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## An Appellate Perspective on Federal Sentencing after Booker and Rita

# AN APPELLATE PERSPECTIVE ON FEDERAL SENTENCING AFTER *BOOKER* AND *RITA*

JEFFREY S. SUTTON<sup>†</sup>

Federal sentencing is haunted by two sets of truths that, if not mutually exclusive, are at least difficult to reconcile.

## I. INDIVIDUALIZED SENTENCING

One set of truths goes something like this: Individuals who commit crimes, like individuals who do not, are unique. They commit crimes for different reasons; they have different prospects for redeeming themselves or for doing it again; and prison time will affect people differently at different stages in their lives. Some crimes deserve more punishment than other crimes. And the effects of crime, whether on individual victims, communities or institutions, differ from crime to crime.

First the President, then the Senate, devotes considerable time to ensuring that the federal judges empowered to sentence these individuals have the experience, intelligence and judgment to sentence them fairly. And each judge takes an oath to do just that.<sup>1</sup> Over time, trial judges charged with sentencing criminals day in and day out develop not just experience but expertise in their sentencing practices and in sentencing individuals within typically wide ranges set by Congress. Before imposing each sentence, trial judges also do something that no legislature, commission or appellate court can do: They hear from the defendants, and they sometimes hear from their families and from the victims of the crime as well, after which the judges must explain on the record why they sentenced the defendant the way they did. In the face of these realities, Congress, the United States Sentencing Commission and above all appellate judges ought to respect these individualized sentencing judgments and be exceedingly reluctant to second-guess them—no matter how varied the resulting sentences may be. Let the trial judges be judges, in short, and let them exercise the judgment entrusted to them.

## II. CONSISTENCY

The other set of truths goes something like this: When it comes to federal criminal laws, the National Government is one sovereign and

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1. 28 U.S.C.A. § 453 (2007).

there thus ought to be some parity, from one federal courthouse to the next, in sentencing practices for violations of the same criminal laws by individuals with similar criminal records. “Equal Justice Under Law” are the first words that visitors see as they approach the entrance to the Supreme Court, yet there is nothing equal or just about permitting one judge to send an individual to prison for ten years while permitting another judge to give probation to a second individual who committed the same crime and who comes before the court with the same criminal record. Bitterness, not self-reflection, is bound to be the first, and may well be the lasting, sentiment of the hapless criminal sent to languish in jail with the unparolable ten-year sentence.

The risk of federal sentencing disparities, history shows, is not a phantom threat.<sup>2</sup> It takes more than one judge to sentence some 72,500 federal criminal defendants a year.<sup>3</sup> And just as the circumstances of each criminal defendant differ, so do the backgrounds of the 1,000 or so active and senior judges who fill the federal trial bench. The experiences and sentencing philosophies of some judges are bound to lead them to err on the side of shorter sentences and the hope for rehabilitation, and the experiences of others are bound to lead them to be more wary of the risk of recidivism and the price (another victim) of being wrong. The seesawing goals of sentencing only feed these disparities. Rehabilitation, deterrence, retribution, protecting the public—each of them offers a different insight, frequently a rival insight, about an appropriate sentence.

While sentencing disparity may happen for legitimate reasons and may well reflect the hopelessly disparate goals of sentencing, the imperatives of predictability, consistency, equal justice and respect for the law require someone, somewhere, to level out these sentences. Unguided and unreviewable sentencing discretion cannot co-exist with sentencing parity—and that is where Congress, the Sentencing Commission and appellate courts enter the picture. In establishing statutory sentencing ranges, in recommending guidelines ranges and in reviewing trial court sentences, these national institutions play an essential role in eliminating, or at least ameliorating, sentencing disparities.

At the extremes, these two sets of truths represent rival visions of national sentencing policy. One cannot exalt the virtues of individualized sentencing without diminishing the virtue of consistency. Sentencing practices in the pre-guidelines era tilted in favor of individualized sentencing that was indeterminate in nature and was subject to virtually

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2. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5-6 (1973); Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 762-90 (2006); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 33-36 (2000).

