Is Substantive Review Reasonable? An Analysis of Federal Sentencing in Light of *Rita* and *Gall*

James L. Fant[†]

[†] J.D. Candidate, 2009, Seton Hall University School of Law; B.A., Boston University, magna cum laude, 2003. I would like to thank my parents for their support and guidance and the diligent members of *Seton Hall Circuit Review*. A special thanks to my loving wife Laura for reading countless drafts of this comment.

I. INTRODUCTION

The *New York Times* recently reported that the United States incarcerates one in 100 adults.[1] This staggering figure brings into perspective the social policies surrounding sentencing jurisprudence in this country and the paramount importance of ensuring that the judiciary can effectively implement penological policy in a constitutional manner. Recently, the Supreme Court has recognized the inherent collision between the mandatory application of the United States Sentencing Guidelines ("the Guidelines") and the Sixth Amendment right to a jury.[2] The heart of the debate centers on who should ultimately decide the factual basis for increasing a criminal defendant's sentence and what policies should be taken into account when crafting an individualized sentence.[3] The serious practical implications of this jurisprudential debate take on an increasing sense of urgency against the backdrop of an exploding prison population.[4] The Supreme Court recently addressed

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[1] Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds*, N.Y. TIMES, Feb. 29, 2008, at A14.

[2] *See* United States v. Booker, 543 U.S. 220 (2005).

[3] *See generally* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999).

[4] The prison population grew last year by 25,000 people, bringing the total prison population to almost 6 million. The last three decades has seen the total prison population nearly triple. The report also found that "[i]ncarceration rates are even higher for some groups. One in 36 adult Hispanic men is behind bars, based on Justice Department figures for 2006. One in 15 adult black men is, too, as is one in nine black men aged 20 to 34." Liptak, *supra* note 1.

some of these issues, albeit narrowly, in *Rita v. United States*[5] and *United States v. Gall*.[6]

In *Rita*, Justice Souter began his dissent with what is perhaps an understatement: "[a]pplying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point."[7] Indeed, since the Supreme Court issued its landmark sentencing decision in *United States v. Booker*[8] changing the Guidelines from mandatory to advisory, the exact operation of the discretionary scheme has fueled contention and litigation.[9] In particular, circuit courts struggle to apply the reasonableness standard of review mandated by the remedial portion of *Booker*, vindicating Justice Scalia's characteristically caustic remark that such an inchoate standard would create a "discordant symphony of different standards varying from court to court and judge to judge. . . ."[10]

Despite the Supreme Court's most recent sentencing decisions, reasonableness review remains problematic. The Court's decisions in *Rita* and *Gall* have reinforced a tendency among the circuit courts to review sentences that deviate from the Guidelines in a manner inconsistent with the advisory scheme mandated in *Booker*.[11] In

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[5] Rita v. United States, 127 S. Ct. 2456 (2007).

[6] United States v. Gall, 128 S. Ct. 586, 597 (2007). A companion case was *Kimbrough v. United States*, 128 S. Ct. 558 (2007), in which the Supreme Court held that a court may "consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." *Id.* at 564. *Kimbrough*, however, is beyond the scope of this comment's focus on the Court's treatment of reasonableness review in *Rita* and *Gall*.

[7] *Id.* at 2484 (Souter, J., dissenting).

[8] United States v. Booker, 543 U.S. 220 (2005).

[9] *See, e.g.*, United States v. Gall, 128 S. Ct. 586, 597 (2007); Rita v. United States, 127 S. Ct. 2456 (2007); Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

[10] *Id.* at 312 (Scalia, J., dissenting).

[11] *See* United States v. Goff, 501 F.3d 250 (3d Cir. 2007) (finding a downward departure unreasonable in light of 18 U.S.C. § 3553 (2006) factors); United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007) (concluding that the district court did not appropriately weigh the factors under section 3553 of the Guidelines); United States v. Bradford, 500 F.3d 808 (8th Cir. 2007) (concluding that the sentence reflected an overemphasis on the relevance of the details of the offense and the defendant's history under section 3553(a)(1) and accorded insufficient weight to existing congressional policy and the need to minimize sentencing disparities); United States v. Hatcher, 501 F.3d 931 (8th Cir. 2007) (reversing the sentence because the district court gave too much weight to an improper factor); United States v. Garcia-Lara, 499 F.3d 1133 (10th Cir. 2007) (concluding that district court ignored Congress's policy of targeting recidivist drug offenders for more severe punishment and failed to distinguish the defendant from other career offenders); Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008) (reversing sentence as substantially unreasonable because the district court failed to properly weigh sentencing factors); United States v. Willingham, 497 F.3d 541 (5th Cir. 2007) (reversing sentence

particular, the presumption of reasonableness endorsed in *Rita* further insulates within-Guidelines sentences, creating a *de facto* mandatory scheme.[12] The reasonableness standard of review remains ambiguous, enabling circuit courts to effectively review sentences *de novo*, in further contravention of *Booker*.[13] In addition, reasonableness review is vulnerable to as-applied challenges, similar to those raised in *Booker*.[14] Finally, the Supreme Court's emphasis on the Guidelines as the centerpiece of sentencing perpetuates a misguided system held to be unconstitutional in *Booker*.

Central to these issues is the interplay between the substantive and procedural reasonableness review. Substantive review requires an inquiry into the sufficiency of the factors the sentencing court considered during sentencing, whereas procedural review ensures that the lower court took the appropriate factors into consideration.[15] This comment proposes that the Supreme Court should effectuate a procedural review that would allow an appellate court to reverse a sentence only if the sentencing court relied on inappropriate or clearly erroneous facts. Such a system would ensure that sentencing judges truly have discretion to impose a sentence within the statutory range as required by *Booker*.

Furthermore, this comment suggests that the Supreme Court should deemphasize the Guidelines as a starting point in the sentencing process by stressing the reasoned analysis of the statutory sentencing factors, including but not privileging the Guidelines. These reforms would promote the integrity of the current Sixth Amendment sentencing jurisprudence developed through a complex line of cases.

The Constitutional cracks in the mandatory Guidelines scheme began to emerge after a series of cases asserted that the Guidelines

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because district court gave too much weight to irrelevant factor); United States v. D'Amico, 496 F.3d 95 (1st Cir. 2007) (applying proportionality review and reversing sentence as substantially unreasonable). *But see* United States v. Sanchez-Ramirez, 497 F.3d 531 (5th Cir. 2007) (upholding sentence under the Guidelines as reasonable in light of the defendant's egregious conduct); United States v. Keller, 498 F.3d 316 (6th Cir. 2007); United States v. Gammicchia, 498 F.3d 467 (7th Cir. 2007) (affirming sentence that fell within the Guidelines as substantially reasonable, and applying presumption of reasonableness); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007) (affirming sentence that fell below the range in the Guidelines as substantively reasonable).

[12] Rita v. United States, 127 S. Ct. 2456 (2007).

[13] *See, e.g.*, Tomko v. United States, 498 F.3d 157 (3d Cir. 2007), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008). Despite being vacated, this does not change the relevance of the opinion, and perhaps further illustrates the difficulties that the circuit courts face in applying the reasonableness standard of review. United States v. Tomko, No. 05-4997, 2008 U.S. App. LEXIS 988 (3d Cir. Jan. 17, 2008) (order vacating judgment and granting rehearing).

[14] Rita v. United States, 127 S. Ct. 2456, 2475 (2007) (Scalia, J., concurring).

[15] United States v. Gall, 128 S. Ct. 586, 597 (2007).

effectively transferred the fact-finding function from the jury to the judge.[16] In *Apprendi v. New Jersey*, the Supreme Court examined a New Jersey hate-crime statute that increased the defendant's sentence upon a judicial finding that the offense was committed "with purpose to intimidate," holding it unconstitutional under the Sixth Amendment.[17] Subsequently, in *Blakely v. Washington*, the Supreme Court invalidated a state sentencing scheme that, like the federal Guidelines, calculated sentences based on judge-found factors.[18] Finally, in *United States v. Booker*, the Supreme Court held the mandatory application of the Guidelines as unconstitutional under the Sixth Amendment, and required appellate courts to review sentences for reasonableness instead of using a *de novo* standard.[19]

Booker, however, provided little guidance to courts applying reasonableness review.[20] Consequently, divergent interpretations among the circuit courts of appeals began to emerge concerning the scope and operation of *Booker*.[21] Some courts viewed *Booker* as transforming the Guidelines-dominated or Guidelines-centric approach of the post-Sentencing Reform Act era into a system that relegates the Guidelines as one sentencing factor among several policy considerations outlined by Congress.[22] Other courts continued to give great weight to the Guidelines both in application and in review.[23] Courts embracing the latter view have adopted two distinct doctrinal approaches: (1) the presumption of reasonableness for within-Guidelines sentences, and (2) the requirement that district court judges provide proportionately compelling reasons whenever sentences substantially deviate from the Guidelines, a doctrine known as the "proportionality principle."[24] The Supreme Court recently

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[16] *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999).

[17] *Apprendi*, 530 U.S. at 490.

[18] Blakely v. Washington, 542 U.S. 296, 313 (2004).

[19] *Booker*, 543 U.S. at 226.

[20] *See id.* at 261–62.

[21] *See, e.g.*, Tomko v. United States, 498 F.3d 157, 173 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007); United States v. Bradford, 500 F.3d 808 (8th Cir. 2007) (applying proportionality principle); United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007) (applying proportionality principle).

[22] *See* Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 666–70 (2006) (citing a statistical analysis of courts continuing to impose sentences within the Guidelines and of courts that viewed *Booker* as minimizing the effect of the Guidelines on sentencing determinations).

[23] *Id.*

[24] *See, e.g.*, Rita v. United States, 127 S. Ct. 2456 (2007) (reviewing appellate court's adoption of presumption of reasonableness); Gall v. United States, 128 S. Ct. 586 (2007)

considered these approaches in *Rita v. United States*[25] and *Gall v. United States*,[26] respectively.

In *Rita*, the Supreme Court held that an appellate presumption of reasonableness for a within-Guidelines sentence is consistent with reasonableness review.[27] The Supreme Court's decision in *Gall*[28] rejected the Eighth Circuit's application of the "proportionality principal."[29] Taken together, the Court's most recent sentencing jurisprudence illustrates the difficulties of fashioning a cohesive sentencing regime that effectively reconciles policy and Constitutionality. Although the Supreme Court has taken substantial steps to rectify ambiguities in federal sentencing jurisprudence, the circuit courts continue to confront the difficult task of reviewing sentences under a reasonableness standard that remains vague and difficult to apply.[30] In essence, Justice Scalia's lamented "discordant symphony"[31] remains at full volume.

