[127]

The Supreme Court upheld the sentence. It explained that, after *Booker*, district courts are not bound by the Commission's determinations of the appropriate sentence in the average case.[128] The Court said that the appellate courts may overturn a sentence based on disagreement with the

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it elevates the Commission's empirical process above the policy choices of Congress, *see* Stith, *supra* note 40, at 1490–92, and because the empirical process was significantly flawed, *see id.*, but also because this process entirely excluded any balancing of the seriousness of the offense or the need for adequate deterrence (or any other § 3553(a) factor). *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988) ("Faced, on the one hand, with those who advocated 'just deserts' but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.").

124. *Cf.* United States v. Moore, 518 F.3d 577, 580 (8th Cir. 2008), *rev'd*, No. 07-10689, 2008 WL 4550138 (U.S. Oct. 14, 2008) ("[T]he Sentencing Commission's long-standing opposition to the 100:1 [crack to powder cocaine] ratio provides some basis for not applying our normal presumption that a sentence within the advisory guidelines range is reasonable.").

125. *Kimbrough*, 128 S. Ct. at 576.

126. *Id.* at 564 (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2007)).

127. *Id.* at 565.

128. *Id.* at 570 ("The Government acknowledges that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" (quoting Brief for the United States, *supra* note 59, at 16)) (alteration in original).

Guidelines only if the disagreement is the product of the district court's unreasonable balance of the § 3553(a) factors.[129] The Court's analysis suggests that the courts of appeals cannot prescribe appropriate ranges for crimes in run-of-the-mill cases; they may evaluate only whether the sentencing range in the run-of-the-mill case given by the district court is unreasonable in light of § 3553(a).

Kimbrough's indication that an appellate court should defer to the district court's policy conclusions about what the appropriate sentencing range should be for run-of-the-mill crack offenses appears to be a departure from the ordinary practice under abuse of discretion review regarding legal conclusions.[130] Appellate courts ordinarily review these sorts of district court policy determinations de novo.[131] That is because policy determinations, at least in the sense used in *Kimbrough*, are legal determinations. It is a determination—based on policy considerations—of the appropriate legal standard. It is not relevantly different from, say, the determination whether to hold a driver to a standard of negligence or strict liability for any injuries he causes—a determination that depends not on the specific facts of the case, but on a balance of policy considerations such as

129. *Id.* at 574.

130. It is not surprising that *Kimbrough* held that district courts may disagree with the policy determinations set forth in the Guidelines. The whole point of the *Booker* remedy was to permit district courts to sentence outside the Guidelines based on their own consideration of the § 3553(a) factors. In limiting district court judges' authority to impose above-Guidelines sentences to situations where a district court identified facts and circumstances *particular* to the individual defendant which warranted a non-Guidelines sentence, appellate courts prior to *Kimbrough* were, in effect, requiring the sort of judicial factfinding that the Supreme Court held unconstitutional in *Booker* and *Blakely*. *See, e.g.*, United States v. Cavera, 505 F.3d 216, 223 (2d Cir. 2007) ("We have cautioned the district courts against misapplying their sentencing authority to make policy decisions relating to an entire class of offenses."); United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006) ("[O]n appellate review, we will view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants."); Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 DENV. U. L. REV. 79, 90 (2007) ("With respect to policy disagreements with the guidelines, it is one thing to permit trial courts (or courts of appeals) to register wholesale objections to a guideline and effectively take on the task of writing a new one; it is another thing to permit a district court to explain not why a guideline has no conceivably legitimate application, but why its application makes little sense in that case."); *see also* Hessick & Hessick, *supra* note 45, at 174 ("In prohibiting district courts from imposing sentences outside the guideline range for offenders whose history, characteristics, and offense details resemble those of the typical defendant, the courts of appeals are denying the more typical offenders the right to have the jury find the existence of any fact that district courts used in their Guidelines calculation to increase base offense levels.").

131. Another example of where an appellate court reviews policy determinations de novo is where a court refuses to enforce a contract as against public policy. *E.g.*, MacPhail v. Oceaneering Int'l, Inc., 302 F.3d 274, 278 (5th Cir. 2002); Reeder v. Am. Econ. Ins. Co., 88 F.3d 892, 894 (10th Cir. 1996); Monarch Life Ins. Co. v. Elam, 918 F.2d 201, 204 n.4 (D.C. Cir. 1990); Cross v. Am. Country Ins. Co., 875 F.2d 625, 628 (7th Cir. 1989), *overruled by* Kaplan v. Pavalon & Gifford, 12 F.3d 87 (7th Cir. 1993). To be sure, appellate courts sometimes defer to district courts' determination of what factors are pertinent to a legal determination. *See* Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 215. But it is one thing to defer to a determination that a particular fact matters to an analysis and quite another to defer to a default rule that applies to all cases.

keeping the roads safe, compensating those who are injured, and avoiding overdeterring people from driving.[132]

After *Kimbrough*, district courts have the power to make policy determinations about how long a sentence should be for a particular crime in the average case. Such a determination sets forth a general rule, independent of specific facts, for the amount of punishment that should be meted out for a particular crime.[133] Because they are legal determinations, these policy determinations would ordinarily be subject to de novo review, not the deferential standard espoused in *Kimbrough*.[134]

Kimbrough's deference to substantive sentencing policy determinations is not the only instance of deference to purely legal determinations. At least one appellate court has deferred to the weight a district court assigned to the various § 3553(a) factors.[135] This holding may be in keeping with the analysis of *Kimbrough*, but it similarly departs from the usual practice under abuse of discretion review. Section 3553(a) does not prescribe an order of importance for its various factors. Whether one factor should get precedence above the rest in all cases is a legal determination. Granting district courts leeway on how to value the different factors would mean that different courts sentence under different rules of law. One court might heavily value the reduction of disparity, for example, while another

132. Indeed, all laws reflect a decision to promote certain policies—so long as policy is defined loosely enough to include not only social and economic goals but also abstract principles of justice and fairness. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 372 (1975); *see also* Gore v. United States, 357 U.S. 386, 393 (1958) ("[T]he proper apportionment of punishment . . . [is a] question[] of legislative policy."); Lee, *supra* note 4, at 13 n.70 ("Questions of law consist of conclusions about the existence and content of governing legal rules, standards, and principles.") (internal quotation omitted).