3. U.S. SENTENCING COMM’N, OFFICE OF POLICY ANALYSIS, STATISTICAL INFORMATION PACKET 4, available at <http://www.ussc.gov/JUDPACK/2006/1c06.pdf> (providing statistics for Fiscal Year 2006).

no appellate review. And sentencing practices during the mandatory-guidelines era tilted in favor of consistency because departures were few and far between and because guidelines-centric appellate review was rigorous—save for the interval when *Koon v. United States*<sup>4</sup> set the standard of review.<sup>5</sup>

### III. INDIVIDUALIZED SENTENCING AND CONSISTENCY AFTER *BOOKER* AND *RITA*

The question after *United States v. Booker*<sup>6</sup> and *Rita v. United States*<sup>7</sup> is where the next Hegelian turn will take us—back to an individualized sentencing regime, back to a consistency regime governed by guidelines that are advisory in name but not in practice, or forward to a system that attempts to accommodate, however imperfectly, these competing goals. Only a fool would presume to know how this will play out—because knowing requires not just a prediction of how the courts will respond to the decisions but also knowing how (and whether) Congress will respond to the courts. And perhaps only a fool should hope. But if an utterly indeterminate sentencing regime slights consistency and if an overly determinate sentencing regime slights individualized sentencing, it may be that *Booker* and *Rita* present an opportunity to thread the sentencing needle.

At the same time that the *Booker* constitutional opinion elevated the role of the jury,<sup>8</sup> the *Booker* remedial opinion elevated the role of district courts by giving them discretion to impose sentences based on all of the § 3553(a) factors rather than effectively just one of them—the guidelines.<sup>9</sup> The § 3553(a) factors in some ways promote consistency by directing courts to consider a national guidelines range,<sup>10</sup> to take into account policy statements of the Sentencing Commission<sup>11</sup> and to “avoid unwarranted sentencing disparities.”<sup>12</sup> The § 3553(a) factors in other ways promote individualized sentencing by telling courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant,”<sup>13</sup> “the need for the sentence imposed” based

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4. 518 U.S. 81 (1996).

5. Compare *id.* at 98 (“A district court’s decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.”), with Feeney Amendment, Pub. L. No. 108-21, § 401(d), 117 Stat. 650, 670 (2003) (codified at 18 U.S.C.A. § 3742(e) (2007)) (“With respect to [departure] determinations . . . the court of appeals shall review de novo the district court’s application of the guidelines to the facts.”).

6. 543 U.S. 220 (2005).

7. 127 S. Ct. 2456 (2007).

8. *Booker*, 543 U.S. at 224.

9. See *id.* at 249, 259-60.

10. 18 U.S.C.A. § 3553(a)(4) (2007).

11. § 3553(a)(5).

12. § 3553(a)(6).

13. § 3553(a)(1).

on the various goals of sentencing,<sup>14</sup> “the kinds of sentences available”<sup>15</sup> and the need to provide restitution to crime victims.<sup>16</sup>

Complicating matters, the Sentencing Commission, at Congress’s direction, has attempted to account for these same factors, suggesting that the recommended guidelines ranges represent an initial cut at reconciling these disparate objectives.<sup>17</sup> And of course one of the effects of establishing nationwide recommended guidelines ranges based in part on “empirical” data of actual sentences<sup>18</sup> is to further consistency *and* individualized sentencing—an objective reinforced by the Commission’s creation of recommended sentencing bands, not recommended sentences.

Even though the Sentencing Commission’s recommendations have taken the § 3553(a) factors into account and even though the Commission’s mission serves at some level to synthesize the disparate goals of consistency and individualized sentencing, the fact remains that the key players in this new world, at least initially, are the district court judges. It is they, not the appellate courts and not the Sentencing Commission, whom Congress (and the Supreme Court) has empowered to balance these considerations in each individual case. It is they alone who have an opportunity to hear from the individuals involved in, and affected by, the crime.<sup>19</sup> “While trial judges sentence individuals face to face for a living, [appellate judges] review transcripts for a living. No one sentences transcripts.”<sup>20</sup> Once a sentencing court offers a reasoned explanation for its application of the § 3553(a) factors to an individual, it therefore makes considerable sense for appellate courts to “give the benefit of the doubt to the district court’s judgment—conducting reasonableness review that comes to nothing more than abuse-of-discretion review.”<sup>21</sup>

That deference, however, may mean different things in different cases—and one of the questions raised by this article is whether it should. Three categories of district-court sentences have emerged since *Booker*: within-guidelines sentences, modest variances from the guidelines and extreme variances from the guidelines. Each group raises a different set of concerns regarding the tension between individualized sentencing and consistency and the role of appellate review in preserving both values.

