NOTE

A REMEDY BUT NOT A CURE: REEVALUATING THE STATUS OF THE *BOOKER* REMEDIAL HOLDING

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In a line of cases culminating in United States v. Booker*, the Supreme Court identified a Sixth Amendment problem with mandatory sentencing guidelines that used judge-found facts in ways that increased a defendant's sentence. The Court's solution for the federal system was to sever and remove the statutory provisions that made the federal Guidelines mandatory and binding on sentencing judges, thus creating a "discretionary" sentencing system.*

Despite the key role judicial discretion plays in the constitutionality of our federal sentencing scheme, the Court has never defined what features are necessary for a sentencing guidelines system to be discretionary, and few academics have considered the question. This Note takes up this issue by considering what features could distinguish mandatory and discretionary sentencing systems. It proposes two models for what makes sentencing guidelines discretionary—a "bundle" model and a "default sentence" model—that most closely adhere to what the Court said about the discretion remedy around the time of Booker.

The Note then considers a number of the Court's recent Guidelines decisions in light of the discretion issue. On their own and in aggregate, these cases enact legal rules, such as procedural requirements and appellate presumptions, that act as nudges towards within-Guidelines sentences. The Note argues that these rules risk violating Booker*'s mandate that judges have discretion at sentencing and identifies*

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grounds on which a new Booker*-style challenge could be brought if these lines of cases were extended further.*

INTRODUCTION 1429
I. DISCRETION IN SENTENCING 1430
A. A Brief History of Sentencing Guidelines Doctrine 1430
B. The Advisory Remedy: Why Does It Solve the Problem? 1433
C. What Is Sentencing Discretion? How Much Discretion Do We Need? 1436
1. Discretion Theory 1437
2. Setting the Range of Possibilities for a Discretion Definition 1438
3. Guidelines Systems the Court Has Already Considered 1439
4. Lessons from These Systems 1446
D. Two Theories of Discretion 1449
II. RECENT SENTENCING DECISIONS AS PRO-GUIDELINES NUDGES 1452
A. Categories of Recent Guidelines Case Law 1453
1. Procedural Requirements: Gall, Molina-Martinez, Chavez-Meza 1453
2. Sentence Modification Procedure: Dillon, Hughes 1455
3. Plain Error: Molina-Martinez, Rosales-Mireles 1457
4. Presumptions of Reasonableness: Rita, Gall, Nelson, Chavez-Meza 1459
5. Peugh *as a Pro-Guidelines Benchmark* 1461
6. Pro-Discretion Cases Have Been Self-Limiting 1462
B. The Court's Motivations for Within-Guidelines Nudges: Empirical and Policy 1464
1. Empirical Motivations 1465
2. Policy Motivations 1467
III. THE THREAT TO *BOOKER*'S SIXTH AMENDMENT DÉTENTE 1469
A. The Guidelines' Status as "Mildly Presumptive" 1469
B. Three Ways Sentencing Can Lose Its Discretionary Status 1471
1. Appellate Substantive Reasonableness Review 1471
2. Comparison with Other Sentencing Regimes 1476
3. A Combination of Procedural Requirements 1480
CONCLUSION 1481

INTRODUCTION

In 2005, *United States v. Booker* began a new era in federal sentencing when it declared that a federal criminal sentence under the United States Sentencing Guidelines was unconstitutional under the Sixth Amendment because it relied on a judge-found fact to impose a sentence above the range authorized by the jury verdict. *Booker*'s remedial opinion sought to fix this problem by severing the parts of the Sentencing Reform Act of 1984 that made the Guidelines binding on sentencing judges. In doing so, the Court rejected an alternative solution that would have expanded the jury's fact-finding role. Thus, the effect of the *Booker* remedy has been to impose a Sixth Amendment détente: judge-found facts may be used at sentencing, so long as it occurs in a discretionary sentencing system.

Questions have been raised about the viability of this remedy. Those critiques have mostly focused on the first part of the *Booker* détente: whether the Sixth Amendment and Due Process Clauses require jury-found facts at the fact-finding phase of sentencing—or at least stronger procedural protections at sentencing in general—regardless of whether a guidelines system is discretionary or not. Fewer discussions have focused, as this Note does, on the second part: what makes a sentencing system discretionary rather than mandatory, and whether our current system is really as discretionary as courts and commentators assume.

This Note argues that our current Guidelines system is not as discretionary as we think it is—at least not in the ways that are most relevant to *Booker*'s Sixth Amendment concerns—and that recent developments in doctrine and practice are making it even less so. Because the Court has set such a low standard for what makes a Guidelines regime discretionary, there is unlikely to be a doctrinal shift on the issue anytime soon. But the inadequacy of *Booker*'s Sixth Amendment remedy may give courts and commentators reason to find other doctrinal tools as they seek to find not just a remedy for our Guidelines system, but a cure.

This Note begins in Part I by considering *Booker*'s remedy, asking why an advisory Guidelines system solves the Sixth Amendment problem and what distinguishes advisory systems from mandatory ones. This is a more difficult question than it first appears, because the Court has had surprisingly little to say on the question over the intervening fourteen years. Part II looks at case law and sentencing practice since *Booker*, and especially in the last five years, arguing that the cumulative effect is to prioritize Guidelines sentencing and to nudge sentences into the Guidelines range. It also considers the motivations behind these doctrinal

developments in an effort to understand how future developments might play out. Finally, Part III connects Parts I and II, arguing that these doctrinal developments reduced sentencing judges' discretion in ways that are important for the constitutionality of the Guidelines system, and identifying a few ways that a challenge to the Guidelines could be brought if these trends continue.

I. DISCRETION IN SENTENCING

The *Booker* opinion left courts with a clear guiding principle—the Guidelines were now advisory[1]—but without much guidance as to what that meant. This Part seeks to add clarity to that question. It begins by considering the nature of the Sixth Amendment conflict identified in the *Apprendi/Blakely/Booker* line of cases, and how an advisory guidelines system fixes that problem. Next it considers what courts mean by discretion, as evidenced both by their words and by the guidelines systems they have approved or found fault with. Lastly, it offers a theory of its own for how we can conceptualize the advisory mandate in a way that is most responsive to the Sixth Amendment concerns that motivated it in the first place.

A. A Brief History of Sentencing Guidelines Doctrine

The United States Sentencing Guidelines were the result of a nearly nine-year legislative effort to find a way to reduce the sentencing disparities that Senators perceived to be rampant in federal sentencing practice.[2] The Sentencing Reform Act of 1984 ("SRA") made a number of changes to the then-governing sentencing regime, including elimination of parole, establishment of a Sentencing Commission to develop federal sentencing guidelines, appellate review of sentences, and—a late addition to the bill—a requirement that sentences must fall within the applicable guidelines range in nearly all circumstances.[3] This last requirement seems to have taken even the Senators by surprise; Senate reports from the 98th Congress continued to assert the "flexibility"

[1] This Note, following the case law and literature, will use "advisory" and "discretionary" interchangeably, as well as "mandatory" and "presumptive." I will use the term "*Booker* remedy" to refer generally to advisory or discretionary sentencing systems.

[2] Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 223, 240 (1993); Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 424 (1992).

[3] Stith & Koh, supra note 2, at 237, 271.

of judges' sentencing power, referring to the Guidelines as a "guide" for the judge that will "enhance the individualization of sentences."[4] By the close of the decade, however, the binding nature of the Guidelines was recognized by both the U.S. Code[5] and the Supreme Court.[6] Although trial judges retained some discretion over limited aspects of the sentencing process, for the most part, once judges had calculated the Guidelines range, they were required to choose a sentence within it.[7] The new Guidelines regime went into effect in 1987.[8]

The regime reigned for the next thirteen years relatively undisturbed[9] until the Court decided *Apprendi v. New Jersey* in 2000.[10] *Apprendi* held that any fact that increased the statutory maximum must be found by a jury beyond a reasonable doubt, not by a judge at sentencing, under the Fourteenth Amendment due-process right and the Sixth Amendment's jury-trial right.[11] The *Apprendi* Court defined "statutory maximum" broadly, applying its rule to any fact that increased the "prescribed range of penalties to which a criminal defendant is exposed," regardless of whether the legislature characterized that fact as a sentencing factor or element.[12]

[4] Id. at 273.

[5] See 18 U.S.C. § 3553(b) (1988) ("The court *shall* impose a sentence of the kind, and within the range, referred to in [the Sentencing Guidelines] 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 . . . ." (emphasis added)).

[6] See Mistretta v. United States, 488 U.S. 361, 367 (1989) ("[The Sentencing Reform Act] makes the Sentencing Commission's guidelines binding on the courts.").

[7] It doesn't appear that Congress ever intended to entirely eliminate judges' discretion in choosing a sentence, and judges did retain a degree of discretion. For example, judges could choose what sentence to impose within the Guidelines range, they could depart from the Guidelines when there were factors the Commission failed to take into account, and they could decide what additional facts to find. See Stith & Koh, supra note 2, at 273.

[8] Miller, supra note 2, at 419.

[9] This was despite several existential challenges to the Guidelines. See, e.g., United States v. Watts, 519 U.S. 148, 152 (1997) (per curiam) (upholding U.S. Sentencing Guidelines Manual § 1B1.4's provision that sentencing judges should find facts not found by the jury, including facts that the jury acquitted on); Witte v. United States, 515 U.S. 389, 403–04 (1995) (upholding relevant conduct sentencing against a double jeopardy challenge); *Mistretta*, 488 U.S. at 412 (upholding the constitutionality of the United States Sentencing Commission).

[10] 530 U.S. 466 (2000).

[11] Id. at 476.

[12] Id. at 490, 494 & n.19.

While *Apprendi* considered a substantive criminal statute,[13] the writing was on the wall for sentencing guidelines systems as well.[14] Soon, the Supreme Court considered a state sentencing regime in *Blakely v. Washington*.[15] Washington's sentencing guidelines allowed judges to find additional facts at sentencing beyond what was found by the jury, and the defendant's sentencing range adjusted up or down depending on what effect those facts had on the guidelines. The Court found a Sixth Amendment violation: just as *Apprendi* found that sentencing enhancements that increased the statutory maximum based on judge-found facts violated the Sixth Amendment, so too did *Blakely* with mandatory guidelines ranges that could shift up on the basis of judge-found sentencing facts. As the *Blakely* Court put it, the *Apprendi* statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[16] As long as the judge had the power to find facts that increased the defendant's possible sentence, there was a Sixth Amendment problem because the "jury's verdict alone [did] not authorize the sentence."[17]

It took only a few more months for the Court to apply this principle to the federal Guidelines in *United States v. Booker*.[18] Much like the sentencing enhancement at issue in *Apprendi* and Washington's guidelines in *Blakely*, the federal Guidelines were held to be statutory sentencing ranges. Because these maxima could be increased on the basis of judge-found facts, the mandatory Guidelines denied Booker the right to have a jury determine facts "that the law makes essential to his punishment."[19] And, the Court was clear, the mandatory Guidelines did constitute "the law": following precedent in *Mistretta v. United States* and other cases, the Court said that the Guidelines "have the force and effect

[13] Id. at 468.

[14] Commentators of all stripes recognized that *Apprendi* spelled trouble for the mandatory Guidelines. See, e.g., Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311 (2003); Note, The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence, 117 Harv. L. Rev. 1236, 1252 (2004).

[15] 542 U.S. 296 (2004).

[16] Id. at 303–04.

[17] Id. at 305.

[18] 543 U.S. 220 (2005).

[19] Id. at 232.

of laws"[20] and rejected the dissent's characterization of the Guidelines as mere "administrative rules" or "administrative guidelines."[21]

There were two possibilities for how the Court could remedy this Sixth Amendment violation, either of which would have enormous effects on sentencing practice in the federal courts: it could require judges to use only jury-found facts at sentencing—the most common solution among states that conformed their sentencing systems to *Blakely*[22]—or it could declare the Guidelines to be no longer binding. Five Justices chose the latter, rendering the Guidelines advisory for judges.[23] The main argument was legislative intent; the majority, led in part by Justice Breyer, determined that the addition of a jury requirement to the Guidelines "would so transform the scheme" that the 98th Congress would have preferred not to have passed the Sentencing Reform Act at all.[24] In the Court's eyes, an advisory sentencing scheme could still achieve many of the policy goals that Congress intended in the SRA, especially promoting uniformity in sentencing, by retaining real-conduct sentencing.[25]

B. The Advisory Remedy: Why Does It Solve the Problem?

The *Booker* remedy was surprising, sweeping, and controversial from the start. Justices and academics have noted the oddity of, if not downright criticized, *Booker*'s use of severance and excision as a remedial tool.[26]

[20] Id. at 234 (citing Mistretta v. United States, 488 U.S. 361, 391 (1989)).

[21] Id. at 328, 331–32 (Breyer, J., dissenting in part).

[22] Stephanos Bibas & Susan Klein, The Sixth Amendment and Criminal Sentencing, 30 Cardozo L. Rev. 775, 786 (2008).

[23] *Booker*, 543 U.S. at 244, 245. The *Booker* remedy had a second feature, which was to excise the appellate review standards found at 18 U.S.C. § 3742(e) (2000).

[24] Id. at 246, 249.

[25] Id. at 253–54.

[26] See, e.g., id. at 283 (Stevens, J., dissenting in part) (criticizing the remedial holding for its unnecessarily sweeping effects, where a more limited remedy would have sufficed); Eric S. Fish, Severability as Conditionality, 64 Emory L.J. 1293, 1307 (2015) (noting that "the majority in *Booker* reasoned as a legislature"); David H. Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 666 (2008) ("*Booker* illustrates the dangers that occur when a court uses severability doctrine to make fundamental changes to a legislature's work and the need for better doctrinal tools in this area."); John Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 80 (2014) (arguing that *Booker*'s use of severance as a remedy was "inconsistent with basic principles of American constitutional law"); Lisa Marshall Manheim, Beyond Severability, 101 Iowa L. Rev. 1833, 1855 (2016) (noting that *Booker*'s discussion of the severability framework is a "stark anomaly in the case law"); Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 749, 752 (2010) (noting the "problems" of severability doctrine's use of

But there is a more basic, substantive question as well, because it is not immediately obvious why making the Guidelines advisory solves the problem identified in the merits opinion.[27] One might expect that the remedy to a Sixth Amendment problem would involve an expanded jury right; the Court, however, explicitly rejected an approach that would have done just that.[28] The *Booker* Court justified its choice of remedy primarily on legislative intent and policy grounds, and it spent relatively few words explaining why, as Justice Stevens wrote, "everyone agrees that the [Sixth Amendment problem] would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges."[29]

There are analytical, historical, and doctrinal reasons why the advisory remedy was seen as a solution to the problems identified in a mandatory guidelines system. Analytically, if a judge has discretion to weigh the facts however he sees fit, then any particular fact—whether found by a judge or by a jury—cannot be considered "essential" to the punishment. For example, if the Guidelines' instruction to add two points to the defendant's offense level when a judge finds that there was a vulnerable victim[30] is treated as a mere recommendation, then the vulnerable victim finding has no particular or even necessary effect on sentencing.[31] Historically, this distinction has a long pedigree in our legal system. The common law recognized a difference between setting the bounds of punishment allowed by law and setting a specific punishment within those bounds.[32] Since the Founding Era, discretionary sentencing on the basis

hypothetical legislative intent, and commenting, "It should come as no surprise that the Court's conclusion in *Booker* about what Congress would have wanted lines up closely with what five Justices think Congress should have wanted" (emphasis omitted)).

