

***Judging Discretion***  
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I can't begin to say what an honor it is for me to be here this evening, in part because anything even remotely connected with Judge Seymour is an honor to be a part of, and in part because it brings me home. It is wonderful, and unique, to have the opportunity to present my academic work to an audience that includes so many familiar faces, so many people who have in various ways shaped my views of the law and of the roles to be played by both lawyers and judges, at their best.

It was in fact the prospect of coming to clerk for Judge Seymour after law school that prompted the first law review article I wrote and that work, as well as the work I did as a law clerk has solidified the long term project into which my talk this evening fits. In all that I write, one way or another, I am always trying to work out an integrated theory of the ethics of the exercise and explanation of judgment in the judicial role.

Some of what I do is very theoretical – it deals with legal philosophy of people like Hart, Dworkin, Cardozo, Llewellyn & Holmes, among many others. That's the jurisprudential bit. But, with a tip of my hat to Judge Seymour here for all those questions about who should care about any of that, another part of what I do is aimed at practical points that may be useful both to those who actually *occupy* the judicial role, who must deal on a regular basis with the questions I raise in my work, AND to those lawyers who come *before* those judges, so that they might have a fuller understanding of the complexities of the roles of those who sit in judgment on their cases. Someone recently asked me what constituted success in my scholarship. For me, it is having my work cited by judges who have found it useful. So it is a particular pleasure to have the

opportunity to raise tonight's topic in the presence of so many judges who might have practical responses to what I have to say.

Those of you who know Judge Seymour either personally or professionally cannot help but know that she is a person of great integrity, both on and off the bench. There are two primary ways in which I have seen this. The first, on the bench and in chambers, is in her open mind – her clerks have no fear in raising objections and putting forward different views about cases coming up for argument or opinions being written. (Or even in pestering her with ideas about jurisprudential law review articles!) Her mind can be changed by a persuasive argument, because it is above all solid reasoning, rather than personal views, that matters in her decisionmaking. If an opinion doesn't make sense yet, it's not right yet.

The second aspect of Judge Seymour's integrity, off the bench, is her strength of character, which may be seen perhaps foremost in her dedication to her family and to the importance of having a real life outside of work, and being engaged with the world around her. Thus, Judge Seymour is always in my mind when I wrestle with the issue of character, personality, and personal convictions in the judicial role. I cannot shake the idea that it matters.

But the tricky problem is to determine HOW it matters, at least how character may legitimately and usefully play a role in the exercise of judgment from the bench. My colleagues who prefer to reside on the purely philosophical end of things tend to want to write off individuality in the judicial role – they loathe the idea of Aristotelian virtue ethics and prefer to say judges must simply look to legal authority and apply it. And in some part, I agree with them and have occasionally written as much, but there is no

ignoring the fact that, to invert the title of a fantastic series of articles by Jerome Frank from the 1930s, “Judges are Human.” So, my topic for this evening wrestles with the problem of the individuality of judgment that is a necessary aspect of the exercise of discretion in judicial decisionmaking. What is the meaning of discretion, and how can its use or abuse be meaningfully judged?

In the first meeting of a seminar on the judicial role last fall, I asked my students to define the role of the judge – to explain what a judge was supposed to do. (This is, rather famously, what Benjamin Cardozo undertook to explain in his small masterpiece, *The Nature of the Judicial Process*.) They supplied some answers, and we discussed them, and at the end of the class session, I took away their responses. In the final meeting of the class, after some three months of reading and discussing various aspects of the judicial role in detail, I asked them to respond to the same question and only then handed back their original responses so that they could compare the two. To my great satisfaction, they were less able to write a definitive answer at the end of the class than they had been at the beginning. The more one reads and thinks hard about the judicial role, the more problematic it inevitably appears. This is a *good* thing, as far as *I'm* concerned, because I hope it will keep me employed, by providing me with an endless stream of articles and books to write over the course of my career.

But it is often viewed by others as a great annoyance, because it would be so much easier if we could just agree upon a simple and straightforward response like the ones my students provided the first time around. "It is the job of the judge to decide cases according to the law." That sounds good. Or in the words of the now- Chief Justice of the Supreme Court, in his confirmation hearings, **judges are like umpires,**

**calling balls and strikes.**<sup>1</sup> (*I imagine that before my remarks are over, some baseball fans in Cleveland and Boston will take issue with the idea that such decisions are so straightforward.*) At any rate, these phrases and others like them keep the public, along with the lawyers and judges, happy and confident in the judiciary, allaying fears that judges might be usurping more power to make law than is properly accorded them. To me, however, they are **troubling** descriptions, because they mask the realities of what we actually call upon judges to do, and thus restrain us from honest exploration of extraordinarily important jurisprudential questions.

