DISCRETION AND DETERRENCE IN TAX SENTENCING AFTER RITA, GALL AND KIMBROUGH - OPPORTUNITIES FOR ALTERNATIVE SENTENCES AND POTENTIAL ABUSES

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I. Introduction.

In 2007, the Third Circuit, on appeal, vacated and remanded the non-incarceration sentence of criminal tax defendant William Tomko Jr. in an opinion notable for its outrage and disgust at the sentencing court's order of probation and home confinement in a luxurious home built with the proceeds of Tomko's criminal tax evasion.² In 2008, the District of Columbia Circuit, on appeal, affirmed a non-incarceration sentence for criminal tax defendant Gus Gardellini, in an opinion that permitted Gardellini to serve his term of probation at his current home in Belgium, and noted that he had already "suffered substantially" due to his prosecution.³ The Tomko court was convinced that deterrence of similar tax crimes requires incarceration⁴ and the Gardellini court noted the sentencing court's belief that publicity was a sufficient deterrent to potential criminal tax offenders, and maintained that a focus on deterrence above all other sentencing factors was a mistake.⁵

Aside from the individual characteristics of the offenders and judges, and the passage of one year, what accounted for the dramatic turn-about in federal appellate sentencing review (and the growing number of sentencing, and sentencing appeals, ² United States v Tomko, 498 F.3d 157 (3rd Cir. 2007), aff'd en banc 562 F.3d 558 (3rd Cir. 2009).
³ United States v Gardellini, 545 F.3d 1089 (DC Cir. 2008).
⁴ Tomko, 498 F.3d at 166-167.
⁵ Gardellini, 545 F.3d at 1091, 1095.
opinions in 2008 sharing Gardellini's flexibility)? In short, 2007 and 2008 sentencing guidance from the Supreme Court that enhanced judicial discretion allowed for this dramatic change in sentences upheld on appeal.

In 1984, Congress gave the nation the Sentencing Reform Act and United States Sentencing Commission, and in 1987 the Commission gave the legal community the Federal Sentencing Guidelines, directions for sentencing criminal defendants with uniformity, justification and an eye towards deterrence of other crimes and criminal intents. The Guidelines took a large measure of discretion away from judges in the name of uniformity in all sentencing and increased punishment, and deterrence, of white collar crime. In 2006 the Supreme Court, in United States v Booker, began to restore discretion to sentencing judges by making the Guidelines advisory, and the floodgates opened wider in 2007 and 2008 with Supreme Court opinions in Rita, Gall and Kimbrough, each of which permitted increasing degrees of judicial discretion and use of less- or non-incarceration sentences to punish criminal defendants.

These grants of increasing judicial discretion, like possession of human free will in any circumstance, were not without drama and dissent. By 2007 the tax community found

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itself faced with a sentencing landscape purporting to embrace
discretion and departure in the absence of mandatory Guidelines,
but proceeding in cases like the sentencing of William Tomko Jr.,
on pre-Booker, Guidelines-adherent grounds. This battle between
sentencing discretion, often favoring hefty fees, restitution and
alternative sentences such as probation and home confinement, and
traditional Guidelines sentences reliant on prison time for all
(with a double helping for the white collar offender), continues
to unfold in the federal tax community. As this Article was
being written, tax practitioners continued to await the opinion
from the Third Circuit Tomko en banc rehearing with a growing
body of individualized, below-Guidelines federal criminal tax
sentences at their disposal. As the oral arguments in the Tomko
en banc rehearing were reminiscent of Gardellini and other,
flexible or downward-departing sentences from 2008.

As the Commission, in a 2009 paper, has turned from its
1980s calls for increased incarceration of white collar criminals
to requests for alternative sentences for non-violent offenders
(to remedy prison overcrowding and cost escalation), a look back
to where we have been and where we are going in federal criminal
tax sentencing is a worthy endeavor. It is also an endeavor
marked by the increased role, need, and respect for sentence
alternatives in carrying out the Commission's and Guidelines'
goals of criminal deterrence.

Much has been written about the effects of Booker and its
progeny, Rita, Gall and Kimbrough, on the current and future
direction of criminal sentencing under the United States Sentencing Guidelines and the availability of flexible and alternative sentences, such as probation, home confinement and restitution. Many publications have viewed these cases and predicted trends with regard to white collar criminal sentencing. However, little to none of the plentiful academic and practitioner studies of the USSG after Booker, Rita, Gall and Kimbrough have focused on the impact of these changes in law on sentencing of tax crimes. Review of United States Sentencing Commission publications on trends after Booker make few or any references to treatment of tax defendants\textsuperscript{10} and some otherwise comprehensive publications by the Commission fail to break tax crimes out of the category of "other white collar" at all\textsuperscript{11}.

The Internal Revenue Service, passionate though it may be in pursuit of tax scofflaws\textsuperscript{12} and closure of the "tax gap" recently

\textsuperscript{10} See U.S. Sentencing Commission, Post-Kimbrough/Gall Data Report, Fiscal Year 2008 which has only scanty mention of Tax and so few statistics on tax cases that meaningful analysis is difficult.

\textsuperscript{11} See The United States Sentencing Commission, Overview of Federal Criminal Cases Fiscal Year 2007 (Glenn R. Schmitt, Director, Officer of Research and Data), which does not discuss tax or specifically mention whether it is discussed in the category of "Fraud". Similarly, The United States Sentencing Commission, Alternative Sentencing in the Federal Criminal Justice System (January 2009) tracks white collar crime by only two categories, "Fraud" and "Other White Collar."

estimated to total $345 billion,\textsuperscript{13} participates in sentencing of tax criminals only as an interested party\textsuperscript{14} and focuses its efforts on tax compliance and enforcement\textsuperscript{15} rather than tracking criminal sentencing trends or advocating for changes in sentencing law. It does not publish on the opportunities and concerns for adequate deterrence under Rita, Gall and Kimbrough, and the Department of Justice is charged with too many other, non-tax litigation duties to focus solely on tax sentencing matters. Tax controversy defense counsel, a group of stakeholders nearly as vitally concerned in criminal tax sentencing trends as their clients, appear to be consumed with other practice matters and most are not publishing on this topic beyond speculations that Gall and Kimbrough could offer certain

\begin{footnotesize}
\begin{enumerate}
\item IRS Updates Tax Gap Analysis, Notice IR-2006-28, Feb. 14, 2006. "As with prior estimates, the updated estimate of the tax gap shows that the largest component of this gap, more than 80 percent, comes from underreported taxes. Underreported income tax is the largest component of this (see attached Tax Gap Map for Tax Year 2001). Nonfiling and underpayment of tax comprise the rest of the tax gap."
\item As set forth in 28 CFR 0.70, the Department of Justice, Tax Division, under the direction of an Assistant Attorney General appointed specifically to that division, conducts civil and criminal litigation arising under the Internal Revenue Code. Detailed information on the specific functions and subgroups within the Tax Division is available at http://www.usdoj.gov/tax/index.html. An example of Tax Division prosecution of criminal tax offenders first investigated by the IRS Criminal Investigation Division, which established the foundation of the case prior to the Tax Division's involvement, may be found at Department of Justice Press Release dated January 29, 2009, Former NFL Player, Ex-Casino Owner and Nevada Businessman Indicted in Massive Tax Fraud Scheme.
\item See IRS publications describing the role of its law enforcement arm, Criminal Investigations, such as Criminal Investigation (CI) At-a-Glance, http://www.irs.gov/irs/article/0,,Id=98398,00.html and Internal Revenue Manual Part 9, Criminal Investigation.
\end{enumerate}
\end{footnotesize}
white collar defendants the possibility of more lenient or otherwise "alternative" sentences.\textsuperscript{16}

In Part II of this Article I will describe the pre-history and creation of the United States Sentencing Commission and Federal Sentencing Guidelines, the roots of the concept of "white collar" crime and its treatment under the Guidelines, and the goals specific to white collar criminal sentencing that motivated Congress, in part, to take these steps to formalize criminal sentencing. I will briefly revisit the Supreme Court's first holdings regarding the limits of the Guidelines and the Sixth Amendment in \textit{Koon v United States},\textsuperscript{17} \textit{Apprendi v New Jersey},\textsuperscript{18} \textit{Blakely v. Washington} \textsuperscript{19} and \textit{United States v. Booker},\textsuperscript{20} which made the Guidelines effectively advisory, and the Supreme Court's subsequent rulings in \textit{Rita}, \textit{Gall} and \textit{Kimbrough}, all of which collectively set the stage for the current opportunities for departure in criminal tax sentencing. In Part III of this Article, I will discuss the current state of flexibility and availability of alternative sentences in criminal tax sentencing after \textit{Rita}, \textit{Gall} and \textit{Kimbrough}. Finally, in Part IV, I will present public outrage against high profile criminal tax


\textsuperscript{17} 518 U.S. 81 (1996).

\textsuperscript{18} 530 U.S. 466 (2000).

\textsuperscript{19} 542 U.S. 296 (2004).

\textsuperscript{20} 543 U.S. 220 (2006).
violators, troubling trends, and a modest proposal for future tax sentencing flexibility that could balance salient legal and public policy concerns. Part V is a brief conclusion.