133. To be sure, the application of a legal standard to a particular set of facts involves in some sense a policy determination, and determinations of this sort sometimes are not subject to de novo review, as in the case of Rule 11 sanctions, *see* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403–05 (1990), though they often are, *see, e.g.*, Wilson v. Belin, 20 F.3d 644, 648–49 (5th Cir. 1994) (de novo review of multi-prong test whether personal jurisdiction exists over a defendant); United States v. Barnhart, 980 F.2d 219, 222 (3d Cir. 1992) (de novo review of multi-prong test whether procedural due process satisfied). But the reason that appellate courts deferentially review those policy determinations is that they are fact specific. By contrast, the policy determination in *Kimbrough* establishes a generally applicable rule and is independent of the facts of the case.

One circuit has recently read *Kimbrough* as allowing district courts to disagree with Guidelines policies only after "conducting an *individualized assessment* based upon the particular circumstances of a defendant's case." United States v. Spears, 533 F.3d 715, 717 (8th Cir. 2008) (en banc). However, this reading is clearly inconsistent with the Court's reasoning in *Kimbrough* and its other recent sentencing cases.

134. By contrast, consistent with traditional abuse of discretion review, the Court has instructed courts of appeals to defer to district courts' conclusions of facts and application of the law to those facts in the sentencing context. *See* Gall v. United States, 128 S. Ct. 586, 597–98 (2007).

135. *See* United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008) ("We may not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo. Instead, we must 'give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" (quoting *Gall*, 128 S. Ct. at 597)).

might most heavily favor parsimony. To be sure, appellate deference makes sense when the specific facts of a particular case lead a district court to weigh a single factor more than the rest. That conclusion is fact specific, and the district court is in a better position than the appellate court to make that determination.[136] But appellate deference does not seem warranted for district court determinations to give a particular § 3553(a) factor more or less weight as a general matter.[137]

III. EXPLAINING THE DEVIATION FROM ORDINARY PRINCIPLES OF APPELLATE REVIEW

There is an obvious question following *Rita* and *Kimbrough*—why did the Supreme Court deviate from the ordinary principles of appellate review in those cases?[138] *Booker*'s constitutional holding—more precisely, the tension between *Booker*'s constitutional holding and *Booker*'s remedy—is likely the source of the divergence between ordinary appellate review and sentencing appellate review.

Booker's constitutional holding found the mandatory Guidelines system offensive because a judge could increase a sentence above the maximum authorized by the Guidelines only if an increase was supported by the judge's factual findings.[139] The remedy adopted in *Booker* was to leave sentencing to district court discretion by making the Guidelines advisory and to promote the uniformity intended by Congress through appellate review for reasonableness.[140]

Booker's remedy is incompatible with its constitutional holding. This incompatibility is most apparent in those cases where, based on the judge-found facts additional to those found by the jury, an appellate court upholds a sentence that it otherwise would have found unreasonable.[141] As

136. *See Cooter & Gell*, 496 U.S. at 403.

137. It is not clear whether the Tenth Circuit in *Smart* intended such general deference or whether the deference was confined to weight accorded based on particular findings. *See Smart*, 518 F.3d at 808.

138. *Gall*, by contrast, does not appear to depart from ordinary principles of appellate review, though it is interesting to note that, contrary to the Court's claim in *Gall*, abuse of discretion review does not *compel* the rejection of the proportionality test. Appellate courts often limit district court discretion through substantive preferences, *see supra* text accompanying notes 100–01, and there is no reason why a court could not impose a procedural rule, such as the proportionality test, similarly to limit district court discretion.

139. United States v. Booker, 543 U.S. 220, 232 (2005) (noting that the Sixth Amendment "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" (quoting Blakely v. Washington, 542 U.S. 296, 303 (2004))).

140. *See supra* text accompanying notes 25–32. *But cf.* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1117 (2008) ("After *Booker* . . . the purpose of appellate review shifted. Rather than reviewing the reasonableness of departures in order to ensure uniformity, the courts of appeals were charged with the less defined task of reviewing the reasonableness of sentences themselves.").

141. This situation seems most likely to arise where a Guidelines provision calls for a drastic ad-

Justice Scalia explained in his *Rita* concurrence, "[T]here will inevitably be *some* constitutional violations under a system of substantive reasonableness review."[142]

This incompatibility of the constitutional holding and the remedy is not limited to cases involving significant factual findings. The *Booker* remedy is fundamentally schizophrenic in that it attempts to increase district court discretion in order to avoid Sixth Amendment problems, but at the same time it seeks to preserve uniformity through appellate review, which by its nature is a limitation on district courts.[143] All forms of appellate review serve to restrict or guide the discretion of district courts, both in the case under review and in future cases. Because district court discretion was the chosen remedy to deal with the constitutional holding in *Booker*, any limitation of that discretion runs the risk of violating the Sixth Amendment.[144]

The tension between appellate review and district court autonomy explains the presumption of reasonableness adopted in *Rita*. Appellate courts usually achieve uniformity by prescribing substantive legal rules to apply to all similarly situated individuals.[145] But adopting a substantive preference for a Guidelines sentence would essentially be a return to the pre-*Booker* system—a district court would be bound to give a Guidelines sen-

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justment to the offense level based on facts that do not constitute part of the offense of conviction—for example, Guidelines providing for increases based on acquitted conduct or loss calculations.