14. § 3553(a)(2).

15. § 3553(a)(3).

16. § 3553(a)(7).

17. 28 U.S.C.A. § 991(b)(1)(A) (2007); *see also* *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007) (“Congressional statutes . . . tell the Commission to write Guidelines that will carry out these same § 3553(a) objectives.”); *id.* at 2464-65 (“[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve 18 U.S.C. § 3553(a)’s objectives.”).

18. *Rita*, 127 S. Ct. at 2464.

19. *United States v. Poynter*, 495 F.3d 349, 351 (6th Cir. 2007).

20. *Id.*

21. *Id.* at 358 (citing *Rita*, 127 S. Ct. at 2465).

### A. Appellate Review of Within-Guidelines Sentences

Any tension between the objectives of individualized sentencing and consistency essentially disappears when the independent views of the sentencing court and the Sentencing Commission “align[.]”<sup>22</sup> As *Rita* explained in permitting appellate courts to apply a presumption of reasonableness to within-guidelines sentences, there is no presumption of unreasonableness for outside-guidelines sentences.<sup>23</sup> What makes the appellate presumption of reasonableness for within-guidelines sentences consistent with *Booker* and consistent with the Sixth Amendment is that it turns in part on the “double determination” that “both the sentencing judge and the Sentencing Commission . . . reached the *same* conclusion as to the proper sentence in the particular case.”<sup>24</sup>

If the Sentencing Commission and the sentencing judge come to the same conclusion about an appropriate sentencing range, and if the sentencing judge exercises independent judgment in reaching that conclusion and satisfies the procedural requirements of post-*Booker* sentencing (appreciating the advisory nature of the Guidelines, properly calculating the guideline range and offering a reasoned explanation for the sentence), it is difficult to see how either individualized sentencing or consistency has been compromised. That is not to say there is no role for appellate review in this setting; the presumption of reasonableness, we know, remains a rebuttable one.<sup>25</sup> It is to say, however, that a central concern of post-*Booker* review—respecting individualized sentencing judgments *while* preserving consistency—does not support reversal when the discretionary views of one judge and the national recommendations of the Commission are on the same page.

### B. Appellate Review of Modest Variances from the Guidelines

When by contrast the Commission and the sentencing judge disagree, even insubstantially, that means an appellate judge concerned about furthering individualized sentencing and consistency has something to think about. The key role of the appellate court when the disagreement is relatively modest, as I see it, is a procedural one, and the most essential procedural protection is an insistence on a coherent explanation for the sentence.

If one takes seriously the Sentencing Commission’s role in developing appropriate sentencing ranges, courts of appeals should insist that district courts offer a reasoned explanation for any guidelines variances, not because outside-guidelines sentences are presumptively wrong, not

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22. *United States v. Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring).

23. *Rita*, 127 S. Ct. at 2467.

24. *Id.* at 2463; see *Buchanan*, 449 F.3d at 736-37 (Sutton, J., concurring).

25. *Rita*, 127 S. Ct. at 2463 (“For one thing, the presumption is not binding.”); *id.* at 2474 (Stevens, J., concurring) (“[T]he rebuttability of the presumption is real.”).

because the district court lacks authority to reinstate the same sentence on remand after giving a more thorough explanation, but because any hope that the Sentencing Commission's recommendations will evolve to account for the views of 1,000 or so district court judges demands dialogue. Congress has recognized as much. Although it requires courts to give a statement of reasons for each and every sentence, it requires courts to give "the specific reason for the imposition of a sentence different from" the sentence recommended by the Sentencing Commission.<sup>26</sup> The Supreme Court seems to have come to the same conclusion, suggesting that within-guidelines sentences demand a less thorough explanation than outside-guidelines sentences.<sup>27</sup>

After insisting on this explanation (and after insisting on trial-court compliance with the other procedural rules of post-*Booker* sentencing), I see little room for appellate review—little room for a substantive reassessment of the length of the sentence in light of the district court's application of the § 3553(a) factors. Why? It is notoriously difficult to conduct this kind of review in a principled way; appellate courts are poorly positioned to reassess the application of these factors from a distance—think of the challenges of reassessing an individual's prospects for rehabilitation or recidivism; the cost of not conducting substantive review (modest inconsistencies) is low; and the value of not doing it (promoting individualized sentencing) is high.