Two recent circuit court decisions that represent the problems associated with applying reasonableness review are *United States v. Tomko*[32] and *United States v. Wachowiak*.[33] In *Tomko*, the Third Circuit provided a particularly lengthy discourse between the majority and the dissent as to the proper role of an appellate court in reviewing a sentence in light of *Rita*.[34] The majority reversed the district court's sentence, concluding that the judge improperly weighed the sentencing factors.[35] The dissent in *Tomko* argued that the majority had essentially reviewed

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(reviewing appellate court's adoption of proportionality principle); United States v. Bradford, 500 F.3d 808 (8th Cir. 2007) (applying proportionality principle); United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007) (applying proportionality principle).

[25] *Rita*, 127 S. Ct. at 2456.

[26] *Gall*, 128 S. Ct. at 586.

[27] *Rita*, 127 S. Ct. at 2456.

[28] Originally, the Supreme Court considered the issue of proportionality in *United States v. Claiborne*, 127 S. Ct. 2245 (2007), a companion case to *Rita.* However, Claiborne's death rendered the case moot, delaying the Court's consideration of the issue until the following term.

[29] *Gall*, 128 S. Ct. at 591. Originally, the Supreme Court considered th issue of proportionality in *United States v. Claiborne*, 127 S. Ct. 2245 (2007), a companion case to *Rita.* However, Claiborne's death rendered the case moot, delaying the issue until the following term. *Id.*

[30] *See, e.g.*, Tomko v. United States, 498 F.3d 157, 173 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008) (arguing that the majority's re-weighing of the factors cited to support the lower court's sentence was tantamount to *de novo* review); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007) (upholding sentence as substantively reasonable despite disagreeing with the sentencing court's analysis of the sentencing factors).

[31] *Booker*, 543 U.S. at 303–13 (Scalia, J., dissenting).

[32] 498 F.3d 157 (3d Cir. 2007), *vacated*, 513 F.3d 360 (3d Cir. 2008).

[33] 496 F.3d 744 (7th Cir. 2007).

[34] *See Tomko*, 498 F.3d at 159–85.

[35] *See Tomko*, 498 F.3d at 173.

the sentence *de novo* in contravention of both *Rita* and *Booker*.[36] In *Wachowiak*, the Seventh Circuit upheld a sentence that deviated from the Guidelines, noting that although reasonable minds could differ as to the appropriateness of the sentence, *Booker* and *Rita* required deferential treatment of the district court's judgment.[37]

In essence, the scope and application of reasonableness review remain problematic. This confusion stems from the Supreme Court's failure in *Rita* and *Gall* to address several fundamental criticisms of reasonableness review. Specifically, the Supreme Court: (1) endorsed a presumption of reasonableness review that further insulates within-Guidelines sentences, creating a *de facto* mandatory guideline system; (2) failed to provide adequate guidance for both appellate and district courts as to the scope and application of substantive reasonableness review; (3) left intact a conception of substantive review vulnerable to as-applied constitutional challenges; and (4) issued opinions replete with misguided Guidelines-centric language that frustrates the remedial mandate of *Booker*.

In order to remedy the fundamental flaws inherent in the current reasonableness review scheme, the Supreme Court should elevate procedural review over substantive review to create a system in which appellate courts could only reverse sentences that relied on impermissible factors or clearly erroneous facts. In doing so, the Court would preserve the integrity of the advisory scheme enacted under *Booker* by giving sentencing judges true discretion to depart from the Guidelines. Furthermore, the Court should underscore the totality of the statutory factors enacted by Congress as the basis for sentencing rather than emphasizing the Guidelines. This "parsimony-centric" approach recognizes the overarching sentencing instruction mandated by Congress requiring that a sentence be "sufficient, but not greater than necessary" to achieve the legislative goals.[38]

II. AN OVERVIEW OF FEDERAL SENTENCING LAW

Federal sentencing changed dramatically after the enactment of the Sentencing Reform Act of 1984.[39] Prior to the statute, Congress gave

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[36] *Id.* (Smith, J., dissenting).

[37] United States v. Wachowiak, 496 F.3d 744, 745 (7th Cir. 2007).

[38] *See* Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, U. CHI. LEGAL F. 1, 49–50 (2005) (discussing the development of the parsimony principle and its relationship to section 3553). Although this comment has not revealed a credited source for the term "parsimony-centric," it will use the term to refer to what Michael W. McConnell described as "*Booker*-maximalism," coupled with an emphasis on the statutory parsimony principle. *See* McConnell, *supra* note 22, at 666.

[39] Pub. L. No. 98-473, 98 Stat. 1987.

judges wide latitude to impose sentences within the statutory range set forth under the substantive law.[40] This broad discretion created the perception that different judges would impose disparate sentences for the same offense.[41] Therefore, Congress created the Sentencing Commission and charged it with the task of promulgating a system that would guide judicial discretion in a manner consistent with the penological goals of punishment outlined in the Sentencing Reform Act of 1984.[42] Pursuant to this mandate, the Sentencing Commission produced the United States Sentencing Guidelines, a rubric which establishes a sentencing subrange[43] based on an offender's criminal history and offense level.[44]

After nearly a decade of mandatory application of the Guidelines to sentences, several cases challenged the constitutionality of the system.[45] The most significant of these early challenges was *Apprendi v. United States*,[46] followed shortly thereafter by *Blakely v. Washington*.[47] The defendants in each case challenged the constitutionality of the sentencing statutes in each respective state. These statutes required a trial judge to make findings of fact independent of the jury in order to enhance sentences.[48] In both cases, the defendants argued that such judicial findings of fact violated their Sixth Amendment right to a jury.[49] The Supreme Court agreed with the defendants in each instance, opening the field for challenges to the federal Guidelines system.[50] The successful challenge appeared in *United States v. Booker*,[51] a landmark decision that

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[40] Roger W. Haines, Jr., *Federal Sentencing Guidelines Handbook*, 1 (2006); *See also* Berman, *supra* note 38, at 3.

[41] *See* Haines, *supra* note 40, at 1 (noting that one of the goals of the Sentencing Commission was to promote uniformity).

[42] *Id.*

[43] Subrange is a term of art used to describe the Guidelines range of sentencing established within the statutory range under the substantive law. *See, e.g.*, Rita v. United States, 127 S. Ct. 2456, 2486 (2007).

[44] Haines, *supra* note 40, at 1.

[45] *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999).

[46] 530 U.S. 466 (2000).

[47] 542 U.S. 296 (2004).

[48] *See id.* at 298; *see also Apprendi*, 530 U.S. at 469. Blakely plead guilty to kidnapping charges. *Blakely*, 530 U.S. at 298. The facts admitted in the plea agreement authorized a sentence of fifty-three months, however the sentencing judge imposed an additional ninety months, finding that Blakely qualified for an "exceptional" enhancement. *Id.* Similarly, Apprendi plead guilty to charges related to shooting into a home and received an enhanced sentence under a New Jersey hate-crime law. *Apprendi*, 530 U.S. at 468–69.

[49] *See id.* at 298; *Apprendi*, 530 U.S. at 469.

[50] *See Blakely*, 542 U.S. at 314; *Apprendi*, 530 U.S. at 497.

[51] 543 U.S. 220 (2005).

rendered the mandatory Guidelines scheme unconstitutional, and substituted an advisory scheme whereby appellate courts were to review sentences under a new "reasonableness" standard.[52] Left with little guidance from the Supreme Court, however, the circuit courts of appeals began to develop their own principles to facilitate the new sentencing system.[53]

One practice that arose within the circuits is the judicial application of a presumption of reasonableness to within-Guidelines sentences. In *Rita v. United States*, the Supreme Court held this presumption constitutional in light of *Booker*.[54] Other circuits began to apply a proportionality principle to sentencing, essentially requiring district courts to justify a sentence in relation to the amount the sentence varied from the Guidelines range.[55] For example, if a sentence reflected a 100% variance from the established Guidelines range, the sentencing judge would have to provide the strongest possible justification for the sentence.[56] In *Gall v. United States*, however, the Supreme Court struck down this doctrine, finding a violation of *Booker*'s mandate that district court sentences be afforded due deference under reasonableness review.[57]

A. The United States Sentencing Guidelines and the Sentencing Commission

Congress enacted the Sentencing Reform Act of 1984 ("the Act")[58] to establish the statutory framework for sentencing within the federal judiciary. The Act instructs the sentencing judge to impose a sentence consistent with the policy statements set forth under 18 U.S.C. § 3553.[59] Pursuant to section 3553(a), a judge must consider: (1) the characteristics of the offense and the offender; (2) the need for a sentence to reflect the basic aims of sentencing, which are just punishment, retribution, deterrence, incapacitation, and rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) the Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[60] Guiding the policy statements is the so-called

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[52] *Id.* at 245.

[53] *See, e.g.*, Rita v. United States, 177 F. App'x 357 (4th Cir. 2006), *aff'd*, 127 S. Ct. 2456 (2007) (applying presumption of reasonableness); United States v. Gall, 446 F.3d 884 (8th Cir. 2006), *rev'd*, 128 S. Ct. 586 (2007) (applying proportionality principle).

[54] Rita v. United States, 127 S. Ct. 2456, 2459 (2007).

[55] *See, e.g.*, United States v. Gall, 446 F.3d 884 (8th Cir. 2006).

[56] *See id.*

[57] Gall v. United States, 128 S. Ct. 586 (2007).

[58] 18 U.S.C. § 3551 (2006).

[59] Sentencing Reform Act of 1984, 18 U.S.C. § 3553 (2006).

[60] *Id*. at § 3553(a)(1)–(7).

"parsimony principle," which instructs the judge to "impose a sentence sufficient, but not greater than necessary" to achieve these basic objectives.[61] The provision also provides that when the court announces a punishment, it must state the reasons for imposing a particular sentence in open court.[62]

At the same time, Congress established the United States Sentencing Commission ("the Commission"), an independent agency in the judicial branch,[63] in order to facilitate the policy goals set forth by Congress.[64] Pursuant to this mandate, the Commission[65] created the United States Sentencing Guidelines,[66] a comprehensive manual that provides sentencing ranges based on a defendant's criminal history and the severity of the criminal conduct.[67] In order to maintain flexibility, the Guidelines provide that a sentence may "depart" from the applicable Guidelines range if the sentencing judge identifies factors not taken into consideration by the Commission.[68] Under the original Sentencing Reform Act of 1984, a within-Guidelines sentence was mandatory,[69] and, pursuant to a subsequent provision enacted in 2003, was reviewable by an appellate court *de novo*.[70]

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[61] *Id.* at § 3553(a).

[62] *Id.* at § 3553(c).

[63] *An Overview of the United States Sentencing Commission*, http://www.ussc.gov/general/USSCoverview_2005.pdf (last visited Feb. 6, 2008).

[64] 28 U.S.C. § 991(b) (2006) (indicating that the Sentencing Commission's basic objectives are to "assure the meeting of the purposes of sentencing as set forth in 3553(a)(2). . . ." In addition, the Commission "must seek to 'provide certainty and fairness' in sentencing, to 'avoid unwarranted sentencing disparities,' to 'maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices,' and to reflect to the extent practicable [sentencing-relevant] advancement in [the] knowledge of human behavior."). *See also Rita*, 127 S. Ct. at 2464.