Discretion is a reality of the judicial role. And it can be a slippery concept, but it is of great importance to actual outcomes. If we were to go back to Aristotle, we would find that discretion in the form of equitable power may be the very thing that allows justice to be accomplished. That, I would venture, is important. But relatively few people tackle the problem of discretion head on.<sup>2</sup> I may be foolhardy, but that is what I propose to do this evening.

What is discretion, then? We typically see it in the law as a standard of review – that is, the higher court may look to see whether the lower court has “abused its discretion.” But we can’t know whether it has been abused until we know what it IS. Discretion is a word typically used in the judicial decisionmaking context to denote an area of choice. It indicates a range of decisionmaking authority in which the judge is required to exercise judgment. Within the bounds of discretion, then, any outcome may be considered “legal” insofar as it has the imprimatur of legitimate authority as a permissible outcome. In the review of discretion, one *\*must\** contemplate a range of right answers rather than a single right answer. And of course when we speak of review

of discretion we must be reminded that we are talking about judgment layered upon judgment.

After all, one of the ways in which discretion may be practically limited is not by a list of factors, or the giving of two ends of a range of possible outcomes, but by the very fact of the imposition of appellate review. A hard-liner might argue that "discretion" is in fact no such thing if the decision is reviewable at all – that is, if it is reversible for error at all.<sup>3</sup> A less extreme claim might be that discretion may be limited by the amount of deference the decision will receive on appellate review. The essential question here is: If the decisionmaker can make the wrong choice, is it right to speak of having had a choice in the first place?

For my money, the important and interesting bits of judicial ethics are NOT in the behavioral rules – they aren't about bribery or family connections or misuse of letterhead or any of that – they are far more deeply buried in the process of reasoning and the substance of reason-giving.<sup>4</sup> This is all the more the case when discretion is explicitly given.

As I demand of my students on a daily basis: "Example!" I will be daring to dip a toe into an area that is not a particular specialty of mine, because it lends a rich body of judicial decisionmaking and explanation of that decisionmaking at both the district and the appellate court levels, through which we may observe and poke at this thing called discretion. And so we will wade into the waters of federal sentencing law and policy which has been so much in the news lately. But before we get there, let me underscore that my focus is not on the sentencing aspect of this discussion – I merely use it as a lens through which we may profitably discuss the meaning and the use of discretion. Many

areas of the law are fertile for such a discussion, and might lead us down different paths – injunctions standards, certain evidence rules, arguably any of those rules of civil procedure that say “may” instead of “shall” – could provide fodder for exploration of the meaning of discretion, but for tonight, we’ll talk about federal sentencing, and this strange young beast called “reasonableness review.”

### **Background on Sentencing Law:**

A bit of very basic background is in order for those of you, who like me, had previously paid scant attention to the great drama of sentencing:

Before the 1980s, almost any law review article about discretion would hold up federal sentencing as the paradigmatic example of an area in which judges had “true” discretion.<sup>5</sup> They were to use their judgment and the sentences they imposed were not meaningfully subject to appellate review. Bounded only by statutory maximums and minimums, judges truly had choice within those bounds. This was true discretion. District court judges believed themselves to be skilled at sentencing, and as a general rule, consistently resisted the imposition of appellate review.

This, it turned out, resulted in inconsistent decisionmaking. Congress stepped in and addressed the problem by establishing the United States Sentencing Commission to create guidelines for federal sentencing.<sup>6</sup> District court judges implemented the guidelines in a mandatory form and some even began to make a show of washing their hands of responsibility for the wisdom of those sentences where they disagreed with the Commission’s work. Thus, in this era, when I was a law clerk for Judge Seymour in 2002-2003, the review of sentencing decisions was more or less limited to checking the math. The work of sentencing judges, who were acting without much discretion in the

first place, was simply reviewed for compliance with the terms of the guidelines. That was pretty easy.