The difficulty of policing modest variances has at least two sources. If 1,000 district court judges have different views about how to implement the disparate purposes of sentences, you can bet that 270 or so appellate judges do as well. Even if you break the numbers down to the active and senior judges serving on one appellate court (the Sixth Circuit has 22), there is no reason to think that geographical affinity will somehow eliminate these differences—to say nothing of creating a consensus on what substantive reasonableness or abuse-of-discretion review means in the setting of modest variances.

How, moreover, does a court of appeals explain the decision to affirm some of these modest variances but not others on substantive reasonableness grounds? In reversing some *extreme* upward and downward variances on substantive grounds, our court has explained that the district court's explanations left "no room to make reasoned distinctions between [the defendant's downward] variance and the variances that other, more worthy defendants may deserve."<sup>28</sup> An insistence that trial courts make "reasoned distinctions" among types of defendants may be appropriate

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26. *Poynter*, 495 F.3d at 356 (quoting 18 U.S.C.A. § 3553(c)(2) (2007)).

27. *See Rita*, 127 S. Ct. at 2468 ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation.")

28. *United States v. Davis*, 458 F.3d 491, 499 (6th Cir. 2006) (vacating a 99.89% downward variance); *see Poynter*, 495 F.3d at 354-55 (vacating a 206% upward variance).



when it comes to extreme variances. But is it doable with respect to *modest* variances? And even if it is, courts of appeals that insist on “reasoned distinctions” between defendants ought to ensure that *they* provide “reasoned distinctions” between the modest variances they uphold and the ones they reverse, and that their efforts in the end promote the best reason for conducting such review in the first instance—consistency—rather than undermining it. That is a difficult mission, perhaps an impossible mission. For my part, so long as appellate courts ensure that the trial courts meaningfully communicate why a guidelines sentence does not make sense in a given case and so long as they ensure that trial courts comply with the procedural requirements of post-*Booker* sentencing, I see little room for substantive-reasonableness review of such sentences. The value of individualized sentencing trumps the minor consistency gains that substantive review might give us.

All of which prompts the question of what kinds of variances am I talking about—what kinds of sentences should receive little substantive review? The answer is not a numerical one—with downward variances of, say, 20% receiving little substantive review and downward variances of, say, 80% receiving more rigorous review. The answer is a functional one. If a court of appeals can draw “reasoned distinctions” among defendants, then it should not hesitate to engage in substantive review, which will further consistency while curbing the risks of unchecked individualized sentencing. If it cannot, then the game is not worth the candle.

### C. Appellate Review of Extreme Variances from the Guidelines

The individualized-sentencing/consistency tension arises most acutely in the setting of extreme variances from the guidelines. Here we have the issue in full bloom—broad statutory sentencing ranges, individualized sentences from one end of each range to the other and the risk that with time sentences all over the map for the same crime will become the rule rather than the exception.

Any effort to avoid the return of sentencing disparities while preserving individualized sentencing must account for the role of the appellate courts. Leave it to an appellate judge, I realize, to identify a problem, then insist that only appellate judges can solve it, but bear with me. Trial courts, for starters, cannot manage consistency—unless they reflexively follow the guidelines and forsake the independent judgment that *Booker* and *Rita* expect of them. Once they exercise that judgment, “district court judges cannot correct” unwarranted sentencing disparities “within their circuit or even their own court (so long as two or more judges sit there), much less nationwide, because ‘different judges (and others) can differ as to how best to reconcile the disparate ends of pun-

ishment.”<sup>29</sup> Reasonableness review allows “appellate courts to minimize sentencing disparities between and among district courts (and between and among courts of appeals),”<sup>30</sup> and thus to “iron out” these sentencing differences.<sup>31</sup>

No doubt, Congress and the Sentencing Commission can manage consistency, but the question is whether they can do so while preserving the virtues of individualized sentencing. Perhaps more importantly, neither body has responded to *Booker*—either by correcting the Sixth Amendment defect in the original guidelines or by correcting the remedy. Until then, the appellate courts are the only body available to manage the individualized-sentencing/consistency dilemma.