II. The Foundations of *Rita, Gall and Kimbrough* and the History of Tax Sentencing.


Prior to the creation of the Federal Sentencing Guidelines, federal judges had broad discretion to sentence defendants within the ranges created by statutory minimums and maximums, and as long as a sentence was within these statutory limits it was nearly unreviewable by a court of appeals.\(^21\) In 1975, Senator Ted Kennedy introduced S. 2966, 94th Cong., 2nd Sess., a sentencing reform measure created by liberal reformers to serve as an anti-imprisonment and antidiscrimination bill.\(^22\)

In "Sentencing Reform I" in 1978 and 1980, S.1437, 95th Cong., 2nd Sess., introduced by Senators Kennedy and McClellan, the bill featured strong encouragement of alternative, non-imprisonment sentences and judicial discretion to depart from guidelines and flexibly meet the challenge of aggravating and mitigating personal characteristics of defendants.\(^23\) The alternatives to imprisonment encouraged by these bills featured a presumption against imprisonment for rehabilitative purposes, the

\(^{21}\) *Id.*. See also, Koon v U.S., 518 U.S. 81, 96 (1996).


\(^{23}\) *Id.* at 237-238.
goal of not exceeding the capacities of the nation's federal prisons, and the desire to reduce society's reliance on imprisonment as "the archetypical criminal punishment." In addition to Senate Judiciary Committee additions to these bills, Senator Gary Hart sponsored an amendment to limit sentences under the new legislation and allay fears that "the results could be longer terms of incarceration than we have under current law." Another provision provided that an newly created sentencing commission would be guided by actual and current sentences, and another directed the commission to draft guidelines reflecting "the general appropriateness of imposing a sentence other than imprisonment" for a first time offender not convicted of a violent or otherwise serious offense (by contrast, habitual offenders and those engaged in racketeering were to be sentenced more harshly).

By "Sentencing Reform II" in 1982 and 1984, all of the prior intent to create non-incarceration, more liberal guidelines that would deal with rehabilitation of the nonviolent, first time offender by alternative means were gone. This legislation was pro-incarceration and not clearly concerned with retention of discretion to sentencing judges.

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24 Id. at 242.
25 Id.
26 Id. at 243.
27 Id. at 266-268.
After years of discussion, debate, haggling and changes of priority beginning in the mid-1970s, Chapter II of The Comprehensive Crime Control Act of 1984, The Sentencing Reform Act of 1984 (popularly referred to as the "SRA"), established the United States Sentencing Commission, which was charged with promulgating Sentencing Guidelines. The SRA directed the Commission to provide certainty and fairness in meeting the purposes of sentencing, avoid unwarranted sentencing disparities while maintaining sufficient flexibility to permit individualized sentences and develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. This subsection (a)(2) contained, in relevant part for this discussion, direction that a court consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense and to afford adequate deterrence to criminal conduct.

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28 Id. at 237-238.


Subsections (b) and (c) of Section 3553 directed courts to impose sentences "of the kind, and within the range" established by the Sentencing Commission for the applicable offense unless the court found that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission and that should result in a sentence different from that described. The sentencing court was required to state in open court the reasons for its imposition of the sentence and specific reasons for any departure from the sentence required in subsection (b).

By November 1987, the Commission created and Congress approved the Federal Sentencing Guidelines, which embodied Congress' primary purposes of promoting honesty in sentencing (e.g., ending the practice of a judge sentencing a defendant to 12 years in prison, only to have the Parole Commission release the prisoner after 4 years) and reducing sentencing disparities. It is interesting to note that while Congress used statistical studies to analyze sentencing disparity trends and

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35 While these guidelines were promulgated as the "Federal Sentencing Guidelines," the Commission currently requests that they be called "United States Sentencing Guidelines" for standard legal citations, so that an individual guideline, such as the one regarding Tax Evasion, is cited as USSG § 2T1.1.

36 Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 4-5 (Fall 1988)

37 Id.
prove the existence on unpalatable variances, the newly created Commission used analysis of 10,000 prior cases to attempt to follow "typical past practice," as it created categories of offenses and set lengths of sentences. The past sentencing patterns of unconstrained judges thus proved simultaneously too wide-ranging and individualized for lawmakers' tastes but also served as the building blocks of the new rules designed to rein in judges. The Commission's depth of empirical and statistical analysis brought significant discrepancies in pre-Guidelines sentences of white collar criminals to its attention, and the Commission decided to remedy this apparent inequity by requiring "short but certain terms of confinement" for many of the kinds of white collar offenders, specifically tax, antitrust and insider trading offenders, who would previously have likely received a sentence of probation.

38 Id. For example, Second Circuit sentences ranging from three to 20 years of imprisonment for Identical crimes.

39 Id. at 7-8.

40 Commission statistics indicated that courts granted probation to white collar offenders more frequently than to other types of offenders, and if a prison term was ordered, the terms were less severe than for other types of offenders. Id. at 20.

Once the Sentencing Guidelines were in place, district court judges were directed to follow a set procedure when sentencing defendants, consisting of determining the applicable offense guideline section, base offense level and specific offence characteristics, making certain adjustments and referring to policy statements or commentary that might warrant consideration in imposing a sentence and also consider the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), namely the competing goals of imposing a sentence "sufficient, but not greater than necessary" that "reflects the seriousness of the offense, to promote respect for the law" and "afford[ing] adequate deterrence."

The version of USSG § 2T1.1 in 2008 clearly retains the marks of this goal, with the base offense level for tax loss of $2,000 or less set to 6 (0-6 months of imprisonment for a Class I Criminal History defendant, 2-8 years for a Class II defendant etc) and rapidly climbing to Offense Levels of 16 and 18 for tax loss over $80,000 or $200,000, respectively (both numbers that are possible and realistic amounts of tax loss for seemingly "ordinary" offenders accused of underreporting income from a

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42 USSG § 1B1.1.

43 USSG §1B1.10 comment (backg'd).

44 18 U.S.C. § 3553(a), (a)(2)(A) and (B). Included in the 2008 version of Section 3553(a), though not in its original SRA incarnation, is a new subsection (7), requiring courts to consider the need to provide restitution to victims.
small business for a limited number of years). 45 For a Class I defendant, these Offense Levels of 16 and 18 equate on the 2008 Sentencing Table to 21–27 or 27–33 months imprisonment, respectively. These are hefty terms of imprisonment for white collar offenders who would be able to make restitution and pay fines to the IRS from their earnings or small business cash flow, but unable to make the United States Treasury whole if imprisoned for a year or more.

B. Sociological Roots of "White Collar" Crime and the Guideline's Focus on Offense, Rather Than Offender.

The term "white collar" crime was first used in 1939 in a speech by sociologist Edwin Sutherland to the American Sociological Society. 46 Sutherland used the term in the course of discussing crime committed by individuals in positions of power, and in the course of his larger work disproving that crime was due to "poverty and its related pathologies." 47 He defined white collar crime as "crime committed by a person of respectability and high social status in the course of his occupation." 48 Sutherland intended to end the treatment of such offenses as civil wrongs and obtain criminal prosecution of them, and ultimately succeeded.

45 USSG § 2T4.1.
47 Id. at 734–735 (quoting EDWARD H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949)).
48 Id. (quoting EDWARD H. SUTHERLAND, WHITE COLLAR CRIME 9, 10 (1949).
While Sutherland's early studies of white collar crime focused on the "high social status" and other characteristics of the offender, the Guidelines and other federal criminal statutes focus instead on the offense committed. While this focus on offense rather than offender (at least until Chapter 5, Part H - Specific Offender Characteristics, of the Guidelines comes into play for potential sentencing departures) would seem to reduce the kind of disparity that Congress and the Commission found offensive when it led to lenience in pre-Guidelines white collar sentencing, this focus actually ignores the greater media scrutiny, shame and difficulty reintegrating into society after incarceration experienced by white collar defendants. The offense-focus also masks one very real offender-focus under the Guidelines, the sentence enhancements under 3B1.1 and 3B1.3 for defendants in a leader or management role, or those acting in a position of trust or using a special skill (defined as skills not possessed by the general public and usually requiring substantial

49 E.g., 28 U.S.C. 7201 makes criminal evasion of federal taxes. See Id. at 736-737 for Podgor's discussion of crimes generally treated as "white collar," involving "deception and absence of physical force" and ranging from racketeering based on mail and wire fraud to antitrust and, in certain jurisdictions, environmental offenses and Food and Drug Administration offenses.

50 Podgor supra note 46 at 740, discussing the long-lasting post-sentencing life disruptions of disbarment for lawyers, exclusion from federal medical programs for doctors, "bad boy" restrictions in federal securities work for stockbrokers and - contra the street cred found by some non-white collar defendants in "catching a case" - the shaming and social ostracism of white collar defendants and their families. See also, Dan M. Kahan and Eric A. Posner, Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines, 42 J. Law & Econ. 365 (April 1999).
education, training or licensing, e.g., skills possessed by lawyers, pilots, doctors, and accountants).

The 3B1.1 and 3B1.3 sentence enhancements most commonly applied to white collar criminals, on top of the heightened Guidelines applicable to defendants sentenced under 2B1.1 (larceny, embezzlement, fraud, etc.) and 2T1.1 (tax offenses), can produce sentences for white collar first-time offenders substantially more severe than those received for violent "street crimes" such as murder and rape.\footnote{Podgor supra note 46 at 732-733, quoting in n 10 United States v Ebbers, 458 F.3d 110, 129 (2nd Cir. 2006) and the Second Circuit's statement that "twenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation."} While, as we will see in Section III.B. of this Article, there appears to be greater flexibility in granting low-incarceration and otherwise "alternative" sentences to criminal tax offenders after the Supreme Court's 2008 opinions in Gall and Kimbrough, as recently as 2007 sentencing data indicated that, after the Supreme Court's 2005 opinion in Booker, the majority of federal criminal sentences imposed remained in conformity with the Guidelines\footnote{U.S. Sentencing Comm'n, Final Report on the Impact of United States v Booker on Federal Sentencing, at vi (2006). See also Ellen S. Podgor, Throwing Away the Key, 116 Yale L.J. Pocket Part 279, 280 (2007), http://thepocketpart.org/2007/02/21/podgor.html.} and did not address issues such as the disproportionate harshness of some white collar sentences.
C. Seeds of Uncertainty: Koon, Apprendi/Blakely and Booker.