[27] For an articulation of this critique, see, e.g., Carissa Byrne Hessick & F. Andrew Hessick, Procedural Rights at Sentencing, 90 Notre Dame L. Rev. 187 (2014) (arguing that the justifications for the jury right and other procedural rights at sentencing apply in both mandatory and discretionary sentencing schemes).

[28] Such a solution, favored by Justice Stevens, would require any additional sentencing fact beyond the facts of conviction to be found by a jury. *Booker*, 543 U.S. at 246.

[29] Id. at 233.

[30] U.S. Sentencing Guidelines Manual § 3A1.1(b) (U.S. Sentencing Comm'n 2018). A two-level increase in a defendant's offense level increases the top end of the sentence range by approximately 26%, on average. See id. § 5A.

[31] A main thesis of this Note is that judges do not think this way.

[32] Apprendi v. New Jersey, 530 U.S. 466, 519 (2000) (Thomas, J., concurring) (citing 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 85, at 54 (2d ed. 1872)).

of both jury- and judge-found facts was widely practiced and assumed not to violate the jury right.[33]

There are doctrinal justifications for the remedial holding as well. *Apprendi*, the doctrinal turning point upon which *Blakely* and *Booker* rely, said that an element of a crime must be found by a jury, and that what turns a fact into an element is "not . . . form, but . . . effect—does the required finding expose the defendant to a greater punishment than that *authorized* by the jury's guilty verdict?"[34] Or as Justice Thomas put it, "If a fact is *by law* the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."[35] The key to Justice Thomas's quote is in the phrase "by law": a particular judge-found fact is not an element to be found by a jury if it merely causes the judge to issue a longer sentence, but only if it changes a legal entitlement.[36] The mandatory Guidelines, which had "the force and effect of laws,"[37] affected legal entitlements. A judge's discretionary judgments did not.

One could object that these reasons are an unsatisfactory combination of formalism and willful ignorance, that judges use judge-found facts at sentencing in both mandatory and advisory sentencing systems, and that *Booker* simply switched out the Sentencing Commission's weighting of particular sentencing facts for a judge's own internal weightings. Indeed, as citizens we should hope that judges *do* have their own internalized "guidelines" such that they are treating defendants consistently. In this sense, it is perhaps true that, from the defendant's point of view, *Booker* swapped out one functionally mandatory Guidelines system for 663

[33] Williams v. New York, 337 U.S. 241, 246 (1949); Bibas & Klein, supra note 22, at 784. Preserving the power and influence of the jury was a key worry of both the *Booker* Court and the Founders. See *Booker*, 543 U.S. at 238–39 (expressing concerns about "judicial despotism" and "arbitrary punishments" (quoting The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); *Apprendi*, 530 U.S. at 477 ("[The] truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." (alteration in original) (emphasis omitted) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769))).

[34] *Apprendi*, 530 U.S. at 494 (emphasis added). But see Stephanos Bibas, The *Blakely* Earthquake Exposes the Procedure/Substance Fault Line, 17 Fed. Sent'g Rep. 258, 259 & n.20 (2005) (arguing that *Booker* retreated from the *Apprendi* theory that elements are whatever raises the statutory maximum punishment).

[35] *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) (emphasis added).

[36] See Blakely v. Washington, 542 U.S. 296, 309 (2004).

[37] *Booker*, 543 U.S. at 234.

systems.[38] The analytical, historical, and doctrinal differences between mandatory and discretionary sentencing systems are huge, however. The net result is that it was simply not controversial that discretionary sentencing would solve the Sixth Amendment problem posed in *Booker*. At the time *Booker* was decided, nine Justices believed that judicial discretion would solve the Sixth Amendment problem posed by the Sentencing Guidelines, and it appears that every Justice on today's Court would agree.[39]

C. What Is Sentencing Discretion? How Much Discretion Do We Need?

As important as the *Booker* remedy is, it does not mark a clean break between a past age of fully presumptive sentencing and a new era of full discretion. Sentencing judges today do not have full procedural and substantive discretion at sentencing;[40] likewise, judges pre-*Booker* did have some degree of discretion in various areas.[41] As Dean Pound noted, "In no legal system is justice administered wholly by rule";[42] judicial discretion plays a role in all systems, to greater or lesser degrees. To confuse matters even more, there is little agreement in jurisprudence or sentencing law on what exactly we mean by "discretion." It is clear that the Court must have had some vision of discretion in mind when it created the *Booker* remedy, but it never said what that vision was. Curiously, little light has been shed on that question in the intervening thirteen years by either the Court or scholars.

That does not mean we are left entirely without guidance. To begin to put together a definition, we can consider the handful of guidelines systems the Court did consider around the time of *Booker*, as well as the Court's statements on discretion and the Sixth Amendment. These systems include the Washington sentencing guidelines considered in *Blakely*, the federal Guidelines at issue in *Booker*, and the California

[38] That is, the number of district court seats in the country. Admin. Office of the U.S. Courts, Authorized Judgeships (2018), https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/5GR2-GGYR].

[39] No Justice has explicitly stated in a Guidelines opinion that they believe fully discretionary sentencing violates the Sixth Amendment.

[40] See, e.g., Kevin Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155, 171 (2005).

[41] For example, judges still retained the ability to choose a point within the Guidelines range or whether to hold sentencing hearings at all. See infra Subsections I.C.2 & I.C.3.

[42] Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. Rev. 925, 929 (1960).

sentencing regime in *Cunningham v. California*.[43] The Court found that each of these three guidelines systems unconstitutionally used judge-found facts at sentencing. Had the Court *approved* any of the guidelines systems, it could have done so on grounds other than discretion.[44] But because the Court *rejected* each system, and because the *Booker* opinions made clear that judicial discretion at sentencing is sufficient to overcome the constitutional issues in the cases, we can reason that none of these three systems had sufficient levels of discretion.

Although this inquiry will not give us a full working definition of discretion, it does start to narrow things down. Importantly, it also shows that our intuitive definitions of sentencing discretion are not necessarily the relevant ones for Sixth Amendment purposes.

1. Discretion Theory

The question of what judicial discretion means, and how much discretion judges really have, has been the subject of long-running debates in jurisprudence.[45] As discussed below, this Note sidesteps the most difficult of these jurisprudential questions, but it cannot do so entirely.

At its root, discretion refers to the ability of a judge to choose among legal options. It does not imply a total freedom to choose, but it does require a wide degree of choice in applying a judge's own judgment to the law.[46] Theorists often discuss two aspects of discretion: the freedom of a decision maker to make a judgment and the ability of that judgment to withstand review from a higher authority that may disagree with the result but is nonetheless deferential to it.[47]

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[43] 549 U.S. 270 (2007).

[44] For example, on the ground that the system had adequate jury involvement at sentencing.

[45] Scott J. Shapiro, The "Hart-Dworkin Debate": A Short Guide for the Perplexed 3–4 (Univ. of Mich. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 77, 2007), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf [https://perma.cc/K376-NELE].

[46] See, e.g., Pound, supra note 42, at 926 ("Discretion is an authority conferred by law to act in certain conditions or situations in accordance with an official's . . . own considered judgment and conscience."); id. (stating that discretion belongs "to the twilight zone between law and morals").

[47] See, e.g., Carissa Byrne Hessick & F. Andrew Hessick, Appellate Review of Sentencing Decisions, 60 Ala. L. Rev. 1, 3 (2008); Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 754–55 (1982); Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 637 (1971).

A key issue in the discretion debate is whether and what types of legal rules impede discretion.[48] A legal rule that prescribes a specific outcome—a mandatory minimum sentence, for example—allows for no judicial discretion at all. At the other end of the spectrum, a decision for which the law provides no guidance—evaluating witness credibility and other aspects of fact finding might be examples—comes close to allowing complete discretion. In the middle are rules that seek to guide discretion—for example, the requirement in 18 U.S.C. § 3553 that judges consider retribution, deterrence, incapacitation, and rehabilitation when sentencing a defendant. Much of sentencing law falls into this third category: The Section 3553 factors, the reasonableness requirement, the oft-cited goals of uniformity and proportionality, and the various procedural requirements around sentencing can all be said to propose principles that seek to guide, but not bind, judges.

This Note avoids the theoretical debate about whether this third category can ever really exist, or whether principles necessarily devolve into rules.[49] Instead, it asks a more basic question: whether, and to what extent, federal sentencing law has moved from category three to category one. To do that, this Note attempts to find where the Court itself has drawn the lines between discretionary systems and mandatory ones.

2. Setting the Range of Possibilities for a Discretion Definition

In sentencing practice, there are at least five main areas where judges can exercise discretion.[50] First, judges may have discretion to decide what factors to consider in the sentence determination. This includes the ability to determine what factors are relevant to sentencing in general, whether to hold a sentencing hearing to find additional facts or only use the facts of conviction, and how to credit any disputed post-trial evidence. Mandatory systems such as the pre-*Booker* Guidelines decide the first question by providing a comprehensive cataloguing of what factors go

[48] See Joseph Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823, 846–47 (1972) (distinguishing "substantive principles" from "principles of discretion").

[49] Compare id. at 847 ("We must conclude that legal principles do not exclude judicial discretion; they presuppose its existence and direct and guide it."), with Ronald Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 35 (1967) ("[T]here is nothing in the logical character of a principle that renders it incapable of binding [a judge]."), and Shapiro, supra note 45, at 12 ("Once one recognizes the existence of legal principles, Dworkin claims, it becomes clear that judges are bound by legal standards even in hard cases.").

[50] For a different categorization of types of sentencing discretion, see Hessick & Hessick, supra note 27, at 198.

into the sentencing calculation. They generally leave the other two questions to the judge. Second, judges may have discretion as to how to weigh the factors. Mandatory sentencing takes away this weighing discretion because it assigns a value to each sentencing fact; for example, under the mandatory Guidelines, accepting responsibility and quickly pleading guilty had a greater effect on the ultimate sentence than being a minor participant in the crime.[51] Third, judges may have discretion as to the ultimate sentence they impose. Judges might base this discretion on policy judgments about the underlying offense (certain judges might view certain crimes as more worthy of severe punishment), about their view of the particular offender, or on their own assessment of the absolute value of the sentencing factors. Mandatory sentencing schemes limit this discretion, too, but usually not entirely; the pre-*Booker* federal Guidelines, for example, allowed judges to select a sentence within a relatively narrow range (usually around 20% of the maximum sentence),[52] and to depart from the Guidelines' criminal history calculation if it underrepresented the seriousness of that history.[53] Fourth, the degree of discretion available to the trial judge will be affected by the level of appellate review. Most obviously, a trial judge exercises no discretion when the appellate court inserts its own sentence in place of his. Appellate review also creates sentencing precedents (and, over time, a common law of sentencing), and these precedents would be just as binding on sentencing judges as other sources of law. Fifth, we can consider the procedural discretion of the sentencing court, including whether the sentencing procedures are designed to anchor the court to a certain sentence and whether it is more procedurally difficult to impose outside-Guidelines sentences.

3. Guidelines Systems the Court Has Already Considered

The Court has evaluated three sentencing schemes for their constitutionality: Washington's mandatory sentencing guidelines in *Blakely*, the federal Guidelines in *Booker*, and California's three-tier system in *Cunningham*. These three systems differed slightly in the levels

[51] Compare U.S. Sentencing Guidelines Manual § 3E1.1 (U.S. Sentencing Comm'n 2004), with id. § 3B1.2(b) (2004).

[52] See Sentencing Table, U.S. Sentencing Guidelines Manual § 5A (U.S. Sentencing Comm'n 2004).

[53] U.S. Sentencing Guidelines Manual § 4A1.3 (U.S. Sentencing Comm'n 2004).

and types of discretion they afforded to sentencing judges, yet all three were held to violate the Sixth Amendment under *Apprendi*.

Washington's guidelines system calculated sentences based on the seriousness of the offense of conviction and the offender's criminal history.[54] The scores for these categories were inputted into the sentencing table, which had a range of sentence lengths in each cell. The judge selected a sentence within this range.[55] Unlike the federal Guidelines, Washington's system did not consider the real conduct of the offense in its sentencing table; the offense level was based solely on the crime of conviction. Instead, there were two ways a sentence could be enhanced beyond the standard level for the crime. First, Washington's code had a limited set of enhancements that added a specified amount of time onto each end of the range, producing a new range of potential sentences.[56] Enhancements were treated like elements and were pleaded to or found by a jury, so they did not present a Sixth Amendment problem.[57] Second, a judge could impose an "exceptional sentence" outside the range, but only if she found "substantial and compelling reasons justifying" such a sentence.[58] The Washington guidelines provided a thorough, but nonexclusive, list of aggravating factors which a judge could use as grounds for such a departure. Judges could go above the guidelines range for any reason on or off the list so long as they had *some* reason and as long as that reason was sufficient to differentiate the particular offense from the generic offense in that category.[59] Unlike the federal Guidelines, the Washington guidelines left judges free to decide how much each aggravating or mitigating factor was worth for that particular defendant.

[54] Wash. Rev. Code § 9.94A.310 (2000).

[55] For a standard offense with no enhancements, the range width was about 25% of the high end of the range. See id.

[56] These enhancements have the effect of narrowing the relative range of punishments available to the sentencing judge as a percentage of the maximum sentence. For example, Blakely's sentence factored in an enhancement for having a firearm, changing the applicable sentencing range from 13–17 months to 49–53 months, which narrowed the percentage range from 23.5% to 7.5%. See id. § 9.94A.310(3); Blakely v. Washington, 542 U.S. 296, 299 (2004).

[57] Respondent's Brief in Opposition at 10 n.4, *Blakely*, 542 U.S. 296 (No. 02-1632).

[58] *Blakely*, 542 U.S. at 299 (quoting Wash. Rev. Code § 9.94A.120(2) (2000)); see also Wash. Rev. Code § 9.94A.390 (2000) (including the same language for "[d]epartures from the guidelines").

[59] State v. Ferguson, 15 P.3d 1271, 1280 (Wash. 2001); Wash. Rev. Code § 9.94A.390 (2000); see also *Blakely*, 542 U.S. at 299 ("A judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.'" (quoting Wash. Rev. Code § 9.94A.120(2) (2000))).

An appellate court could reverse the sentence for three reasons: where the record lacked evidence supporting the court's reasons for imposing an extraordinary sentence under a clear error standard; where the reasons cited by the court did not justify an extraordinary sentence under a de novo standard; and where the sentence was too excessive or lenient under an abuse of discretion standard.[60] The Court held that this "exceptional sentence" departure feature of Washington's system violated the *Apprendi* rule because it permitted the sentencing judge to depart upward from the guidelines range only if the judge found additional facts beyond the facts of conviction.[61]

The United States Sentencing Guidelines as considered in *Booker* were similar in structure to the Washington system. The Guidelines and Sentencing Reform Act of 1984 laid out a clearly defined procedure for the judge to follow. The first step was to consider the Section 3553 purposes.[62] Next, judges were to calculate the offense level and criminal history category. The offense level calculation started with a base offense level according to the crime of conviction, which was adjustable on the basis of judge-found facts. Judges had the power to decide whether to hold a separate sentencing hearing to determine these additional facts.[63] A sentencing grid took into account the offense level and the defendant's criminal history, outputting a range within which a judge had discretion to select a sentence.[64]

The federal Guidelines had three opportunities for judicial fact-finding to influence the sentence. First, certain base offense levels required the judge to find facts beyond just the crime of conviction—in Booker's case, the quantity of drugs.[65] Second, the judge could make adjustments to the offense level based on different circumstances of the offense. These "adjustments" were analogous to Washington's enhancements in that they

[60] State v. Blakely, 47 P.3d 149, 157–58 (Wash. App. 2002).