However, in 2005, in *United States v. Booker*,<sup>7</sup> the Supreme Court decided that the guidelines could not in compliance with the Sixth Amendment be considered mandatory, but only advisory. Appellate review changed at that point from a deferential review of calculus to this new creature called "reasonableness review."<sup>8</sup> *Booker* made clear, as have several opinions since, that this reasonableness review is akin to review for abuse of discretion, so you will hear me use both terms throughout this discussion.<sup>9</sup>

I teach Torts, so I have endless fun with the Silly Putty concept of "reasonableness" determinations, and perhaps you were similarly entertained (or tortured, depending on your viewpoint) by your own Torts professors in the past. Reasonableness is a pliable and elusive concept that contemplates a range of possible correct answers – just like discretion. But in either case – reasonableness or discretion - the correctness of a decision really lies in the legitimacy of the underlying reasoning that led to the decision – something we'll come back to in full force in a few minutes.

One last decision I need to put on the table as a matter of background, and this is the decision that prompted my interest in talking about sentencing this evening. In late June of this year, the Supreme Court issued its opinion in *Rita v. United States*.<sup>10</sup> The holding of the majority opinion in *Rita* is that circuit courts *may* (but need not) apply a presumption of reasonableness on review of any sentence that falls within the advisory guidelines. Reasonableness review was clarified in *Rita* as having two components: procedural reasonableness and substantive reasonableness. Appellate courts are thus supposed, as a threshold matter, to review the sentencing record to assure themselves that

the lower court first correctly calculated the advisory guidelines range, then considered the factors in 18 USC § 3553, which lays out the appropriate considerations and purposes that go into formulating an appropriate sentence, as well as the arguments of the parties, and that they then provided an adequate explanation of their reasoning as to why the chosen sentence, in compliance with the statutory directives and advisory guidelines constitutes a term sufficient but not greater than necessary to achieve the goals of criminal sentencing.

Some of you may now be thinking “wait a second – why did she say all that stuff about RANGES of correct outcomes, when the standard for the sentencing judge contemplates a POINT? After all, “sufficient, but not greater than necessary” \*must\* contemplate a point. To understand better, we must dig deeper still by looking at how the appellate courts of various circuits have been implementing the law announced in *Booker* and *Rita* thus far.

While appellate courts conduct their review for “reasonable” decisionmaking by the district courts, the district courts are actually forbidden to use “reasonableness” as their own goal in the process.<sup>11</sup> To do so constitutes reversible procedural error. Sentencing judges must instead comply with the directive of the so-called “parsimony provision” in aiming for a point (sufficient but not greater), and then the appellate court can come along and determine whether the point actually selected was within the range of reasonable sentences that might have been chosen.

Along similar lines, the majority in *Rita* made clear that rebuttable presumptions about the reasonableness of sentences imposed within the bounds of the advisory guidelines range were ONLY appropriately applied by appellate courts.<sup>12</sup> A sentencing

judge may not assume, according to *Rita*, that a within-guidelines sentence is reasonable and require the defendant to overcome that presumption. (Put a mental asterisk next to that statement, if you will and if time permits, we can come back and talk about the extent to which that directive might be overcome with semantics.)

Instead of applying a presumption of reasonableness to the guidelines range, a sentencing judge is to arrive at her own conclusion as a result of consideration of all of the 3553(a) factors (which include the guidelines) AND any non-frivolous arguments from the parties. If it happens that the sentencing judge's conclusion places the sentence within the advisory guidelines range, according to *Rita*, the appellate court may presume the reasonableness of the sentence based on the "double-determination" or the "coincidence" of the judgments of these two experienced and knowledgeable entities, the United States Sentencing Commission and the sentencing judge herself.<sup>13</sup> So far this sounds solid enough as a theory. However, if we stop and think about it, you've got a judge who is supposed to start with the guidelines and then consider the 3553(a) factors – there's tremendous potential here for a cognitive anchoring bias. Furthermore, it is not really the consistent reality of the implementation of the rules of *Booker* and *Rita* that judges consider themselves so free from the guidelines that they come up with the sentence independently of the influence, or what has been called the "gravitational pull," of the guidelines.

But I'm getting slightly ahead of myself. Let's talk about the basics. There are several problems I have observed over the course of several months of reading appellate reviews of sentencing courts' sentencing performances. Many opinions, of course, are rightly critical or rightly approving, but others do not seem to conduct meaningful review

at all, or worse, simply replace the judgment of the sentencing court. So, let me break the problems of appellate review of this discretionary task into the two major categories of "reasonableness" – procedural and substantive – first taking up the procedural side of things.