Once the Guidelines were in place and held to be constitutional, district sentencing courts applied them with strictly constrained discretion until United States v Koon in 1996, when the Supreme Court ruled that the decision of a district court to grant a departure from the Guidelines would be due, in most cases, "substantial deference" upon review by a court of appeals, because the district court's decision "embodies the traditional exercise of discretion by a sentencing court." Much of this discretion was due to the fact that the Koon court saw district courts in the position of being best able to make a "refined assessment" of the facts bearing on a sentence outcome and whether the sentence should fall within or without the "heartland" of cases in the Guidelines. As the district courts had "an institutional advantage over appellate courts in making these sorts of determinations" deference was owed to the "judicial actor...better positioned than another to decide the

53 See, United States v Mistretta, 488 U.S. 361 (1989) holding the SRA constitutional because it provides an "intelligible principle" to guide the Commission's work, Id. at 372, and that the principle of separation of powers was not violated in allowing judges on the Commission or locating the Commission in the judicial branch, Id. at 390-392.

54 See, 18 U.S.C. § 3553(b). See also, Koon v United States, 519 U.S. at 92, "Before the Act [SRA], sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated...A district judge now must impose on a defendant a sentence falling within the range of the applicable Guideline, if the case is an ordinary one."


56 Id. at 98.

57 Id. at 98.
issue in question."

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."\(^{59}\)

This restoration of at least limited discretion to sentencing judges did not last long, though. In 2001 the Commission promulgated more stringent Guidelines for tax criminals, which increased the chances of time in prison for offenders, and in 2003, the PROTECT Act\(^{60}\) reversed the portion of Koon that directed appellate courts to give due deference to sentencing judges' decisions.\(^{61}\)

The Supreme Court opinions in Apprendi and Blakely sowed the seeds of Booker by, in cases regarding the interplay of the Sixth Amendment with state sentencing guidelines, overruling guidelines-compliant sentences that allowed judges to usurp the constitutional role of the jury in finding facts necessary to support increased criminal sentences.\(^{62}\)

\(^{58}\) Id. at 98-99.

\(^{59}\) Id. at 113.


\(^{62}\) 530 U.S. at 490 ("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."); 542 U.S. at 313 ("As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").
taken together appeared to curtail judicial discretion by limiting the sentences that a judge may impose based on judicially found facts, but these opinions also (as the Supreme Court was about to elucidate in Booker) struck at the viability of sentencing guidelines in general.\textsuperscript{63}

By the time the Supreme Court was presented with review of Freddie Booker's and Duncan Fanfan's sentences on cocaine charges, the implications of Blakely's reservation of rights to juries and away from guidelines had caused chaos in the federal criminal justice system and raised issues regarding proper ongoing administration of justice.\textsuperscript{64} Booker presented a case of two defendants convicted of cocaine offenses, for whom trial judges had made additional factual findings.\textsuperscript{65}

The Booker Court held that Apprendi and Blakely applied to the Federal Sentencing Guidelines,\textsuperscript{66} that any fact necessary to support a Guidelines sentence exceeding the maximum authorized by jury-found facts must be admitted by the defendant or proved to a jury beyond a reasonable doubt,\textsuperscript{67} that the Guidelines (in the so-

\textsuperscript{63} 542 U.S. at 305-306. "Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."

\textsuperscript{64} Steven Toscher, Sentencing Discretion in Criminal Tax Cases -- Where We Have Been and Where We Are, CCH JOURNAL OF TAX PRACTICE AND PROCEDURE, December 2007-January 2008, Vol 9, No 6.

\textsuperscript{65} 543 U.S. at 227-228.

\textsuperscript{66} Id. at 235.

\textsuperscript{67} Id. at 244.
called "remedy opinion") offer the possibility of imposing sentences beyond those supported by jury-found facts and thus are no longer constitutional but instead "effectively advisory," and, finally, that courts must now "consider" the advisory Guideline ranges and also tailor sentences in light of other concerns set forth in 18 U.S.C. § 3553(a). The Booker "remedy" court adopted this approach to maintain a "strong connection between the sentence imposed and the offender's real conduct -- a connection important to the increased uniformity of sentencing that Congress intended..." The "remedy" court also directed appellate courts to review sentences for reasonability. Booker spawned numerous law review and practitioner articles as well as marked uncertainty over the future of federal sentencing - would life with "effectively advisory" Guidelines be a sentencing free-for-all or more of the same?

D. Sea Change or Free For All? Booker's aftermath in Rita, Gall, and Kimbrough.

Any excitement generated by Booker's de-fanging of the Guidelines had barely abated when the Supreme Court took on its next groundbreaking federal sentencing case, Rita v United

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68 Id. at 245.

69 Id. at 245-246 and 264.

70 Id. at 246.

71 Id. at 261.

The defendant in *Rita* appealed post-*Booker*, using the *Booker* remedy court's holding that district court sentences should be reviewed for reasonability to argue that his within-Guidelines sentence was improperly subjected to the presumption of reasonability on appellate review. The Court held that a court of appeals may apply a presumption of reasonableness to a within-Guidelines sentence because the presumption is not binding and also reflects the fact that by the time a within-Guidelines sentence has reached an appellate court for review, both the sentencing judge and Commission will have reached the same conclusion as to the proper sentence for the defendant.

The Court also revisited the basic sentencing objectives set forth in 18 U.S.C. § 3553(a) and noted the Guidelines' commentary statement that Congress's aims of seeking uniformity (narrowing the disparity of sentences imposed by different courts for similar conduct) and proportionality (imposing appropriately different sentences for criminal conduct of different severity) of sentencing often conflict. The Court acknowledged that difficulty in conceding that a presumption of reasonability could

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73 127 S. Ct. 2456 (2007).

74 127 S. Ct. at 2462.

75 Id.

76 Id. at 2463.

77 Id. at 2464.
encourage sentencing judges to impose within-Guidelines sentences.\textsuperscript{78}

The subsequent cases of Gall and Kimbrough, each of which the most tantalizing issues for the future of federal criminal tax sentencing and lay the groundwork for the last part of this Article, were heard and decided on the same days in late 2007. Gall followed Rita's discussion of within-Guideline sentences by addressing the case of a defendant charged for his past participation in a drug ring, who after substantial rehabilitation and cooperation with law enforcement, received a sentence far below the applicable Guideline.\textsuperscript{79}

While defendant Gall's presentence report recommended a term of incarceration of 30 to 37 months, the district court sentenced Gall to 36 months' probation, stating that probation reflected the seriousness of his offence and imprisonment was unnecessary because of Gall's voluntary withdrawal from the criminal activity years before his charge and the upstanding character of his post-offense conduct.\textsuperscript{80} The Eighth Circuit reversed and remanded for sentencing\textsuperscript{81} and the Supreme Court took the case to address the reasonability of Gall's sentence and the Eighth Circuit's practice of requiring proportionality (or requiring "extraordinary" circumstances to justify a substantial departure

\textsuperscript{78} Id. at 2467.

\textsuperscript{79} 128 S. Ct. 586 (2007).

\textsuperscript{80} Id. at 600-601.

\textsuperscript{81} Id. at 594.
from a Guidelines range. It held that Gal's dramatically lowered sentence was reasonable, for reasons set forth below.82

The Supreme Court first addressed the applicable standard of review. Gall addressed a downward departure so substantial that it was sentence wholly outside of the applicable Guidelines.83

The Court briefly revisited its holdings in Booker,84 directed sentencing judges to give serious consideration to any departure from the Guidelines and explain their conclusions that unusually lenient or harsh departure sentences were appropriate and sufficiently justified.85 The Court left sentencing courts with sufficient discretion to vary from the Guidelines without requiring rules that demand "extraordinary" circumstances to justify substantial departures outside of Guidelines ranges.86

The Gall Court, in the context of upholding the district court's non-incarceration sentence, dispelled any suggestion that a sentence of probation with no incarceration was overly lenient. This language subsequently played a starring role in opinions and oral arguments granting or advocating for non-incarceration sentences for white-collar offenders. The Court stated:

We recognize that custodial sentences are qualitatively more severe than probationary

82 Id. at 591.
83 Id. at 594 (the Court of Appeals characterized the sentence as "a 100% downward variation").
84 Id. at 594.
85 Id.
86 Id.
sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. [Citations omitted] Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. 87

Furthermore, the conditions of a sentence of probation "can have a significant impact on both that person and society. . . . Often these conditions comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist." 88

The Court then introduced a concept that has produced much of the opportunity for increased judicial discretion and use of alternative sentences discussed in Section III.B of this Article. These concepts of procedural and substantive reasonableness may be explained as follows. First, at the district court level, a sentencing court should begin all sentencing proceedings by correctly calculating the Guidelines range applicable to the defendant and offense, and then consider all of the § 3553(a) factors to see whether they support the sentences advocated by

87 Id. at 595-596.

88 Id. at 595, fn 4, quoting 1 N. COHEN, THE LAW OF PROBATION AND PAROLE 7:9 (2d ed. 1999).
the parties. As a penultimate step, the sentencing court must consider the extent of deviation from the Guidelines, if it believes that an outside-Guidelines sentence is warranted, and weigh the justification to ensure that it is "sufficiently compelling to support the degree of variance". Finally, the sentencing judge must "adequately explain" the sentence to promote the perception of fair sentencing and allow for meaningful appellate review.

Procedural error may occur when a sentencing court treats the Guidelines as mandatory, fails to consider § 3553(a) factors

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89 Id. at 597, also fn 6 "Section 3553(a) lists seven factors that a sentencing court must consider. . . . The fact that 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analyses with the Guidelines and remain cognizant of them throughout the sentencing process."