[61] *Blakely*, 542 U.S. at 303–04.

[62] Miller, supra note 2, at 449.

[63] Susan N. Herman, The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. Cal. L. Rev. 289, 290–91, 354 (1992).

[64] The federal sentencing table ranges converged at a width of about 20% (i.e., the lower end was about 20% shorter than the upper end), which is not too different from Washington's range of 25%. Compare Sentencing Table, U.S. Sentencing Guidelines Manual § 5A (U.S. Sentencing Comm'n 2004), with Wash. Rev. Code § 9.94A.310 (2000).

[65] United States v. Booker, 543 U.S. 220, 235 (2005).

had a prescribed, quantitative impact on the sentence,[66] but there were a few key differences. The list of possible adjustments was longer and more comprehensive under the federal system.[67] In addition, the adjustments were factored in before consulting the sentencing table, not after. This is an important difference in the two regimes, because the federal method preserved the relative "width" of its sentencing ranges post-adjustment, while the width of the Washington ranges was more dynamic. For instance, in Ralph Blakely's case, the Washington sentencing table output was 13–17 months, and a firearm adjustment increased both ends of the range by 36 months to 49–53 months.[68] This left the sentencing judge with a 7.5%-wide range within which to impose the sentence. By contrast, under the federal system, the adjustment would have been made before determining the Sentencing Table range, preserving the full width of the sentencing range (likely 20%[69]) available for the judge. Departures provided the third opportunity for judicial fact-finding to influence the sentence. Departures from the range were permitted only in "atypical" cases where the court found a circumstance that was "not adequately taken into consideration by the Sentencing Commission," or that was considered but in the present case "significantly differ[ed] from the norm."[70] In cases where a departure was justified, judges were free to decide how much it was "worth"—unlike adjustments, departures did not

[66] See generally U.S. Sentencing Guidelines Manual § 3 (U.S. Sentencing Comm'n 2004) (providing circumstances under which offense levels may be adjusted and degree of adjustment). In the federal system, this was done via changes to the offense level, which was then used as an input in the Sentencing Table; in the Washington system, it took the form of particular lengths of time added to the range outputted from the table. Compare id. § 1B1.1, § 3, & § 5K (prescribing fixed adjustments to the offense level to be calculated before determining the Sentencing Table range, and suggesting grounds for departures without providing a fixed departure amount), with Wash. Rev. Code § 9.94A.310(3) (2000) (prescribing fixed enhancements to be added to the "presumptive sentence" determined by the sentencing grid).

[67] Compare U.S. Sentencing Guidelines Manual § 3 (U.S. Sentencing Comm'n 2004), with Wash. Rev. Code § 9.94A.310(3) (2000).

[68] Blakely v. Washington, 542 U.S. 296, 299 (2004).

[69] See supra note 64.

[70] U.S. Sentencing Guidelines Manual § 1A1.1 cmt. (4)(b) (U.S. Sentencing Comm'n 2004). One specific example is the ability to depart upward on the criminal history category if the sentence "substantially under-represents the seriousness of the defendant's criminal history." Id. § 4A1.3(c). Although this is a strict standard, it has been interpreted to be somewhat looser than Washington's grounds for departure (and thus compliant with the Sixth Amendment because it would not always require the finding of an additional fact). See *Booker*, 543 U.S. at 333–34 (Breyer, J., dissenting in part).

come with prescribed amounts.[71] Appellate courts reviewed departures under a de novo standard.[72] The Court found that the Guidelines' thorough list of adjustments meant that the Guidelines would be binding in most cases, because there would be few grounds left over on which the sentencing judge could depart.[73]

The Court also considered California's sentencing system in *Cunningham*. At the time, California had a determinate sentencing law ("DSL") that provided three potential sentences for each offense of conviction: a lower term, a default medium term, and an upper term.[74] Judges could impose lower or upper term sentences upon finding that either aggravating or mitigating facts predominated,[75] and were required to provide their reasons for doing so.[76] Appellate review was for reasonableness,[77] but appellate courts were relatively deferential in their review of sentences, upholding them even when the judge committed procedural error and relied on a single aggravating factor against several mitigating factors to impose an upper term.[78] The Supreme Court of California reasoned that the jury's verdict of guilty "authorizes . . . any of the three terms specified by statute as the potential punishments for that offense," and that therefore the upper term should be considered the statutory maximum.[79] It also found this system to be formally similar to the post-*Booker* federal Guidelines, analogizing the DSL's requirement that a judge find any aggravating fact before imposing an upper term sentence to the federal Guidelines' reasonableness requirement, and highlighting both systems' requirements that judges rationalize their sentence, including why they departed from the default medium term or Guidelines range.[80] The United States Supreme Court reversed. The Court

[71] Compare U.S. Sentencing Guidelines Manual § 5K2.8 (U.S. Sentencing Comm'n 2004) (departure for deliberate cruelty), with id. § 3A1.3 (adjustment adding two points to the offense level if the victim was restrained during the offense).

[72] Hessick & Hessick, supra note 47, at 6.

[73] *Booker*, 543 U.S. at 234.

[74] Cunningham v. California, 549 U.S. 270, 277 (2007) (citing Cal. Penal Code § 288.5(a) (West Supp. 2006)).

[75] People v. Black, 113 P.3d 534, 543 (Cal. 2005). Policy grounds were probably not sufficient grounds for departure. See *Cunningham*, 549 U.S. at 279–80.

[76] *Black*, 113 P.3d at 539.

[77] *Cunningham*, 549 U.S. at 297–98 (Alito, J., dissenting).

[78] See, e.g., People v. Laupua, No. A108523, 2005 WL 3150299, at *3–*4 (Cal. Ct. App. Nov. 23, 2005).

[79] *Black*, 113 P.3d at 545.

[80] Id. at 548.

fell back on *Apprendi*'s formal requirement that judges may not "impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."[81] Because the additional facts required to justify the upper term sentence under the DSL were generally found by the judge at sentencing, the upper term was "based on" non-jury-found facts. This made the medium term sentence the effective statutory maximum.[82]

The *Cunningham* result is odd from the point of view of the *Booker* remedy. Sentencing judges in California had nearly unlimited discretion to impose the upper or lower terms, and could consider "any . . . criteria reasonably related to the decision being made."[83] There was also no guidelines framework to cabin this exercise of discretion, other than a suggested and nonexclusive list of potential aggravating and mitigating factors.[84] Because the standards for finding an aggravating factor were so lax, the requirement that there be an aggravating factor before a judge imposed an upper term sentence seems no different from a requirement that judges explain their sentence.[85] The *Booker* opinion itself appeared to endorse this exact approach when it suggested that "there would be no *Apprendi* problem" if departures were available in every case.[86] That leaves three possibilities: the *Cunningham* Court might not have considered the discretion question, it might have been concerned that judges only had three possible sentences available to them, or it might have focused on the lack of discretion in determining the default sentence.

Table 1, below, summarizes the discretionary features of these three systems in terms of the five types of discretion discussed in Subsection I.C.1. It then assigns a rating to the level of discretion in each category.

[81] *Cunningham*, 549 U.S. at 274–75.

[82] Id. at 274.

[83] Respondent's Brief on the Merits at 10, *Cunningham*, 549 U.S. 270 (No. 05-6551).

[84] Cal. Rules of Court 4.420–4.421, 4.423 (2004); see also *Cunningham*, 549 U.S. at 278 ("The Rules provide a nonexhaustive list of aggravating circumstances . . . .").

[85] Indeed, it is hard to see how this system is different from the situation today in a circuit that applies a presumption of reasonableness to in-Guidelines sentences and also requires a higher burden of explanation on outside-Guidelines sentences, as is permitted under *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007). See infra Subsection II.A.4.

[86] *Booker*, 543 U.S. at 234.

Table 1: Comparison of rejected sentencing systems and aspects of discretion

LEVEL OF DISCRETION	Washington Guidelines	Federal Guidelines	California DSL
What factors to consider beyond offense of conviction	MEDIUM ▪ Limited list of adjustments based on facts found by jury ▪ List of departures but free to consider anything	LOW ▪ Comprehensive list of adjustments ▪ Departures permitted only in "atypical" case	HIGH ▪ List of suggested aggravating and mitigating factors but judge had discretion to impose upper or lower term for any reason
How to weigh the factors	MEDIUM ▪ Fixed offense level starting point based on offense of conviction ▪ Enhancements had fixed weight ▪ Discretion to weigh departures	LOW ▪ Fixed starting point based on offense of conviction + limited additional facts (e.g., drug quantity) ▪ Enhancements had fixed weight ▪ Discretion to weigh departures, but departures were "atypical"	HIGH ▪ Fixed starting point based on offense of conviction
Ultimate sentence output	MEDIUM ▪ Range width converges at 25% ▪ Adjustments made to	MEDIUM ▪ Range width converges at 20% ▪ Adjustments made to	LOW ▪ Only three possible sentences available, but wide discretion

	sentencing table outputs ▪ Aggravating adjustments had fixed time values, resulting in a narrower sentencing range on a percentage basis ▪ Ability to depart with no fixed departure value	sentencing table inputs ▪ Ability to depart with no fixed departure value	as to which one to select
Appellate review	LOW ▪ Clear error for facts ▪ De novo for whether facts support a departure ▪ Abuse of discretion for overall appropriateness	LOW ▪ Deferential review for fact-finding and application of facts to Guidelines ▪ De novo for departures	HIGH ▪ Reasonableness
Procedural discretion	MEDIUM ▪ Sentencing grid with defined order of operations ▪ Must state reasons for departures	LOW ▪ Detailed, step-by-step procedure	HIGH ▪ Must provide reasons for imposing sentence other than middle term

4. Lessons from These Systems

Each of these cases was rejected because it required the judge to find facts herself before imposing a sentence above the range authorized by the jury verdict. We know from *Booker* that removing "required" from that description—that is, making the system discretionary—restores the sentencing system's constitutionality. The three guidelines systems considered in these cases had elements of discretion in them, but clearly

not enough. From these cases, we can determine a few lessons about which of the discretionary features discussed in Subsection I.C.1 are relevant to the *Booker* remedy.

For one, the ability to depart from the guidelines is not enough by itself, even if the judge has discretion to decide what factors justify a departure in a particular case. The mandatory federal Guidelines allowed for departures for any circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines."[87] Yet because the Sentencing Commission had taken into account the factors that would be relevant in most cases, thus foreclosing judges' ability to depart in most cases, the Court decided the departure power did not provide a suitable level of discretion.[88] The Washington guidelines had a more liberal departure power, both because the list of predetermined adjustments was less thorough and because it used a "substantial and compelling reasons" standard that did not reference whether those reasons were considered elsewhere in the Guidelines. Notably, as well, neither set of guidelines explicitly prohibited departures on the basis of policy disagreement—i.e., without any judge-found facts at all. Likewise, discretion to decide whether to engage in real-conduct sentencing at all, including whether to hold sentencing hearings, cannot be the decisive feature, as such a system was in place before, during, and after the mandatory guidelines era.[89]

Second, discretion as to how to weigh the factors does not seem to be a consideration, either. The three guidelines systems vary widely on this point: the federal Guidelines outlined a comprehensive methodology that accounted for most of the considerations a judge would want to make, the California system provided a list of factors to consider but allowed the judge to decide when the aggravating factors outweigh the mitigating ones enough to impose an upper term sentence (or vice versa), and Washington's system was somewhere in between. Yet all three were rejected by the Court.

The importance of discretion as to the sentencing output—the third factor in Subsection I.C.1—is a bit less clear, as two of the systems granted a limited degree of discretion to select a point within their

[87] 18 U.S.C. § 3553(b) (2000).

[88] *Booker*, 543 U.S. at 234.

[89] Witte v. United States, 515 U.S. 389, 400–02 (1995); see also Dillon v. United States, 560 U.S. 817, 828–29 (2010) (holding that certain sentence modification proceedings are not constitutionally compelled).

sentencing ranges. The Washington and federal guidelines systems both outputted similarly sized ranges (20% for most ranges under the federal system and 25% under Washington's) and allowed sentencing courts to choose within those ranges; judges thus had some discretion as to the final sentence. Departures were also available, but rare. California's system allowed very little discretion as to the output sentence, allowing only three possible sentences for each offense. Even systems that are ostensibly discretionary, such as the federal system in place today, usually have some sort of appellate reasonableness review such that a truly outrageous sentence is able to be overturned.[90]

Appellate review was not much discussed in the opinions, either, and it received mixed treatment. Justice Alito pointed out that the theoretical standards of review for both California's model and the post-*Booker* Guidelines were the same (reasonableness), suggesting that the standard of review could not have been a decisive factor in the court's analysis.[91] But despite the Court's lack of attention to the implications of appellate review for sentencing discretion, judges and commentators have long argued that appellate review is an extremely limiting constraint on discretion.[92]

Finally, procedural discretion was largely left out of the opinions, as well. The three systems shared at least two procedural commonalities: each system required judges to calculate the default range, and each required judges to provide some sort of justification for departing from the default range.[93] There was no language in the opinions to suggest these procedural requirements were dispositive factors for the Court in any of

[90] Whether there is any teeth to substantive reasonableness review is an open question and is discussed later. See infra Subsection II.A.4.

[91] Cunningham v. California, 549 U.S. 270, 297–98 (2007) (Alito, J., dissenting).

[92] Id. at 309 & n.11 (Alito, J., dissenting); see also *Booker*, 543 U.S. at 234–35 (discussing appellate reversal as a limit on discretion); People v. Coles, 339 N.W.2d 440, 449 (Mich. 1983) (linking "unchecked discretion" with the absence of appellate review); Friendly, supra note 47, at 755 (arguing that the degree of appellate review and level of discretion to the sentencing judge are inversely related).

[93] Beyond the calculation and justification requirements, the three systems varied widely in both what the procedures required and how detailed the requirements were. For example, California's system required the judge to state her reasons for the sentence "orally on the record," Washington's system required a written statement of reasons only for sentences outside the presumptive range, and the federal system required the judge to prepare a written statement of reasons for any sentence outside the Guidelines range, and to state in open court her reasons for selecting a particular within-range sentence if the range was particularly wide. Cal. Rules of Court 4.420(e) (2004); Wash. Rev. Code § 9.94A.105 (2000); 28 U.S.C. § 994(w)(1)(B) (Supp. V. 2001–2006).

the cases, but they do seem important because they operationalize the features that were problematic. For example, California's requirement that judges find an aggravating fact before imposing the upper term (i.e., the aspect of the system the Court found unconstitutional) would be unenforceable if the judges did not have to state which facts they relied on. And none of the systems would face constitutional issues if sentences defaulted to the upper end of possible outcomes and judges departed downward from there.[94]

D. Two Theories of Discretion

The case law does not seem to provide a ready standard for what discretion means—only that it is one way that a guidelines system can be constitutional, and that it is key to the constitutionality of the federal Guidelines in particular. That does not mean we have to throw up our hands, however. There are two possibilities left. First, the Court might be using discretion to refer to something that does not obviously look like what most of us think of as discretion. Based on the case law and for reasons discussed below, this could be the lack of a default sentence. Second, discretion might refer not to one single idea, but to a collection of concepts. I will call these the "default" theory and "bundle of sticks" theory,[95] respectively. *Blakely* and *Cunningham* align most closely with the default theory, but language in the *Booker* opinion suggests that it is possible for sentencing systems to be constitutional even if they provide a default sentence.