142. Rita v. United States, 127 S. Ct. 2456, 2478 (2007) (Scalia, J., concurring in part and concurring in the judgment). Indeed, such a case appears to have arisen recently in the Sixth Circuit. *See* Marlowe v. United States, 77 U.S.L.W. 3221 (Oct. 14, 2008) (Scalia, J., dissenting from denial of cert.).

143. *See* Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 102 NW. U. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102512 ("*Booker*, *Rita*, and especially *Gall* signal that sentencing courts should have greater discretion in sentencing . . . . On the other hand, these cases required courts of appeals to review sentences for reasonableness even if sentencing courts have calculated sentences properly within the Federal Guidelines. . . . Why would the Court emphasize judicial discretion in one sphere while seemingly constricting it in another?"); Sutton, *supra* note 130, at 79 (noting the "tension between" *Booker*'s two objectives: "individualized sentencing and consistency"); *see also* Stith, *supra* note 40, at 1485 ("Appellate review for reasonableness does not make the Guidelines *binding*, but it does make them . . . legally meaningful."); *cf.* Stephanos Bibas & Susan R. Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105503 ("How can sentencing law simultaneously pursue centralized uniformity (to reduce disparity) and decentralized judicial discretion (to individualize sentences)?").

144. *See e.g.*, Bibas, Schanzenbach & Tiller, *supra* note 143, at 3 ("*Booker* left unclear exactly how loose appellate review must be to satisfy the Sixth Amendment."); Frank O. Bowman, III, *"The Question Is Which Is to Be Master—That's All":* Cunningham, Claiborne, Rita*, and the Sixth Amendment Muddle*, 19 FED. SENT'G REP. 155, 156–58 (2007) (suggesting that, if district court discretion is to serve as an effective remedy to the "bright-line rule" announced in the *Apprendi-Blakley-Cunningham* line of cases, then "the exercise of that discretion cannot be subject to the rule of law," including "appellate authority to reject some sentences as unreasonable correlations between facts and outcomes").

145. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (de novo review "helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself").

tence unless it determined, based on the specific facts of the case, that a Guidelines sentence was inappropriate—and consequently would run afoul of the Sixth Amendment.[146] The presumption of reasonableness avoids this problem by creating an appellate preference for a Guidelines sentence instead of a substantive one, though in practice the presumption no doubt creates a substantive bias for district courts to render within-Guidelines sentences by making such sentences more likely to be affirmed than sentences outside the Guidelines.[147]

The attempt to preserve the remedy adopted in *Booker*, while avoiding running afoul of the Sixth Amendment, is likewise responsible for *Kimbrough*'s indication that appellate courts should defer to district court policy determinations.[148] De novo appellate review of substantive sentencing policy determinations would functionally reinstate the mandatory system condemned in *Booker* because it would inevitably result in binding legal rules defining sentencing ranges.[149] Deferential review largely avoids this problem. Instead of being called upon to articulate rules about the appro-

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146. *See* Hessick & Hessick, *supra* note 45, at 174.

147. *See* Alexander P. Robbins & Lynda Lao, The Effect of Presumptions: An Empirical Examination of Inter-Circuit Sentencing Disparities After *United States v. Booker* 1 (Nov. 4, 2007) (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027541) ("[A] circuit's adoption of a presumption of reasonableness decreases the frequency of below-Guidelines sentences by less than one percent, although this result is statistically significant."); *see also Rita*, 127 S. Ct. at 2467 ("Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences."); *id.*. at 2488 (Souter, J., dissenting) ("What works on appeal determines what works at trial, and if the Sentencing Commission's views are as weighty as the Court says they are, a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range.") (citation omitted).

148. District courts are not necessarily the best body for setting substantive sentencing policy. They lack the expertise and resources of the Sentencing Commission, and unlike the courts of appeals, they cannot issue binding rules. Granting district courts power to make substantive sentencing policies means that each district court may choose a different policy. Indeed, the deference given to policy decisions and the presumption that certain sentences are reasonable seems to treat the district courts as administrative agencies.

149. As Justice Scalia has explained:

> Suppose in this case the court of appeals instead of disallowing the lower sentence, approved it? And then in the next case that comes up involving what was the small amount of equivalent, 5.26 grams of cocaine powder rather than crack, okay? Suppose in the next case it would have been 30 grams of powder. And the district court judge once again departs just the way the departure was here, and the court of appeals says no, that departure is unreasonable.
>
> You now have circuit law which says 30 grams, you get the guidelines sentence; 5.26 grams, you're entitled to a lesser sentence. Okay?
>
> Why isn't—why haven't we fallen back into the same problem that produced *Booker/Fanfan*? You have fact findings being made by the judge. It's a judge who decides whether it's 30 grams or 5.26 grams. What difference does it make whether that factual difference produces an entitlement to a sentence on the basis of the guidelines or on the basis of an opinion by or a series of opinion [sic] by a court of appeals? Isn't the Sixth Amendment equally violated?