90 596-597.

91 Id. at 597, though note that "sufficiently compelling" falls short of the mathematical proportionality and "exceptional" circumstances embraced by the Eighth Circuit and rejected by the Supreme Court, though all of the terms of "sufficiently compelling," "proportional" and "exceptional" are sufficiently amorphous and susceptible to construction and manipulation, and the Stevens Opinion does not define, parse and differentiate these terms in a meaningful way.

92 Id. See also United States v Peters, 512 F.3d 787 ((6th Cir. 2008) for an example of a failure of procedural reasonableness, when the sentencing court failed to adequately address defendant's non-frivolous (time served) reasons for imposing a different sentence or adequately explain his reasons for rejecting the arguments); United States v Funk, 534 F.3d 522 ((6th Cir. 2008) "Procedural error, then, is abuse of discretion per se, inasmuch as the court applied the law improperly. But substantive error is far more ambiguous -- it is an error so serious that the decision is not entitled to deference, just as if the court had relied on a clearly erroneous finding of fact, clearly misapplied the law, or applied the wrong law." Internal citation omitted).
or fails to explain a sentence.\textsuperscript{93} Substantive error may occur if, taking into account the totality of the circumstances, the sentence impose is substantively unreasonable (a nebulous standard at best).\textsuperscript{94} The Gall Court directed appellate courts to review for both levels of reasonableness under the "familiar" abuse of discretion standard.\textsuperscript{95} Once a sentencing court's actions successfully pass both procedural and substantive review, the appellate court may apply a presumption of reasonableness to a within-Guidelines sentence, but may not apply a presumption of unreasonableness to an outside-Guidelines sentence.\textsuperscript{96} It must instead consider the extent of the deviation and give "due deference" to the sentencing court's decision that "the Section 3553(a) factors, on the whole, justify the extent of the variance."\textsuperscript{97} The fact that the appellate court might have ruled otherwise is insufficient to reverse the district court's sentence.\textsuperscript{98} The Gall Court supported this explication of procedural and substantive reasonableness review by acknowledging that sentencing judges are in superior positions to find facts with full knowledge of the facts and insights not on the record, and reiterated Rita's and Koon's statements that the sentencing

\textsuperscript{93} Id. at 597.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
judge has greatest access to and familiarity with the individual defendant and case. 99

The Court's opinion in Kimbrough, issued on the same day, takes Gall's focus on the role of § 3553(a) in a procedurally reasonable sentence even further to make § 3553(a) the foundation of judicial freedom to vary from the Guidelines based on policy disagreements. Defendant Derrick Kimbrough pled guilty to four crack cocaine offenses, which under statutory sentencing minimum carry applicable Guidelines ranges dramatically higher (i.e., Kimbrough's crack offenses led to a range of 19-22.5 years of incarceration, versus 97 to 106 months for similar powder cocaine charges). 100 While the court stated that it granted certiorari to determine whether the crack/powder Guidelines disparity had been rendered advisory by Booker, 101 its subsequent discussion of the district court's below-Guidelines sentence focused on the fundamental role of the 18 U.S.C. § 3553(a) goals of sentencing and a sentencing court's responsibility to consider those varying, often contradictory goals (e.g., sufficient but not greater than necessary versus sufficient to afford deterrence). 102

99 Id. at 597-598, quoting Rita, 551 U.S. at 2463 and Koon, 518 U.S. at 98 "district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentence than appellate courts do."

100 128 S. Ct. at 565-566.

101 Id. at 565-566.

102 Id. at 570.
After a discussion of the policy reasons for the 100:1 crack/powder sentence ratio, the Court revisited is holding in Booker and the new status of the Guidelines as advisory. It characterized the post-Booker Guidelines as containing an overarching provision, codified in 18 U.S.C. § 3553(a), instructing district sentencing courts to impose sentences "sufficient, but not greater than necessary" to accomplish sentencing goals, including reflecting "the seriousness of the offense," promoting respect for law, providing just punishment and affording "adequate deterrence to criminal conduct." In short, "Booker permits the court to tailor the sentence" in light of statutory concerns other than the Guidelines.

The Court reviewed the district court's dramatically below-Guidelines sentence and statements that a within-Guidelines sentence would have been "greater than necessary" to accomplish the purposes set forth in 18 U.S.C. § 3553(a), especially in light of the "disproportionate and unjust effect" of the 100:1 sentence disparity and upheld the district court's sentence, because the district court properly fulfilled its procedural prerequisites (calculating a Guidelines range, addressing 18 U.S.C. § 3553(a) factors, considering the nature and

103 Id. at 568-569.
104 Id. at 570.
105 Id.
106 Id.
107 Id. at 565.
circumstances of the offense and history and characteristics of the defendant, and explaining its sentence and its disagreement with the "unwarranted disparity" caused by the crack/powder sentences). Finally, the district court "appropriately," in the view of the Court, framed its final sentence determination in terms of the overarching instruction of 18 U.S.C. § 3553(a) to "impose a sentence sufficient, but not greater than necessary" to accomplish the sentencing goals of 18 U.S.C. § 3553(a)(2).

The district court sentence met the second test, that of substantive reasonableness, as well by weighing the goals of 18 U.S.C. § 3553(a) with the "particular circumstances" of the defendant's case and the policy argument that a 100:1 sentence disparity was at odds with § 3553(a) and the goal of preventing unwarranted sentence disparities. The Kimbrough Court looked back to Gall and Rita to acknowledge the sentencing court's superior position for fact finding and § 3553(a) evaluation and the need for closer review when the sentencing court varies "based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) conditions'."

Subsequent commenters have raised the possibility that the Kimbrough holding properly affects only crack cocaine

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108 Id. at 575.
109 Id. at 575-576.
110 Id. at 576.
111 Id. at 574.
112 Id. 575, quoting Rita, 551 U.S. at 2563.
sentences, though the Supreme Court's January 2009 per curiam opinion in Spears v United States suggests that a new door for judicial discretion based on policy disagreements opened with Justice Ginsburg's opinion in this case.

III. Cases and Trends: Sentencing Tax Crimes and Debates Over Deterrence.

White collar criminal scholars and defense practitioners eagerly wondered at the wider impact of Kimbrough on sentences for which § 3553(a) arguments for leniency might be made. They did not have to wait long for a series of cases addressing combinations of Rita, Gall and Kimbrough, notably with regard to varying amounts of judicial severity and leniency on appellate

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113 Lynn Adelman & Jon Deitrich, Gall, Kimbrough and Crack Retroactivity: Positive but Incomplete Steps in the Evolution of Federal Sentencing, OSJCL AMICI: VIEWS FROM THE FIELD (January 2008), at http://osjcl.blogspot.com, stating that the Kimbrough justices refused "to fully accept the government's concession that district courts may disagree with other policies embedded in the guidelines."


115 Id. at 843-844. "Kimbrough thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance form the Guidelines is not suspect." While this immediately appears to apply only to crack sentences, the Court goes on to state that its permission of policy disagreement-based variances follows in the tradition of Booker's permission of individualized determinations of Guideline applicability to particular cases. Id. ("and not simply based on an individualized determination that they yield an excessive sentence in a particular case. The latter proposition was already established pre-Kimbrough, see United States v Booker..."). This language, and the absence of any statement by the Court in Spears that its permission of policy disagreements in crack cocaine cases is inapplicable to any non-crack cocaine case, leaves the white collar criminal bar with the appearance of retained flexibility and hope for future policy-motivated judicial discretion.


review of downward departures in criminal tax sentences. The first illustrative tax case issued after *Rita*, and in expectancy of the Supreme Court's yet-undelivered opinions in *Gall* and *Kimbrough*, is the Third Circuit's 2007 opinion, and 2008 oral argument, in *Tomko v United States*.¹¹⁸

**A. Severity in Tax Sentencing With Gall and Kimbrough in the Wings — United States v Tomko, or Was Booker's Restoration of Limited Judicial Discretion Just a Dream?**

*Tomko* featured the case of a contractor who pled guilty to tax evasion, pursuant 26 U.S.C. 7201, after causing numerous subcontractors to falsify invoices and create the appearance that work done on his luxurious new home was actually done for his company.¹¹⁹ The estimated tax loss was more than $225,000.¹²⁰ He was sentenced by the district court to community service, probation and a fine, rather than the applicable Guidelines sentence of 12-18 months of incarceration, after extensive district court explication of *Tomko*’s charitable generosity, acceptance of responsibility and the effect that his incarceration would have on his 300 innocent employees.¹²¹

Following guidance provided in *Rita*, the Third Circuit Court of Appeals reviewed the sentence for reasonableness under a deferential abuse of discretion standard, and to make sure that

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¹¹⁸ *United States v Tomko*, 498 F.3d 157 (3rd Cir. 2007), *aff'd en banc* 562 F.3d 558 (3rd Cir. 2009).

¹¹⁹ 498 F.3d at 159.

¹²⁰ *Id.* at 159.

¹²¹ *Id.* at 161.
the sentencing court gave meaningful consideration to the 18 U.S.C. § 3553(a) factors and applied them to the circumstances of the case. The court noted that "review for reasonableness, though deferential [does] not equate to a rubber stamp" and there is a "difference between deference and abdication." These disclaimers should rob the eventual holding that the court found Tomko's non-incarceration sentence lacking of no suspense.