The default theory holds that a sentencing system fails to provide adequate judicial discretion under the Sixth Amendment when it imposes a default sentence for a particular crime which the sentencing court must stick to unless it does something more. This approach conforms most closely with *Apprendi*'s language regarding the "range of punishment to which the prosecution is by law entitled for a given set of facts."[96] A purely advisory guidelines system would be constitutional under this

[94] See Blakely v. Washington, 542 U.S. 296, 339 (2004) (Breyer, J., dissenting) ("Is there a fourth option? Perhaps. Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts.").

[95] I am borrowing this phrase, of course, from the famous property law metaphor. See, e.g., Benjamin N. Cardozo, The Paradoxes of Legal Science 129 (1928).

[96] Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring).

theory, because there is no default sentence to speak of. In such a system, there might still be guidelines, but they would hold no more legal weight than a policy paper or journal article. So, too, would a system succeed under the default theory if it allowed judges to consider the guidelines output only after they considered their own personal calculation, and afforded neither number greater weight. By contrast, a system would fail this model if there were any thumb on the scale, procedural or substantive, that defined a particular option as the default (assuming, of course, that that method allowed for consideration of judge-found facts).

The default theory conforms with the surprising result in *Cunningham*, where the sentencing system under consideration gave the judge wide discretion in almost every respect except as to what the middle term—i.e., default sentence—would be.[97] It also finds support in the post-*Booker* Court's use of the term "advisory" to describe the Guidelines.[98] That term better captures a conception of the Guidelines as one consideration among others, whereas "discretionary" leaves open the possibility of a default sentence that courts have discretion to depart from (which, as we have seen, is not constitutional).[99]

A recent case, *United States v. Haymond*,[100] both confirms and complicates the default theory's status as the dominant framework for Sixth Amendment issues at sentencing. *Haymond* considered the constitutionality of 18 U.S.C. § 3583(k), which imposes a mandatory minimum sentence for certain enumerated violations of an offender's supervised release conditions. The Court held that the provision was unconstitutional under the Sixth Amendment, although there was no majority opinion.[101] The plurality expressed support for the default theory in two ways. First, it drew a firm formal line between a system that releases defendants before the end of their sentence and reimposes a portion of the remaining sentence for violations of the terms of the release (such as the historical parole practice), and a system that required

[97] The lack of discretion as to sentence output was not a focus of the majority's analysis, although it does stand out.

[98] *Gall v. United States*, 552 U.S. 38 (2007), for example, contains one instance of "discretionary" to ten instances of "advisory" across its five opinions. *Rita v. United States*, 551 U.S. 338 (2007), is seven to twenty-one. *Beckles v. United States*, 137 S. Ct. 886 (2017), is nine to sixteen.

[99] Unlike the Court, the literature, and this Note, generally use the two terms interchangeably.

[100] United States v. Haymond, 139 S. Ct. 2369 (2019).

[101] Id. at 2378–79 (plurality opinion); id. at 2386 (Breyer, J., concurring in the judgment).

offenders to serve the entire prison sentence but allowed judges to send them back to prison if they violated the terms of their release (such as modern supervised release). The plurality's analysis turned on which system is the default: under the old parole system, the default was the original sentence, which could be re-imposed if the prisoner was released early and violated their parole; under the modern system, the default is the sentence imposed under the statutory range, and any additional mandatory prison time imposed for a violation of supervised release (a violation that would be found by a judge, not a jury) would be a new mandatory minimum, in violation of *Alleyne v. United States*.[102] Language in the opinion goes even farther, however, and suggests that the plurality views the *initial prison term*, not the statutory range, as the default sentence, and *any* imposition of additional jail time for violations of supervised release conditions is unconstitutional if not decided by a jury.[103] This position reflects a strong view of the default theory, and suggests that statutes and the Sentencing Guidelines are not the only determinants of what makes a sentence the default.

There is one (thus far hypothetical) type of system that presents problems for the default theory, and that is where there is a default sentence but no requirement that a judge explain his reasons for departing from it. Such a system would seem to conform with dicta in *Booker*, which implies that if a sentencing regime gives judges the ability to depart in every case, that regime would not present an *Apprendi* problem.[104] However, this hypothetical system would be scarcely different from the one rejected in *Cunningham*. The one difference would be a procedural one: the requirement that the judge justify his sentence, including why it departs from the guidelines.[105] This procedural distinction must be

[102] Id. at 2378–79 (citing Alleyne v. United States, 570 U.S. 99 (2013)).

[103] See id. at 2386–88 (Alito, J., dissenting) (highlighting language in the plurality opinion to this effect); see also id. at 2381 (expressing concern that "a jury's conviction on one crime would (again) permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment"); id at 2382 n.7 (declining to "pass judgment" on the general system of supervised release laid out in 18 U.S.C. § 3583(e)).

[104] *Booker*, 543 U.S. at 234 ("At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case [under the federal Guidelines], and in fact are unavailable in most.").

[105] Federal judges face almost exactly this requirement today, as they must justify their sentences with reference to the Guidelines. See infra Subsection II.A.1.

important, either *qua* procedure or for its substantive ramifications, such as inhibiting appellate review.

The second theory considers how discretionary a system is by looking at the "bundle" of available means to depart from the standard or guidelines sentence. The bundle theory is particularly persuasive in cases where there appears to be a default sentence, but many factors go into determining whether a sentence is the default. Under this theory, no one type of discretion is sufficient or necessary to pass *Booker*, but it is possible that certain types are more important than others. My own read of the case law is that permissive appellate standards of review and certain types of procedural discretion are particularly important sticks in the bundle, but all of the considerations discussed in Section I.C are relevant. Importantly, each must be considered in the context of the overall system. Discretion to select a sentence output is more valuable when the range is zero-to-ten years than when it is five-to-six, for example. Likewise, a procedural requirement to calculate the guidelines range as the first step in the sentencing process is relatively more troubling if the guidelines are comprehensive and account for almost all of the possible situations a judge might see, because the judge might then assume that the guidelines range takes account of all the relevant factors and thus might be more susceptible to psychological effects like anchoring. If the guidelines only account for a few of the possible aggravating circumstances, by contrast, the system preserves space for the judge to weigh the remaining facts and circumstances on her own. The bundle theory accounts for our difficulty in distilling what exactly the Court meant in the *Booker* remedy, because the theory holds that it is a case-by-case determination. Because each jurisdiction's sentencing system has a different bundle of means to depart from (or disregard) its guidelines, we should not necessarily expect to see many common themes in the case law.

II. RECENT SENTENCING DECISIONS AS PRO-GUIDELINES NUDGES

In the nearly decade-and-a-half since *Booker*, the Court has addressed the Sentencing Guidelines on more than a dozen occasions. Those decisions have sought to preserve the Guidelines' ability to enforce uniformity and provide procedural protections in a legal setting where the Guidelines are not formally binding. This Part reviews the post-*Booker* case law and develops the thesis that the cumulative effect is to reduce sentencing judges' discretion substantively and procedurally, and to create "nudges" encouraging judges to impose within-Guidelines

sentences. The following Part considers whether this reduction in judicial discretion is relevant to the *Booker* remedy.

A. Categories of Recent Guidelines Case Law

The post-*Booker* case law affecting the Guidelines has had the effect of encouraging judges to impose sentences within the Guidelines ranges. These cases can be classified in four main categories. One series of cases imposed procedural requirements that make it more onerous for judges to impose sentences outside the Guidelines.[106] Another line of cases considered whether a sentence was "based on" the Guidelines for purposes of a sentence modification statute, determining that sentences are "based on" the Guidelines even when the sentence was the result of a binding plea bargain.[107] A third line of cases considered the plain-error standard, deciding that an error in calculating the Guidelines range—even when it produced a sentence within the correctly calculated range—has a "reasonable probability" of affecting the imposed sentence. In doing so, the court established a judicial presumption that a sentence is based on the Sentencing Guidelines.[108] Fourth, a set of cases have touched on issues of substantive reasonableness appellate review, which is a key aspect of discretion.[109]

1. Procedural Requirements: Gall*,* Molina-Martinez*,* Chavez-Meza

The Court has set out a series of procedural requirements for sentencing judges in its post-*Booker* case law. In *Gall v. United States*,[110] the Court addressed the step-by-step process that judges must follow in thinking about a sentence, ordering that the very first step of a district court's sentencing proceedings should be to calculate the correct Guidelines range.[111] This calculation is crucial to the rest of the proceedings, the Court said, and a calculation mistake is a "significant procedural error."[112] Next, a judge must listen to the sentencing arguments from the government and defendant and consider the Guidelines and Section 3553

[106] See infra Subsection II.A.1.
[107] See infra Subsection II.A.2.
[108] See infra Subsection II.A.3.
[109] See infra Subsection II.A.4; see also supra Section I.D; infra Subsection III.B.1.
[110] 552 U.S. 38 (2007).
[111] Id. at 49.
[112] Id. at 51.

factors together to craft an individualized sentence.[113] The judge must explain her sentence, and in cases of departure from the Guidelines the explanation must be "sufficiently compelling to support the degree of the variance."[114] Later, *Molina-Martinez v. United States*[115] and *Chavez-Meza v. United States*[116] further discussed this explanatory requirement, stating in dicta that judges need not provide "extensive explanations" for within-Guidelines sentences,[117] and holding that a brief explanation—consisting of the new sentence and two checked boxes confirming the judge considered the Guidelines and relevant statutes and was granting the sentence modification motion—was sufficient explanation for a sentence modification that was within the new Guidelines range.[118] As the Court wrote, "there was not much else for the judge to say."[119] So long as her new sentence is within the Guidelines, a judge need not provide much of any explanation at all in sentence modification proceedings.[120]

An effect of these procedural requirements is to make it easier for judges to impose a within-Guidelines sentence. Anchoring effects are well-documented in the behavioral economics literature and recognized in the courts.[121] *Gall*'s requirement that judges calculate the Guidelines range as the first step in their sentencing inquiry probably makes it more likely that the final sentence would be in that range, too.[122] Likewise, the laxer burden of explanation for in-Guidelines sentences incentivizes busy trial judges to sentence within the Guidelines. We do not need to make

[113] Id. at 49–50.

[114] Id. at 50.

[115] 136 S. Ct. 1338 (2016).

[116] 138 S. Ct. 1959 (2018).

[117] *Molina-Martinez*, 136 S. Ct. at 1347; see *Chavez-Meza*, 138 S. Ct. at 1964.

[118] *Chavez-Meza*, 138 S. Ct. at 1967. For a fuller explanation of sentence modification proceedings, see infra Subsection II.A.2.

[119] *Chavez-Meza*, 138 S. Ct. at 1967.

[120] See Dawinder S. Sidhu, Towards the Second Founding of Federal Sentencing, 77 Md. L. Rev. 485, 496 & n.71 (2018). But see 18 U.S.C. § 3553(c)(1) (2012) (requiring sentencing judges to state their reasons for imposing a sentence at a particular point within the Guidelines range if the range is more than twenty-four months wide).

[121] See, e.g., United States v. Ingram, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (discussing the significance of anchoring effects in the sentencing inquiry); Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124, 1128 (1974).

[122] See Jed S. Rakoff, Why the Federal Sentencing Guidelines Should Be Scrapped, 29 Fed. Sent'g Rep. 226, 228 (2017) ("[T]he very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, and that creates a kind of psychological presumption from which most judges are hesitant to deviate too far.").

assumptions about how or whether judges are likely to respond to these incentives, however, because the Supreme Court has made them for us. In *Gall*, the Court acknowledged that "secur[ing] nationwide consistency" was a main motivation for its rule that judges use the Guidelines as their "starting point" in the sentencing process.[123] In other words, the Court has acknowledged its explicit intention to use its procedural holdings to effect substantive sentencing outcomes.

2. Sentence Modification Procedure: Dillon*,* Hughes

When the Sentencing Commission lowers the Guidelines range applicable to a defendant after he was sentenced, a district court may modify the defendant's sentence under 18 U.S.C. § 3582(c)(2) if it was "based on" the Guidelines range.[124] The statute requires the reduction to be consistent with relevant policy statements in the Guidelines, one of which states that the modified sentence may not be below the updated Guidelines range.[125]

The Court has considered two aspects of Section 3582(c)(2). First, it ruled in *Dillon v. United States* that the *Booker* remedy does not apply to Section 3582(c)(2) sentence modifications; the judge must impose a sentence within the new Guidelines range, not below it.[126] The Guidelines were effectively mandatory in that situation. Second, in *Hughes v. United States*,[127] it considered what types of sentences are "based on" the Guidelines.[128] The Court said that a sentence *was* based on the Guidelines when it was imposed subject to a "Type-C plea" under Federal Rule of Criminal Procedure 11(c)(1)(C)—a type of plea agreement that binds the court to the agreed sentence if it accepts the guilty plea[129]—so long as the Guidelines range was "part of the framework the district court relied on

[123] Gall v. United States, 552 U.S. 38, 49 (2007).

[124] 18 U.S.C. § 3582(c)(2) (2012).

[125] Id.; U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(A) (U.S. Sentencing Comm'n 2018).

[126] Dillon v. United States, 560 U.S. 817, 829–30 (2010).

[127] 138 S. Ct. 1765 (2018).

[128] This is particularly relevant post-*Booker* and post-*Kimbrough*, where judges are free to disregard the Guidelines entirely in crafting their sentence on grounds that they inadequately take all the individual factors into consideration, or (to at least some extent) for policy disagreements. See Kimbrough v. United States, 552 U.S. 85, 109 (2007); Note, More than a Formality: The Case for Meaningful Substantive Reasonableness Review, 127 Harv. L. Rev. 951, 963 (2014).

[129] *Hughes*, 138 S. Ct. at 1773.

in imposing the sentence or accepting the agreement."[130] In the typical case, the Court wrote, "there will be no question that the defendant's Guidelines range was a basis for his sentence";[131] but to find the Guidelines were *not* the basis for sentence for Section 3582(c)(2) purposes, a court must find a "clear demonstration" from the record that there was another basis for the sentence.[132]

These cases occupy a relatively confined area of the sentencing world, as the Court in *Dillon* made especial effort to point out.[133] Nevertheless, they serve as important doctrinal signposts in three respects. First, *Dillon* affirmed yet another limit on the scope of advisory sentencing by declining to extend the advisory requirement to sentence modifications, rendering the Guidelines mandatory for those purposes. Second, *Hughes* established an additional precedent, beyond the plain error cases, for the idea that appellate courts may presume sentences are based on the Guidelines unless proven otherwise. This could become relevant if substantive reasonableness review of sentences ever comes back into fashion, as advocated by many judges and commentators and as already practiced by several circuits.[134] The more areas of law that follow this principle, the more incentive sentencing courts have to sentence within the Guidelines, because the Guidelines have been repeatedly blessed as a safe-harbor of reasonableness[135]—or at least because the Court clearly believes that most judges are strongly influenced by the Guidelines, which

[130] Id. at 1775.