### **Procedural Reasonableness**

Again, procedural reasonableness in sentencing consists a set of seemingly straightforward steps: (1) calculate the appropriate advisory Guidelines sentencing range; (2) consider all of the 3553(a) factors [*nature and circumstances of the offense, history and characteristics of the offender, seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public, providing appropriate training or treatment, kinds of sentences available, guidelines ranges and policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution*] along with any non-frivolous arguments of the parties; (3) determine the sentence that will be sufficient but not greater than necessary to achieve the goals of 3553 and (4) provide an explanation of reasoning adequate to allow the reviewing court to determine that you followed the process here correctly. In implementing this procedure, district courts must not presume the guidelines are reasonable or impose burdens on defendants to overcome such presumptions.

Thus, we see appellate courts performing initial reviews of the record for any indication that these steps were actually taken. If any steps or considerations were obviously entirely omitted, that's an easy way to determine procedural unreasonableness and avoid the need to dig any deeper. However, there are two starkly divergent ways in

which some appellate courts behave, even in this simplest aspect of the reasonableness review process.

On the one hand: *Rita* is very generous to sentencing judges in allowing them flexibility and judgment about how much explanation is necessary to support the imposition of a sentence that falls within the advisory guidelines. It is clear from the example of the analysis in *Rita* that the Court really meant that,<sup>14</sup> and we see deferential standards consistently cited by the circuit courts, such as the requirement that they “ensure only that the district judge imposed the sentence for reasons that are logical and consistent with the factors set forth in 3553(a).”<sup>15</sup> And they consistently agree that there is no need to provide any ritualistic incantation of all of the 3553 factors.<sup>16</sup>

However, many appellate courts afford a degree of deference, a degree of presumption that the sentencing court did what it was supposed to do, that goes too far. One can see some striking differences of approach to this aspect of reasonableness review by taking a somewhat oblique angle on the problem – that is, by looking at the appellate perspective on when appeals of procedural reasonableness might be deemed “frivolous.” In the few months since *Rita*, Judge Posner in the 7th Circuit has more than once declared that *Anders* briefs should have been submitted instead of reasonableness appeals for within- or even above-guidelines sentences.<sup>17</sup> (*Anders* briefs, for those unfamiliar with the term, are written by attorneys seeking to be excused by the appellate court from the obligation to represent their clients on appeal, on the ground that there is no non-frivolous basis for appeal.<sup>18</sup> They are these odd pieces of sort of anti-advocacy, in which attorneys have to simultaneously suggest and then knock down arguments that might conceivably be made.) So Judge Posner is suggesting that *Anders* briefs should have been filed

instead of challenges to procedural reasonableness. By contrast, the 2d circuit has now denied two *Anders* briefs on **within**-guidelines sentences for failure to exhaust the possibilities of bringing reasonableness challenges, even when there was an indication that the lawyers filing those briefs had thought of the sentencing issues and understood them, but considered them less than viable.<sup>19</sup>

Aside from looking at the *Anders* angle on this problem, we can simply see some courts affording deference to the sentencing court that goes too far – actually saying things like: “The sentencing judge in this case said that he [balanced the factors] in this case and we have no reason to doubt that he did.”<sup>20</sup>

For reasons that will become yet clearer as I turn to my analysis of substantive reasonableness review, in order that discretion may be given robust meaning, I would urge less presumption that procedures were followed, more stringency in the appellate enforcement of the requirement of providing reasoning to support the determination of the sentence, to put more meat into procedural reasonableness review. Generally, I must underscore, it seems to me that both district and circuit courts usually get it right in practice, whether their language about what they are doing gets it right or not. The reasoning is generally there on the district court record, either on the transcript or in written reasoning of the sentencing court, it is apparent that all requisite hoops were jumped through - that the judge considered the pre-sentence report, heard arguments from parties, and gave reasons for the sentence based on legitimate considerations under the statute. And appellate courts, in the main, do a fine job of identifying procedural errors while keeping themselves from substituting their judgment on substance. But that’s the model to stick with – the model of actually looking at the considerations, rather than

saying “we trust that the judge did it right.” If anything, I would urge a strengthening of the review of sentences for an assurance of procedural reasonableness, because in order to establish a meaningful understanding of discretion, I am about to suggest the total elimination of substantive reasonableness review.