The Third Circuit began its review of Tomko's probationary sentence by acknowledging that reasonability review must begin with procedural review of the district court's weighing and balancing of the 18 U.S.C. § 3553(a) factors, and substantive review of the sentence itself, to ferret out sentences illogical and inconsistent with 18 U.S.C. §3553(a). Such a sentence is substantively unreasonable, stated the court in a notably vague piece of guidance, when it is illogical and inconsistent with the § 3553(a) factors (even if procedurally reasonable). In a notably vague piece of guidance, the Tomko court went on to explain identification of illogical and inconsistent sentences by conceding that there is a "recipe for reasonableness," though

122 Id. at 163.
123 Id. at 164, quoting United States v Rattoballi, 452 F.3d 127, 132 (2nd Cir. 2006).
124 Id., quoting United States v Crisp, 454 F.3d 1285, 1290 (11th Cir. 2006).
125 Id. at 172.
126 Id. at 165, fn 7.
appellate courts may not complain of overly bitter or sweet results, but if key ingredients are missing they must draw attention to sentences for which "there is no proof in the pudding." This statement leaves one wondering how an appellate court is to find proof, or lack thereof, in a recipe that may be acceptable when either bitter or sweet.

The Third Circuit went on to find no proof in Tomko's pudding on the grounds that the Guidelines were drafted by a respected public body with access to the best studies of penology (and thus sentences that departed from the Guidelines to impose no imprisonment required "careful, impartial" weighing of sentencing factors); contained policy statements emphasizing the seriousness of tax evasion; and underscored in policy statements the need for tax prosecutions to provide just punishment, promote respect for the law and provide for deterrence. Specifically, the Guidelines state that "criminal tax prosecutions serve to punish the violator and promote respect for the tax laws," that deterrence from violating the tax laws is a primary consideration in light of the low proportion of tax violations actually prosecuted, and that sentences for tax crimes

\[\text{127 Id.}\]
\[\text{128 Id. at 165.}\]
\[\text{129 Id. at 165-166, quoting USSG Manual ch 1, pt A, intro cmt 4(d) re the Commission's goal to replace pre-Guidelines probationary sentences for economic criminals with "at least a short period of imprisonment."}\]
\[\text{130 Id. at 166, citing 18 U.S.C. § 3553(a)(2)(A) and (B).}\]
should be "commensurate with the gravity of the offense" to act as successful deterents.\textsuperscript{132}

The Tomko appellate court found his probationary sentence lacking in deterrent value due to the component of home confinement in a "gilded cage" bought through tax evasion,\textsuperscript{133} and that the luxury and comfort of Tomko's 8,000 square-foot house (complete with home theatre, pool, sauna and bar) did not reflect the seriousness of his offence or provide adequate deterrence pursuant to 18 U.S.C. § 3553(a)(2)(A) and (B). In light of its belief that 18 U.S.C. § 3553(a) required a sentence "minimally sufficient" to satisfy concerns of general and specific deterrence,\textsuperscript{134} and an Eighth Circuit discussion of the greater value of jail time as a general deterrent (citing the Guideline's statement that willful tax evaders go undetected so often that those who are caught must be given some term of imprisonment),\textsuperscript{135} it agreed with the Government's argument that "real deterrence is jail"\textsuperscript{136} and concluded that Tomko's probationary sentence was inconsistent with the deterrence goals of 18 U.S.C. § 3553(a)(2)(A)-(B).\textsuperscript{137}

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id. note 9 at 166.
\textsuperscript{135} Id. at 167.
\textsuperscript{136} Id. at 166-167.
\textsuperscript{137} Id. at 167.
Ultimately, when faced with Booker's goals of increasing deference to sentencing courts, the Tomko court elected instead to closely and conservatively hew to the 20 year old "basic statutory goals" Congress embraced when it created the Commission and charged it with diminishing unwarranted sentence disparity. As the taxpayer's counsel relied on arguments supporting Tomko's bid for downward departure based on charitable works and negligible prior criminal history, the chance to engage in any meaningful debate regarding alternative sentences (such as home confinement and other probation) as paths to deterrence was lost.

In its own, brief, dismissal of alternative sentences as inadequate to provide deterrence, the Tomko court summarizes its rejection of the sentencing court's departure based on good works and employment history, noting the sentencing court's alleged errors with brief statements that "a sentence of mere probation. . . is unreasonable" and "we disagree with the dissent that the hefty fine imposed on Tomko mitigates the unreasonableness of the sentence in this case." The court found the fine imposed on Tomko a "justification for leniency" that would reinforce the perception that "wealthy defendants can buy their way out of a prison sentence" contra Congress's clear intent as shown in the

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138 Id. at 169.
139 Id. at 169-172.
140 Id. at 172.
141 Id. at 173.
SRA and § 3553(a), and condemned restitution imposed in "lenient" sentences as encouraging disparate sentencing, violative of the Guidelines and possibly unconstitutional.\textsuperscript{142}

The Tomko dissent acknowledged the opportunity for greater judicial discretion, and looked forward to the Supreme Court's pending ruling in Gall, with its exploration of whether a deviation required exceptional circumstances\textsuperscript{143} and prohibition of applying the presumption of unreasonableness of outside-Guidelines sentences.\textsuperscript{144}

The Tomko dissent found that the sentencing court gave ample and meaningful consideration to § 3553(a) factors.\textsuperscript{145} The district court did, in fact, examine subsections (a)(1) [nature and circumstances of the offense and defendant characteristics], (a)(2)(A)-(D) [the need to reflect the seriousness of the offense, promote respect for the law and provide just punishment, to afford adequate deterrence, and to protect the public from further crimes of the defendant], (a)(3) [kinds of sentences available], (a)(4) [sentences and Guidelines range for the offense] and (a)(6) [the need to avoid unwarranted sentence disparities] of § 3553 and discuss its considerations at length.\textsuperscript{146} In summary, it explained its sentence departure for

\textsuperscript{142} Id. at 173.
\textsuperscript{143} Id. at 174.
\textsuperscript{144} Id. at 175.
\textsuperscript{145} Id. at 176.
\textsuperscript{146} Id.
Tomko through its recognition of the need for consistent sentencing, but given Tomko's specific characteristics, its finding that a sentence mitigated by § 3553(a) factors was more appropriate. It also increased Tomko's fee above that in the applicable Guidelines range (to $250,000, over eight times more than the upper end of the applicable Guideline range at the time\(^{147}\)) and ordered restitution as permitted under § 3553(a)(7), stating that, for a wealthy defendant, the within-Guidelines fee was insufficient, but the combination of probation, a substantial fine and payment to the IRS of Tomko's tax obligation "will address the sentencing goals of punishment, deterrence and rehabilitation."\(^{148}\)

The dissent opined that both it and the appellate court majority would have applied the § 3553(a) factors differently had they been the sentencing court, yet conceded that the district court's evaluation of § 3553(a) factors was thorough, supported by the record, logical and consistent with the factors and thus ultimately deserved to be upheld under a deferential reasonableness standard.\(^{149}\) Finally, the dissent addressed its disagreement with the Tomko majority's emphasis on Guidelines policy statements and the majority's view that the sentencing

\(^{147}\) Id. at 181.

\(^{148}\) Id. at 176-177.

\(^{149}\) Id. at 177-179. See also, Gall, 128 S. Ct. at 597 regarding the fact that the appellate court may not reverse a district court solely because it would have imposed a different sentence.
court improperly ignored the pertinent policy statements.\footnote{USSG Manual ch 2, pt T introductory cmt [stating that because of the limited number of criminal tax prosecutions relative to incidence of such violations, deterrence is a primary consideration of the Part T tax Guidelines] and Section 2T1.1, cmt. background [discussing the pre-Guidelines history of more probationary sentences for white-collar offenders, the Commission's belief that increased costs of incarceration are inconsequential in relation to potential revenue from tax compliance and the Commission's intent that Guideline 2T1.1 will reduce sentence disparity and "somewhat increase average sentence length"].} The dissent countered with criticism that the Tomko majority was impermissibly reviewing the sentencing court's judgment on a de novo standard, and most crucially, justifying its reversal of the district court's sentence based on overreliance on one § 3553(a) factor ((a)(5) direction to look to Guidelines policy statements) and devaluation of all other § 3553(a) factors.\footnote{Id. at 181.}

The Tomko dissent is correct that the majority's skewed application of § 3553(a) factors is not supported elsewhere in case law. However, the dissent could have, and did not, use the discussion as an opportunity to revisit the purely advisory nature of the Guidelines (and their policy statements) per Booker as well as Gall direction that a reasonable sentence upheld on review need not be the same sentence that the appellate court would have issued itself, had it been in the position of the sentencing court.\footnote{Gall, 128 S. Ct at 597 "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."}

Taken together, the Tomko majority and dissent present an interesting discussion of the politics and policy of probationary
sentences and deterrence of criminal tax defendants. The majority focused on the need for deterrence (one factor among many) and its perceived inadequacy of arguments for departure based on Tomko's charitable works, employment record and ability to pay restitution. In response, the dissent notes that the policy statement in USSG 2T.1. used in the majority opinion as a weapon against non-incarceration sentences actually states that its intention of disparity reduction will result in a "reduced," not "eliminated," number of purely probationary sentences. The dissent sees the plain language of the background comment to 2T1.1 mirroring § 3553(a)(6) to acknowledge the need to avoid unwarranted sentence disparities, though neither mandates elimination of non-incarceration sentences, and also notes that overreliance on § 3553(a)(6) encourages automatic application of the Guidelines and violation of the Supreme Court's holding in Booker. On this topic, and with its fuller acknowledgment of the messy and often contradictory goals of the Guidelines and § 3553(a) after Booker, the Tomko dissent appears to have the superior recipe for pudding (leaving the Tomko majority with no "proof" in the same).