[65] The Commission is comprised of seven voting members appointed by the president and confirmed by the senate. No more than three of the members may be federal judges and no more than four may belong to the same political party. *See supra* note 63.

[66] The Commission took an "empirical approach," examining thousands of pre-sentence reports and making adjustments in accordance with congressional instructions. Haines, *supra* note 40, at 1.

[67] See *supra* note 63.

[68] *Id.*

[69] One provision provides that the court "shall impose" a within-Guideline sentence "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553 (b)(2). As discussed later in this comment, the mandatory language within this provision was held to be unconstitutional in the remedial portion of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

[70] The Court first considered the issue of appellate review in *Koon v. United States*, 518 U.S. 81 (1996), holding that the appropriate standard of review for sentences is abuse

B. Jones v. United States*: A Sixth Amendment Challenge*

Although the Supreme Court rejected any initial constitutional challenges to the Guidelines system on separation of powers grounds,[71] a new line of cases raising Sixth Amendment issues eventually undermined the federal mandatory Guidelines system and similar state sentencing schemes.[72] The first significant challenge of this nature was *Jones v. United States*.[73]

In *Jones*, the government convicted the defendant under a statute that provided for a substantial increase in the maximum penalty depending on whether the defendant's conduct resulted in "serious bodily injury" or "death."[74] In the case, the indictment failed to reference the specific provision carrying the heightened penalty or the alleged facts consistent with that provision.[75] However, the trial court, upon a finding by a preponderance of the evidence that the defendant's conduct resulted in "serious bodily injury," imposed the higher sentence.[76]

On appeal, the Supreme Court recognized the Sixth Amendment[77] implications that occur when a judge makes a factual finding which increases a defendant's exposure to a higher sentence.[78] Consequently,

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of discretion. However, Congress subsequently overruled *Koon* and changed the standard of review to *de novo* under 18 U.S.C. § 3742(e) (2006).

[71] Mistretta v. United States, 488 U.S. 361, 374 (1989) (holding that the Sentencing Guidelines reflect neither an unconstitutional delegation of congressional authority nor a violation of the separation of powers doctrine).

[72] *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999).

[73] Jones v. United States, 526 U.S. 227 (1999).

[74] *Id.* at 230.

[75] *Id.* at 230–31.

[76] *Id.* at 231.

[77] U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[78] *Jones*, 526 U.S. at 227. ("[T]here is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern. It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.").

the Court construed the statute as establishing three separate offenses with distinct elements that the prosecution must prove to a jury beyond a reasonable doubt.[79] However, the decision was limited to the specific provision at issue, effectively obviating the Sixth Amendment issues troubling the Court.[80]

C. Apprendi v. New Jersey*: A State Sentencing Enhancement Violates the Sixth Amendment*

Shortly thereafter, the Supreme Court confronted a similar challenge in *Apprendi v. New Jersey*.[81] In *Apprendi*, the defendant pled guilty to charges relating to a series of shootings[82] which, pursuant to a plea agreement, carried a maximum sentence of ten years.[83] However, on motion by the prosecution,[84] the judge imposed a sentence of twelve years under New Jersey's "hate crime" law.[85] The state law explicitly provided for an "enhanced" sentence if the judge found, by a preponderance of the evidence, that the defendant committed the offense "with purpose to intimidate."[86]

Faced squarely and inescapably with the Sixth Amendment issue raised but not decided in *Jones*,[87] the Supreme Court held that, in the absence of a jury waiver, jury-found facts prescribed the statutory maximum.[88] Drawing heavily on the fundamental constitutional protections afforded under the Sixth Amendment, the *Apprendi* majority "recognized that the [Sixth Amendment] jury right would be trivialized

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[79] *Id.* at 253. A defendant can waive the right to a jury, in which case a judge would be the sole fact-finder. *See, e.g.*, *Apprendi*, 530 U.S. at 490.

[80] The Supreme Court applied the doctrine of constitutional avoidance in which a court interprets a statute in a manner that avoids constitutional issues. In *Jones*, the majority bypassed the direct constitutional question by interpreting the statute at issue to require "serious bodily injury" as an element of the crime. Rita v. United States, 127 S. Ct. 2456, 2485 (J., Stevens, dissenting) (characterizing *Jones* as applying the doctrine of constitutional avoidance.).

[81] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[82] Apprendi fired shots into the home of an African-American family and later stated that he desired to keep the family out of the neighborhood. Apprendi later retracted that statement. Among other counts, he pled guilty to weapons charges carrying a maximum penalty of five to ten years. *Id.* at 469.

[83] *Id.*

[84] Pursuant to the plea agreement, the prosecution reserved the right to request the enhancement and Apprendi reserved the right to appeal on Constitutional grounds. *Id.* at 470.

[85] *Id.* at 471.

[86] N.J. STAT. ANN. § 2C:44-3 (West 2007).

[87] The Court could no longer apply the doctrine of constitutional avoidance because the New Jersey statute expressly provided for heightened exposure based on facts found by the judge. *See* Rita v. United States, 127 S. Ct. 2456, 2485 (J., Stevens, dissenting).

[88] *Apprendi*, 530 U.S. at 490.

beyond recognition if that traditional practice could be extended to the point that a judge alone . . . could find a fact necessary to raise the upper limit of a sentencing range."[89] Thus, in extending the constitutional right to a jury,[90] the Supreme Court established a precedent that seriously questioned the legitimacy of a mandatory Guidelines scheme.

D. Blakely v. Washington*: Sixth Amendment Challenges to State Sentencing Guidelines*

In *Blakely v. Washington*,[91] the Supreme Court considered a Sixth Amendment challenge to a state sentencing system similar to the federal Guidelines system. The defendant pled guilty to kidnapping charges carrying a statutory maximum of ten years.[92] However, under Washington's Sentencing Reform Act, a state analogue to the United States Sentencing Guidelines, the trial court calculated a subrange sentence of forty-nine to fifty-three months.[93] The analogue further provided that a judge could depart from the standard sentencing range and impose "an exceptional sentence" upon a finding of certain aggravating factors.[94]

The trial court rejected the government's recommendation of a standard-range sentence and imposed a sentence of ninety months (greater than the forty-nine-to-fifty-three-month range established by the jury verdict alone).[95] The sentencing judge based this upward departure upon a finding that the defendant acted with "deliberate cruelty."[96]

In *Blakely*, the Supreme Court held that in order to comport with the Sixth Amendment, the government must submit to a jury and prove beyond a reasonable doubt any fact necessary to enhance a sentence beyond a statutory subrange.[97] The *Blakely* Court rejected the notion that a judge could enhance a sentence beyond the subrange authorized by the jury.[98] Thus, the "statutory maximum for *Apprendi* purposes is the

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[89] *Rita*, 127 S. Ct. at 2485 (Stevens, J., dissenting).

[90] *See Apprendi*, 530 U.S. at 497.

[91] Blakely v. Washington, 542 U.S. 296, 299 (2004). Also note that the Court limited its discussion to the scope of the Sixth Amendment without reference to the incorporation doctrine of the Fourteenth Amendment. *See id.*

[92] *Id.* at 299. Blakely pleaded guilty to kidnapping his estranged wife. *Id.* at 296.

[93] *Id.* at 300.

[94] *Rita*, 127 S. Ct. at 2485 (Stevens, J. dissenting) (discussing the holding in *Blakely*).

[95] *Blakely*, 542 U.S. at 300.

[96] *Id.* at 300.

[97] *Id.* at 313.

[98] United States v. Booker, 543 U.S. 220, 331 (2005); *see* Rita v. United States, 127 S. Ct. at 2487 (Stevens, J., dissenting) ("If *Blakely* had come out the other way, the significance of *Apprendi* itself would be in jeopardy: a legislature would be free to bypass *Apprendi* by providing an abnormally spacious sentencing range for any basic crime

maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[99]

E. United States v. Booker*: The Advent of the Advisory Guidelines System and Reasonableness Review*

After *Blakely*, a Sixth Amendment challenge to the federal Guidelines system followed in *United States v. Booker*,[100] marking the advent of the advisory Guidelines system and reasonableness review. The government convicted Booker of possession with the intent to distribute, which carried a maximum sentence of life imprisonment under the applicable statute.[101] The trial court's calculation using the Guidelines took into account both Booker's criminal history and the quantity of drugs established by the conviction, resulting in a sentence range of 210–262 months.

At sentencing, however, the judge concluded that Booker actually possessed a higher quantity of drugs and was guilty of obstruction of justice.[102] Accordingly, the judge imposed a thirty-year sentence (a sentence substantially higher than the sentence authorized by the jury's verdict).[103] Addressing the substantive issues presented by the case, a narrow majority in the Supreme Court[104] extended the holding in *Blakely* to the federal Guidelines.[105] The Court concluded that the same Sixth Amendment requirements operative in the Washington sentencing scheme applied to the federal Guidelines.[106] The majority in the substantive portion of the opinion acknowledged that the mandatory nature of the Guidelines created the constitutional deficiency.[107] However, the Justices disagreed over the appropriate remedy.[108]

[theoretically exposing a defendant to the highest sentence just by the jury's guilty verdict], then leaving it to a judge to make supplementary findings not only appropriate but necessary for a sentence in a subrange at the high end. That would spell the end of *Apprendi* and diminish the real significance of jury protection. . . .").

[99] *Booker*, 543 U.S. at 232 (emphasis in original) (internal quotations omitted).

[100] *Id.* The decision consolidated two cases: United States v. Booker, 375 F.3d 508 (7th Cir. 2004) and United States v. Fanfan, 03-47-P-H (D. Me. Jun. 28, 2004). This comment only addresses the facts in the *Booker* case.

[101] *Booker*, 543 U.S. at 227.

[102] *Id.*

[103] *Id.*

[104] Justice Stevens delivered the substantive portion of the opinion with Justices Scalia, Souter, Thomas, and Ginsburg joining.

[105] *See Booker*, 543 U.S. at 223.

[106] *Booker*, 543 U.S. at 226.