### **Substantive Reasonableness Review**

Federal courts at all levels seem to me to be in a state of some confusion about what to make of **substantive** reasonableness. There is really no useful guidance from the Supreme Court about what it means. During the oral argument for *Gall v. United States* a few weeks ago, Justice Scalia said if he were sitting on a court of appeals, he would have no idea what he’s allowed to do.<sup>21</sup> Since *Rita* (which confirmed that such a thing as substantive unreasonableness existed, but gave no real guidance as to its meaning or implementation), most circuit courts seem to pay it lip service. Many others that actually purport to analyze it are really confusing it with what would be better styled procedural issues. And then there is a smaller and far more problematic group of those who, in trying to find a meaning for substantive reasonableness, misuse it entirely, and in doing so, undermine the meaning of discretion entirely along the way.

So, let us walk through these three basic types of cases with a bold thesis in mind. I propose that if discretion is to have any robust meaning, any integrity of meaning, in the sentencing context, there can be no such thing as substantive unreasonableness. I will argue that if the procedural requirements are met (and again I would be very demanding and thorough on this score), then if discretion is to have any real meaning or integrity, there should be no further review, because the choice, the individualized judgment, of the sentencing judge is within its proper bounds and there is no error.

I should note here that I am not the only one to have said substantive reasonableness can't exist in a sensible way. Justice Scalia's concurrence in *Rita* said as much quite plainly – that “reasonableness review cannot contain a substantive component at all[, but] that appellate courts can nevertheless secure some amount of sentencing uniformity through the procedural reasonableness review made possible by the *Booker* remedial opinion.”<sup>22</sup> But he takes this position on an entirely different basis. Justice Scalia's concern is about judicial fact-finding under the Sixth Amendment, whereas I am concerned about the meaning of discretion.<sup>23</sup>

Discretion, again, is an area of bounded choice, of judgment within certain fetters. In the sentencing context, discretion is bounded in two major ways. First and most obviously, it is bounded on two ends by statutory maximums and minimums particular to each case. Second, between those ends, the discretion is bounded by procedures that require particular considerations to be made and to be made properly. The right considerations must be taken into account, and this without mistake of law or fact, and the sentencing judge must afford adequate explanation for the reasoning to be determined to be within those procedural parameters. (This is a crucial point about the sentencing context, that the adequacy of the explanation is a part of procedural reasonableness.)

Within these bounds, or fetters, on discretion, the sentencing court exercises judgment. That judgment requires practical wisdom, and is, of necessity, individual, calling upon the insight and experience of the district court judge. If discretion is to mean anything, it must mean that within those procedural bounds, any determination is legitimate. If appellate courts or Congress or other observers don't like the way the

sentences come out under such a system, then by all means, they should work to change the bounds or the terms within which those sentencing judges exercise reasoned choice. But they must do so through a device other than substantive reasonableness review on appeal.

So now let us take a quick look at the ways in which substantive reasonableness has actually been treated by circuit courts. In the first category of treatments I mentioned, and it is by far the largest from what I have seen, circuit courts pay lip service to the concept. There isn't too much to say about this category, but I do wish to underscore the fact that most courts, even those who appear to perceive (without explaining) some legitimate content in substantive reasonableness review, and who find it to be an issue properly before them for decision, as a practical matter do not engage with it. Instead, having engaged in the analysis of procedural reasonableness, they simply conclude, without any analysis, that the sentence is substantively reasonable (or at any rate that it is not substantively UNreasonable.<sup>24</sup> It looks very much as though those courts are merely paying lip service to the concept because the Supreme Court has said it exists, but they (quite correctly in my view) have no idea what it is. And, in practical terms, I think these courts are choosing the best option currently available to them, but I would prefer to see that option given greater integrity through the clear elimination of substantive reasonableness analysis. I will talk a bit later about how the Supreme Court might eliminate the confusion in two sentencing cases, *Gall* and *Kimbrough*, this term.<sup>25</sup>

But in the meantime, there are other circuit courts I think actually get substantive reasonableness wrong. There are a few approaches that fall into a middle ground not so much of overreaching, but of confusing the issue. First of all, there are a few open

attempts to explain the difference between substantive and procedural reasonableness, in order to show that there is such a thing as substantive unreasonableness.