[131] Id.

[132] Id. at 1776. In the case of defendants who plead guilty and receive a sentence below the mandatory minimum following an 18 U.S.C. § 3553(e) substantial assistance motion, their sentences are *not* based on the Guidelines. Koons v. United States, 138 S. Ct. 1783, 1788 (2018).

[133] The Court emphasized that § 3582(c) proceedings could not even be considered resentencings but instead were "sentence modification[s]," wholly different from the sorts of proceedings at issue in the *Booker* line of cases. Dillon v. United States, 560 U.S. 817, 825 (2010) (quoting 28 U.S.C. § 994(a)(2)(C)) (internal quotation marks omitted).

[134] See, e.g., Martin Flumenbaum & Brad S. Karp, Substantive Reasonableness Review Finally Getting Teeth in the Second Circuit, 259 N.Y. L.J. (2018), https://www.paulweiss.com/media/3977894/27june2018nylj.pdf [https://perma.cc/N2FJ-9MUX].

[135] Indeed, this is already reality. See Rita v. United States, 551 U.S. 338, 347 (2007) (holding a court of appeals "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines").

is almost the same thing.[136] On this score, *Koons v. United States*[137] serves as the exception that proves the rule. *Koons* held that a sentence is *not* based on the Guidelines if it was below the mandatory minimum due to a substantial assistance motion under 18 U.S.C. § 3553(e).[138] It is the sole example cited in *Hughes* of an exception to the presumption that a sentence was based on the Guidelines, and yet it is based on a legal necessity: the statutory minimum always takes precedence over the Guidelines.[139] Third, these cases are saturated with language that reinforces the norm that most sentences will be based on the Guidelines, referring to the Guidelines as the "foundation" of sentencing decisions,[140] affirming that the Sentencing Commission maintains "authority to bind the courts,"[141] and writing against the idea that the Guidelines are "completely advisory."[142] In a world where lower courts are grasping for guidance and clarity on the discretion question, dicta like these can end up providing unofficial direction to sentencing judges.[143]

3. Plain Error: Molina-Martinez*,* Rosales-Mireles

Gall made clear that errors in calculating a Guidelines range were "significant procedural errors,"[144] and two recent cases, *Molina-Martinez*

[136] See Kelsey McCowan Heilman, Why Vague Sentencing Guidelines Violate the Due Process Clause, 95 Or. L. Rev. 53, 77–79 (2016) ("*Peugh* and *Molina-Martinez* confirm that the Guidelines' empirically-demonstrated effect on sentences has legal consequences.").

[137] 138 S. Ct. 1783 (2018).

[138] Id. at 1788.

[139] See U.S. Sentencing Guidelines Manual § 5G1.1(b) (U.S. Sentencing Comm'n 2018) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."); id. § 5G1.1(c), (c)(2) ("In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not less than any statutorily required minimum sentence."). See generally U.S. Sentencing Comm'n, Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 16–19 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications-/2017/20170711_Mand-Min.pdf [https://perma.cc/X4TQ-32H8] (discussing the history of incorporating mandatory minimum penalties into the Guidelines).

[140] Hughes v. United States, 138 S. Ct. 1765, 1775 (2018).

[141] Dillon v. United States, 560 U.S. 817, 830 (2010).

[142] Id. (quoting id. at 839 (Stevens, J., dissenting)) (internal quotation marks omitted).

[143] See Carissa B. Hessick, SCOTUS Term: Hughes v. United States and Federal Sentencing, PrawfsBlawg (June 6, 2018), https://prawfsblawg.blogs.com/prawfsblawg/2018/06/-scotus-term-hughes-v-united-states-and-federal-sentencing-.html [https://perma.cc/6DAX-P-JEY].

[144] Gall v. United States, 552 U.S. 38, 51 (2007).

v. United States[145] and *Rosales-Mireles v. United States*[146] decided that they also satisfied the plain error standard in Federal Rule of Criminal Procedure 52(b).[147] The plain error standard is used where the defendant raises an error on appeal that was forfeited at trial. The test established in *United States v. Olano* has four independent[148] prongs that must be satisfied for a reversal: there must be (1) error, (2) that is plain, (3) affects substantial rights, and (4) "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[149] The cases both were brought by defendants who ultimately were sentenced within the correct Guidelines range, but for whom the trial judge miscalculated the range at step one. *Molina-Martinez* overturned the requirement of the U.S. Court of Appeals for the Fifth Circuit that a defendant must show evidence that the sentence was not based on the Guidelines in order to establish *Olano*'s third prong of affecting substantial rights; instead, the "error itself" is usually enough to infer a "reasonable probability" that the sentence would have been different if the sentencing judge had calculated the Guidelines correctly.[150] This reasonable probability is, in turn, enough to satisfy the "substantial rights" prong without any evidence beyond the erroneously high calculation.[151] The Court then flipped the Fifth Circuit rule, allowing for the possibility that in future cases, the Government could produce evidence that a sentence was *not* based on the Guidelines and therefore a calculation error did not affect a defendant's substantial rights.[152] An assumption was established, however, that sentencings—in this case and in the future—would be based on the Guidelines.[153]

Rosales-Mireles considered substantially the same scenario, but this time in the context of the fourth *Olano* prong. The Court rejected the Fifth Circuit's standard that an error must "shock the conscience" in order to satisfy the fourth prong.[154] Instead, the court ruled that the "risk of unnecessary deprivation of liberty" that is created by a Guidelines error

[145] 136 S. Ct. 1338 (2016).
[146] 138 S. Ct. 1897 (2018).
[147] *Rosales-Mireles*, 138 S. Ct. at 1903; *Molina-Martinez*, 136 S. Ct. at 1345.
[148] *Rosales-Mireles*, 138 S. Ct. at 1913 (Thomas, J., dissenting).
[149] United States v. Olano, 507 U.S. 725, 732 (1993) (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).
[150] *Molina-Martinez*, 136 S. Ct. at 1345.
[151] Id. at 1347.
[152] Id. at 1346–47.
[153] Id. at 1349 (Alito, J., concurring in part and concurring in the judgment).
[154] United States v. Rosales-Mireles, 850 F.3d 246, 250 (5th Cir. 2017) (quoting United States v. Segura, 747 F.3d 323, 331 (5th Cir. 2014)) (internal quotation marks omitted).

sufficiently "undermines the fairness, integrity, or public reputation of judicial proceedings" to satisfy the *Olano* plain error standard.[155]

These two cases decreased the sentencing judge's discretion, because they expanded appellate courts' ability to review sentences for procedural error.[156] Their reasoning also reaffirms the assumption that sentencing decisions will continue to be based on the Guidelines, and in fact suggests an appellate presumption that most cases will fall within the Guidelines range.[157] Much like the sentence modification cases just discussed, the plain error cases hold the potential to act as helpful precedent for future courts looking to expand upon the doctrine in constitutionally problematic ways.[158]

4. Presumptions of Reasonableness: Rita*,* Gall*,* Nelson*,* Chavez-Meza

From the early days of legislative debate on the Sentencing Reform Act, appellate reasonableness review has vexed those who think about the Guidelines.[159] Courts and academics use the term "substantive reasonableness review" to refer to appellate review of whether a sentence is appropriate on the merits. Substantive reasonableness review was supposed to be a feature of post-*Booker* practice,[160] but it is rarely used today.

In *Rita v. United States*,[161] the Court allowed presumptions of reasonableness for sentences that fall within the Guidelines range, but only for appellate courts.[162] The sentencing court may not even

[155] *Rosales-Mireles*, 138 S. Ct. at 1908.

[156] Brief for the United States at 27, *Rosales-Mireles*, 138 S. Ct. 1897 (No. 16-9493) ("Because [a Guidelines calculation error], by itself, will ordinarily satisfy the third prong of the plain-error standard under *Molina-Martinez*, and would presumptively satisfy the fourth prong under petitioner's rule, the defendant would be virtually assured of resentencing.").

[157] *Molina-Martinez*, 136 S. Ct. at 1349, 1352 (Alito, J., concurring in part and concurring in the judgment).

[158] See infra Part III.

[159] See Stith & Koh, supra note 2, at 244–45, 269–70; infra Subsection III.B.1.

[160] *Booker*, 543 U.S. at 263 (discussing the remedial question at issue regarding Congress' objective).

[161] 551 U.S. 338 (2007).

[162] Id. at 347, 351 (noting that courts of appeals "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," but "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"); Nelson v. United States, 555 U.S. 350, 352 (2009) (restating the *Rita* distinction that courts of appeals may apply presumptions of reasonableness for in-Guidelines sentences, but not district courts). Although it was a short per curiam reversal, *Nelson* made the distinction a necessary part of its holding; there, the sentencing judge followed the correct

acknowledge such a presumption or else it will be reversed, as was the judge in *Nelson v. United States*.[163] The converse presumption—that out-of-Guidelines sentences are *un*reasonable—is not allowed by either Court under *Gall*, however.[164] Also disallowed is any sort of procedural requirement—such as a requirement from an appellate court that sentencing judges justify departures using a rigid, percentage-based formula to determine how much explanation is necessary—that "come[s] too close" to creating an impermissible presumption of unreasonableness for out-of-Guidelines sentences.[165] *Chavez-Meza* established a similar presumption for resentencing, holding that a form resentencing order was sufficient for in-Guidelines sentences, because a reviewing court could assume that such a sentence substantively and procedurally incorporated the Section 3553 factors.[166]

Substantive reasonableness standards that are enforced on appellate review are a key restriction on a sentencing judge's discretion, as Subsection III.B.1 discusses. For now, though, it suffices to consider how such standards nudge trial judges into Guidelines sentences. Trial judges do not want to be reversed,[167] and judges who preside in circuits that follow the *Rita* rule know their sentences will enjoy a presumption of reasonableness on appeal if they stay within the Guidelines.[168] Of course, this will be in the back of their minds whether or not they can say it out loud, as the trial judge in *Nelson* made the mistake of doing.[169] Over time, one would expect a common law of sentencing (or at least of Guidelines

sentencing procedures but his one error was to state at the sentencing hearing that he thought the Guidelines were presumptively reasonable, a presumption that district court judges may not make. Id. at 352.

[163] *Nelson*, 555 U.S. at 352.

[164] Gall v. United States, 552 U.S. 38, 47 (2007).

[165] Id.

[166] Chavez-Meza v. United States, 138 S. Ct. 1959, 1967 (2018).

[167] Judge Calvert Magruder expressed this sentiment more colorfully than most when he said: "Now, I don't enjoy getting reversed any more than any other judge, and when that happens, my first impulse is to repair to the nearest tavern and 'cuss out' the Supreme Court." Calvert Magruder, The Trials and Tribulations of an Intermediate Appellate Court, 44 Cornell L.Q. 1, 7 (1958).

[168] According to the Sentencing Commission, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits have adopted the presumption of reasonableness for within-Guidelines sentences. The First, Second, Third, Ninth, and Eleventh Circuits have not. U.S. Sentencing Comm'n, Primer: Departures and Variances 5 n.22 (2019), https://-www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Departure_Variance.pdf [https://perma.cc/HJZ3-WTJB].

[169] Nelson v. United States, 555 U.S. 350, 350–51 (2009) (per curiam).

departures) to emerge in circuits that follow *Rita*'s permissive presumption of reasonableness for in-Guidelines sentences. In these circuits, trial judges will eventually learn which departures are likely to be reversed for substantive reasonableness and which will be upheld. And we would then expect judges to conform their sentencing decisions to those appellate standards rather than their own discretionary judgments.

5. Peugh *as a Pro-Guidelines Benchmark*

Peugh v. United States[170] held that the ex post facto doctrine applies to the Sentencing Guidelines when a sentencing judge uses a version of the Guidelines that went into effect after the defendant committed his offense.[171] While this case should not be thought of as a nudge into the Guidelines—it involved a choice between in-Guidelines sentences under two different versions of the Guidelines—*Peugh* is notable for its extensive pro-Guidelines reasoning and language. The opinion rests on the idea that there is a "significant risk" that using an old version of the Guidelines with a higher range will result in a longer sentence, because courts impose Guidelines sentences in the "vast majority" of cases.[172] The opinion goes beyond that obvious observation, and is replete with language elevating the status of the Guidelines during the sentencing process beyond how previous cases treated them, and drawing a more explicit connection than ever before between the procedural requirements of sentencing and the policy goals of the Court.[173] The opinion ran through the requirements that sentencing courts begin their analysis with the Guidelines, consider them throughout the sentencing process, and then consider the extent of any variations with the Guidelines.[174] The Court then stated that the effect of those "procedural 'hurdle[s]'" is that "[i]n the usual sentencing," the sentence imposed will be within the Guidelines range.[175] The Court went on to cite data showing that as Guidelines ranges are changed, sentences change with them, before

[170] 569 U.S. 530 (2013).
[171] Id. at 535.
[172] Id. at 541, 543.
[173] See, e.g., id. at 537, 550.
[174] Id. at 541.
[175] Id. at 542 (alteration in original).

calling the Guidelines the "lodestone" of sentencing and "in a real sense [the] basis for the sentence."[176]

Peugh is significant because it reveals the Court's thinking on Guidelines issues and provides tools for future cases that could further restrict judicial discretion at sentencing. The Court is clearly comfortable with the idea that the Guidelines are the basis of federal sentences, and it is aware of the reality that most sentences follow the Guidelines. Instead of using those facts as reason for caution, lest the Court further discourage judges from exercising discretion at sentencing, the Court doubled down. Following *Peugh*, there can be little question that the Court is aware that its decisions serve to discourage the exercise of discretion and encourage pro-Guidelines results; indeed, it seems likely that the Court intends as much. Although *Peugh*'s formal holding might not impact the discretion issue either way, the signal the opinion sends to lower courts and its highly quotable language will be influential in future cases. Indeed, the Court has cited to and quoted from *Peugh* in almost every one of its subsequent Guidelines cases.[177]

6. Pro-Discretion Cases Have Been Self-Limiting

Not every case the Court has considered can be characterized as anti-discretion. Some of its cases have expanded the ability of judges to depart from the Guidelines and emphasized principles of broad discretion in their reasoning. For example, in *Kimbrough v. United States*,[178] the Court allowed district judges to depart from the Guidelines based on a policy disagreement with the Commission's use of the 100-to-1 crack cocaine

[176] Id. at 542, 544 (emphasis omitted) (internal quotation marks omitted) (quoting Freeman v. United States, 564 U.S. 522, 529 (2011) (plurality opinion)).

[177] See, e.g., Hughes v. United States, 138 S. Ct. 1765, 1775 (2018) ("[T]he Guidelines remain 'the lodestone of sentencing.'" (quoting *Peugh*, 569 U.S. at 544)); Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904 (2018) ("Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.'" (quoting *Peugh*, 569 U.S. at 541)); Beckles v. United States, 137 S. Ct. 886, 898 (2017) (Sotomayor, J., concurring in the judgment) (explaining that the Guidelines are "in a real sense[,] the basis for the sentence" (alteration in original) (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) (quoting *Peugh*, 569 U.S. at 542))); *Molina-Martinez*, 136 S. Ct. at 1345 ("The Guidelines are 'the framework for sentencing' and 'anchor . . . the district court's discretion.'" (quoting *Peugh*, 569 U.S. at 542, 549)). *Peugh* is not cited in *Chavez-Meza*, 138 S. Ct. 1959 (2018).