[107] *See Booker*, 543 U.S. at 233 ("Indeed, everyone agrees that the constitutional issues presented by the these cases would have been avoided entirely if Congress had omitted from the SRA ["Sentencing Reform Act"] the provisions that make the Guidelines binding on district judges . . . [f]or when a trial judge exercises his discretion

One approach, endorsed vigorously by Justice Stevens in his dissent,[109] called for preserving the text of the Act but "superimposing" the Sixth Amendment requirements.[110] However, the majority ultimately rejected Stevens' approach in favor of altering the explicit text of the Act.[111] The Court reasoned that Congress would prefer excision—removing the mandatory language within the text of the Act—to outright invalidation or engrafting a Sixth Amendment requirement directly onto the statute.[112] Thus excision, the majority reasoned, would cure the constitutional infirmity while maintaining congressional intent, to the extent possible.[113]

Accordingly, the Supreme Court excised 18 U.S.C. § 3553(b)(1), the portion of the statute that required mandatory imposition of a Guidelines sentence.[114] However, removing section 3553(b)(1) also required excision of section 3742(e), the section of the Act that provided a *de novo* standard of review for sentences on appeal.[115] The Court reasoned that the excision was necessary because the provision contained "critical cross-references" to section 3553(b)(1).[116] In addition, the Court opted to replace *de novo* review with reasonableness review, noting that the sentencing statute had previously directed courts to determine if sentences outside of the Guidelines range were "unreasonable" in light of the section 3553(a) factors.[117]

In his dissenting opinion, Justice Scalia attacked the foundations of the remedial majority's holding, particularly the reasonableness standard

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to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

[108] Justice Breyer delivered the remedial portion of the opinion, joined by Justices Rehnquist, O'Connor, Kennedy, and Ginsberg.

[109] *See Booker*, 543 U.S. at 272 (Stevens, J., dissenting).

[110] *Id.* at 247.

[111] *Id.* at 249. The majority did not agree with Justice Stevens that the language of the mandatory provision was facially constitutional. ("This provision makes it difficult to justify Justice Stevens' approach, for that approach requires reading the words 'the court' as if they meant 'the judge working with the jury.' Unlike Justice Stevens, we do not believe we can interpret the statute's language to save its constitutionality, because we believe that any such reinterpretation, even if limited to the instances in which a Sixth Amendment problem arises would be 'plainly contrary to the intent of Congress.'") *Id.* at 250 (internal citations omitted).

[112] *See Booker*, 543 U.S. at 248–51, 258.

[113] *See id.* at 258.

[114] *Id.* at 259.

[115] *Id.*

[116] *Id.* at 260.

[117] *Id.* Congress enacted section 3742(e) setting forth the *de novo* standard of review in response to *Koon v. United States*, 518 U.S. 81 (1996), which held that sentences were to be reviewed under the abuse of discretion standard.

of review.[118] Among Justice Scalia's many criticisms regarding the majority's decision to excise section 3742(e)[119] was the concern that the new reasonableness standard could function to perpetuate the very system held unconstitutional.[120] In ominous language, Justice Scalia suggested that "unreasonableness review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . . ."[121] Indeed, the practical effects of the reasonableness standard of review resulted in significant litigation, prompting the Supreme Court to address the differing approaches among the circuits to the application of the new standard.[122]

F. Rita v. United States*: A Presumption of Reasonableness for Within-Guidelines Sentences*

One approach to reasonableness review emerged in the form of a presumption of reasonableness for within-Guideline sentences.[123] In *Rita v. United States*, the Supreme Court held that an appellate court could apply such a presumption.[124] The government convicted Rita of perjury for lying to a grand jury under oath.[125] Prior to sentencing, a probation officer prepared a pre-sentence report and calculated Rita's sentencing range as between thirty-three and forty-one months under the Guidelines.[126]

During the sentencing hearing, Rita's attorney argued for a sentence below the applicable Guidelines range, citing reasons not taken into account by the Guidelines.[127] The judge sentenced Rita to thirty-three

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[118] *See Booker*, 543 U.S. at 303–13 (Scalia, J., dissenting).

[119] Justice Scalia decried the majority's inconsistency of excising section 3742(e) while leaving intact several provisions that specify dispositions based on terminations made under the provision as "rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." *Booker*, 543 U.S. at 307. Justice Scalia also rejected the majority's logic in replacing an explicit standard of review by relying on implications of the remaining statute. *Id.* ("The question is, when the Court has *severed* that standard of review . . . does it make any sense to look for some congressional 'implication' of a *different* standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland.") *Id.* at 309 (emphasis in original).

[120] *Id.* at 311–12 ("[T]he remedial majority's gross exaggerations . . . may lead some courts to conclude—may indeed be designed to lead courts of appeals to conclude—that little has changed.").

[121] *Id.* at 312.

[122] *See supra* note 9.

[123] Rita v. United States, 127 S. Ct. 2456, 2462 (2007).

[124] *Id.* at 2459.

[125] *Id.*

[126] *Id.* at 2461.

[127] *Id.* Rita argued that because of his prior employment in criminal justice, his military experience, and his poor physical health, a below-guideline sentence was therefore appropriate.

months, the lower end of the Guidelines range, stating that he was "unable to find that the [reports' recommended] sentencing guideline range . . . is an inappropriate guideline range . . . ."[128] In affirming the sentence, the Fourth Circuit stated that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable."[129]

Justice Breyer, writing on behalf of the majority, concluded that a circuit court could legally apply a presumption of reasonableness.[130] He explained that the presumption merely reflected the fact that both the sentencing judge and the Sentencing Commission arrived at the same conclusion.[131] Justice Breyer asserted that this "double determination" resulted in an increased probability that the sentence was reasonable.[132]

In addition to permitting the presumption of reasonableness, the *Rita* opinion reflects the Supreme Court's view of the relationship between substantive and procedural reasonableness review. Procedurally, the Court determined that the district court's allocution under section 3553(c)—the provision requiring the judge to "state in open court the reasons for its imposition for the particular sentence"—was adequate.[133] According to the opinion, such a statement should "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[134]

The Court found that the judge's statement indicating the Guidelines range was not "inappropriate" and was thus procedurally sufficient.[135] The majority then turned to the substance of Rita's sentence, upholding as appropriate the Fourth Circuit's conclusion that the special circumstances provided by the defendant were not "special enough" to warrant a below-Guidelines sentence. [136]

In dissent, Justice Souter argued that a presumption of reasonableness would undermine *Apprendi*, effectively returning courts to a pre-*Booker* mandatory sentencing regime.[137] The "gravitational pull"

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[128] *Id.* at 2462.
[129] Rita v. United States, 127 S. Ct. 2456, 2470 (2007).
[130] *Id.* at 2459.
[131] *Id.* at 2463.
[132] *Id.* at 2465 ("[T]he courts of appeals' 'reasonableness' presumption, rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of section 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.").
[133] *Id.* at 2468–69.
[134] *Id.* at 2468.
[135] Rita v. United States, 127 S. Ct. 2456, 2469 (2007).
[136] *Id.* at 2470.
[137] *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting).

of attaching a presumption to within-Guidelines sentences, Justice Souter argued, "would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange."[138] Justice Souter proposed that an appellate court should apply an across-the-board standard of reasonableness to ensure that the entire range of statutorily authorized sentences were available to the sentencing judge, in order to discourage judges from imposing "appeal-proof" sentences within the Guidelines or perpetuating the constitutional violations *Booker* sought to remedy.[139]

G. Gall v. United States*: The Proportionality Principle*

In *Gall v. United States*,[140] the Supreme Court held that a strict application of the "proportionality principle" was an improper application of reasonableness review.[141] In essence, the doctrine requires the sentencing court to support a sentence falling outside the Guidelines range by a justification that is "proportional to the extent of the difference between the advisory range and the sentence imposed."[142] Gall, who entered into a plea agreement with the government, was sentenced to a term of probation for thirty-six months, a 100% departure from the thirty to thirty-seven-month imprisonment range under the Guidelines.[143]

The district court judge issued a lengthy sentencing memorandum listing several factors in support of the sentence under section 3553:

> [T]he Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the indictment, the Defendant's post offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed . . . .[144]

Thus, the sentencing court provided a substantial list of factors to support a below-Guidelines sentence of probation. On appeal, the Eighth Circuit

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[138] *Id.* at 2487.
[139] *Id.* at 2488.
[140] Gall v. United States, 128 S. Ct. 586 (2007).
[141] *Id.* at 591. The Court initially agreed to resolve the issue in *United States v. Claiborne*, 127 U.S. 2245 (2007); however, Claiborne's untimely death mooted the case and delayed the Court's consideration of the issue into the following term.
[142] *See Gall*, 128 S. Ct. at 594.
[143] *Id.* at 592–93.
[144] *Id.*

reversed, holding that there were not sufficient "extraordinary circumstances" to support such an "extraordinary variance."[145]

The Supreme Court rejected the Eighth Circuit's application of the proportionality principle, characterizing the doctrine as 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."[146] Such an approach, the majority argued, would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range"[147] and undermine the abuse of discretion standard of review by applying a heightened standard for below-Guidelines sentences.[148]

The Supreme Court then went on to apply the reasonableness standard of review, both procedurally and substantively, to Gall's sentence. The Court concluded that the district judge was within his discretion and that the Eighth Circuit inappropriately applied what amounted to *de novo* review.[149]

As illustrated by the above cases, the transformation of the mandatory Guidelines scheme originally envisioned by Congress to reasonableness review under an advisory Guidelines system has been arduous. From the initial Sixth Amendment challenges through the state sentencing laws in *Jones*, *Apprendi*, and *Blakely* to the repudiation of mandatory federal Guidelines in *Booker*, the Supreme Court has struggled to fashion a coherent system that maintains the Congressional vision of a unified system, while simultaneously curing the inherent constitutional defects. *Rita* and *Gall* represent the Supreme Court's latest attempt to guide the sentencing process and resolve the constitutionality of the various mechanisms the circuits have adopted.

Although the Supreme Court has established additional parameters by endorsing a presumption of reasonableness in *Rita* and rejecting the proportionality principle in *Gall*, the following cases illustrate how the scope of reasonableness review is far from settled.

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145 *Id.*
146 Gall v. United States, 128 S. Ct. 586, 595 (2007).
147 *Id.*
148 *Id.* at 595.
149 *Id*. at 601.

III. THE APPLICATION OF THE REASONABLENESS STANDARD: A PARADIGM OF CONFUSION

Despite the Supreme Court's holding in *Rita*, the exact scope and operation of reasonableness review remains elusive and divisive.[150] Statistical data suggests that post-*Booker* appellate courts have been reluctant to reverse as substantively unreasonable sentences within the Guidelines,[151] affirm sentences with a substantial downward variance,[152] and reverse above-Guidelines sentences.[153]

Since *Rita*, appeals courts throughout the circuits have interpreted substantive reasonableness review as endorsing, at least on some level, an evaluation of the underlying reason for imposition of a particular sentence.[154] The Third Circuit's decision in *United States v. Tomko*[155]

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[150] *See, e.g.*, Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

[151] Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 DENV. U. L. REV. 31 (2007) (The New York Council of Defense Lawyers ("NYCDL") as *Amicus Curiae* Supporting Petitioners stated that circuit courts reversed only one within-Guidelines sentence as substantially unreasonable out of 1,152 sentences since *Rita*.).