The Tomko majority and dissent also plumb the depths of the then-recent Rita opinion for Supreme Court direction on

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153 498 F.3d at 169-173.
154 Id. at 182.
155 Id.
procedural and substantive reasonableness. The majority, as discussed above, focused on a mythical "recipe for reasonableness" and Tomko's probationary sentence substantively having "no proof in [its] pudding." The dissent saw the majority's review and application of *Rita* as improperly drawing a hard line between procedural and substantive review that the *Rita* court, with its emphasis on the interconnectedness of procedure and substance, did not intend.\(^{156}\) The dissent argued convincingly that the majority impermissibly focused on pure substance, ignoring the sentencing court's thorough procedural review, in its "repeated references to the need for Tomko to spend time in jail."\(^{157}\) and makes the prescient statement that "In order for the Guidelines to be truly advisory, a District Court must be able to potentially, when the proper situation arises, sentence a defendant outside of the Guidelines range but within the statutory range. Any other conclusion would alter the statutory sentencing scheme as passed by Congress and interpreted by *Booker.*"\(^{158}\) The *Tomko* dissent's call to proper departure under

\(^{156}\) *Id.* at 183. The *Tomko* dissent correctly note that in *Rita*, Justice Stevens' attempt to separate procedural and substantive review in the story of a district judge acting unreasonably, despite perfect procedural rulings, in giving Yankees fans harsh sentences and Red Sox fans lenient ones, 127 S. Ct at 2473, (Stevens J., concurring), is ultimately unhelpful as a guide to bifurcating these processes and that Justice Scalia's statement that substance and procedure are chameleon-like terms, 127 S. Ct at 2483 (Scalia, J., concurring in part and concurring in the judgment), though no more practically helpful, is more accurate in acknowledging the slippery ground underfoot.

\(^{157}\) *Id.* at 183.

\(^{158}\) *Id.* at 184.
Booker was answered within months by the Supreme Court's holdings in Gall and Kimbrough.159

B. Lenience In Tax Sentencing After Booker, Rita, Gall and Kimbrough.

In contrast to the "business as usual" approach of the Third Circuit in Tomko,160 a growing number of tax cases decided after Gall and Kimbrough embrace the opportunity for more flexible sentencing. For example, Third Circuit tax sentencing appeal Levinson is more welcoming of the opportunities for alternative sentencing presented in Gall and Kimbrough, though the district court in question undermined its attempt at authorizing a probationary sentence by failing to explain at all the grounds

159 Gall and Kimbrough were released shortly after the Third Circuit's Tomko opinion, reversing and remanding a non-incarceration sentence on grounds of providing inadequate deterrence and (not said but strongly implied) offending the sensibilities of the court by allowing Tomko to serve out his home confinement sentence in a luxurious home complete with home theatre, pool and bar. The effect of Gall, Kimbrough and increased discussion of deterrence - overarching goal or merely one of many 3553(a) factors - can be seen in the November 19, 2008 oral argument transcript of the Third Circuit's en banc rehearing. Transcript of Oral Argument, United States v Tomko, No. 05-4997 (3rd Cir. argued November 19, 2008). The oral argument is lively reading, with the court hazing Assistant Attorney General, Tax Division, Nathan Hochman over his unwavering interest in deterrence as "the" 3553(a) goal to be met, and its good-natured teasing of Tomko's defense counsel (who doubts that he will argue before the panel again). Given the tone of the court's insistence with Hochman that deterrence is only one of many 3553(a) factors, and that his laser-like focus on it and only it is unduly narrow, it was no surprise to find that the en banc court upheld Tomko's sentence in an opinion filed on April 17, 2009. The majority opinion upheld the Tomko sentence and procedurally and substantively reasonable, though it admitted that many of its judges would not have imposed the same sentences had they been in the district court - but that is not the test of a sound and reasonable sentence. Students of tax sentencing are watching eagerly to see if the Government appeals to the Supreme Court and if cert is granted on this issue.

160 Appearing in that case to not see a Guidelines sentence that it did not like or a variance that it could support, see, Nancy Gertner, Gall, Kimbrough and Me, OSJCL AMICI: VIEWS FROM THE FIELD (January 2008), at http://osjcl.blogspot.com.
This embrace of downward departures is seen outside of tax in "other" white collar criminal sentencing as well.\footnote{United States v Levinson, 543 F.3d 190 (3rd Cir. 2008).}

1. \textit{United States v Taylor.}

Talmus Taylor was convicted of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S. § 7206(2), and sentenced to one year in a halfway house and a fine.\footnote{532 F.3d 68, 69 (1st Cir. 2008).} The Guidelines sentence for his offence would have been 30 to 37 months in prison, supervised release and a fine.\footnote{United States v Taylor, 499 F.3d 94, 96 (1st Cir. 2007).} After an appeal by the Government, the First Circuit vacated the sentence as substantively unreasonable and remanded it. The case returned to the First Circuit again after the Supreme Court remanded it for further consideration in light of Gall and Kimbrough, which were released after Taylor's initial sentencing.\footnote{532 F.3d at 69.} The First Circuit acknowledged that Rita, Gall and Kimbrough made clear "that in the post-Booker world, district judges are empowered with considerable discretion in sentencing, as long as the sentence is generally reasonable and the court has followed the proper procedures," and that it would, per Gall,
review Taylor's sentence under a deferential abuse of discretion standard, requiring procedural and substantive inquiries.\textsuperscript{166}

While the First Circuit, in its first, 2007, review of Taylor's sentence\textsuperscript{167} found the sentence substantively unreasonable on the grounds that the district court failed to take all § 3553(a) factors into account, failed to adequately explain its justifications for a probationary sentence,\textsuperscript{168} and ultimately issued a sentence that did not afford adequate deterrence.\textsuperscript{169} This appellate opinion is very much like the Third Circuit's opinion in \textit{Tomko}, both on disagreement with the sentencing court's weight given to charitable work and the ultimate holdings that probationary sentences lacked deterrence, though it tempers \textit{Tomko}'s harshness with the open-minded approach of requesting adequate explanation of the sentence on remand and leaving open the possibility that the non-incarceration sentence might be upheld so long as it is procedurally sound and adequately explained per \textit{Gall}.\textsuperscript{170}

\textsuperscript{166} \textit{Id.} at 69-70, noting that in the First Circuit, after procedural and substantive review, "[R]eversal will result if - and only if - the sentencing court's ultimate determination falls outside of the expansive boundaries of that universe [of reasonableness]."

\textsuperscript{167} 499 F.3d at 94.

\textsuperscript{168} \textit{Id.} at 102, finding the statement that a non-incarceration sentence was appropriate because of the "fantastic contribution he [Taylor] has made to the community" was insufficient.

\textsuperscript{169} \textit{Id.} at 102-103.

\textsuperscript{170} 532 Fed at 69.
2. United States v Coughlin.

Like Taylor, this case presents a pre-Gall/Kimbrough sentence remanded for resentence after Gall's release. Thomas Coughlin, a prominent corporate executive, pled guilty to five counts of wire fraud and one count of filing false tax returns in violation of 26 U.S.C. § 7206(1).\(^{171}\) His applicable Guidelines sentence would have been 27 to 33 months, but the district court sentenced him to no imprisonment, five years of probation, a $50,000 fine and $411,218 in restitution due to Coughlin's poor health,\(^{172}\) family circumstances and charitable works.\(^{173}\) Tantalizingly, the district court mentioned Coughlin's "fall from grace" in its order of a non-incarceration sentence.\(^{174}\) Was this a poorly articulated opinion on the punitive and deterrent effect of probation, fines and restitution or merely an off-hand acknowledgment of the shame suffered by any criminal offender? A more thorough statement could have been useful, given Gall's acknowledgement of the loss of liberty and real effect of non-incarceration sentences. The Eighth Circuit reversed and remanded this sentence on the grounds that the district court did not appropriately weigh the § 3553(a) factors and state with specificity the reasons for its below-Guidelines sentence.\(^{175}\)

\(^{171}\) United States v Coughlin, 500 F.3d 813 (8th Cir. 2007).

\(^{172}\) Id. at 816-817.

\(^{173}\) Id. at 818.

\(^{174}\) Id. at 819.

\(^{175}\) Id. at 819-820.
On remand, the district court restored its sentence of no incarceration, five years of probation, including 27 months of home detention with electronic monitoring (and credit given for time served) with a memorandum explaining its reasoning at length. Not surprisingly, the district court in this February 2008 resentencing first addresses the impact of Gall, released after the initial sentence and before the remand hearing, and the procedure Gall established for calculating Guidelines, reviewing § 3553(a) factors and adequately explaining the given sentence. The district court then revisited its below-Guidelines sentence in light of the direction in § 3553(a) to impose a sentence "sufficient, but not greater than necessary" to achieve the diverse statutory sentencing goals. Among the § 3553(a) factors discussed at length is the factor of greatest interest for the purposes of this Article, the need for deterrence.

The district court defended its non-incarceration sentence for Coughlin, on the grounds that his offense was "gravely serious," but probation and home detention accomplished the goals of punishment and deterrence "more effectively than imprisonment. Not all defendants must be sentenced to be duly

178 Id. at 9-10.
179 Id. at 17-18.
punished.\textsuperscript{180} Stating that probation can accomplish the goals of punishment, the court revisited Gall's discussion of the substantial restriction of liberty inherent in non-incarceration punishment,\textsuperscript{181} concluding that Coughlin's sentence "is far from an act of leniency, and its characterization as such deprives sentencing courts of a valuable and effective form of punishment."\textsuperscript{182} The district court, in addition, revisits portions of the SRA, enacted in part to address prison overcrowding, and Congress' statutory direction to the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons."\textsuperscript{183} The court concluded with the observation that, after the fines, restitution and loss of liberty "Coughlin has suffered greatly, for he had it all and squandered his success. For that he is paying the price and will be punished for the rest of his life."\textsuperscript{184}

3. \textit{United States v Levinson.}

Levinson pled guilty to counts of wire fraud and filing a false tax return under 26 U.S.C. § 7206(1).\textsuperscript{185} The district court

\textsuperscript{180} Id. at 20-21.