Transcript of Oral Argument at 25–26, Claiborne v. United States, 127 S. Ct. 2245 (2007) (No. 06-5618); *see also* Bibas & Klein, *supra* note 143, at 8 (questioning whether "a common-law process of accretion [will] risk hardening into an impermissibly mandatory rule").

priate sentencing range for particular crimes, courts of appeals simply evaluate whether a policy determination by the district court is reasonable. Holding that a particular determination is reasonable does not make that determination binding.[150] The approval of one district court's policy as reasonable does not mean that other district courts, or even the same district court, must apply that same policy in the future to similar cases.

One has to ask whether preserving the *Booker* remedy is worth twisting the procedural process. The doctrines of appellate review have developed for a reason. Abandoning those doctrines may have negative consequences. Consider the deference to district court policy determinations endorsed in *Kimbrough*. The principal reason that courts of appeals do not defer to district court legal determinations is to promote the fundamental rule that similarly situated people should be treated similarly.[151] That reason applies with full force to sentencing policy determinations.[152] Deferential review leaves the determination of what punishment is appropriate for a particular type of crime to the district court's discretion. Under a deferential standard, an appellate court may well uphold one district court's determination that a 50–60 month range is appropriate for a particular crime, and another district court's determination that a 70–80 month range is appropriate for the same crime. De novo review would have removed the matter from the district court's discretion and assured that defendants face the same range of penalties for committing similar crimes.[153] By leaving substantive sentencing policy to district court discretion, *Kimbrough*

150. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (holding that one reasonable interpretation does not bar agency from adopting a different, reasonable interpretation). Although holding that a particular policy determination is unreasonable limits district court discretion, it does not foreclose the district courts from making other, less radical policy determinations.

151. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001); Friendly, *supra* note 76, at 758; Rosenberg, *supra* note 76, at 643; Rosenberg, *supra* note 81, at 32–36. This is not the only reason for de novo review, though it is the most important. Another, more practical, reason is that the multiple members of the appellate panel tend to reduce prejudice that may influence a judge's decision were he sitting alone. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1647 (2003); Friendly, *supra* note 76, at 757; Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1591 (2007). This concern is particularly important in the sentencing context. Bibas, Schanzenbach & Tiller, *supra* note 143, at 17. The sentencing factors identified in § 3553(a) are vague and open-ended, and weighing them is an indeterminate exercise that may easily allow for the influence of bias. A third reason for plenary review is that appellate judges usually have more exposure to the area of the law than district judges, although this reason does not necessarily hold for sentencing since district judges decide many more sentencing issues than any given appellate judge. Gall v. United States, 128 S. Ct. 586, 597–98 (2007). However, that alone is not a basis to reject de novo review. A legal determination issued by a panel of newly appointed appellate judges is binding on even the most experienced district judge—though appellate courts may informally defer to the decisions of particularly well-respected district judges, much as they might accord deference to a well-respected legal treatise.

152. *See* Bibas, Schanzenbach & Tiller, *supra* note 143, at 25 ("Sentencing-court discretion makes sense when needed to tailor rules to case-specific facts, but it makes much less sense for recurring policy issues susceptible of rules or at least rules of thumb.").

153. *See Cooper Indus.*, 532 U.S. at 436.

sacrificed equal treatment and the rule of law in order to preserve the remedial scheme adopted in *Booker*.[154]

The presumption of reasonableness adopted in *Rita* raises different problems. One of the principal purposes of appellate review is to ensure that district court decisions are correct—or at least, in the case of deferential review, not unacceptably incorrect.[155] Determining whether a decision is acceptable requires the appellate court to conduct an independent substantive analysis. But under *Rita*'s presumption, appellate courts need not independently evaluate whether the district court's decision to impose a within-Guidelines sentence is acceptable. Instead, they may conclude without substantive analysis that the sentence is acceptable because the district court decided to impose a sentence in the Guidelines range. In other words, the presumption permits an appellate court to pronounce a sentence as acceptable simply because the district court thought it was acceptable. That hardly fulfills the appellate function of error correction and is bound to leave more unwarranted sentences in place.

The presumption also gives the impression that the Court is sacrificing principles to achieve ends. As noted earlier, appellate review usually does not favor a particular substantive outcome except to the extent that the substantive law prefers that outcome.[156] But that is not the case with the presumption of reasonableness. The presumption has the effect of favoring within-Guidelines sentences at the appellate level. By doing so, the presumption creates an end-run around the limits of the *Booker* remedy, the constitutionality of which depends on the district courts not affording the Guidelines special weight.[157] The presumption assures that, even if district courts cannot favor the Guidelines, the judiciary system as a whole favors the Guidelines, and it creates an incentive for district courts tacitly to favor Guidelines.[158] The Court's endorsement of the presumption gives the troubling impression that the Court is fashioning whatever new rules are necessary to achieve the outcomes it desires without blatantly running afoul of the Constitution.[159]

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154. Of course, allowing district courts to develop different policies may well generate a useful dialogue on appropriate sentencing policies. One of us believes that district courts have an important role to play in the articulation of substantive sentencing policy. Congress largely abrogated its role when it endorsed a laundry list of vague and conflicting policies in § 3553(a); the Commission has made policy decisions largely by fiat and without explanation; and both bodies appear far more capable of articulating aggravating sentencing factors than mitigating factors. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. (forthcoming 2008) (manuscript at 21–29, on file with author). The other of us thinks that the benefits of a dialogue are outweighed by the unfairness that results from subjecting different people to different punishment rules.

155. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 425 (1995).

156. *See supra* text accompanying notes 100–01.

157. *See supra* text accompanying notes 25, 103.

158. *See supra* note 147.