[152] *Id.* Data compiled by the NYCDL showed that 78.3 percent of below-Guideline sentences appealed by the government were reversed, compared to 3.5 percent of above-range sentences appealed by the defense. *Id.*

[153] *Id.*

[154] *See, e.g.*, United States v. Goff, 501 F.3d 250 (3d Cir. 2007) (finding a downward sentencing departure unreasonable in light of section 3553 factors); United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007) (concluding that the district court did not appropriately weigh the factors under section 3553); United States v. Bradford, 500 F.3d 808 (8th Cir. 2007) (concluding that the sentence reflected an overemphasis on the relevance of the details of the offense and the defendant's history under section 3553(a)(1) and accorded insufficient weight to existing congressional policy and the need to minimize sentencing disparities); United States v. Hatcher, 501 F.3d 931 (8th Cir. 2007) (reversing sentence because the district court gave too much weight to an improper factor); United States v. Garcia-Lara, 499 F.3d 1133 (10th Cir. 2007) (concluding that the district court ignored Congress's policy of targeting recidivist drug offenders for more severe punishment, and failed to distinguish defendant from other career offenders); Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008) (reversing sentence as substantially unreasonable because the district court failed to properly weigh sentencing factors); United States v. Willingham, 497 F.3d 541 (5th Cir. 2007) (reversing sentence because the district court placed too much weight on an irrelevant factor); United States v. D'Amico, 496 F.3d 95 (1st Cir. 2007) (applying proportionality review and reversing sentence as substantially unreasonable). *But see* United States v. Sanchez-Ramirez, 497 F.3d 531 (5th Cir. 2007) (upholding an above-Guidelines sentence as reasonable in light of the defendant's egregious conduct); United States v. Keller, 498 F.3d 316 (6th Cir. 2007); United States v. Gammicchia, 498 F.3d 467 (7th Cir. 2007) (affirming within-Guidelines sentence as substantially reasonable and applying a presumption of reasonableness); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007) (affirming below-Guidelines sentence as substantively reasonable).

and the Seventh Circuit's decision in *United States v. Wachowiak*[156] are indicative of the challenges circuit courts face in balancing procedure and substance in light of the Supreme Court's holding in *Rita*.[157]

A. United States v. Tomko

In *United States v. Tomko*,[158] the Third Circuit reversed as unreasonable a sentence that was substantially below the Guidelines range.[159] Tomko pled guilty to tax evasion and received a sentence of 250 hours of community service, three years probation, and a $250,000 fine. The trial court imposed this noncustodial sentence despite a recommended Guidelines range of twelve to eighteen months of imprisonment.[160] In addition, the sentencing judge provided a comprehensive list of reasons for the sentence, taking into account the section 3553 factors.[161]

Acknowledging that the standard of review "is akin to abuse of discretion and accordingly deferential,"[162] the Third Circuit framed the scope of review as a determination of "whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in 3553(a)."[163] The Third Circuit interpreted the Supreme Court's decision in *Rita* as emphasizing the role of the appellate courts in providing substantive oversight.[164] Thus, the

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[155] Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[156] United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

[157] A number of cases have responded to the Supreme Court's decision in *Gall*; *Tomko* and *Wachowiak* were chosen because of their comprehensive analysis of *Rita*.

[158] Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008). The case was subsequently vacated. However, this does not change the relevance of the opinion, and perhaps further illustrates the difficulties that the circuits face in applying the reasonableness standard of review. United States v. Tomko, 2008 U.S. App. LEXIS 988 (3d Cir. Jan. 17, 2008) (order vacating judgment and granting rehearing).

[159] *Tomko*, 498 F.3d at 158.

[160] *Id.* at 162.

[161] *Id.* (After considering the section 3553 factors in detail, the sentencing judge stated, "[h]owever, this need to avoid unwarranted sentence disparities among defendants with similar records also gives me enough leniency to understand that there are differences and those differences have to be taken into account. I recognize the need for consistent sentencing; however, in this case, given the defendant's lack of any significant criminal history, his involvement in exceptional charitable work and community activity, and his acceptance of responsibility, we find that a sentence that is mitigated by the factors of 3553 are [sic] warranted.").

[162] *Id.* at 163 (citing Rita v. United States, 127 S. Ct. 2456, 2465 (2007)).

[163] *Tomko*, 498 F.3d at 163 (quoting United v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006).

[164] *Tomko*, 498 F.3d at 163.

Third Circuit suggested that "reasonableness review, while deferential, is not utterly impotent."[165] Consequently, the court concluded that proper substantive review requires actual reweighing of the section 3553 factors.[166] In the final analysis, the Third Circuit disagreed with the district court that the sentence imposed reflected the seriousness of the crime, and held that the mitigating factors did not justify such a substantial departure from the Guidelines sentence.[167]

In a lengthy dissent, Judge Smith criticized the majority's approach, equating the standard actually applied by the majority to a *de novo* standard of review and a misapplication of the principles in *Rita*.[168] The dissent noted that the district court gave meaningful consideration to the section 3553 factors and applied them in a reasonable manner to the individual facts of the case.[169] Thus, Judge Smith asserted, even though the majority would have applied the section 3553 factors differently, a district court's sentence should be affirmed absent a showing that the sentencing judge failed to give meaningful consideration to the sentencing factors.[170] A reweighing of factors, the dissent asserted, is tantamount to *de novo* review, and improper under *Booker*.[171]

Moreover, Judge Smith suggested that by focusing exclusively on the substance of the district court's decision, the majority separated substance from procedure in a manner inconsistent with the majority opinion in *Rita*.[172] According to the dissent, the majority's emphasis on the trial court's treatment of the section 3553 factors rather than the

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[165] *Id.* at 165.

[166] *Id.* at 165 n.7 ("To put it figuratively, there is a recipe for reasonableness that in many, if not most cases, will lead to a palatable result, and we are not in a position to protest if the result is a little too sweet or bitter for our taste. However, when a number of key ingredients prescribed by that recipe are obviously missing from the mix, we cannot ignore the omission and feign satisfaction—we are obliged to point out there is no proof in the pudding.").

[167] *Id.* at 172 ("Viewed cumulatively, the three factors considered by the District Court as mitigating factors—negligible criminal history, support and ties in the community and charitable work, employment record—pale in comparison to the numerous section 3553(a) factors suggesting that a term of imprisonment is warranted in cases of tax evasion as willful and brazen as Tomko's. A sentence of mere probation, in light of these factors, is unreasonable and it was an abuse of discretion for the District Court to impose it. We do not rule that any below-Guidelines sentence would have been improper in this case, only that the District Court abused its discretion in rendering this particular below-Guidelines sentence.").

[168] Tomko v. United States, 498 F.3d 157, 173 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[169] *See id.* at 174.

[170] Judge Smith noted that he would have imposed a term of imprisonment. *Id.* at 177.

[171] *Id.* at 174.

[172] *Id.* at 183 ("The Supreme Court in *Rita* repeatedly stressed the importance of the process by which the sentencing court arrives at its conclusion.").

process by which the court arrived at its result illustrated this inconsistency. Judge Smith viewed the majority's approach as eroding the remedial portion of *Booker* to create confusion among sentencing courts in determining the "spectrum of cases that are ineligible for substantial variances regardless of the reasons given by that judge."[173]

B. United States v. Wachowiak

In *United States v. Wachowiak*, the Seventh Circuit embraced the reasoning reflected by the dissent in *Tomko*, affirming a below-Guidelines sentence as reasonable.[174] Wachowiak pled guilty to receiving child pornography and received a seventy-month term of imprisonment despite a recommended Guidelines range of 121 to 151 months.[175] The sentencing judge concluded that the Guidelines sentence was "greater than necessary to achieve the sentencing purposes of section 3553(a)" based on several mitigating circumstances, an individual assessment of the section 3553(a) factors, and a determination that the Guidelines did not adequately account for the appropriate individual circumstances of the case.[176]

On appeal, the Seventh Circuit upheld the sentence, stating that a reasonable sentence should reflect a "meaningful consideration [of] sentencing factors enumerated in section 3553(a), including the advisory sentencing guidelines."[177] Accordingly, the court indicated that a sentence sufficiently justified by considering the proper statutory factors should survive substantive reasonableness review.[178] The Seventh Circuit concluded that the district court's sentence, "though certainly lenient given the seriousness of the crime, lies tolerably within the boundaries of permissible difference of judicial opinion."[179] Thus, the Seventh Circuit recognized that the yardstick of substantive reasonableness represents a range of discretionary sentences.[180] However, it conceded that some sentences would continue to fall outside the bounds of reasonableness.[181]

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[173] Tomko v. United States, 498 F.3d 157, 184 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[174] *See* United States v. Wachowiak, 496 F.3d 744, 745 (7th Cir. 2007).

[175] *Id.* at 746.

[176] *Id.* at 746–47.

[177] *Id.* at 748.

[178] *See id.*

[179] United States v. Wachowiak, 496 F.3d 744, 755 (7th Cir. 2007).

[180] *See Wachowiak*, 496 F.3d at 750 (quoting United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) ("The concept of substantive reasonableness contemplates 'a range, not a point.'")).

[181] *Id.* ("A one-day sentence for a millionaire bank executive who stole nearly $1 million fell outside that range, as did a sentence of probation for a brokerage employee who embezzled $400,000. A one-day sentence for possession of hundreds of highly

Ultimately, both *Tomko* and *Wachowiak* illustrate the difficult issues confronting circuit courts when applying the reasonableness standard of review after *Rita*. The sentencing judges scrutinized in *Tomko* and *Wachowiak* provided comprehensive explanations of the reasons underlying their imposed sentences. However, the sentence imposed in *Tomko* represents a greater departure from the Guidelines than the sentence imposed in *Wachowiak*.[182] Based on the court's tone in *Wachowiak*, the Seventh Circuit would likely have reversed a sentence closer to the statutory minimum on substantive grounds.[183] On the other hand, the dissent in *Tomko* suggests that only a stripped down procedural review can effectively preserve the integrity of the remedy mandated by *Booker*.[184] Although they represent early reactions, both *Tomko* and *Wachowiak* provide a sampling of judicial adherence to the Supreme Court's decision in *Rita.* These divergent applications exemplify the legal uncertainty that follows the decision.

IV. *RITA* AND *GALL* DID NOT ADEQUATELY ADDRESS THE FUNDAMENTAL FLAWS OF REASONABLENESS REVIEW

Although the Supreme Court focused on narrow issues in both *Rita* and *Gall*, the majority opinions in both cases discussed at length the proper application and theoretical underpinnings of reasonableness review.[185] These decisions ultimately failed to adequately address many of the criticisms of reasonableness review, forestalling the resolution of several patent flaws identified by commentators and judges alike.[186] Specifically, but by no means exhaustively, the Supreme Court: (1) endorsed a presumption of reasonableness that further insulates within-Guidelines sentences, creating a *de facto* mandatory Guidelines system;

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aggravated images of child pornography fell outside that range . . . as did a sentence of one month for armed bank robbery. This sentence of seventy months for receiving child pornography, though certainly lenient given the seriousness of the crime, lies tolerably within the boundaries of permissible differences of judicial opinion.").

[182] The sentence in *Tomko* represented a one-hundred percent departure from the recommended Guidelines range. *Tomko*, 498 F.3d at 162. Wachowiak received a seventy-month sentence despite a range of 121 to 151 months established by the Guidelines. *Wachowiak*, 496 F.3d at 746.