[178] 552 U.S. 85 (2007).

ratio.[179] *Gall* similarly expanded district court discretion when it rejected rigid proportionality review for out-of-Guidelines sentences.[180] And in *Beckles v. United States*,[181] the Court rejected a vagueness challenge to a particular Guidelines provision, in part because the text itself was not vague as applied to the defendant,[182] but also because vagueness challenges cannot be made against discretionary systems like the Guidelines.[183]

While these cases do expand discretion's role in the Guidelines system on the margins, they are each limited by their own terms. The key factor for the *Kimbrough* majority was the unique history of the crack cocaine Guidelines: the Commission's drafting process ignored the weight of "empirical data and national experience"[184] in contradiction with its usual "institutional role,"[185] and the Commission itself had criticized the 100-to-1 ratio as unduly harsh.[186] The Court's analysis suggests to some that *Kimbrough* only applies to the crack cocaine guidelines and the small number of other sections (probably child pornography, as well[187]) that had similarly flawed drafting processes.[188] The *Kimbrough* Court also instructed appellate courts to apply closer scrutiny when they review policy departures, but relatively less scrutiny for departures in cases that had circumstances that were not considered by the Commission in drafting the Guidelines section for that offense category[189] (notably, these departures were already available to judges pre-*Booker*[190]). Also, the language of the opinion emphasized the central importance of the Guidelines and Sentencing Commission.[191] So, *Kimbrough*'s effect appears limited to a small number of policy departures, and it provided little for future courts to cite to if they want to expand discretion.

[179] Id. at 91.
[180] Gall v. United States, 552 U.S. 38, 47 (2007).
[181] 137 S. Ct. 886 (2017).
[182] Id. at 897–98 (Ginsburg, J., concurring in the judgment).
[183] Id. at 890.
[184] Kimbrough v. United States, 552 U.S. 85, 109 (2007) (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).
[185] Id. at 109.
[186] Id. at 110.
[187] See Note, supra note 128, at 963–64.
[188] See Frank O. Bowman, III, Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 U. Chi. L. Rev. 367, 449 (2010); Note, supra note 128, at 957, 963. But see Bibas & Klein, supra note 22, at 775–76.
[189] *Kimbrough*, 552 U.S. at 109; Bowman, supra note 188, at 449.
[190] U.S. Sentencing Guidelines Manual § 5K2.0 (U.S. Sentencing Comm'n 2004).
[191] Bowman, supra note 188, at 448–49 (citing *Kimbrough*, 552 U.S. at 109–10).

While *Gall* expanded district judges' procedural discretion by rejecting a rigid and mathematical proportionality-based formula for justifying departures, it allowed for other versions of proportionality review.[192] Post-*Gall*, appellate courts can still take into account the level of variance from the Guidelines range[193]—which may have been what the lower court had been doing anyway, raising the question of whether the Court struck down anything in practice.[194] As in *Kimbrough*, there is also (highly quotable) language in *Gall* affirming the procedural importance of Guidelines calculations.

Beckles did not need to rely on its arguments about discretion to reach its result. The Court probably would have found the section at hand to not be vague as applied to *Beckles* if it had reached the issue,[195] and the vagueness doctrine more typically applies to statutes that invite arbitrary enforcement by the executive; it would have been unusual to apply it to a guideline used by judges.[196] In any case, *Beckles*'s reasoning and its pro-discretion language have been all but avoided by the subsequent cases, leading some commentators to describe the case as dead on arrival.[197]

B. The Court's Motivations for Within-Guidelines Nudges: Empirical and Policy

If the Court's current doctrine has had the effect of nudging sentences into the Guidelines, it is worth considering why that might be. The Court's opinions suggest two main motivations. The empirical reality at the sentencing level shows that most district court judges do, in fact, sentence

[192] Gall v. United States, 552 U.S. 38, 47 (2007).

[193] Id.

[194] See id. at 72 (Alito, J., dissenting).

[195] In a recent case, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), four Justices dissented from the Court's holding that a similarly worded statute was vague. Id. at 1234 (Roberts, C.J., dissenting). Justice Ginsburg was in the majority in that case but said in *Beckles* that she did not think the Guidelines' equivalent provision was vague. *Beckles*, 137 S. Ct. at 897–98 (Ginsburg, J., concurring in the judgment). Presumably, Justice Ginsburg and the *Dimaya* dissenters could have resolved *Beckles* on those grounds.

[196] See John Calvin Jeffries Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 215 (1985) ("The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards."). But see Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) (noting that a vague statutory sentencing provision "invites arbitrary enforcement by judges").

[197] See Leah Litman, Beckles v. US as Anti-Canon, Take Care (June 18, 2018), https://take-careblog.com/blog/beckles-v-us-as-anti-canon [https://perma.cc/Y9HK-E3GA].

within the Guidelines, suggesting that the Guidelines are still influential even if they are advisory.[198] The Court's opinions can be read as an attempt to impose doctrinal protections in light of this empirical reality. Second, the Court has sought as a policy matter to enforce the Sentencing Reform Act's goals of uniformity, consistency, and proportionality.

Discerning the Court's motivations in these cases is important because it suggests what it might do in future cases. Given the barrage of Guidelines cases the Court has dealt with over the past thirteen years, it is likely there will be even more such cases in the future. As we will see in Part III, the direction these future cases go could have important effects for the constitutionality of the Guidelines system.

1. Empirical Motivations

Just under half of all federal sentences in 2017 were within the Guidelines range for the particular offense and offender.[199] Most of the remainder are responses to government-sponsored below range sentences, a category which includes substantial assistance departures under Guidelines Section 5K1.1, and departures pursuant to Department of Justice early disposition programs under Guidelines Section 5K3.1. In total, 76.9% of sentences in 2017 were within the Guidelines range or were government-sponsored below range sentences.[200] An additional 3.1% of sentences were other types of departures,[201] a category considered to be within the Guidelines as well,[202] leaving only about 20.0% of sentences imposed wholly apart from the Guidelines. These numbers have been relatively steady since 2014; the within-Guidelines

[198] See U.S. Sentencing Comm'n, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Tbl. N (2017), https://www.ussc.gov/sites/default/files/pdf/-research-and-publications/annual-reports-and-sourcebooks/2017/TableN.pdf [https://perma.-cc/9Z5Q-2LFS].

[199] See id. (demonstrating that 49.1% of all federal sentences were within the Guidelines range).

[200] See id.

[201] See id.

[202] U.S. Sentencing Comm'n, Primer: Departures and Variances 2 (2019), https://www.us-sc.gov/sites/default/files/pdf/training/primers/2019_Primer_Departure_Variance.pdf [https:-//perma.cc/7CP2-D3SE] (citing United States v. Crosby, 397 F.3d 103, 111 n.9 (2d Cir. 2005)).

figure, in fact, has crept up several percentage points, from 46.0% in 2014 to 49.1% in 2017.[203]

These numbers have not been lost on the Justices and advocates, who all realize that the great preponderance of sentences have been, are, and likely will continue to be, based on the Guidelines range and departures that appear within the Guidelines framework.[204] *Peugh*, for example, justified its extension of the ex post facto doctrine to the Guidelines on the ground that, even post-*Booker*, "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion."[205]

Molina-Martinez, as well, cited statistics showing that in less than twenty percent of sentences over the prior ten years had courts imposed above- or below-Guidelines sentences without a government-sponsored motion.[206] The Court then drew a direct line from the "centrality of the Guidelines" to the conclusion that a Guidelines error substantially affected the defendant's sentence.[207] The court picked up the thread again in *Rosales-Mireles*, citing to the "reasonable probability" that a Guidelines error will result in a longer sentence as reason why such a case meets the fourth *Olano* prong as well.[208]

Most recently, Justice Sotomayor cited these same statistics in *Beckles* to make the point that the Guidelines range is what determines the sentence in the majority of cases.[209] As a result of this "central role"

[203] Compare U.S. Sentencing Comm'n, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Tbl. N (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf [https://perma.cc/MN32-SPPA] (46.0% in 2014), with U.S. Sentencing Comm'n, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Tbl. N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/TableN.pdf [https://perma.cc/M2VA-UHYH] (49.1% in 2017).

[204] See, e.g., Kelsey McCowan Heilman, Why Vague Sentencing Guidelines Violate the Due Process Clause, 25 Or. L. Rev. 53, 77–79 (2016) (discussing *Molina-Martinez* and *Peugh* and how Guidelines case law is based on the empirical reality of the importance of Guidelines); Transcript of Oral Argument at 30, 38, United States v. Beckles, 137 S. Ct. 886 (2017) (No. 15-8544) (Principal Deputy Solicitor General Michael Dreeben discussing the eighty percent figure in exchanges with Chief Justice Roberts, Justice Alito, and Justice Sotomayor).

[205] Peugh v. United States, 569 U.S. 530, 543 (2013).

[206] See Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016).

[207] Id.

[208] Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905 (2018).

[209] *Beckles*, 137 S. Ct. at 900 (Sotomayor, J., concurring in the judgment).

played by the Guidelines, Justice Sotomayor concluded that the Guidelines should be subject to vagueness challenges under the Due Process Clause.[210]

As these cases show, the Justices are aware of the empirical importance of the Guidelines and are motivated to assign procedural and constitutional protections in light of that importance. As discussed above, this realization has occurred at the same time as the Court has issued decisions that tend to encourage sentences that are within the Guidelines range. This creates two feedback loops: one that has effects on sentencing judges and one on the doctrine itself. First, as trial judges continue to sentence most defendants to Guidelines sentences, the Supreme Court responds with cases that affirm the procedural importance of the Guidelines in their holdings and language, incentivizing trial judges to keep sentencing within the Guidelines. Second, the more procedural nudges there are that make the Guidelines more "mandatory," the greater the need to provide doctrinal and procedural protections for Guidelines sentences—protections that, as we have seen, tend to cut back on sentencing judges' discretion.[211]

2. Policy Motivations

The Court's recent Guidelines cases also make clear their attempts to fulfill the policy goals of the Sentencing Reform Act. The post-*Booker* Guidelines cases are replete with references to the SRA's purposes of

[210] Id.

[211] There is a general correlation between how mandatory a sentencing system is and the level of procedural protections assigned to it. Perhaps related, there has also been a trend toward more procedural rights at sentencing over the last twenty years. See Hessick & Hessick, supra note 27, at 193–94. Of course, the trend could reverse course, too: judges still have the theoretical discretion to impose sentences that are not within the Guidelines ranges. See, e.g., *Molina-Martinez*, 136 S. Ct. at 1349 (Alito, J., concurring in part and concurring in the judgment). By justifying so much of its Guidelines jurisprudence with statistics rather than the formal status of the Guidelines, the Court has created a swath of doctrine that can change as the data changes.

improving proportionality,[212] individualization,[213] uniformity[214] and reducing unwarranted disparities.[215] The Court has sought to enforce these purposes through its procedural protections. For example, the *Gall* Court cited sentencing uniformity as the reason why calculating the Guidelines should be the first step a judge takes to begin the sentencing determination.[216] Similarly, the requirement that sentencing judges must give reasons for their sentences helps to reduce disparities, ensure proportionality, and achieve the various other goals of the SRA and Sentencing Guidelines.[217] These sentencing purposes are in tension with each other and with the constitutional requirement that the Guidelines be advisory.[218] The Court's commitment to them reveals the many balls it has in the air as it crafts sentencing doctrine. They also show that the nudges observed in this Part are intentional on the part of the Court.

[212] See Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98–473, 98 Stat. 1987, 1989 (1984) (codified at 18 U.S.C. § 3553(a)) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set out in paragraph (2) of this subsection."); Miller, supra note 2, at 424. Cases citing the legislative purpose of proportionality include *Rita v. United States*, 551 U.S. 338, 349–51 (2007); id. at 381–82 (Scalia, J., concurring in part and concurring in the judgment); *Molina-Martinez*, 136 S. Ct. at 1342; *Rosales-Mireles*, 138 S. Ct. at 1908; *Peugh v. United States*, 569 U.S. 530, 536 (2013); *Kimbrough v. United States*, 552 U.S. 85, 110 (2007).

[213] See SRA, Pub. L. No. 98–473, 98 Stat. 1987, 1989 (1984) (codified at 18 U.S.C. § 3553(a)(1)); Miller, supra note 2, at 424. Cases citing the need to conform with the legislative purpose of facilitating individualization of sentences include *Rita*, 551 U.S. at 348; *Gall v. United States*, 552 U.S. 38, 52 n.8 (2007).

[214] See U.S. Sentencing Guidelines Manual § 1A1.3, at 3 (U.S. Sentencing Comm'n 2018) (discussing Congress's goal of increasing uniformity through the SRA). Cases citing the legislative purpose of uniformity include *Rita*, 551 U.S. at 349; id. at 370 (Scalia, J., concurring in part and concurring in the judgment); *Molina-Martinez*, 136 S. Ct. at 1342; *Gall*, 552 U.S. at 52 n.8; *Rosales-Mireles*, 138 S. Ct. at 1908; *Peugh*, 569 U.S. at 541; *Kimbrough*, 552 U.S. at 107–08; *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018).

[215] See SRA, Pub. L. No. 98–473, 98 Stat. 1987, 1990 (1984) (codified at 18 U.S.C. § 3553(a)(6)); Miller, supra note 2, at 423–24. Cases citing the legislative purpose of reducing unwarranted disparities include *Rita*, 551 U.S. at 348; *Peugh*, 569 U.S. at 536; *Kimbrough*, 552 U.S. at 106–07.

[216] See *Gall*, 552 U.S. at 49.

[217] See *Rita*, 551 U.S. at 381–82 (Scalia, J., concurring in part and concurring in the judgment).

[218] See, e.g., Transcript of Oral Argument at 26, United States v. Beckles, 137 S. Ct. 886 (2017) (No. 15-8544) (discussing the tension between "individualization or proportionality" on the one hand and "uniform or predictable results" on the other).

III. THE THREAT TO *BOOKER*'S SIXTH AMENDMENT DÉTENTE

The preceding Parts put forward a theory of what makes a Guidelines system discretionary for purposes of *Booker* compliance, and argued for interpreting the recent Guidelines cases as nudges towards in-Guidelines-range sentences. This final Part argues that the trend identified in Part II has the potential to undermine discretion as conceptualized in Part I. Our sentencing regime probably still is "discretionary enough" to withstand a new *Booker*-style challenge, but there are several foreseeable paths that could bring it to presumptive territory once again.

A. The Guidelines' Status as "Mildly Presumptive"

Professor Frank Bowman has described the Guidelines as "mildly presumptive," in recognition of the Court's "embrace of at least a mild rebuttable presumption of the correctness of a within-range sentence."[219] That may be an accurate descriptor for a system that insists on discretion with one hand, but that seeks to limit that discretion with the other hand—especially when data show that the hand limiting discretion is winning.