Justice Stevens' concurrence in *Rita*, for example, attempts to explain the difference by saying that if the procedure had been impeccable, but a sentencing judge always sentenced Yankees fans more harshly than Red Sox fans, the decision would be substantively unreasonable.<sup>26</sup> This simply won't work as an example. To have considered baseball allegiances in determining a sentence would constitute consideration of an improper factor. That is clear procedural error, and thus undermines the hypothetical setup that the procedure had been "impeccable" in the first place.<sup>27</sup>

Similarly, there is an inapposite attempt at a cooking analogy in an opinion from the 3<sup>rd</sup> Circuit in a case called *Tomko*.<sup>28</sup> The majority writes in a footnote, to explain the content of substantive unreasonableness:

To put it figuratively, there is a recipe for reasonableness that in many, if not most cases, will lead to a palatable result, and we are not in a position to protest if the result is a little too sweet or bitter for our taste. However, when a number of key ingredients prescribed by that recipe are obviously missing from the mix, we cannot ignore the omission and feign satisfaction – we are obliged to point out there is no proof in the pudding.<sup>29</sup>

Obviously a failure of both logic and over-cuteness – that is a clear example of procedural error. It is beyond argument that the omission of a factor or the inclusion of an improper factor is a matter of procedural error. These failed attempts to demonstrate the difference between the two types of reasonableness only underscore that the legitimate analysis is all procedural.

Other courts in this middle ground of confusion don't try to explain the difference, but simply treat certain arguments as substantive reasonableness arguments

that are in fact procedural arguments. So, for example, we might look at *United States v. Fink* in the Sixth Circuit, in which there is a lumping of various procedural issues into a category labeled “substantive reasonableness” analysis.<sup>30</sup> The appellate panel in this case states that the only issue on appeal is substantive reasonableness, but under that heading discussing factors having been left out, the proper application of factors that have been considered, and so on. These are really procedural matters about what are the proper considerations to bring into or leave out of the mix, and how they are to be applied in terms of law and fact.

And again, I would venture a guess that this confusion results from the lack of guidance about what constitutes substantive unreasonableness in the first place, which might lead a court to borrow from the well of procedure to fill the analysis of substance.

But much more troubling than the confusion and the lip service are those opinions that fall into a third category. It is the existence of this category that urges me to say that it really matters that the confusion about substantive reasonableness get sorted out, because it is in this category that discretion suffers. In this category, when judges try to find content for substantive reasonableness analysis, they simply replace the sentencing court’s judgment with their own. They take different approaches in doing so. And they all say they aren’t doing this, but a closer look betrays that they are. In these cases, discretion has lost all its robust meaning, and that practical wisdom exercised so carefully by the sentencing courts is improperly cast aside.

Take the 1<sup>st</sup> Circuit’s opinion in a case called *Taylor*.<sup>31</sup> This was a government appeal of a below-guidelines sentence on grounds of substantive unreasonableness. The opinion begins by stating that it is appropriate for an appellate court, as a part of its

reasonableness analysis, to engage in an independent review of whether a district court properly interpreted the Sentencing Commission's policy statements in determining a sentence.<sup>32</sup> On this point, they find the district court did properly interpret the policies, even though another judge might have settled on a different sentence. This section of the opinion includes a lot of talk about the importance of deference to the experience of district courts in sentencing, about how "unwarranted interference in this process is likely to hinder individualized consideration and result in one-size-fits-all sentencing, an approach that was rejected long ago."<sup>33</sup> And that, of course, is really procedural reasonableness analysis.

BUT, here's the shocker, the panel nevertheless finds the sentence substantively UNREASONABLE, basing its conclusion on nothing less than its own judgment of the proper *weighting* of factors, finding that the district court's sentence was not a plausible result, even though the court went through all the proper procedures.<sup>34</sup> To top this all off with a bit more confusion, the opinion concludes that on remand, the district court needs to take proper account of all of the 3553(a) factors (as if it were simple procedural error in failing to consider certain factors, rather than as previously stated, a disagreement with the substantive consideration of those factors). Here the opinion and its conclusion boil down to a simple disagreement with the district court's quite proper use of discretion.

For another example, take again the 3<sup>rd</sup> circuit opinion in *Tomko*.<sup>35</sup> Again, the majority showed concern with the weight put on particular factors, but did so with the kind of conclusory language that would exercise the red pen of any grader of first-year law school exams – using phrases like “simply does not justify” and “it was unreasonable and an abuse of discretion.” The dissenter on that panel (and I do think it is noteworthy

that the opinions in this category tend to provoke dissents from panelists saying the majority doesn't understand how to review the use of discretion) – the dissenter in *Tomko* says “look, I get that none of US would have let this guy off with no prison time, but we don't do *de novo* review, and you're just reweighing these things for yourself. The sentencing judge had discretion and this is how he used it, so we have to leave it alone.”<sup>36</sup> It is difficult to imagine a more unsympathetic defendant than the one in that case, but the dissenting judge has got it right. If the sentencing judge complied with the procedural requirements, he had free choice of a sentence within those bounds.