159. *See* Playforth, *supra* note 94, at 851 ("[T]he Court's solution [in *Rita*] was merely to obscure

It is important for courts to avoid the impression that they are creating rules to achieve particular outcomes, particularly in the sentencing review context. Despite the Court's claim to the contrary in *Booker*, reasonableness review of district court decisions under an advisory-Guidelines system is not the product of ordinary statutory interpretation, but is a judicial creation,[160] and the courts, therefore, are the only authority on its content. Because reasonableness review is not constrained by statute,[161] the Court must appear to be constraining itself to avoid giving the impression that it is acting on whim. No doubt, the Court's pronouncement that reasonableness review is simply review for an abuse of discretion was intended to give the impression that reasonableness review is not unbounded but instead is no different from review of other discretionary determinations. But given that sentencing review is not, in fact, identical to abuse of discretion review,[162] the Court's assertion gives the impression that the Court itself either does not understand what it has done or is trying to gloss over what it has done, neither of which is a desirable conclusion.[163]

The conflict between the Court's desire for appellate review (and the uniformity that accompanies such review) and the *Booker* remedy of increased district court discretion is also responsible for the unsettled nature of appellate review of sentences. The principal task of the Supreme Court is to clarify the law,[164] and the duty to provide clarity seems especially acute when, as is the case in sentencing, the law is the product of the Court's creation. Providing clear legal guidance is particularly important in the area of sentencing, not only because it involves important interests like liberty, but also because sentencing affects so many people.[165] Yet the Court has not succeeded in that task so far.

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both of these issues: it upheld a presumption that, at best, could give the appearance of sentencing uniformity while remaining meaningless enough so as not to violate the Sixth Amendment.").

160. *See generally* Kimbrough v. United States, 128 S. Ct. 558, 577–78 (2007) (Thomas, J., dissenting); United States v. Booker, 543 U.S. 220, 272 (2005) (Stevens, J., dissenting in part).

161. While references to reasonableness review appeared in the SRA both prior and subsequent to the adoption of the Feeney Amendment, the Court's post-*Booker* reasonableness review cannot be interpreted according to Congressional intent. Transcript of Oral Argument at 31–32, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754). That is because Congress never anticipated creating reasonableness review without mandatory Guidelines. *Cf.* Stith, *supra* note 40, at 1463 ("[R]eview of departures for 'abuse of discretion' in fact does not liberate sentencing judges to depart in a regime that by law limits departures. Since the Guidelines limited the allowable bases for departure, the 'abuse of discretion' standard amounted to something close to the usual judicial review for legal error.") (footnotes omitted).

162. *See supra* Part II.A.

163. *See generally infra* notes 194–97.

164. This is reflected in Supreme Court Rule 10, which states that a writ of certiorari ordinarily will be granted to resolve conflicts in the lower courts or to settle an important question of law. SUP. CT. R. 10; *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 236 (9th ed. 2007).

165. *See, e.g.*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2006) (indicating that more than 72,000 federal offenders were sentenced in 2006).

Although *Rita*, *Kimbrough*, and *Gall* resolved the particular questions at issue, they may prove less useful for resolving future issues because they do not acknowledge the conflict inherent in attempting to achieve both district court autonomy and appellate review. Instead, the opinions contain apparently inconsistent statements that support each of these goals. In *Gall*, for example, at the same time it purported to reject proportionality review, the Court stated that, "[I]t [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one."[166] The Court made no effort to resolve the tension between this statement—which encourages substantive appellate review of sentences outside the Guidelines range—and the Court's holding—which suggested that appellate courts should defer to district court determinations.[167]

Similar conflict is present in *Kimbrough*. There, the Court deferred to the district court's disagreement with the Guidelines' policy on crack cocaine because the Commission had not exercised its expertise in developing the guideline.[168] The *Kimbrough* Court stated that "as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'"[169] But the Court also added that "closer" scrutiny may be warranted when a district court disagrees with a guideline that is the product of the Commission's empirical process of deriving sentencing ranges based on past practice, which the Court intimated is ordinarily the case.[170] This language suggests that, for most guidelines, appellate courts ought to be more deferential in cases where a district court elects to sentence outside the Guidelines because of some fact unique to the particular case, but should be less deferential in cases where a sentence outside the Guidelines is based on policy disagreement.[171]

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

167. In resolving the case presented, the Court merely stated that although the court of appeals purported to review the district court's sentencing decision under the abuse of discretion standard, "it engaged in an analysis that more closely resembled *de novo* review." *Id.* at 600.

168. Indeed, the Commission subsequently revisited and changed the treatment that crack cocaine offenses receive under the Guidelines. After Derrick Kimbrough was convicted and sentenced, but before the Court decided *Kimbrough*, "the Commission adopted an ameliorating change in the Guidelines. The alteration, which became effective on November 1, 2007, reduces the base offense level associated with each quantity of crack by two levels. This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder." Kimbrough v. United States, 128 S. Ct. 558, 569 (2007) (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28571–72 (May 21, 2007)).

169. *Id.* at 570 (quoting Brief for United States, *supra* note 59, at 16).

170. *Id.* at 575. The Court made this comment in the context of noting that, in the ordinary case, the Guidelines will reflect a reasonable balance of the sentencing objectives identified in § 3553(a). *Id.* at 574.

171. *See id.* at 574–75 ("[A] district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.' On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect

Kimbrough did not state just how "close" appellate review should be for sentences based on policy disagreements when the Guideline in question is based on the Commission's expertise. The not-so-subtle hint is that the review should be quite close indeed. But too close of a review presents a constitutional problem by cabining district court discretion and thus effectively reinstating a mandatory Guidelines system.[172] The *Kimbrough* Court did not resolve this tension. Nor did it even address the more basic question of how the idea that policy disagreements should trigger more searching appellate review is consistent with the central feature of the *Booker* remedy that district courts must be free to sentence outside the Guidelines to comply with the Sixth Amendment.[173]

The Court's contradictory statements in *Gall* and *Kimbrough* have led to consternation and confusion in the circuit courts. Some courts have read *Gall* as requiring highly deferential review of district court decisions,[174] while others have relied on the conflicting dicta as an indication that their pre-*Gall* review practices are still appropriate.[175] Indeed, the circuits seem

§ 3553(a) considerations' even in a mine-run case." (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007))) (citations omitted).