This status of mild presumption represents a knife's edge that academics, litigants, and the Court itself have long recognized. A little too far to one side, and the Guidelines' purpose of reducing disparities and enforcing uniformity is compromised; too far to the other, and the Guidelines become effectively mandatory, undermining the *Booker* holding that has defined sentencing law for the past thirteen years.

Just two years after *Booker*, Justices Scalia and Souter recognized in their separate opinions in *Rita* that the Court's own Guidelines cases could add up to a Sixth Amendment violation. Justice Scalia in a concurrence spoke in particular of substantive reasonableness review, stating that "there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts."[220] Speaking more generally in dissent, Justice Souter expressed concern that the Guidelines could become practically mandatory, in violation of *Booker*'s Sixth Amendment holding: "[I]f sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as

[219] Bowman, supra note 188, at 453.

[220] *Rita*, 551 U.S. at 374 (Scalia, J., concurring in part and concurring in the judgment).

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."[221] Justice Scalia rose much the same concern in a later case, writing that "any thumb on the scales" for the Guidelines would violate the Sixth Amendment.[222] Litigants and academics have recognized this possibility as well. [223]

The recent cases discussed in Part II act as nudges toward within-Guidelines sentences, creating problems in light of the default and bundle theories of discretion discussed in Part I.[224] The more the Guidelines are procedurally and doctrinally prioritized over other sentencing methodologies, the more they begin to look like a legal default (statistically, the Guidelines are already the de facto default, and it would not be surprising if those numbers rose further as result of the recent case law). These cases also skew the bundle of discretion in our sentencing system, including by reducing judges' sentencing discretion and facilitating certain forms of appellate review.[225]

Nevertheless, these cases are probably not enough to constitute a return to mandatory Guidelines for *Booker* purposes. Despite issuing opinions that have reduced sentencing discretion, the Justices continue to insist that the Guidelines are fully advisory. Furthermore, the issues the Court has considered have had a relatively small bore. Although the plain-error holdings were significant for their relevance to appellate review, they can be interpreted to merely correct the lower court's interpretation of the plain error standard, without much sentencing-specific relevance. And, as important as procedural cases are for the ways they anchor the sentencing process around the Guidelines range, we rely on judges to overcome that sort of unconscious priming.

But these cases do reveal a trend, and that trend has a set of specific motivations behind it.[226] There are several ways that the Supreme Court or the courts of appeals could build upon the reasoning and rhetoric of these cases to shape the doctrine in a way that would be truly problematic for the cause of judicial discretion at sentencing. These include a renewed

[221] Id. at 390 (Souter, J., dissenting).

[222] Kimbrough v. United States, 552 U.S. 85, 113 (2007) (Scalia, J., concurring).

[223] See, e.g., Brief Amicus Curiae by Invitation of the Court at 32, *Beckles*, 137 S. Ct. 886 (No. 15-8544); Amy Baron-Evans & Kate Stith, *Booker* Rules, 160 U. Pa. L. Rev. 1631, 1670 (2012).

[224] See supra Section I.D.

[225] See supra Subsection I.C.1; Section I.D.

[226] See Section II.B.

emphasis on substantive appellate review of sentences; a recognition that the Guidelines are practically, if not formally, more binding than past systems; and a further accumulation of certain procedural requirements. The next Section considers these potential developments.

B. Three Ways Sentencing Can Lose Its Discretionary Status

If recent history is a guide, the Court can expect to see many more Guidelines-related cases. This Section builds upon the recent case law and sentencing trends to consider a few possible futures for sentencing law. These developments both are enabled by the recent Guidelines case law and would create problems for it. Particularly when viewed alongside the other restrictions on discretion already discussed in this Note, these trends raise serious constitutional problems for the Guidelines system and could provide grounds for new challenges to the *Booker* regime.

1. Appellate Substantive Reasonableness Review

The *Booker* remedy purported to expand substantive appellate review to all sentences, not just departures.[227] The *Booker* Court viewed substantive reasonableness appellate review as a way to ensure uniformity by "iron[ing] out sentencing differences" within circuits.[228] Two years later, *Rita* enabled an early form of substantive reasonableness review by permitting appellate presumptions of substantive reasonableness for within-Guidelines sentences, opening the door to common law approaches of determining which factors justified departures from that presumption.[229] But for whatever reason (possibly due to confusion over how to conduct substantive review[230]), reversals of sentences for

[227] See, e.g., Hessick & Hessick, supra note 47, at 8.

[228] *Booker*, 543 U.S. at 263; see also Note, supra note 128, at 964–70 ("Disparity between circuits with respect to disagreement with particular Guidelines is inevitable, but by leveraging their ability to engage in 'closer review' of policy disagreement, appellate courts can make the policy determinations and thus promote uniformity within their circuits.").

[229] Rita v. United States, 551 U.S. 338, 371–72 (2007) (Scalia, J., concurring in part and concurring in the judgment) (illustrating ways in which a common law of sentencing factors can develop under a presumption-of-reasonableness regime).

[230] See id. at 382 n.6 (recognizing the difficulty in differentiating between substantive and procedural review); John Playforth, The Veil of Vagueness: Reasonableness Review in *Rita v. United States*, 127 S. Ct. 2456 (2007), 31 Harv. J.L. & Pub. Pol'y 841, 848–49 (2008); Public Hearing before the U.S. Sentencing Commission in Chicago, Ill. 205–07 (Sept. 9–10, 2009), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript.pdf [https://perma.cc/66QC-TPGY] (remarks by Judge Jeffrey Sutton wondering whether substantive review

substantive unreasonableness are exceedingly rare[231]: In 2017, 359 sentences were reversed on reasonableness grounds, but only seven of those were for substantive unreasonableness.[232]

Nevertheless, substantive reasonableness review never fully disappeared. Since *Booker*, there has been a steady call for stronger and more frequent substantive review of sentences. Judges and commentators alike have written in favor of substantive reasonableness review as a "common law" method of "addressing systemic problems with the Sentencing Guidelines"[233] and achieving a number of other judicial policy goals.[234] In recent years, courts of appeals have taken approaches that begin to establish common law rules of sentencing, identifying specific factors that do or do not justify particular sentences.[235] At last, some practitioners are seeing signs of a revival of substantive reasonableness review.[236]

Post-*Booker* case law has enabled and facilitated this growth of substantive reasonableness review. For example, the Court's procedural requirement that sentencing judges "adequately explain the chosen sentence,"[237] and its suggestion that certain sentences may require a "more detailed explanation,"[238] provide the raw material for appellate courts to conduct substantive reasonableness review. In addition, by

was "worth it" and what exactly appellate judges "should be doing when it comes to reviewing sentences for substantive reasonableness").

[231] Frank O. Bowman III, Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines, 51 Hous. L. Rev. 1227, 1234 n.25 (2014).

[232] U.S. Sentencing Comm'n, Reasonableness Issues Appealed in Cases Where the Original Sentence was Reversed or Remanded, Tbl. 59 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table59.pdf [https://perma.cc/34SF-V8UD].

[233] United States v. Corsey, 723 F.3d 366, 378 (2d. Cir. 2013) (Underhill, J., concurring).

[234] Note, supra note 128, at 964–70.

[235] See, e.g., United States v. Helton, 782 F.3d 148, 155 (4th Cir. 2015) (declining to credit defendant's claim of substantive unreasonableness where the district court had imposed a below-Guidelines sentence because doing so would be "unprecedented"); United States v. Jenkins, 854 F.3d 181, 191 (2d Cir. 2017) (holding that a sentence near the statutory maximum for transportation of child pornography, 18 U.S.C. § 2252A(a)(1), was not justified when the transportation was for personal use and not distribution). Other courts have undertaken what looks like a substantive analysis within formally procedural inquiries, such as whether the district court correctly calculated the Sentencing Guidelines, and referred back to this calculation in its substantive reasonableness inquiry. See United States v. Pol-Flores, 644 F.3d 1, 4 (1st Cir. 2011).

[236] Flumenbaum & Karp, supra note 134.

[237] Gall v. United States, 552 U.S. 38, 50 (2007).

[238] Chavez-Meza v. United States, 138 S. Ct. 1959, 1967 (2018).

enabling courts of appeals to presume that within-Guidelines sentences are substantively reasonable, *Rita* encouraged the circuits adopting that presumption to articulate reasons why outside-Guidelines cases can also be reasonable despite falling "outside the 'heartland'" of the Guidelines ranges.[239] Future extension of these concepts would further facilitate substantive reasonableness review.

A rebirth of substantive reasonableness review could occur in a few ways. It could happen explicitly as appellate courts reject sentences on certain bases and uphold sentences on other bases, creating a common law of sentencing over time. For example, a circuit might articulate a rule that it will uphold sentences near the top of the statutory range for transportation of child pornography only if the transportation was for the purpose of distribution, as the Second Circuit appears to have done recently.[240] Or, common law sentencing rules could dictate how sentencing judges weigh different factors by assigning specific values to certain factors common in all sentences,[241] effectively creating a common law version of the Sentencing Guidelines.

Substantive reasonableness review can also occur implicitly under the guise of procedural review. As discussed above, recent case law has given appellate judges many different ways to vacate a sentence for being procedurally unreasonable. Reversals on procedural grounds are not uncommon; there were 351 such reversals in 2017.[242] Circuit court judges who may be reluctant to undertake substantive review of an unreasonable sentence have many means to do so on procedural grounds instead.[243]

Further, the line between substantive and procedural reasonableness is blurry, suggesting that some procedural reasonableness cases might be

[239] Rita v. United States, 551 U.S. 338, 351 (2007) (quoting U.S. Sentencing Comm'n, Guidelines Manual § 5K2.0 (2018)).

[240] United States v. Jenkins, 854 F.3d 181, 191 (2d Cir. 2017).

[241] See supra Subsection I.C.1.

[242] U.S. Sentencing Comm'n, Reasonableness Issues Appealed in Cases Where the Original Sentence was Reversed or Remanded, Tbl. 59 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table59.pdf [https://perma.cc/UQH9-U273].

[243] See, e.g., United States v. Corsey, 723 F.3d 366, 377 (2d. Cir. 2013) (vacating a sentence on procedural unreasonableness grounds and declining to consider the substantive reasonableness issue). Indeed, appellate judges acknowledge doing this. See United States v. Ingram, 721 F.3d 35, 45 (2d Cir. 2013) (Calabresi, J., concurring) (advocating for "more attentive . . . procedural scrutiny" in cases that raise close questions of substantive reasonableness).

more properly considered substantive instead.[244] For example, the Court's holdings that in-Guidelines sentences carry less of a burden of explanation in certain contexts has substantive implications, because it affects the size of the record on which an appellate court can review a sentence.[245] And *Gall*'s requirement that an appellate court reviewing a sentence must check that the sentencing court did not commit a "procedural error" such as failing to consider the Section 3553 factors looks more like a substantive demand when we consider the text of that section.[246] Section 3553 builds in a parsimony requirement that requires sentences to be "not greater than necessary" to comply with the purposes of sentencing. [247] Unlike the rest of Section 3553, which lays out a set of concepts to consider, the parsimony requirement is a substantive rule that demands a particular outcome—the lowest sentence that is sufficient to achieve the purposes of sentencing. In sum, there are several mechanisms—some of which are blessed by the Court—through which the courts of appeals can exercise substantive reasonableness review over sentences, and at least a few of the courts are poised to take advantage of that power.

Meaningful substantive reasonableness review very likely violates *Booker*, however, because it uses common law rules to restrict the discretion of sentencing judges in ways that the Supreme Court has said are unconstitutional when those restrictions are imposed by sentencing guidelines.[248] Appellate review is recognized as an important

[244] See, e.g., United States v. Jeter, 721 F.3d 746, 756 (6th Cir. 2013) (acknowledging that substantive and procedural reasonableness inquiries "overlap" with regards to claims about how the judge considered the § 3553 factors). The porous border between substantive and procedural reasonableness review goes both ways, as courts also use what looks like procedural review to review substantive reasonableness claims. See, e.g., United States v. Jackson, 662 F. App'x 416, 428 (6th Cir. 2016) (analyzing a substantive reasonableness claim in terms of whether the sentencing court "reviewed the § 3553(a) factors" and "identified its reasoning").

[245] For instance, a form certification verifying that the judge considered the § 3553 factors was considered to be appropriate in a resentencing proceeding imposing a within-Guidelines sentence. Chavez-Meza v. United States, 138 S. Ct. 1959, 1967 (2018).

[246] Gall v. United States, 552 U.S. 38, 51 (2007).

[247] 18 U.S.C. § 3553(a) (2012) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.").

[248] I make this argument while recognizing the many merits of substantive reasonableness review and the common law approach to sentencing, which I think better recognize the individualized nature of sentencing practice and are more responsive to the equities of particular cases than a commission-imposed set of guidelines. My quibble is with the *Booker* remedy, which in my view necessarily limits the scope of substantive reasonableness review,

restriction—indeed, possibly the main restriction—on the discretion of lower court judges in all areas of the law.[249] Any form of substantive reasonableness review would have the effect of removing a stick from the discretionary bundle, or of establishing a strong presumptive default sentence.[250] A common law of sentencing could also, over time, recreate the detailed and mandatory scheme seen in the pre-*Booker* Guidelines as appellate courts remove, case-by-case, certain fact patterns from the zone of reasonableness or assign weights to particular sentencing facts.[251]

But we need not consider theoretical models of discretion, because substantive appellate review has the possibility to result in the very thing the *Booker* merits majority ruled was unconstitutional: sentences that are upheld on the explicit basis of a judge-found fact. Consider the Second Circuit case involving transportation of child pornography discussed above. Any future sentence for 18 U.S.C. § 2252A(a)(1) that is near the top of the sentencing range will be upheld only if it involved an intent to distribute. Yet that sentence would be unconstitutional under *Booker*, because it would be permitted only if "a judge found true by a preponderance of the evidence a fact"—here, the intent to distribute—"that was never submitted to a jury."[252] Had the *Booker* remedy turned out the other way and increased the jury's role at sentencing, this result would be constitutionally permissible; under current sentencing law and practice, it is not.

The Court's recent sentencing case law has exacerbated the problems for substantive reasonableness review. Consider the incentives created by

not with substantive reasonableness review as a potentially beneficial feature in sentencing law. It is quite possible that a common law of sentencing would be acceptable in a system that used jury-found facts at sentencing.

[249] Rosenberg, supra note 47, at 637; Friendly, supra note 47, at 754–55 & n.27; Hessick & Hessick, supra note 47, at 3; see also Stith & Koh, supra note 2, at 243 ("Also crucial to the degree of discretion retained by the sentencing court is the provision governing appellate review. If the standard of review is flexible (for instance, a standard of reasonableness), the trial court has broad discretion. On the other hand, if the standard of review is more rigid (for instance, de novo application of relevant law), the trial court has significantly less discretion.").

[250] See supra Section I.D.

[251] *Booker*, 543 U.S. at 333 (Breyer, J., dissenting in part) (recognizing that appellate rules would fall under the language of *Blakely* and *Apprendi*). But see id. (distinguishing between legislatively-created limits and judicially-created ones).