And how can it rationally, or with integrity, be otherwise? What if we were to say that even within this space of choice bounded by procedural requirements, a higher court could review for something more? What would that something more be? What can be the content of that rule, or the standard to be applied? What could it mean other than “unless the appellate court would have decided otherwise”? I cannot make sense of, or find the integrity in, such a standardless rule. As Justice Scalia put it to the petitioner in *Gall* earlier this month: “We're trying to [develop] a rule here that can be applied sensibly by all the courts of appeals when they are reviewing the innumerable sentences of federal district judges.”<sup>37</sup> I have to believe that the procedural fetters, taken seriously on review by the circuit courts, are the sole sensible bounds on the discretion of the district judges in the sentencing context.

In the same oral argument in *Gall*, Chief Justice Roberts asked the attorney for the petitioner if there is any legitimate review left at this point other than procedural reasonableness review.<sup>38</sup> Even more clearly than the petitioner there, I would answer a

resounding “NO.” Or at least if we mean discretion and reasonableness to have any meaningful content, the answer ought to be no.

### **Conclusion**

From my relatively brief attention to sentencing law, which has included lots of reading, but also informal discussions with sitting judges and attendance at some sentencing hearings, I firmly believe that these sentencing judges go about their work with great integrity. Those with whom I’ve spoken have also told me that sentencing is the hardest part of their job, and the part that keeps them awake at night. They have been given discretion to do that part of their job within certain bounds. It is my suggestion that if they stay within procedural bounds, we should value their virtue of Aristotelian “phronesis” or practical wisdom, a quality for which we presumably selected them in the first place, and a quality which should only grow with their greater practical experience. We should value that judicial virtue by protecting it, rather than asking circuit courts to engage in undirected Monday-morning quarterbacking through the device of a standardless substantive reasonableness review. A few weeks ago at the Supreme Court, the petitioners in both *Gall* and *Kimbrough* made good and forceful arguments on issues directly related to the scope of district court discretion, and it is my great hope that the Court will clear up the confusion as soon and as sensibly as possible to lend greater integrity to the concept of discretion in the sentencing arena.

*(finis)*



Useful reference examples:

Examples of good district court explanations:

- U.S. v. Ortiz, No. 1:06-CR-417-004 (N.D. Ohio Aug. 14, 2007).
- U.S. v. Santoya, 2007 WL 1830730 (E.D. Wis. June 25, 2007).

Good standard/average examples of appellate procedural reasonableness review:

- U.S. v. Kelly, 2007 WL 2693860 (10<sup>th</sup> Cir. Sep. 12, 2007).
- U.S. v. Gillmore, No. 06-3545 (8<sup>th</sup> Cir. Aug. 15, 2007).

Examples of proper remand for inadequate explanation:

- U.S. v. Thomas, No. 06-1290 (6<sup>th</sup> Cir. Aug. 10, 2007).

Examples of over-lenience on procedural reasonableness:

- U.S. v. Tisdale, 2007 WL 2478665 (6<sup>th</sup> Cir. Aug. 30, 2007) (Clay, J., dissenting).

Examples of appellate courts paying lip service to substantive reasonableness:

- U.S. v. Olfano, 2007 WL 2728665 (3<sup>rd</sup> Cir. 2007).
- U.S. v. Salas-Argueta, 2007 WL 2850638 (11<sup>th</sup> Cir. Oct. 2, 2007).
- U.S. v. Grant, 2007 WL 2617179 (6<sup>th</sup> Cir. Sep. 7, 2007).

Other examples of misuse of substantive reasonableness to replace judgment:

- U.S. v. D'Amico, Nos. 05-1468 & 05-1573 (1<sup>st</sup> Cir. Aug. 7, 2007).
- U.S. v. Garcia-Lara, 2007 WL 2380991 (10<sup>th</sup> Cir. Aug. 22, 2007).
- U.S. v. Poynter, 2007 WL 2127353 (6<sup>th</sup> Cir. Jul. 26, 2007).