[184] *Wachowiak*, 496 F.3d at 751 (listing several examples of sentences that "help illustrate the limits of *Booker* sentencing discretion").

[184] *See Tomko*, 498 F.3d at 173 (Smith, J., dissenting).

[185] *See* Rita v. United States, 127 S. Ct. 2456 (2007); Gall v. United States, 128 S. Ct. 586 (2007).

[186] *See, e.g.*, *Rita*, 127 S. Ct. at 2475 (Scalia, J., concurring in part, concurring in judgment); *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting); Douglas A. Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 DEN. U. L. REV. 7 (2007); Nancy Gertner, *Rita Needs Gall—How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 65 (2007).

(2) failed to provide adequate guidance for both appellate and district courts as to the scope and application of substantive reasonableness review; (3) left intact a conception of substantive review vulnerable to as-applied constitutional challenges; and (4) issued opinions replete with misguided Guidelines-centric language that frustrates the remedial mandate of *Booker*.

A. The Presumption of Reasonableness Insulates Within-Guidelines Sentences to Create a De Facto *Mandatory Guidelines System*

The issue addressed in *Rita*—whether or not appellate courts could use a presumption of reasonableness for within-Guidelines sentences—provided the Supreme Court with an opportunity to slow the re-emerging prominence of the Guidelines in sentencing.[187] However, the Court succeeded in accomplishing the opposite result by wholeheartedly approving a presumption that further insulates within-Guidelines sentences, creating what amounts to a *de facto* mandatory guideline system. In fact, the decision in *Rita* contained language that suggests such a desired result.[188] For example, Justice Breyer, writing for the majority, observed that a "presumption, even if it increases the likelihood that the judge, not the jury, will find 'sentencing facts,' does not violate the Sixth Amendment."[189] In support of this contention, Justice Breyer argued that a non-binding presumption does not implicate the Sixth Amendment because a non-binding presumption neither requires nor forbids any sentence within the statutory range of sentences available.[190]

Interestingly, Justice Breyer's argument implies that a presumption of reasonableness does not legally affect the advisory system, even if the actual result is to increase the frequency of within-Guidelines sentences to levels consistent with a pre-*Booker* mandatory system.[191] Therefore, the majority was not concerned if the actual result of the presumption created a "gravitational pull" toward the Guidelines, because such a result would not render the advisory scheme unconstitutional.[192] Justice

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[187] The Court was presented with an opportunity to issue an opinion consistent with the "*Booker* maximalism" interpretation in which it could have instructed that the Guidelines are only to be taken into consideration by the sentencing judge. "*Booker* minimalists" argue that such a transformation was not the intended result of *Booker*. The presumption of reasonableness endorsed in *Rita* is consistent with the latter approach. *See* McConnell, *supra* note 22, at 666.

[188] *Rita*, 127 S. Ct. at 2465–66.

[189] *Id.* at 2465.

[190] *Id.*

[191] *See* Hofer, *supra* note 151, at 30.

[192] *Rita*, 127 S. Ct. at 2467.

Breyer asserted that this result is consistent with the Sixth Amendment, and also consistent with the policies of Congress.[193]

In his concurring opinion, Justice Stevens discounted the effect of the presumption's "gravitational pull," arguing that the abuse-of-discretion standard, explicitly provided in *Booker*, requires deference to sentences which consider the section 3553 factors.[194] This position is subtly distinct from the majority's position. Justice Stevens suggested that the standard of review protects sentencing judges and therefore judges should not, at least in theory, be obligated to impose within-Guidelines sentences,[195] whereas the majority's position appears to encourage such a result.[196] Despite Justice Stevens' complacency with the abuse of discretion standard, empirical data has suggested that appellate courts are unwilling to countenance sentences falling outside of the Guidelines range.[197]

In essence, *Rita*'s endorsement of a presumption of reasonableness is difficult to reconcile with the advisory Guidelines system mandated in *Booker*. The *Rita* majority's position rested on the premise that the presumption does not require judges to impose within-Guidelines sentences.[198] While this may be true, the practical effect has been to insulate Guidelines sentences by implicitly encouraging judges to impose within-Guidelines sentences. Such a system effectively mirrors the pre-*Booker* scheme.[199]

Justice Souter argued that if *Booker* is to have any meaning at all, judges must be free to depart from the Guidelines.[200] As he warned in his dissent, if judges treat the Guidelines as "persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right."[201] Indeed, the Court's decision in *Rita* approving the presumption of reasonableness only serves to insulate within-Guidelines sentences, creating a *de facto* mandatory system. Such a system merely pays lip service to the advisory scheme designed to remedy the constitutional defects identified in *Booker*.

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193 *Id.*
194 *Id.* at 2470 (Stevens, J., concurring).
195 *Id.*
196 *See Rita*, 127 S. Ct. at 2466.
197 *See* Hofer, *supra* note 151, at 31 (Data compiled by the NYCDL showed that 78.3 percent of below-Guideline sentences appealed by the government were reversed.).
198 *See Rita*, 127 S. Ct. at 2466.
199 *See Tomko*, 498 F.3d at 173 (Smith, J., dissenting).
200 *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting).
201 *Id.*

B. Substantive Reasonableness Review Remains an Ambiguous Standard of Review

The Supreme Court's conception of substantive review remains ambiguous and difficult to apply. The dissent in *Tomko* asserted that the "gravitational pull" toward a within-Guidelines sentence created by substantive review is even greater than that of a "nonbinding appellate presumption," because it encourages judges to impose within-Guidelines sentences.[202] While the Supreme Court's majority opinion in *Rita* provides some clues as to the appropriate sentencing procedure courts are to utilize, the interaction between substance and procedure remains ambiguous.[203]

For instance, the majority in *Rita* spends considerable time discussing the sentencing analysis a district court should implement.[204] The Court explained that the "sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[205] The threshold of this "reasoned basis" in the facts of the case was apparently fairly low[206] and somehow proportional to the conceptual complexity of the arguments presented.[207] The Court further explained that the "sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court," which allows the sentencing judge to utilize his "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through [18 U.S.C.] § 3553(a)'s list of factors." [208]

Ultimately, the Supreme Court's intended scope of procedural review is not entirely clear.[209] The Court has emphasized a reasoned analysis of the section 3553 factors informed by the Guidelines and even suggests that a party can argue that "the Guidelines' sentence itself fails

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[202] *Tomko*, 498 F.3d at 184.

[203] *Rita*, 127 S. Ct. at 2467.

[204] *Id.*

[205] *Id.* at 2468.

[206] The sentencing judge in *Rita* simply stated that the Guidelines range was not "inappropriate." *Id.* at 2469.

[207] *Id.* at 2468 ("In our view, given the straightforward, conceptually simple arguments before the judge, the judge's statement of reasons here, though brief, was legally sufficient."); *see also Id.* at 2469 ("Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.").

[208] *Rita*, 127 S. Ct., at 2456.

[209] *See, e.g.*, Berman, *supra* note 38, at 15.

properly to reflect § 3553(a),"[210] but it has never explained the practical implications of this statement. As illustrated in *Tomko*, the circuit courts enjoy little guidance regarding the extent of substantive review, and have interpreted *Rita* to mean that substantive reasonableness review allows an appellate court to re-weigh the section 3553 factors for sentencing.[211]

Similarly, *Gall* reaffirmed the Supreme Court's endorsement of both substantive and procedural review.[212] The Court reiterated that reasonableness review should give due deference to the district courts and that the "reasoned and reasonable decision that [the district court gave] the section 3553 factors, on the whole, justified the [defendant's probationary] sentence."[213]

The analysis consisted of a determination that the Eighth Circuit's arguments against imposition of the sentence of probation, based on section 3553, did not overcome the rational arguments asserted by the lower court. While *Gall* established that "proportionality" review goes too far and that "the extent of the difference between a particular sentence and the recommended Guidelines range" are relevant to the inquiry, [214] it remains unclear exactly *when* an appeals court may overturn a sentence as substantively unreasonable.[215]

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[210] *Rita*, 127 S. Ct. at 2465.

[210] *Id.*

[211] Tomko v. United States, 498 F.3d 157, 173 (3d Cir. 2005).

[212] Gall v. United States, 128 S. Ct. 586, 602 (2007).

[213] *Id.*

[214] *Id.* at 591.

[215] *See Gall*, 128 S. Ct. at 597. The Court described substantive reasonableness review as follows:

> Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Id. (internal citations omitted). The Court's articulation of substantive review provides only vague standards while emphasizing that an appellate court must give the sentencing court due deference. Exactly when a sentence has reached the threshold of unreasonableness remains elusive.

C. Reasonableness Review is Still Vulnerable to As-Applied Constitutional Challenges

Justice Scalia, concurring in the judgment in *Rita,* criticized the majority opinion as avoiding the constitutional issues presented by the reasonableness standard of review.[216] Scalia's basic argument, admittedly not presented directly by the circumstances in *Rita* or *Gall*, is that, under the substantive reasonableness review endorsed by the Supreme Court, there will be some sentences upheld as reasonable based solely on judge-found facts, which under *Booker* represents an unconstitutional deprivation of the Sixth Amendment right to a jury. Thus, Scalia argued, reasonableness review is vulnerable to as-applied constitutional challenges.[217]

Scalia illustrated his point with hypotheticals.[218] The "two brothers" hypothetical assumed that the government convicted two brothers of robbing a bank; one chose the particular bank because of racial bias, the other because of the perception that the bank's location would be advantageous.[219] Both brothers receive the maximum sentence under the statute.[220] On review, Justice Scalia contended, the appellate court would reverse the sentence of the "non-racist" brother as unreasonable and affirm the sentence of the biased brother.[221] The racially-biased brother's sentence would be lawful *only* because of a judge-found fact.[222]

The second example is a more likely scenario in which aggravating factors significantly increase a convicted bank robber's sentencing range under the Guidelines; for example, if the defendant discharged a firearm or a victim incurred serious bodily injury.[223] Accordingly, a sentence would only be reasonable based on the judge-found facts because if these facts did not exist, the appellate court would likely reverse the sentence as unreasonable.[224] Therefore, Justice Scalia explained, the authority to review the substance of the district court's sentence would result in sentences that could only be justified on the basis of judge-found facts.[225] Justice Scalia suggested that the constitutional implications are avoided

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216 Rita v. United States, 127 S. Ct. 2456, 2475 (2007) (Scalia, J., concurring).
217 *Id.*
218 *Id.* at 2476–77.
219 *Id.*
220 *Id.*
221 *Id.*
222 Rita v. United States, 127 S. Ct. 2456, 2475 (2007) (Scalia, J., concurring).
223 *Id.*
224 *Id.*
225 *Id.*

by abandoning substantive reasonableness review altogether and limiting appellate courts to review sentences only for procedural deficiencies.[226]

In *Rita*, Justice Breyer dismissed these criticisms of the majority, adding that Justice Scalia's "need to rely on *hypotheticals* to make his point is consistent with our view that the approach adopted here will not 'raise a multitude of constitutional problems.'"[227] Thus, Justice Breyer essentially conceded the point, yet adhered to the belief that the issue would arise infrequently.[228] This argument, however, is unsatisfactory because *Booker* mandated reasonableness review as a means to cure the very same constitutional defect—that increased exposure to heightened penalties based on judge-found facts is a violation of the Sixth Amendment. Therefore, the only difference between the as-applied constitutional defect identified by Justice Scalia and the defect identified in *Booker* is that an appeals court is evaluated in the former and the sentencing judge is assessed in the latter.