\textsuperscript{181} 128 S. Ct. at 595.

\textsuperscript{182} 2008 U.S. Dist LEXIS 11263 at 26.

\textsuperscript{183} Id. at 32-33.

\textsuperscript{184} Id. at 38. NB, in light of Gall, the United States filed a Motion to Dismiss Appeal with the Eighth Circuit on March 28, 2008 (entered as a Mandate of that court on March 31, 2008), dismissing its own appeal of the sentencing court's 2008 sentence on remand.

\textsuperscript{185} United States v Levinson, 543 F.3d 190 (3rd Cir. 2008).
found that the tax loss from Levinson's actions exceeded $44,000, and thus the applicable Guidelines sentence would be 24 to 30 months.\textsuperscript{186} The district court instead imposed a sentence of two concurrent 24 months of probation\textsuperscript{187} and restitution\textsuperscript{188} on the grounds that Levinson did not harm the public through his conduct (considering harm to a privately held company already compensated through a civil suit to be a purely private harm).\textsuperscript{189} The Third Circuit found that the Delaware sentencing court failed to offer sufficient explanation for its downward departure to a wholly non-incarceration sentence, and failed to adequately explain its policy disagreement with the Guidelines.\textsuperscript{190} Levinson's sentence was reversed and remanded, and any subsequent opinion has not yet been released.

While it might appear from this brief summary that the Levinson court was acting as the Tomko court did in hewing closely to the Guidelines, closer reading of the case shows the profound effect of Gall and Kimbrough (and the passage of 10 months from the date of filing the Tomko opinion) on the Third Circuit. The Levinson court acknowledged that the sentencing court properly determined the applicable Guidelines sentence and

\begin{itemize}
\item \textsuperscript{186} Id. at 191.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 192.
\item \textsuperscript{189} Id. at 194.
\item \textsuperscript{190} Id. at 199-200.
\end{itemize}
reviewed the § 3553(a) factors, before it made its controversial determination that Levinson was unlike other white collar tax offenders because his harm to a privately held company was a private harm. The district court sentenced Levinson to probation and restitution after a few short statements regarding its view that after it reviewed the costs of incarcerating Levinson, a non-violent offender "whose crimes had little impact beyond his business partners and family," it concluded that "I just can't see that it makes much sense. I just do not."

The Third Circuit did not agree with the Government that the sentencing court committed procedural and substantive error in imposing Levinson's sentence, but did take the view, reasonable in the circumstances, that the district court must "provide us with enough analysis on the record to permit meaningful appellate review, which it so far has not." It also looked to Gall for the proposition that a failure to adequately explain a sentence deviation may be addressed "by giving the sentencing judge an opportunity to better explain the reasoning behind the decision" and to Kimbrough for the proposition that district courts have institutional advantages in access to and consideration of evidence, and appellate courts would be foolish.

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191 Id. at 192-193, also 197-198.
192 Id. at 194.
193 Id. at 194.
194 Id.
195 Id. at 195.
to try to second guess them.\footnote{Id. at 196.} The Levinson court further stated that in the post-Booker era of advisory Guidelines, per Gall it did not need "extraordinary circumstances" to justify a downward departure.\footnote{Id. at 199.} It took issue only with the district court's sparse explanation of its analysis for downward departure\footnote{Id. at 199.} and the spectre of an unexplained policy disagreement with the Guidelines raised by that court's comments on public and private harm and the cost of incarcerating criminal tax violators.\footnote{Id. at 200.} "Policy considerations are not off-limits in sentencing, see Kimbrough" though they require care in forming the basis of a wholly probationary sentence.\footnote{Id. at 202.} The Levinson court concluded with its acknowledgment that, given the sentencing possibilities offered by Gall and Kimbrough, "We do not say that a sentence of probation would be, on the record, plainly outside of the boundaries of permissible discretion. We only hold that the justifications given for the sentence are inadequate for us to recognize them as reflecting a proper exercise of discretion."\footnote{Id. at 202.} Compare this acceptance of the possibility of departures to probationary sentences, departures based on policy disagreements, and sentences deemed procedurally and substantively reasonable
though they might not be to the tastes of all jurists with the Tomko court's disregard of procedural reasonableness and apparent obsession with the cost of Tomko's residence.\textsuperscript{202} This shift from wholesale dismissal of non-incarceration sentences, on the grounds of failure to afford adequate deterrence, to open acknowledgment that a below-Guidelines sentence (one that would not be the appellate court's first choice)

4. \textit{United States v Gardellini.}

Gus Gardellini pled guilty to filing a false income tax return in violation of 26 U.S.C. § 7206(1), an offense that, given Gardellini's offender characteristics, resulted in a Guidelines sentence of 10 to 16 months of imprisonment.\textsuperscript{203} The district court took into account Gardellini's payment of restitution and § 3553(a) factors, principally his cooperation, minimal risk of recidivism and that he had "suffered substantially" due to his prosecution.\textsuperscript{204} The district court concluded with a statement that "what really deters" potential tax evaders is "the efforts of prosecutors...in vigorously enforcing the laws."\textsuperscript{205} In consideration of its review of the § 3553(a) factors and the preceding considerations, the district court found a sentence of probation and a fine to be adequate.\textsuperscript{206}

\textsuperscript{202} 498 F.3d at 159.
\textsuperscript{203} United States v Gardellini, 545 F.3d 1089, 1090 (DC App 2008).
\textsuperscript{204} Id. at 1091.
\textsuperscript{205} Id.
\textsuperscript{206} Id. The opinion notes that Gardellini would spend his probation in
The government appealed Gardellini's probationary sentence as substantively unreasonable under Booker and Gall. The Court of Appeals for the DC Circuit reviewed the district court's sentence in light of Rita, Gall and Kimbrough, using a deferential abuse of discretion standard, reviewing for procedural and substantive reasonableness, looking for policy disagreements with the Guidelines or Commission, and mindful that Gall does not require "extraordinary circumstances" to support a below-Guideline sentence.\textsuperscript{207} The Gardellini court next raised an interesting point - when an appellate court, in substantive reasonableness inquiry, asks whether a sentence is unreasonably high or low, "analytical difficulty" arises because this question begs the response "Compared to what?"\textsuperscript{208} The Guidelines are advisory, the § 3553(a) factors are "vague, open-ended, and conflicting" and each sentence decision involves a unique combination of offender and offense characteristics.\textsuperscript{209} When the foregoing are combined with the deferential abuse-of-discretion standard of review, "It will be an unusual case when an appeals court can plausibly say that a sentence is so unreasonably high

\textsuperscript{207} Id. at 1092-1093.
\textsuperscript{208} Id. at 1093.
\textsuperscript{209} Id.
or low as to constitute an abuse of discretion by the district court." 210

The DC Circuit upheld Gardellini's non-incarceration sentence as procedurally and substantially reasonable, noting that the government's objection to it held one § 3553(a) factor - deterrence - above all others 211 and in light of the discretion given to sentencing courts by the Supreme Court's holdings in Booker, Rita, Gall and Kimbrough, "only a fool would think that he or she necessarily would receive the same sentence as Gardellini for a similar tax offense." 212 To the extent that Booker and its progeny causes the federal sentencing system to become "unwise or inequitable," Congress and the President are empowered to produce new legislation and should address sentencing concerns. 213

The Gardellini dissent disagreed, finding Gardellini's sentence too low and inadequate to afford deterrence, in a thorough opinion supported by statistics on the low percentage of filed returns audited by the IRS and the interplay of courtroom publicity and deterrence. 214 In so doing, however, the dissent arguably fell into the government's trap of placing excessive

210 Id.
211 Id. at 1095.
212 Id.
213 Id. at 1096.
214 Id. at 1098-1099.
weight on only one § 3553(a) factor – deterrence – and denying reasonability to all other inquiries and considerations.

5. United States v Weisberg.

This brief and unpublished Sixth Circuit case offers an additional view of the increased discretion and liberalization in sentencing post Gall and Kimbrough. Joseph Weisberg pled guilty to felony tax evasion in violation of 26 U.S. 7201, which would carry a Guidelines sentence of 33 to 41 months, after enhancement in light of Weisberg’s "special skills" gained in his practice of law and tax loss of $321,654.\textsuperscript{215} The district court sentenced Weisberg to five months imprisonment, five months home confinement, and a three-year term of supervised release after finding no "special skill" required to evade taxes and mitigating offender characteristics (age, health, no prior convictions, punishment in the loss of his law license).\textsuperscript{216} On appeal, the Sixth Circuit reviewed Weisberg’s sentence for procedural and substantive reasonableness and upheld the sentence, noting that post Rita and Gall, the government failed to appreciate the amount of deference due an appellate court to the sentencing court, and, given the superior position of a sentencing judge in having access to and familiarity with the individual case before

\textsuperscript{215} United States v Weisberg, 2008 U.S. App. LEXIS 22095 (6th Cir. 2008).