In “iron[ing] out” serious sentencing differences through reasonableness review, appellate courts must determine the role that the guidelines will play and must determine what other tools they may use to preserve consistency without squelching individualized sentencing.<sup>32</sup> A few tools seem straightforward and relatively non-controversial.

*First*, in conducting reasonableness review, appellate courts ought to be able to treat the guidelines as an organizing principle—in view of the Sentencing Commission’s expertise, its efforts to account for the § 3553(a) factors and the absence of any other tenable threshold for beginning the discussion.

Starting with the statutory minimum (if any) for the offense, then adjusting the sentence upward (if appropriate) based on the appellate court’s own assessment of the § 3553(a) factors, and then (and only then) considering the guidelines range might work in theory but would seem doomed to founder on the “rough equality” requirement, if not the impracticability of such an approach.<sup>33</sup>

*Booker* and *Rita* seem to resolve this issue, both clearly noting that reasonableness review must account for the guidelines recommendation and both seeming to permit that review to start with a consideration of the guidelines-recommended sentencing range.<sup>34</sup> Consistent with this approach, *Rita* suggests that the trial court should consider whether to grant a departure before considering whether to grant a variance.<sup>35</sup>

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29. *Poynter*, 495 F.3d at 352 (quoting *Rita*, 127 S. Ct. at 2464).

30. *Davis*, 458 F.3d at 495.

31. *United States v. Booker*, 543 U.S. 220, 263 (2005).

32. *Id.*

33. *United States v. Buchanan*, 449 F.3d 731, 738 (6th Cir. 2006) (Sutton, J., concurring).

34. *Rita*, 127 S. Ct. at 2465 (“The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.”); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

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

*Second*, appellate courts should be able to insist that trial courts offer more detailed explanations for outside-guidelines sentences than for within-guidelines sentences. Although Congress expects sentencing courts to give a rationale for all sentences, it requires them to give “the specific reason for the imposition of a sentence different from” the guidelines-recommended sentence.<sup>36</sup> Given this congressional directive, appellate courts have ample grounds for conducting a searching inquiry of the “specific reason” or reasons given when a district court chooses to impose a sentence near or at the outer edge of the statutory range—or what often comes to the same thing, a sentence that varies substantially from the guidelines range.<sup>37</sup>

*Third*, I likewise see no reason why courts of appeals cannot give careful scrutiny to the other procedural requirements of post-*Booker* reasonableness review in the context of extreme variances. When a sentencing judge exercises his discretion to vary from the recommendations of the Sentencing Commission in a substantial way, he should not be surprised when appellate courts scrutinize his compliance with the procedural requirements of post-*Booker* review—not because outside-guidelines sentences are presumptively wrong or even discouraged but because an appellate court’s concerns about uniformity ought to ensure that such variances adhere to these rules and ensure for the benefit of the Sentencing Commission that the explanations for these sentences are meaningful ones.

*Fourth*, whatever rules appellate courts adopt for reviewing post-*Booker* sentences, they ought to apply them with equal vigor or laxity to upward and downward variances. Nothing in the guidelines suggests that variances in one direction over another deserve special attention. Nothing in *Booker* and *Rita* suggests different standards of review should apply to the two types of variances; indeed, the opposite is true.<sup>38</sup> Nothing Congress has said indicates that different standards of review should apply. The directive that trial courts should “impose a sentence sufficient, but not greater than necessary, to comply with the provisions set forth in paragraph (2) of this subsection” does not favor one type of sentence over another.<sup>39</sup> It is as concerned with ensuring that sentences are “sufficient” as it is with ensuring that they are “no greater than necessary.”<sup>40</sup> And nothing about the individualized-sentencing/consistency dilemma suggests that different standards of review ought to apply de-

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36. 18 U.S.C.A. § 3553(c)(2) (2007).