D. The Guidelines-centric Approach is Misguided and Frustrates the Remedy in Booker

In many ways, *Rita* and *Gall* underscored and endorsed a continuing reliance by the federal judiciary on sentences calculated under the Guidelines,[229] perpetuating a misguided system and frustrating the remedy in *Booker*. The Supreme Court spent very little time discussing the actual text of the section 3553 factors, focusing instead on the dual-reasonableness of the Guidelines while approving a presumption that further insulates within-Guidelines sentences.[230]

The majority in *Rita* argued that "where judge and Commission *both* determine that the Guidelines sentences [sic] is an appropriate sentence for the case at hand, that sentence likely reflects the section 3553(a) factors (including its 'not greater than necessary' requirement)."[231]

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[226] *Id.* at 2476.

[227] Rita v. United States, 127 S. Ct. 2456, 2466 (2007) (quoting Clark v. Martinez, 543 U.S. 371, 380–81 (2005)).

[228] *Rita*, 127 S. Ct. at 2466.

[229] For a discussion on sentencing conservatism among the circuit courts, *see* Berman, *supra* note 38.

[230] *See Rita*, 127 S. Ct. at 2462 ("[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.").

[231] *Rita*, 127 S. Ct. 2456 at 2467.

This recognition assumes that sentences under the Guidelines actually achieved the goals set forth by Congress under section 3553 and that sentencing judges independently determined sentences within Congress's framework. At least one author has criticized these assumptions. Judge Nancy Gertner, a district court judge for the District of Massachusetts, stated in a recent article on *Rita*, "Justice Breyer's analysis of the Guidelines rationale reiterates the *ideology* of the Guidelines formation—not their actual genesis or operation."[232] In other words, although the Sentencing Commission has adopted the policy statements identified by Congress, the resulting sentences do not reflect these same goals.[233] This issue is arguably most apparent in drug cases. Judge Gertner observed:

> You apply the Sentencing Guidelines, as you have been told you must, and you tally up the numbers and determine where the defendant is on the grid, and ultimately come up with a result that makes no sense by any measure. It is inconsistent with the purposes of sentencing in the Sentencing Reform Act . . . it is out of proportion to the defendant's culpability and to sentences that have been meted out for far worse, even violent offenses; it is not at all what the public—if they knew all the facts—would demand.[234]

In essence, Judge Gertner identified a fundamental disconnect between the Guidelines and the penological polices identified by Congress.

The discrepancy between the Congressional goals and the sentences produced by the Guidelines might be explained by the Guidelines' predominant focus on offense conduct.[235] Offense conduct relates to the defendant's actions during the commission of the crime, such as brandishing a weapon, the amount of harm suffered by the victim, or the class of crime committed.[236] Offender characteristics relate to the circumstances surrounding the defendant's history.[237] The district court typically considers both offense conduct and offense characteristics.[238] However, the Guidelines tend only to focus on offense conduct, discounting a number of offender characteristics as "not ordinarily relevant" such as "age; education and vocational skills; mental and

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[232] Nancy Gertner, Federal Sentencing Survey: *Rita Needs Gall—How To Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 69 (2007).

[233] *See id.*

[234] *Id.* at 63.

[235] Jeffrey S. Hurd, Comment, *Federal Sentencing and the Uncertain Future of Reasonableness Review*, 84 DENV. U. L. REV. 835, 851 (2007).

[236] *Id.*

[237] *Id.*

[238] *Id.*

emotional conditions; physical condition; employment record; family ties and responsibilities; previous military, public or charitable service; and lack of guidance as a youth."[239]

Significantly, the Guidelines Manual exempts from this list the defendant's criminal history, which, along with offense category, establishes the defendant's applicable sentence range.[240] Consequently, the Guidelines directly contradict the Sentencing Act, which instructs a court to consider "the nature and circumstances of the offense and the history *and characteristics* of the defendant."[241]

Moreover, the Supreme Court's continued focus on the Guidelines as the centerpiece of sentencing reinforces a tendency among sentencing judges to apply a within-Guidelines sentence unless the defendant can demonstrate that his individual case warrants a departure.[242] Judge Gertner identified the district court judge's comments in *Rita* as a typical example:

> At sentencing, the district court heard Rita's presentation but concluded that it was 'unable to find that the . . . sentencing guideline range . . . is an inappropriate guideline range for that. . . . Clearly, the court's remarks suggest that Rita had to show that he was somehow extraordinary, not the usual person in this guideline range.[243]

As Judge Gertner observed, the above allocution does not reflect an independent determination of reasonableness confirmed by the Guidelines, but instead demonstrates rote application of the Guidelines absent some showing that a within-Guidelines sentence was inappropriate in the case.[244]

Additionally, the current Guidelines-centric approach only serves to perpetuate the Sixth Amendment constitutional deficiencies the Supreme Court sought to eliminate in the remedial portion of *Booker*. In order to cure the constitutional defects of the mandatory system, *Booker* mandated an advisory scheme.[245] However, the Supreme Court has continued to limit actual discretion by emphasizing the Guidelines as the dominant factor and starting point of all sentencing determinations.[246]

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[239] *Id.* (internal citations omitted).
[240] *Id.*
[241] Hurd, *supra* note 235, at 851 (emphasis added). *See also* the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(1) (1984).
[242] *See* Hurd, *supra* note 235, at 851.
[243] Gertner, *supra* note 232, at 230.
[244] *See id.*
[245] United States v. Booker, 543 U.S. 220, 225 (2004).
[246] *See* Rita v. United States, 127 S. Ct. 2456, 2465–66 (2007).

Furthermore, substantive reasonableness review insulates within-Guidelines sentences by enabling appellate courts to overturn sentences falling outside of the Guidelines range.[247] Thus, while *Booker* gives a judge freedom to depart from the Guidelines, below-Guidelines sentences are susceptible to substantive scrutiny akin to *de novo* review.[248] The combined effect of this Guidelines-centric approach and substantive reasonableness review is a return to a *de facto* mandatory scheme, with "advisory" an empty adjective. Such a system is constitutionally repugnant under *Booker*.[249]

Ultimately, *Rita* and *Gall* failed to adequately address the fundamental flaws of reasonableness review. *Rita* endorsed a presumption of reasonableness that further insulates within-Guidelines sentences, creating a *de facto* mandatory guideline system.[250] Additionally, the Supreme Court failed to provide adequate guidance for both appellate and district courts as to the scope and application of substantive reasonableness review, leaving circuit courts with the task of trying to determine exactly when a sentence reaches the threshold of reasonableness. Moreover, the Supreme Court left intact a conception of substantive review vulnerable to as-applied constitutional challenge. Finally, both *Rita* and *Gall* are replete with Guidelines-centric language that further frustrates the remedial mandate of *Booker*. If the Supreme Court seeks to fashion a sentencing jurisprudence that passes constitutional muster, the Court must effectuate a significant change in course.[251]

V. PROCEDURAL REASONABLENESS REVIEW AND A PARSIMONY-CENTRIC APPROACH WOULD ALLEVIATE THE ISSUES THE SUPREME COURT NEGLECTED IN *GALL* AND *RITA*

As discussed above, many of the challenges confronting both district and appellate courts stem from a misguided emphasis on the

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[247] *See, e.g.*, Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[248] *See Tomko*, 498 F.3d at 173.

[249] *See id.*

[250] *See* Rita v. United States, 127 S. Ct. 2456, 2466 (2007) ("Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences. But we do not see how that fact could change the constitutional calculus.").

[251] Of course, Congress could solve many of these problems by requiring that all facts necessary to enhance a sentence under the Guidelines be submitted to a jury. *See Booker*, 543 U.S. at 270 (Stevens, J., dissenting). This comment only discusses the role of the Supreme Court in addressing the issues that have arisen since *Booker*. Congress is free to amend the sentencing statute as it deems necessary (within the Constitutional framework established by the Court). However, Congress has thus far declined to do so, and until amendments are made, the Court must adhere to its holding in *Booker*.

Sentencing Guidelines. Further, appellate courts have essentially unfettered authority to review the substance of sentences that deviate from those Guidelines. As a result, the Supreme Court has seriously jeopardized the advisory system that *Booker* implemented.

The Supreme Court may alleviate the critical issues neglected in *Gall* and *Rita* by developing a parsimony-centric approach to sentencing in district courts and by advocating procedural reasonableness review of those sentences by the appellate courts. The words "parsimony-centric" imply a de-emphasis on the Guidelines. By de-emphasizing the importance of the Guidelines, the Supreme Court would promote a more holistic approach, enabling the sentencing court to rely on the section 3553 factors in their entirety. Additionally, a review based on procedure would facilitate discretion by limiting review to patently procedural flaws. Both of these proposals tend to produce a sentencing scheme that is more consistent with the Supreme Court's remedy in *Booker*—a Guidelines system that is truly *advisory*.

The problems associated with substantive reasonableness review are twofold. First, the process allows appellate courts to effectively re-weigh the section 3553 factors, resulting in the erosion of the judicial discretion mandated by *Booker*.[252] Second, as Justice Scalia asserted in his *Rita* dissent, substantive review is vulnerable to as-applied constitutional challenges.[253] The Supreme Court could resolve both problems by greatly limiting the scope of reasonableness review by appellate courts down to a highly deferential, procedural review.

Procedural reasonableness review would foreclose as-applied constitutional challenges. Under the current conception of substantive reasonableness review, the courts of appeals will uphold certain cases as reasonable based solely on judge-found facts.[254] Although such cases would be rare, or at least rarely obvious from the factual circumstances of the case,[255] this argument underscores the inherent unconstitutionality of substantive review. Procedural review would eliminate this issue because appellate courts would lose their freedom to independently evaluate the sentencing judge's justifications for the chosen sentence. A sentence would not be reasonable or unreasonable based solely on the factual determinations of an appeals court.[256] Therefore, there will not be

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[252] *See, e.g.*, *Tomko*, 498 F.3d at 183–84.

[253] *Rita*, 127 S. Ct. 2456, 2478 (Scalia J., concurring).

[254] *Id.*

[255] Justice Scalia illustrates this using two stylized hypotheticals. *See supra* Part IV.C.