172. *See* Bibas, Schanzenbach & Tiller, *supra* note 143, at 3; *see also supra* note 149.

173. Another issue relating to reasonableness review of policy determinations is the amount of evidence necessary to justify a district court's policy conclusion. Whether to adopt a policy usually depends on broad social conditions—so called legislative facts. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–25 (1942). Legislative facts can arise in a variety of sentencing policy contexts, such as whether one type of drug results in greater social harm than another, or whether drug dealing in urban areas poses a greater threat of harm than in rural areas. The commentary to Federal Rule of Evidence 201 explains that legislative facts ordinarily need not be established by evidence or through judicial notice; courts may take account of legislative facts based solely on a reasonable belief that they are true. *See* FED. R. EVID. 201(a) advisory committee's note. Under Rule 201, district courts may make sentencing policy decisions based on assumptions—assumptions that may be faulty—instead of evidence, and appellate courts similarly may review the reasonableness of those policy decisions based, not on evidence, but on factual assumptions that may be equally false. But there is reason to believe that the appellate courts are at least somewhat better at ascertaining legislative facts. Because appellate cases present fewer issues than cases in the district court, both the parties and the appellate judges may devote greater resources to developing those issues. Appellate courts also receive more amicus briefs, which often provide information useful to resolving legislative facts. Finally, appellate courts consist of multiple judges with different experience and knowledge. Requiring appellate courts to defer to district court policy determinations seems to ignore these, and other, institutional benefits.

174. *See, e.g.*, United States v. Smart, 518 F.3d 800, 804–09 (10th Cir. 2008) (noting that *Gall* and *Kimbrough* prohibited many of the circuit's past appellate review practices); United States v. Williams, 517 F.3d 801, 811 (5th Cir. 2008) ("We find no merit in Williams's arguments that these factors could not support a sentence outside the guidelines, although we recognize that some of our pre-*Rita*, pre-*Gall* and pre-*Kimbrough* decisions indicate otherwise.").

175. *See, e.g.*, United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008) ("[A]lthough the Court 'reject[ed] . . . an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range . . . [or] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence,' it nonetheless repeatedly emphasized that 'appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.'" (quoting Gall v. United States, 128 S. Ct. 586, 595 (2007))) (alterations in original); *see also* United States v. Langford, 516 F.3d 205, 224 (3d Cir. 2008) (Weis, J., dissenting) ("The Supreme Court confirmed that appellate courts can continue to require a strong showing to sustain a final sentence that is im-

unable to agree whether *Gall* prohibited proportionality review in general, or only a strict mathematical proportionality test.[176] As for *Kimbrough*, at least one court appears to have read the opinion as permitting almost any policy disagreement with the Guidelines,[177] while another seems to have suggested that *Kimbrough* should be limited to policy disagreements involving policies that "suffer[] from any criticisms like those *Kimbrough* identified for the crack cocaine Guidelines."[178] Other circuits have noted the limiting language but have not yet resolved whether disagreements with policies other than crack cocaine Guidelines will be afforded deference.[179]

CONCLUSION

Appellate review of sentencing after *Booker* is in a state of disarray. Although *Booker* directed appellate courts to review sentences for reasonableness, *Booker* failed to give content to that standard. The Court has attempted to provide clarity by equating reasonableness review with abuse of discretion review, but that effort may do more to confuse than to clarify, because the Court's subsequent deviations from abuse of discretion review indicate that the two are not equivalent. The problem is that the *Booker* remedy rests on two pillars that are fundamentally in tension with each other: broad district court discretion and consistency through appellate review. This tension has required the Supreme Court to develop unique doctrines of appellate review.

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posed outside the Guidelines range, but that justification can be supplied by the strength of the reasoning in the court's discussion of the § 3553(a) factors.") (citation omitted). For a detailed analysis of the inconsistent level of appellate scrutiny in the Eleventh Circuit, see Harrison, *supra* note 140, at 1137–53.

176. *Compare* United States v. Lehmann, 513 F.3d 805, 808 (8th Cir. 2008) ("[W]e may not require 'proportional' justifications for variances from the guidelines range."), *and* United States v. Bolds, 511 F.3d 568, 581 (6th Cir. 2007) ("[W]e no longer apply a form of proportionality review to outside-Guidelines sentences, which would require the strength of the justification for a departure to vary in proportion to the amount of deviation from the Guidelines."), *with* United States v. Austad, 519 F.3d 431, 435 (8th Cir. 2008) ("In light of *Gall,* we must recognize, although it is 'uncontroversial that a major departure should be supported by *a more significant* justification than a minor one,' the justification *need not be precisely proportionate*. . . . [T]he district court, in sentencing Austad, supported the upward variance with sufficient and *proportionate* justifications." (quoting *Gall*, 128 S. Ct. at 597)) (second and third emphases added) (citations omitted).

177. United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008).

178. *Pugh*, 515 F.3d at 1201 n.15.