37. *United States v. Poynter*, 495 F.3d 349, 356 (6th Cir. 2007).

38. *Cf. Rita*, 127 S. Ct. at 2478 (Scalia, J., concurring in the judgment) (“Thus, if the contours of reasonableness review must be narrowed in some cases because of constitutional concerns, then they must be narrowed in all cases in light of Congress’s desire for a uniform standard of review.”); *Booker*, 543 U.S. at 257 (“Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*.”).

39. § 3553(a).

40. *Id.*

pending on whether the variance runs toward the statutory minimum or toward the statutory maximum.

*Fifth*, once the appellate judge moves beyond these tools for reviewing extreme variances, the matter gets more complicated. How does an appellate court conduct substantive reasonableness review? How does it work toward consistency while preserving individualized sentencing? May it apply a sliding-scale form of review to extreme variances, insisting that the greater the variance, the greater the explanation needed to justify it? May it permit trial judges to sentence individuals based on policy disagreements with the guidelines? What of discouraged factors under the guidelines—such as family circumstances, employment history or a disadvantaged youth?<sup>41</sup> The Court has some of these questions before it in *Gall v. United States*<sup>42</sup> and *Kimbrough v. United States*.<sup>43</sup> In view of that fact, let me highlight the unusual nature of this litigation and briefly consider these debates in the context of the individualized-sentencing/consistency dilemma.

Both cases, like *Rita*, arise in an atypical setting. It is not every day that the Court, after deciding that a statute violates the Constitution, addresses whether the implementation of the remedy for that constitutional violation itself violates the Constitution or whether the remedy remains consistent with congressional intent as revealed by the remnants of a partially invalidated statute. *Booker* of course was not an everyday case, so implementation questions should surprise no one.

This unusual backdrop also helps to explain why *Rita* would permit appellate courts to adopt a presumption of reasonableness while not requiring them to do so.<sup>44</sup> If an appellate presumption of reasonableness does not violate the Sixth Amendment and if it is not otherwise inconsistent with what Congress would have wished once the mandatory provisions of the guidelines were invalidated, on what basis could the Court strike it? And if the absence of the presumption does not raise any of these problems, on what basis could the Court invalidate this contrary approach to appellate review? The Court might have said that the absence of an appellate presumption fosters inconsistency—a driving concern behind the creation of the guidelines.<sup>45</sup> But there has been no sus-

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41. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.5, 5H1.6, 5H1.12 (2006).

42. 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-7949).

43. 174 F. App'x 798 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-6330).

44. *Rita v. United States*, 127 S. Ct. 2456, 2462 (2007) (“The first question is whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it can.”).

45. See 28 U.S.C.A. § 991(b)(1)(B) (2007) (stating that one purpose of the Sentencing Commission is to devise guidelines that “provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .”); see also *Rita*, 127 S. Ct. at 2467

tained indication that the presumption has produced meaningfully different outcomes in the circuits.<sup>46</sup> If neither side of a circuit split violates the *Booker* constitutional or remedial opinions, and if the disagreement between the circuits has not generated materially different results, one can readily sympathize with the Court's inclination to let the circuits continue to implement these approaches as they will.

*Rita*, as I have indicated, does not undermine consistency or individualized sentencing. Because the presumption of reasonableness applies only when the sentencing judge independently agrees with the Sentencing Commission's national recommendations, the Court's approval of the presumption does not compromise either objective.

*Gall* and *Kimbrough*, by contrast, squarely present the individualized-sentencing/consistency dilemma. Sliding-scale review, at issue in *Gall*, raises the specter of advancing consistency at the expense of individualized sentencing and of potentially using this form of review to reinstate mandatory guidelines. But the absence of some form of sliding-scale review, particularly in the context of extreme variances, is equally problematic. How does an appellate court manage consistency concerns or, in the words of the statute, "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"<sup>47</sup> without insisting on an explanation commensurate with the length of an extreme variance? "What would an 'unwarranted' sentencing disparity be if not a sentence lacking sufficient justification for its disparity from the sentences of other similarly situated defendants?"<sup>48</sup> And how else can a court of appeals judge "tell when such disparities are occurring without consulting the guidelines range?"<sup>49</sup>

The *Kimbrough* case raises similar problems. Prohibiting district court judges from disagreeing with the application of certain guidelines in individual cases risks favoring consistency over individualized sentencing. What are *advisory* guidelines, moreover, if they are not guidelines with which district court judges can disagree—or at least disagree with their application in a given case? But if a district court judge may disagree with the policy judgment behind a guideline, what does a court of appeals do when another district court judge takes a different view? Are both views permissible? Or only one? One view destroys consistency while the other promotes it. Or do trial and appellate judges have authority only to offer reasoned explanations for choosing not to apply a guideline in a given case?