On semantic issues:

- Think about the fact that by using departures, the court can change the GSR and make a within-guidelines sentence so that it is more insulated than if the court used 3553(a) factors to vary in the same amount from a different GSR (all about the reason-giving). See, e.g., U.S. v. Garcia, No. 05-30596 (9<sup>th</sup> Cir. Aug. 10, 2007).
- Think about the fact that a judge can be strongly tied to or at least strongly influence by the GSR, but it is only error if the judge says openly that she applied a presumption of reasonableness (again, all about what the judge says, but here in a way that bugs me – I don't really like the idea of presumptions based on within/outside guidelines starting point). See, e.g., U.S. v. Schmitt, 2007 WL 2241652 (7<sup>th</sup> Cir. Aug. 7, 2007); U.S. v. Chavez-Calderon, 2007 WL 2171363 (10<sup>th</sup> Cir. Jul. 30, 2007).
- Reversals for using presumption at district court level: U.S. v. Conlan, 2007 WL 2538047 (10<sup>th</sup> Cir. Sep. 6, 2007) (Seymour & Henry); U.S. v. Ross, No. 07-1215 (7<sup>th</sup> Cir. Sep. 11, 2007).

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<sup>1</sup> See transcript of confirmation hearings online.

<sup>2</sup> See, e.g., Greenawalt and Dworkin as exceptions. [cite articles]

<sup>3</sup> Cite from Greenawalt article

<sup>4</sup> Alabama article (forthcoming).

<sup>5</sup> See, e.g., Judge Nancy Gertner, From Omnipotence to Impotence: American Judges and Sentencing, 4 Ohio St. J. Crim. L. 523, 524-525 (2007).

<sup>6</sup> See Sentencing Reform Act, 28 U.S.C. §991-998; 18 U.S.C. §3551-3626.

<sup>7</sup> United States v. Booker, 125 S. Ct. 738 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Rita v. United States, 127 S. Ct. 2456, at 2465, and 2471 n.2 (June 21, 2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Rita* at 2462.

<sup>12</sup> *Rita* at 2465.

<sup>13</sup> *Rita* at 2463.

<sup>14</sup> *Rita* at 2468-69.

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<sup>17</sup> U.S. v. Gammicchia, No. 06-3325 (7<sup>th</sup> Cir. Aug. 9, 2007) (slip op. at 1); see also U.S. v. Gilbert, 2007 WL 2728531 (7<sup>th</sup> Cir. Sep. 18, 2007) (granting *Anders* brief presented on similar circs).

<sup>18</sup> *Anders v. California*, 386 U.S. 738 (1967).

<sup>19</sup> U.S. v. Whitley and U.S. v. Artis, 05-3359-cr, 06-4444-cr (2d Cir. Sep. 17, 2007).

<sup>20</sup> See *Gammicchia* (slip op. at 5).

<sup>21</sup> See *Gall* unofficial transcript at 43.

<sup>22</sup> *Rita* at 2476 (Scalia, J., concurring).

<sup>23</sup> *Rita* at 2476-2479 (Scalia, J., concurring).

<sup>24</sup> Just for a few examples: U.S. v. Olfano, 2007 WL 2728665 (3<sup>rd</sup> Cir. 2007); U.S. v. Salas-Argueta, 2007 WL 2850638 (11<sup>th</sup> Cir. Oct. 2, 2007); U.S. v. Grant, 2007 WL 2617179 (6<sup>th</sup> Cir. Sep. 7, 2007).

<sup>25</sup>

<sup>26</sup> *Rita* at 2473 (Stevens, J., concurring). See also plain statements of the basic principle, as for example in U.S. v. Reina-Salas, 2007 WL 2735709 (11<sup>th</sup> Cir. Sep. 20, 2007).

<sup>27</sup> *Rita* at 2483 n.6 (Scalia, J., concurring).

<sup>28</sup> See U.S. v. Tomko, No. 05-4997 (3d. Cir. Aug. 20, 2007).

<sup>29</sup> *Id.* (slip op.) at 18 n.7.

<sup>30</sup> United States v. Fink, No. 06-3436 (6<sup>th</sup> Cir. Sep. 7, 2007).

<sup>31</sup> U.S. v. Taylor, 2007 WL 2349415 (1<sup>st</sup> Cir. Aug. 17, 2007).

<sup>32</sup> Taylor at \*4.

<sup>33</sup> Taylor at \*6.

<sup>34</sup> Taylor at \*7-8.

<sup>35</sup> Tomko slip op. at 35-36.

<sup>36</sup> Tomko slip op. at 38 et seq. (Smith, J., dissenting).

<sup>37</sup> U.S. v. Gall, unofficial transcript of oral argument at 43.

<sup>38</sup> Gall transcript at 9.