[256] Returning to Justice Scalia's hypotheticals, a sentence which was substantially increased because a firearm was involved would not be upheld as reasonable solely because of that fact; rather it would be upheld because the sentencing judge did not rely

an occasion for judicial fact-finding by the appellate courts; a court of appeals could only overturn a sentence if it was procedurally deficient.[257]

In addition, a stripped-down procedural review would revitalize judicial discretion. The remedial decision in *Booker* laid the groundwork for reasonableness review. In *Rita*, Justice Stevens asserted that *Booker* "plainly contemplated . . . a substantive component."[258] The Supreme Court emphasized that, while sentencing judges must impose sentences that consider the section 3553 factors, an appellate court could still overturn a sentence as substantively unreasonable.[259] Accordingly, substantive reasonableness review effectively allows an appellate court to reconsider a sentencing judge's decision. Such a conception essentially draws a line between substance and procedure.[260]

However, substance and procedure often overlap.[261] Reconfiguring the reasonableness standard of review so that courts would elevate procedure over substance would not completely eliminate an appeals court's ability to overturn a sentence on substantive grounds. While an appellate court could not reweigh the section 3553 factors, a sentence issued by a district court based on patently flawed logic, impermissible circumstances, or clearly erroneous facts is both substantively and procedurally deficient.[262] Thus, a procedurally-based review would ensure that district court judges truly have discretion to sentence within statutory range as long as the sentence reflects a careful consideration of the section 3553 factors, including the Guidelines as one factor.

On balance, the circuit courts have not embraced this view.[263] Both *Tomko* and, to a lesser degree, *Wachowiak*, interpret the Supreme Court's decision in *Rita* as advocating a notion of substantive review where

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on clearly erroneous facts or some other procedural deficiency. *See Rita*, 127 S. Ct. 2456, 2478 (Scalia J., concurring), *and supra* Part IV.C.

[257] *Rita*, 127 S. Ct. 2456, 2478 (Scalia, J., concurring).

[258] *Rita*, 127 S. Ct. at 2473.

[259] *See id.* at 2466.

[260] *See Tomko*, 498 F.3d at 183.

[261] *Rita*, 127 S. Ct. at 2481 n.6 (Scalia, J., concurring) ("'Substance' and 'procedure' are admittedly chameleon-like terms. As the text indicates, my use of the term 'procedure' here includes the limiting of sentencing factors to permissible ones—as opposed to using permissible factors but reaching a result that is 'substantively' wrong.") (internal citations omitted).

[262] Justice Scalia envisioned a system in which appellate courts could reverse a sentence that "appears not to have considered section 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with section 3553(c)'s requirement of statement of reasons." *Rita*, 127 S. Ct. at 2483 (Scalia J., concurring).

[263] *See, e.g.*, Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

substance outweighs procedure.[264] A procedurally-based review would likely assuage the dissent in *Tomko*, which regarded the substantive review as trivializing the *Booker* decision, thus creating uncertainty among the district courts.[265] Although the *Wachowiak* court exercised a greater degree of deference to the district court, there remains a range of sentences, which at some undefined threshold would trigger the court's authority to reverse on substantive grounds.[266]

However, *Rita* and *Gall* do not preclude procedural substantive review. In fact, the Supreme Court's emphasis on reasoned sentencing in both decisions provides the foundation for a departure from the Guidelines-centric approach. Professor Berman, a leading commentator on sentencing policy, recently remarked that "the *Rita* decision emphasized (though opaquely) the importance of sentencing rulings as reasoned decisions . . . the ruling still sent an important signal that district and circuit judges should—indeed, must—explore and contemplate the reasons for specific sentencing outcomes."[267] *Gall* reflects the Court's emphasis on procedure and individualized sentencing as well.[268]

Indeed, the parsimony principle underlies the Sentencing Reform Act, which provides that a sentence should be "sufficient but not greater than necessary" to achieve the policies enumerated under section 3553.[269] By emphasizing the sentencing factors outlined by Congress, as opposed to affording greater weight to the Guidelines, the Supreme Court would give greater effect to the advisory system. Such a system would allow a judge the freedom to depart from the Guidelines when, in light of the section 3553 sentencing factors, the Guideline sentence would result in a sentence "greater than necessary" to achieve the basic goals set forth by Congress.[270]

Ultimately, a procedurally-based reasonableness review coupled with a holistic, parsimony-centric approach to sentencing would activate

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[264] *Tomko*, 498 F.3d at 157 (3d Cir. 2007); Wachowiak, 496 F.3d at 744 (7th Cir. 2007).

[265] Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[266] *Wachowiak*, 496 F.3d at 744.

[267] Berman, *supra* note 38, at 23.

[268] *See Gall*, 128 S. Ct. at 597 ("It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.").

[269] 18 U.S.C. § 3553(a) (2006).

[270] *Id.*

the basic holding in *Booker* by giving sentencing judges the freedom to impose a sentence within the full statutory range. While *Rita* and *Gall* appear to embrace the Guidelines as the center of sentencing jurisprudence, they do not preclude a departure from substantive review.

The Supreme Court decided *Booker* to prevent judges from finding facts that permit them to impose sentences that contravene the Sixth Amendment right to a jury. Continued application of substance-dominated review discourages the very judicial discretion central to an advisory scheme. Moreover, substantive review is vulnerable to as-applied constitutional challenges. Finally, an emphasis on the parsimony principle rather than the Guidelines would return the Guidelines system to its proper place as one factor among several policy considerations identified by Congress as appropriate in sentencing.

VI. CONCLUSION

Sentencing jurisprudence is a highly important and significant area of law that is easily consumed by abstract complexities. In *United States v. Booker*,[271] the Court held that the application of the Guidelines would no longer be mandatory and that appellate courts would review sentences for reasonableness. For better or for worse, the Supreme Court's decision in *Booker* implemented an advisory Guidelines system designed to ensure that people convicted of crimes receive sentences on the basis of facts proven to a jury beyond a reasonable doubt.[272] In *United States v. Booker*,[273] the Court held that the application of the Guidelines would no longer be mandatory and that appellate courts would review sentences for reasonableness.[274]

In an attempt to apply the reasonableness standard, the circuit courts have devised different doctrines for determining when a sentence is in fact unreasonable.[275] The Supreme Court addressed the validity of two of these doctrines in *Rita v. United States*[276] and *Gall v. United States*.[277] *Rita* held that a presumption of reasonableness for within-

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[271] United States v. Booker, 543 U.S. 220 (2005).
[272] *See* United States v. Booker, 543 U.S. 220, 226 (2005).
[273] United States v. Booker, 543 U.S. 220 (2005).
[274] *Id.*
[275] *See, e.g.*, Rita v. United States, 127 S. Ct. 2456 (2007) (reviewing appellate court's adoption of presumption of reasonableness); Gall v. United States, 128 S. Ct. 586 (2007) (reviewing appellate court's adoption of proportionality principle); United States v. Bradford, 500 F.3d 808 (8th Cir. 2007) (applying proportionality principle); United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007) (also applying proportionality principle).
[276] Rita v. United States, 127 S. Ct. 2456 (2007).
[277] United States v. Gall, 128 S. Ct. 586 (2007).

Guidelines sentences is not inconsistent with the advisory Guidelines.[278] In *Gall*, however, the Supreme Court held that the circuits cannot apply the so-called "proportionality principle," a standard that would overturn sentencing decisions that do not provide proportional reasons for deviating from a Guidelines sentence.[279] Although the Court reconciled these specific approaches with reasonableness review, the exact scope of reasonableness review remains ambiguous.

Tomko[280] and *Wachowiak*[281] indicate the ambiguity of reasonableness review among the circuits. While reaching different results, the Third and Seventh Circuits construed *Rita* as approving a substantively-based standard of review in which appellate courts can reverse sentences deemed to be substantively unreasonable.[282] Despite disagreeing with the sentence imposed, the *Wachowiak* court upheld the lower court's sentence, citing *Rita* for the proposition that appellate courts should afford a high level of deference to the district court.[283] The *Tomko* court essentially reconsidered the section 3553 factors, finding the justifications offered by the sentencing judge to be inadequate.[284] Taken together, the cases reflect a core disagreement among the circuit courts over the scope of substantive review.

Ultimately, *Rita* and *Gall* failed to address the fundamental flaws inherent in reasonableness review in a number of different ways. First, the presumption of reasonableness only serves to insulate and encourage Guideline sentences, threatening the very foundations of the remedial portion of *Booker*.[285] Second, the majorities in both *Rita* and *Gall* continue to privilege the Guidelines and endorse a substantive reasonableness review in which the appellate courts can effectively reweigh sentencing factors.[286] This "gravitational pull" toward the Guidelines further frustrates the *Booker* remedy and prevents judges from exercising any meaningful discretion.[287] Third, substantive reasonableness review is vulnerable to as-applied constitutional challenges similar to those addressed in *Booker*, except appellate judges

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[278] *Rita*, 127 S. Ct. at 2459.

[279] *Gall*, 128 S. Ct. at 601.

[280] Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008).

[281] United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

[282] Tomko v. United States, 498 F.3d 157 (3d Cir. 2007) (Smith, J., dissenting), *vacated*, *reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007).

[283] *Wachowiak*, 496 F.3d at 744.

[284] *See Tomko*, 498 F. 3d at 163.

[285] *See Rita*, 127 S. Ct. at 2466.

[286] *See Rita*, 127 S. Ct. at 2467; *Gall*, 128 S. Ct. at 597.

[287] Rita v. United States, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting).

determine the facts necessary to support a reasonable sentence in those instances, rather than trial judges.[288] Finally, the Supreme Court continues to endorse a Guidelines-centric approach to sentencing that fails to effectively fulfill the goals outlined by Congress under section 3553 of the Sentencing Reform Act.[289]

An approach that elevates procedure over substance, along with a holistic, parsimony-centric reliance on the statutory factors outlined by Congress, would effectively alleviate these fundamental flaws. Sentencing judges could then exercise meaningful discretion that is integral to the protection of the constitutional rights of criminal defendants and to the preservation of the Supreme Court's remedial holding in *Booker*. Additionally, a procedurally-based system would eliminate as-applied constitutional challenges based on judicial fact finding by appellate courts.

Moreover, the Supreme Court should encourage sentencing judges to account for all of the sentencing factors set forth by Congress, including, but not privileging, the Sentencing Guidelines. This approach would ensure that sentences are "sufficient but not greater than necessary" in accordance with the overarching provision set forth by Congress in section 3553.[290] As Justice Scalia observed in his dissent in *Rita*, "[i]t is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts—as *Booker* itself recognized."[291] Perhaps the Court will finally become cognizant of the practical implications of sentencing jurisprudence when it inevitably faces the next round of challenges to reasonableness review.

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[288] *Id.* at 2475 (Scalia, J., concurring).
[289] *See Rita*, 127 S. Ct. at 2462.
[290] 18 U.S.C. § 3553(a) (2006).
[291] *Rita*, 127 S. Ct. at 2479 n.4 (Scalia, J., dissenting).