179. *See, e.g.*, United States v. Verkhoglyad, 516 F.3d 122, 129 n.4 (2d Cir. 2008) ("Whether sentencing ranges not grounded in such data and experience warrant different consideration, particularly in light of the Supreme Court's recent decisions in *Kimbrough v. United States* and *Gall v. United States* is something that the parties have not addressed and that we need not decide to conclude that there is no merit to Verkhoglyad's sentencing challenge.") (citations omitted); United States v. Grossman, 513 F.3d 592, 597 (6th Cir. 2008) ("The extent to which a district court may offer a wholesale disagreement with a guideline as the basis for a variance remains unclear after *Kimbrough*.").

In *Rita* and *Kimbrough* respectively, the Court concluded that to preserve the *Booker* remedy, it was necessary to sacrifice the two central functions of appellate courts: error correction and lawmaking.[180] The cost of abandoning these features of appellate review for sentencing decisions, combined with the confusion that has resulted in the appellate courts, may reflect that the remedy adopted in *Booker* is simply unworkable. It may indicate that the remedy cannot achieve the uniformity necessary for its legitimacy, while at the same time maintaining the discretion necessary for its constitutionality.

Several of the other remedial options have been well hashed. The Court could abandon the quest for uniformity through appellate review, returning to the extremely limited review that was provided prior to the enactment of the Sentencing Reform Act, or even, have no review at all.[181] Or the Court could remove the role of the district judge, requiring any fact that would increase a defendant's sentence above the Guidelines range to be proved to a jury beyond a reasonable doubt.[182] Neither option would run afoul of the constitutional rule in *Booker*, and both would provide more predictable and manageable legal doctrines than the current regime. But it seems unlikely that the Court will adopt either of these approaches. The majority opinions in *Rita*, *Gall*, and *Kimbrough* each garnered more than five votes,[183] suggesting that a majority of the Court is wedded to both sentencing discretion and appellate review.

Of course, there are ways of restructuring the sentencing system without completely abandoning sentencing discretion or the quest for uniformity. One can construct any number of sentencing schemes that retain judicial discretion, achieve some level of uniformity, and avoid the constitutional problems in *Booker*—though these schemes tend to be infeasible or awkward. For example, one possibility is to change the role that appellate courts play. Instead of giving deference to the district court's decision, appellate courts could review de novo the application of the § 3553(a) fac-

180. *See generally* DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 4 (1994) ("Error correcting and lawmaking are the core appellate functions."); *accord* DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 5 (2d ed. 2006).

181. The government offered a variation on this remedy. *See* Brief for the United States at 66–70, United States v. Booker, 543 U.S. 220 (2005) (Nos. 04-104, 04-105) ("If the Court concludes that *Blakely* does apply, it should hold that the Guidelines as a whole are inapplicable to respondents' cases, and should remand for the district courts to exercise sentencing discretion within the congressional minimum and maximum terms, treating the Guidelines as advisory.").

182. *E.g.*, United States v. Booker, 543 U.S. 220, 272–73 (2005) (Stevens, J., dissenting). While one might argue that sentencing *outcomes* would be less predictable under a system of jury factfinding, the sentencing *rules* would be entirely predictable because the factfinding would translate into predetermined sentencing ranges, just as under the pre-*Booker* mandatory Guidelines system.

183. Six Justices joined the *Rita* majority, and seven Justices joined the majority opinions in *Gall* and *Kimbrough*.

tors.[184] To comply with *Booker*'s constitutional holding, the appellate decisions would have to be non-binding. Still, this scheme would promote some degree of uniformity because there are relatively few appellate judges and because panel decisionmaking tends to rein in outliers.[185] It would also preserve judicial discretion in sentencing, although it shifts that discretion from the district court to the appellate courts. But this proposal, and others like it, may create more problems than they solve. If nothing else, it would require a difficult-to-justify rule rendering these decisions non-precedential[186] and would massively increase appellate workload.

Perhaps a more plausible way of attaining the two *Booker* goals would be to retain the *Booker* remedy, but leave the task of achieving uniformity more to the Sentencing Commission than to the appellate courts. The *Booker* and *Rita* opinions both praised the Commission as an institution that works with district courts to craft sentencing policy, noting that the Commission will "collect and examine" the reasons that district courts give for departing from the Guidelines so that "it can revise the Guidelines accordingly."[187] In practice, however, the Commission largely structured its pre-*Booker* institutional role as one of authority over the district courts, responding to district court departures by enacting contrary guidelines[188] and failing to provide explanations for its policy choices.[189] If the

184. The appellate court could possibly review factual findings de novo as well. *Cf.* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984).

185. *See* Friendly, *supra* note 76, at 578. *See generally* Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (discussing how ideological diversity on panels tends to moderate decisions).

Indeed, prior to the enactment of the SRA, the Eastern District of Michigan employed a "sentencing panel" in which, prior to any sentencing, the sentencing judge conferred with two other judges, both of whom had studied the probation report, and they would make their recommendations to the district judge. *See* Symposium, *supra* note 3, at 269–70, 302.

186. Of course, one justification is that rendering the decisions non-precedential would avoid the constitutional problem in *Booker*. But that is not a good reason. The primary reason that appellate decisions are binding is to ensure similar treatment for similarly situated individuals. *Booker*'s constitutional ruling provides no basis for abandoning that principle.

187. Rita v. United States, 127 S. Ct. 2456, 2464 (2007); *see also Booker*, 543 U.S. at 263 ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process."); United States v. Jones, 531 F.3d 163, 174 n.8 (2d Cir. 2008) ("District courts' exercise of their discretion in imposing non-Guidelines sentences is critical to the ongoing development of responsible Guidelines. As the Supreme Court noted in *Rita,* the district court's 'reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.'" (quoting *Rita*, 127 S. Ct. at 2469)).