[252] *Booker*, 543 U.S. at 238; see also Marlowe v. United States, 555 U.S. 963, 964 (2008) (Scalia, J., dissenting from denial of certiorari) (raising the question of whether a decision to uphold a sentence as substantively reasonable because it fell within the Sentencing Guidelines violated *Booker*).

the Court's suggestion that there is less of a burden of explanation for within-Guidelines sentences than for sentences outside the Guidelines ranges in certain situations.[253] These cases encourage within-Guidelines sentences by making it easier to impose them. Under a substantive reasonableness review regime, this incentive would be amplified because a more cursory explanation is not only easier to produce, but also is harder for an appellate court to review and reverse. To take another example, the Court's allowance for courts of appeals to presume in-Guidelines sentences are reasonable[254] encourages sentencing courts in those circuits to sentence within the Guidelines, lest they be overturned more easily on appeal. Even sentencing courts *not* in circuits adopting that presumption will be mindful of the Supreme Court's strong pro-Guidelines language—such as its statement that courts should promote a "federal sentencing scheme [that] aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines"[255]—and can expect their reviewing courts to apply it as well.

In summary, the Supreme Court's recent sentencing case law facilitates substantive reasonableness review, and courts and academics alike have recognized the promise the methodology has for sentencing law. But that same case law—and *Booker* itself—may preclude substantive reasonableness review from taking hold. If it does, the Court could be forced to choose between a form of review it seemed to encourage in *Booker*, and the sentencing scheme it has created in the years since.

2. Comparison with Other Sentencing Regimes

While the Court has continued to emphasize that the Guidelines are formally advisory,[256] in practice, the Guidelines' status is clear: about 79% of sentences are within the Guidelines framework.[257] The Court recognizes this phenomenon, yet nonetheless continues to produce cases

[253] See supra Subsection II.A.1.

[254] Rita v. United States, 551 U.S. 338, 347 (2007).

[255] Peugh v. United States, 569 U.S. 530, 541 (2013).

[256] Id. at 543.

[257] Average over the last ten years, as calculated by adding within-Guidelines sentences and government-sponsored below-range sentences. Government-sponsored sentences below the Guidelines range are generally considered to be within the Guidelines framework, as they are usually achieved through the various Guidelines departure mechanisms. See U.S. Sentencing Comm'n, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Tbl. N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications-/annual-reports-and-sourcebooks/2017/TableN.pdf [https://perma.cc/9Z5Q-2LFS].

that "steer district courts to more within-Guidelines sentences."[258] At the same time, the formal status of the federal Guidelines as "advisory" has never been fully defined, and the Court's few forays into that question are unilluminating and arguably contradictory.[259]

Both of these facts—the high (and Court-enforced) rate of Guidelines compliance and the uncertain doctrinal ground of the Guidelines' advisory status—are in tension with the *Booker* remedy. They raise the question of whether this tension is unique to the post-*Booker* federal system, and how the federal system compares to analogous regimes. This methodology is important, because in at least one recent case, the Court has expressed a willingness to engage in system-to-system analogizing to determine constitutional questions in sentencing.[260] When we compare the federal system to state systems, we see that federal sentencing practice is not as discretionary, and *Booker*'s advisory remedy not as successful, as the case law assumes.

First, a statistical comparison of the federal Guidelines to the guidelines systems in other jurisdictions shows that the federal system is not as discretionary as the Court suggests. Virginia's advisory guidelines system has a concurrence rate of around 80%, just slightly higher than the federal Guidelines.[261] Curiously, though, the federal Guidelines conformity rate is only a few percentage points lower than the conformity rate under Kansas's presumptive guidelines system in Fiscal Year 2001,[262] immediately before that state's guidelines were invalidated on *Apprendi* grounds.[263] These data points are anecdotal,[264] but they seriously undercut the effectiveness of the *Booker* remedy and of formal discretion in general. If sentencing guidelines are followed nearly as often when they are formally advisory (e.g., Virginia's or the current federal Guidelines)

[258] *Peugh*, 569 U.S. at 543; id. at 541; supra Section II.A.

[259] See supra Subsection I.C.2.

[260] See United States v. Haymond, 139 S. Ct. 2369, 2381–82 (2019) (plurality opinion) (comparing modern supervised release revocation to historical parole revocation practices); id. at 2387–89 (Alito, J., dissenting) (same).

[261] Va. Crim. Sentencing Comm'n, Annual Report 12 (2018), http://www.vcsc.virginia.gov/2018AnnualReport.pdf [https://perma.cc/NN7X-ZLA7].

[262] In FY 2001, 83% of sentences in Kansas fell within the presumptive guidelines grids. Kan. Sentencing Comm'n, FY 2001 Annual Report 42 (2002), https://www.sentencing.ks.gov/docs/default-source/annual-reports/fy-2001-annual-report.pdf [https://perma.cc/3QT-S-TBBQ].

[263] State v. Gould, 23 P.3d 801, 814 (Kan. 2001).

[264] Unfortunately, not every state's sentencing commission keeps data as thorough as Virginia's and Kansas's.

as when they are formally mandatory (e.g., Kansas's in 2001), then we should begin to question what practical difference the advisory aspect makes. This is especially important in light of the Court's focus on the data underlying sentencing practice.[265] While it is impossible to know exactly why these systems show similar numbers, one possibility is that the Court's Guidelines jurisprudence, which has repeatedly emphasized the centrality of the Guidelines to sentencing, has dampened whatever effect the change from formally mandatory to formally advisory might have had on these statistics.[266] Regardless of the reason, the similarity in conformity rates could be a compelling piece of evidence for future litigants arguing that the *Booker* remedy failed to have much effect.

Second, a comparison of the Guidelines' formal features with state sentencing systems also calls into question the effectiveness of the advisory remedy and its Guidelines case law. Other states have sentencing systems that have been upheld by their state courts against *Apprendi* and *Blakely* challenges, but appear to be no less discretionary than systems (particularly California's Determinate Sentencing Law) that the United States Supreme Court has invalidated. New York, for example, requires a finding of persistent offender status for offenders to be eligible for an enhanced sentence after conviction for certain crimes.[267] But, the statute authorizes the sentencing court to impose an enhanced sentence "when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest."[268] Without this finding, the statute does not grant the judge discretion to sentence above the presumptive range. This language seems to require the court to make findings at sentencing beyond the mere fact

[265] See supra Subsection II.B.1.

[266] Two other explanations have been offered. The Court has pointed to the empirical approach of the Sentencing Commission, which updates its guidelines ranges to conform with survey data about what sentences judges are imposing. Rita v. United States, 551 U.S. 338, 349 (2007). Professor Frank Bowman theorizes (based in part on testimony from federal judges) that judges are comfortable applying laws to facts, and cling to the Guidelines because they "look and feel like 'law.'" Bowman, supra note 231, at 1269 & n.140.

[267] This aspect of New York's sentencing scheme, at least, is constitutional under *Almendarez-Torres v. United States*, which exempts findings of prior convictions from the Sixth Amendment requirement of proof to a jury. 523 U.S. 224, 226–27 (1998).

[268] N.Y. Penal Law § 70.10(2) (Consol. 1998); Carissa Byrne Hessick & William W. Berry III, Sixth Amendment Sentencing After *Hurst*, 66 UCLA L. Rev. 448, 489–90 (2019); see also People v. Rivera, 833 N.E.2d 194, 199 (N.Y. 2005) (upholding New York's sentencing regime under an *Apprendi*/*Blakely*/*Booker* challenge).

of conviction in order to use the enhanced sentencing range.[269] In this way, it appears to be no different from the California system rejected in *Cunningham v. California*, where the jury conviction made a defendant eligible for the upper term sentence, but a judge needed to find an aggravating fact before imposing it.[270] The New York example pushes the boundaries of *Cunningham* and could present the Court with a chance to clarify what it meant in that case and its other Guidelines decisions.

Alaska's system presents another edge case. The system is similar to New York's in that a finding of a prior conviction can authorize an enhanced sentence, but it differs in a few important respects. First, the enhanced range is authorized on the basis of a single sentencing factor, which must be either a prior conviction or a fact found by a jury.[271] This feature probably makes the sentencing regime compliant with the Sixth Amendment case law.[272] Second, however, the sentencing statute only allows the judge to consider a limited number of aggravating factors.[273] This feature restricts substantive discretion considerably from the New York system or the Washington system in *Blakely v. Washington*, because it permits the judge to consider only the aggravating factors on the statutory list.[274] The statute also restricts procedural discretion by

[269] Despite this seemingly clear statutory language, New York courts have avoided the *Apprendi*/*Blakely* problem by interpreting § 70.10(2) to authorize an enhanced sentence on the basis of the prior felony convictions only, effectively reading out of the statute the second clause of § 70.10(2) ("when it is of the opinion . . . that extended incarceration . . . will best serve the public interest"). *Rivera*, 833 N.E.2d at 198. Federal courts sometimes defer to this interpretation of New York law by the New York courts, but have also recognized that the language itself violates *Blakely* and *Cunningham*. Besser v. Walsh, 601 F.3d 163, 186 (2d Cir. 2010) (holding § 70.10(2) unconstitutional under *Blakely* and *Cunningham*); Portalatin v. Graham, 624 F.3d 69, 84 (2d Cir. 2010) (en banc) (overturning the *Besser* panel because the Second Circuit is "bound by [the New York Court of Appeals'] construction of *New York* law").

[270] 549 U.S. 270, 293 (2007).

[271] Alaska Stat. Ann. § 12.55.155(f) (West 2019).

[272] *Apprendi* and *Blakely* permit the use of jury-found sentencing enhancements and sentencing enhancements based on a judge's finding of a prior conviction. Blakely v. Washington, 542 U.S. 296, 301 (2004) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000))); see also Cleveland v. State, 143 P.3d 977, 988 (Alaska Ct. App. 2006) (holding that the § 12.55.155 enhancement authorizations were "*Blakely*-compliant").

[273] Alaska Stat. Ann. § 12.55.155(c), (f) (West 2019).

[274] Id. § 12.55.155(b).

requiring judges to consider all of the statutory factors.[275] Appellate courts in Alaska have further restricted discretion by attempting to circumscribe trial courts' use of the factors[276] in ways that make clear that the factors go beyond mere 18 U.S.C. § 3553-like factors and into statutory commands. At the same time, sentencing judges in Alaska do retain discretion as to how to weigh those factors, unlike the pre-*Booker* federal Guidelines. A challenge to the Alaska sentencing regime could shine more light on what the Court means by discretion, and which sticks in the discretionary bundle are most important.

3. A Combination of Procedural Requirements

A final problematic yet foreseeable trend would be if the Court instituted more procedural rules that nudged judges within the Guidelines ranges. As discussed, the Guidelines are comprehensive and feature narrow ranges. In such a system, procedural rules can blur into substantive ones.[277] They can also create anchoring effects that guide judges into the Guidelines range. Eventually, a few of the hundreds of procedural reasonableness challenges heard by the courts of appeals each year are bound to make their way to the Supreme Court. How these cases are resolved, and whether they act as nudges and anchors to a Guidelines range that is already heavily favored in doctrine and practice, could have important effects for the future of the *Booker* remedy.

There is reason to think that the Court will continue its attempt to use procedural rules to nudge sentences into the Guidelines ranges, producing further tension with the advisory aspect of the Guidelines. This is because uniformity—the motivating concern behind the Court's recent procedural Guidelines cases—has declined dramatically since the Guidelines became advisory. Inter-judge disparities doubled after *Booker*,[278] and when we zoom out, we see increased disparities at the inter-district and inter-region levels as well.[279] These disparity statistics represent trends and coexist

[275] Id. This is a potentially problematic procedural requirement. See supra Subsection III.B.1.

[276] Tofelogo v. State, 408 P.3d 1215, 1219–20 (Alaska Ct. App. 2017); Scholes v. State, 274 P.3d 496, 498–500 (Alaska Ct. App. 2012). The Alaska Supreme Court reversed the *Tofelogo* decision, in part on grounds that the appellate court's interpretation of the sentencing factor left too little discretion to the trial court. See State v. Tofelogo, 444 P.3d 151 (2019).

[277] The Court appears to intend as much. Gall v. United States, 552 U.S. 38, 47, 49 (2007).

[278] Crystal S. Yang, Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from *Booker*, 89 N.Y.U. L. Rev. 1268 (2014).

[279] Bowman, supra note 231, at 1260–68.

with the statistical fact that most sentences still fall within the Guidelines ranges, suggesting that absolute disparity levels are either small or are partially accounted for by variations within the Guidelines range.[280] But the increase in sentencing disparity does indicate that the Court's strategy of enforcing uniformity by nudging sentences into the Guidelines is misplaced; most judges are already following the Guidelines in most cases, and yet disparities persist.[281] If that is the case, the court might face a choice: it can seek uniformity, or it can keep discretion, but not both.

CONCLUSION

The *Booker* Court made the surprising decision to remedy the Sixth Amendment error by rendering the Guidelines advisory, thus placing judicial discretion at the constitutional heart of our federal sentencing system. But the Court never explained how it defined discretion, and its statements and decisions around the time of *Booker* only added to the confusion. This Note has proposed two possibilities for what constitutes discretion in light of those experiences. Discretion could refer to a package of concepts that are unique in any individual system. Or it could refer to a general concept, such as the degree to which guidelines provide a default sentence.[282]

Since *Booker*, the Court has considered other sets of cases that have been decidedly lower profile. Viewed in totality, the decisions tend to encourage trial judges to impose within-Guidelines sentences. This trend in the doctrine tends to shift the Guidelines away from the advisory end and towards the mandatory end of the spectrum, even if they do not yet raise a viable *Booker* problem.[283] It is not inconceivable that our sentencing law *will* violate the discretionary mandate in the future,

[280] The inter-judge disparities do appear to be small on an absolute basis. For example, a judge who is a full standard deviation more lenient than the average judge is only 6.9% more likely to sentence below the Guidelines range. Yang, supra note 278, at 1310–11. Inter-region disparities are also relatively narrow in absolute terms. The standard deviation of within-Guidelines sentences for all districts was 13.7% in 2012. Bowman, supra note 231, at 1264.

[281] Rampant disparities may just be a feature of discretionary sentencing models, such as the federal system prior to the Sentencing Reform Act. See Marvin E. Frankel, Criminal Sentences: Law Without Order 5–8 (1973). If that is the case, it is hard to see how the Court could achieve uniformity without directly challenging discretion.

[282] See supra Part I.

[283] See supra Part II.

however. There are a few ways that could happen, the seeds of which are present in the recent case law.[284]

If this came to pass, the Court would have several options. It could backtrack on its post-*Booker* case law, sacrificing its policy goals of uniformity and reducing disparities in favor of protecting the advisory status of the Guidelines. It could invalidate the Guidelines even as an advisory tool, perhaps on the grounds that it is impossible to retain judicial discretion within a comprehensive guidelines system while also preserving the Sixth Amendment right. Or, it could revisit its choice of remedy in *Booker*, and require sentences to be based on jury-found facts. That might not be as heavy of a lift as it seems. In the months after *Blakely*, many states adjusted their guidelines systems to use only jury-found facts, and prosecutors likewise adjusted the way they charged and presented cases. Even today, states such as Virginia employ jury sentencing, holding a separate sentencing hearing with additional evidence immediately after the jury delivers their verdict on guilt. A federal system that used jury-found facts at sentencing would allow for the continued use of the Guidelines, and judges could retain the discretion to decide which of the jury-found facts are relevant inputs to the sentence. All of these options would be disruptive to current practice. But our sentencing system certainly has dealt with disruption before.

[284] See supra Part III.