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("Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity.")

46. *United States v. Buchanan*, 449 F.3d 731, 737 (6th Cir. 2006) (Sutton, J., concurring).

47. § 991(b)(1)(B).

48. *United States v. Poynter*, 495 F.3d 349, 357 (6th Cir. 2007).

49. *Id.*

The critical question is whether the cases are amenable to resolution without compromising one objective or the other. Time will tell. If there is a path to common ground, it is likely one that narrows what is meant by sliding-scale review and what is meant by policy disagreements with the guidelines. Sliding-scale review need not foreshadow a return to mandatory guidelines if all that the appellate court seeks is an explanation commensurate with the variance, a requirement that advances the Sentencing Commission's information-gathering function, that is essential to preserving consistency in the context of extreme variances and that at any rate does not prohibit the sentencing judge from re-imposing the same variance on remand after supplying additional reasoning. With respect to policy disagreements with the guidelines, it is one thing to permit trial courts (or courts of appeals) to register wholesale objections to a guideline and effectively take on the task of writing a new one; it is another thing to permit a district court to explain not why a guideline has no conceivably legitimate application, but why its application makes little sense in that case. The latter approach raises the possibility of preserving consistency and individualized sentencing.

The broader question—maybe the most important question—lurking in both cases is the respect the Sentencing Commission deserves in attempting to reconcile consistency goals with individualized-sentencing goals through its recommended guidelines ranges. Few people, I suspect, would object to a world in which rough sliding-scale review applied and judges could not register across-the-board objections to specific guidelines if all participants in the criminal justice system had the same level of confidence in the work of the Commission. Whether there is a need for a better understanding of how the Commission accounts for what district court judges are in fact doing and what diverse experts in the field are in fact recommending, or whether there is a demand for the Commission to have success in altering guidelines that have lost the confidence of the public (take the 100:1 crack-powder cocaine ratio), one cannot help but think that concerns about consistency and individualized sentencing will be easier to manage in the future as the Commission continues to make headway in convincing stakeholders that what Congress asked the Commission to do—account for all of the § 3553(a) factors—it in fact did do.

In that sense, *Gall* and *Kimbrough* may be beside the broader point. The goal after *Booker* ought to be to ensure that district courts exercise the independent judgment the Court gave them; the courts of appeals ought to ensure that trial judges exercise this discretion while preserving rough ranges of consistency; and the Commission ought to listen to both of them and continue working to convince all participants in the criminal justice system that its recommendations deserve respect.

Congress of course has a role to play as well—first in letting the Commission do the task it was assigned and second in its regulation of

crime. Any long-term effort to respect the virtues of individualized sentencing and consistency should account for the role that the federalization of crime has played in creating the problem. It is one thing for a state such as Ohio to develop criminal laws and ranges of criminal punishments for 11.4 million people who live within 41 thousand square miles;<sup>50</sup> it is quite another for Congress to undertake the same task for 299 million people who live within 3.5 million square miles.<sup>51</sup> While Ohio has no obligation to sentence those who commit drug offenses within its borders consistently with those who do the same in North Dakota, Congress does have such an obligation. Anyone interested in balancing consistency with individualized sentencing ought to acknowledge that the task is harder for the Federal Government than for a State, and ought to keep that in mind each time someone proposes federalizing a new area of crime. Criminal law experiments unleashed on 300 million people are as difficult to implement and monitor as they are to change.

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50. OHIO QUICKFACTS FROM THE U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/39000.html> (last visited Aug. 20, 2007).

51. See ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/nations/United-States> (last visited Sept. 17, 2007).