188. *See* Jean H. Shuttleworth, *Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission*, 46 VAND. L. REV. 1333, 1344 (1993) ("Although judges throughout the federal system have provided valuable feedback, the Commission has largely ignored it, particularly suggestions that the Commission take a more flexible approach in considering offender characteristics during sentencing. The Commission has not only ignored this

Commission were to change the Guidelines in response to repeated district court disagreement with particular guidelines,[190] district courts may be more likely to impose within-Guidelines sentences. Moreover, if the Commission were to explain its disagreement with those district courts that hand down below-Guidelines sentences, it might convince some judges of the correctness of its position or at least advance the dialogue regarding the appropriateness of various sentencing factors.

Even if the *Booker* remedy remains unchanged, there would be value in the Court's acknowledging the differences between ordinary principles of appellate review and appellate review in sentencing cases. The Court's current practice of stating that sentencing review is equivalent to abuse of discretion review may lead appellate courts to apply principles of abuse of discretion review that are inconsistent with the constitutional holding in *Booker*. Or even worse, the Court's insistence that sentencing review is no different than abuse of discretion review may lead to appellate courts applying the unique sentencing doctrines to other, non-sentencing cases. If the Court were to acknowledge the inherent tension between district court discretion and appellate review, it might allow circuit courts to resolve issues on their own using appellate practices as constrained by the *Booker* constitutional holding, rather than simply choosing among the Court's seemingly conflicting statements.[191]

Finally, Supreme Court transparency regarding the special challenges posed by appellate review of sentencing decisions would help the appearance of institutional credibility. The *Booker* remedy has been roundly criticized,[192] and the inconsistencies in the Court's more recent sentencing decisions have not gone unnoticed.[193] More generally, the Court's influ-

request, but it has further restricted the scope of discretionary departures by attacking those offender characteristics that judges have relied on in specific cases."); *see also* Christina Chiafolo Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 37–43 (1993) (describing the Commission's response to several types of departures).

189. *See* STITH & CABRANES, *supra* note 3, at 69 ("[T]he Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.").

190. Two good candidates for re-examination are the guideline for loss calculation for white collar offenses and the guideline for reduction for minor participants. The former has been subject to stinging critiques. *See, e.g.*, United States v. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006). As for the latter, the largest reduction available for minor participants is a four-level reduction in offense level, *see* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2007), a reduction that even the United States Government appears to acknowledge is insufficient in some cases. *See* Transcript of Oral Argument at 35, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754).

191. *See supra* notes 174–79 and accompanying text.

192. *E.g.*, Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006) (characterizing the decision as "a two-headed monster and a conceptual monstrosity"); Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006) (expressing the condemnation of the decision that the title suggests).

193. *See* Posting of Carissa Byrne Hessick & F. Andrew Hessick to SCOTUSblog, Gall *and Appel-*

ence depends in large part on the reasoning in its written decisions.[194] When that reasoning suffers from obvious inconsistencies or other shortcomings, the Court itself suffers as an institution—especially where those inconsistencies could potentially be interpreted as a lack of candor on the part of the Court.[195]

Acknowledging the tension between the Court's two choices in *Booker*—the choice to restore judicial discretion to district judges and the choice to retain appellate review—would have several important ramifications. First, it could help to clarify when appellate review of sentencing decisions must depart from ordinary sentencing principles, allowing the circuits to resolve issues that require them to balance the constitutional need for discretion with the congressional desire for appellate review. Second, it would avoid introducing any ambiguity into ordinary appellate practice, as appellate courts would understand that sentencing review is not equivalent to ordinary abuse of discretion review. Finally, it would increase transparency in the Court's current sentencing jurisprudence. At present, the ambiguity and inconsistency in *Booker* and its progeny could be interpreted as either ineptitude or a failure to appreciate consequences.[196] Acknowledging the tension between district court discretion and appellate review would force the Court to defend the balance that it has struck, and that defense not only would help foster a more coherent law of appellate sentencing decisions, but also would enhance the public image of the Court as an institution that holds itself accountable.[197]

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late Court Transparency, http://www.scotusblog.com/wp/commentary-and-analysis/commentary-gall-and-appellate-court-transparency (Dec. 11, 2007, 9:59 EST) (expressing concern that "this language may have sufficiently muddied the water that it will result in a 'business as usual' approach to reversing lenient sentences in some circuits"); Posting of Michael O'Hear to PrawfsBlawg, *Another Sentencing Win for Breyer*, http://prawfsblawg.blogs.com/prawfsblawg/2007/12/another-sentenc.html (Dec. 10, 2007, 16:34 EST).

194. Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 156 (2005) ("Courts—especially appellate courts—operate largely outside the public eye. Because nearly all of the decisional process is hidden from view, the judiciary's legitimacy and authority depend largely on its ability to persuasively explain and justify its decisions. The process of explanation and justification, of course, occurs largely through the issuance of written opinions, which provide the almost exclusive basis for holding judges accountable and assessing their performance in general.").

195. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[L]ack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges."); *see also* Oldfather, *supra* note 194, at 157.

196. *Cf.* Shapiro, *supra* note 195, at 731 ("A typical law review note, or even a leading article, will address an important judicial decision, or series of decisions, in an effort to show that the court has misconceived the problem, the solution, or both. Implicit in the analysis is a hint that whoever wrote the opinion was too inept, or perhaps too devious, to reveal what was really at stake.").

197. Oldfather, *supra* note 194, at 156 ("[W]ritten opinions . . . provide the almost exclusive basis for holding judges accountable and assessing their performance in general. Only when the reasons provided by a court are those that actually motivated its decision can the public properly debate the appropriateness of the decision, legislatures react to it, and private actors structure their affairs to comply with it.").