\textsuperscript{216} Id. at 6-7.
him, finding that the district court adequately explained its reasons for imposing a below-Guidelines sentence.\textsuperscript{217}

6. \textit{United States v Smith.}

A Northern District of Ohio sentencing case provides an additional look at below-Guidelines sentences in the wake of \textit{Rita}, \textit{Gall} and \textit{Kimbrough}. Joseph Smith pled guilty to conspiracy to defraud the IRS in violation of 18 U.S.C. 371, making false tax returns in violation of 26 U.S.C. § 7206(1) and corruptly endeavoring to obstruct and impede in violation of 26 U.S. § 7212(a).\textsuperscript{218} Smith's Guidelines sentence was 27 to 33 months, though the district court sentenced him to imprisonment of 12 months and 1 day on one count, 3 months on the other counts (to be served concurrently with the year-and-day sentence), 2 years of supervised release, community service, and restitution of $39,154 to the IRS.\textsuperscript{219}

The sentencing judge approached her below-Guidelines sentences by noting the duty of every sentencing judge is to evaluate each person as a unique individual who may not fit within a formulaic sentencing table. The importance of this duty has only been enhanced by \textit{Koon}, \textit{Booker}, \textit{Gall} and the like.\textsuperscript{220} After consideration of § 3553(a) factors and the difficulty of

\textsuperscript{217} \textit{Id.} at 14-15.

\textsuperscript{218} United States v Smith, 2009 U.S. Dist LEXIS 7462 (N.D. Oh. 2009).

\textsuperscript{219} \textit{Id.} at 2-3.

\textsuperscript{220} \textit{Id.}
reconciling the goals of specific and general deterrence the court explained Smith's below-Guidelines sentence as adequate because of its success in specific deterrence (the stress, shame and financial burden on Smith since he was charged make it "most unlikely" that he will re-offend) and the punitive and deterrent effects of the hefty restitution Smith must make to the IRS. The sentencing judge further dispelled any concerns of unwarranted sentence disparity by showing that Smith's year-and-a-day term of incarceration was the median sentence given for such offenses in the Sixth Circuit, and only 3 months shorter than the median national sentence for such offenses. In an example of the kind of adequate disclosure and explanation of a below-Guidelines sentence not seen in Taylor and Levinson, supra, the sentencing judge concluded with a summary of matters considered, each party's briefs, the Guidelines range and § 3553(a) factors, in arriving at a sentence "sufficient, but not greater than necessary, to comply with the purposes of § 3553(a)."

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221 Id. at 10-11 "Yet specific and general deterrence are inherently in conflict with one another, as the former requires the focus on the individual and the latter requires the focus on the larger societal good."

222 Id. at 10-11.

223 Id. at 13.

224 Id. at 16-17.
IV. The Future and A Modest Proposal.

A. Troubling Trends.

At the time that this article was written, high profile white collar and tax criminals such as Ponzi scheme promoters Bernard Madoff and R. Alan Stanford\textsuperscript{225} and offshore tax shelter promoter UBS\textsuperscript{226} dominate the business and financial news with stories of multimillion and multibillion dollar thefts from clients and illegal sheltering of taxes from United States law. This author believes it reasonable to assume that these cases will further poison public sentiment against white collar offenders, especially those accused or convicted of high profile offenses with large dollar figures of loss. Such an understandable hardening of public opinion brings with it the danger of courts turning away from the judicial discretion to impose non-incarceration sentences embodied Gall and Kimbrough to revisit sentencing pre-Booker and impose within-Guidelines sentences (in other words, to follow the lead of the Tomko appellate court in 2007).

Federal judge Nancy Gertner of the District of Massachusetts raises a similar specter of conservative conformity in her study of discretion in Gall and Kimbrough, noting that Booker "did not unleash judges and herald a return to indeterminate sentencing"

\textsuperscript{225} Fraud is the "In" Crime March 1, 2009, White Collar Crime Prof Blog, \url{http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/03/fraud-is-the-in.html} ("The message is loud and clear - the DOJ has a growing number of alleged fraud cases dropping in its lap.").

\textsuperscript{226} Lynnley Browning, US Extends its Inquiry of Offshore Tax Fraud, \url{NYTIMES.COM} March 18, 2009.
and that the vast majority of judges "in the vast majority of cases did essentially nothing new. Judge Gertner speculates that this is due in part to the fear of some judges that after nearly twenty years of Guidelines they were no longer competent to make sentencing judgments, and in part to those judges who "never saw a Guideline sentence they didn't like" despite the disrespect for law promoted by harsh punishments that fail to take into account individual facts and circumstances. Judge Gertner's concerns are well founded, as shown in her acknowledgement that Koon's pro discretion language did not spur a revolution in sentencing (so much for "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."), nor did Booker's (see the Tomko 2007 majority appellate decision), and dicta in Spears notwithstanding.


228 Id. p 4.

229 519 U.S. at 113.

230 129 S. Ct at 843-844. "Kimbrough thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance form the Guidelines is not suspect." While this immediately appears to apply only to crack sentences, the Court goes on to state that its permission of policy disagreement-based variances follows in the tradition of Booker's permission of individualized determinations of Guideline applicability to particular cases. Id. ("and not simply based on an individualized determination that they yield an excessive sentence in a particular case. The latter proposition was already established pre-Kimbrough, see United States v Booker...")). This language, and the absence of any statement by the Court in Spears that its permission of policy disagreements in crack cocaine cases is inapplicable to any non-crack cocaine case, leaves the white collar criminal bar with the
Kimbrough may only be applied to crack offenses\textsuperscript{231} or may be limited to policy disagreements closer in magnitude to the 100:1 crack-powder dichotomy (while at lower loss levels tax crimes are dealt with somewhat more harshly than non-tax economic crimes, the disparity quickly evens out and is nowhere near 100:1 in magnitude).\textsuperscript{232}

Also, in a caution and concern raised by Federal Judge Lynn Adelman of the Eastern District of Wisconsin and Professor Jon Deitrich, the defendant in Gall was "an extremely sympathetic figure" who withdrew from crime and began self-rehabilitation before he was contacted by the police.\textsuperscript{233} Criminal tax defendants are rarely sympathetic figures (William Tomko, Jr., convicted of instructing subcontractors to falsify invoices and appear to be doing work for schools when they were building his new home instead,\textsuperscript{234} was certainly not treated with sympathy, respect or affection upon his Third Circuit appeal) in the manner of defendant Gall, and in the wake of Stanford, Madoff, Wesley appearance of retained flexibility and hope for future policy-motivated judicial discretion.


\textsuperscript{232} In Lynn Adelman & Jon Deitrich, Gall, Kimbrough and Crack Retroactivity: Positive but Incomplete Steps in the Evolution of Federal Sentencing, OSJCL AMICI: VIEWS FROM THE FIELD (January 2008), at http://osjcl.blogspot.com, Page 4, Judge Adelman and Professor Deitrich also note that even after Kimbrough addressed the 100:1 crack/powder ratio and the Commission revised the Guidelines, the disparity remains significant (between 25:1 and 80:1).

\textsuperscript{233} Id. at 3.

\textsuperscript{234} 498 F.3d at 159.

B. Opportunities.

However, troubling trends and gloom aside, if Gall, Kimbrough and the dicta in Spears bear out true restoration of judicial discretion in sentencing, and fulfillment of Koon's promise of sentencing every defendant as an individual,\footnote{116 S. Ct. at 2053.} the Supreme Court has created great opportunities for sentencing judges to deal most effectively with criminal tax defendants. The Commission's and Guidelines' competing goals of affording adequate discretion and imposing sentences sufficient, but no greater than necessary to punish, will remain, but increased judicial discretion will offer a larger toolkit for tackling these issues. The tensions between sufficient and deterrent sentences are frequently seen in most stark detail in white collar sentences, when the "piling on of points" for special skills, leadership roles, etc. can result in sentences for
subordinate white collar offenders so severe that even the Government may advocate for departures at sentencing.237

The Commission, in its own publications, has begun to advocate for alternative sentences to mitigate the high cost of incarceration - a stunning change of position from its advocacy of more incarceration for more white collar offenders in the 1980s. With a cost to the nation of more than $49 billion to incarcerate one in every 100 adults in 2007-2008, the Commission is now interested in uses of restitution and probation for nonviolent offenders.238 In a recent publication on the uses of alternative sentences in the federal criminal justice system, the Commission stated "Increasingly, criminal justice professionals have argued that dwindling prison space should be reserved for the most serious and dangerous offenders, necessitating a reconsideration of alternative sanctions for first-time and nonviolent offenders."239 While the SRA required the Guidelines to reflect the general appropriateness of non-imprisonment sentences in certain cases for first-time or non-violent offenders, or those not convicted of an "otherwise serious

237 See, United States v Adelson, 441 F. Supp. 2d 506, 510-511 (S.D.N.Y. 2006), in which the court noted that with regard to a Guidelines sentence of 85 years "Even the Government blinked at this barbarity. Pressed repeatedly by the Court as to whether he was asking for a guideline sentence (which, under the Justice Department's prevailing policy he was obligated to do), Government counsel refused to answer the question directly."

238 UNITED STATES SENTENCING COMMISSION, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (January 2009).

239 Id. at 1.
offense,” and tax crimes are considered serious offenses, the Commission concedes that in the current fiscal climate "Aside from offense severity, financial offenses may be more suited to alternative sentences because of restitution...To the extent that these offenders are sentenced to prison alternatives, they may be better positioned to pay restitution.”

Reasoned and intelligent discussions of the legitimate uses, and genuine punitive, life-inconveniencing character, of alternative sentences such as probation and home confinement (i.e., drug tests, unannounced home visits, inability to move or change jobs freely) are found in Gall and the Tomko rehearing oral argument as well as Professor Ellen S. Podgor's numerous and impassioned writing on the topic. A Congressional policy preference for sentencing alternatives to strict incarceration is found, though often forgotten, in the 1970s and 1980s legislative histories of Senate Acts predating the SRA, in which promotion of

241 USSG § 2T1.1 comment (backg'd).
242 Id. at 19.
244 Transcript of Oral Argument, United States v Tomko, No. 05-4997 (3rd Cir. argued November 19, 2008), at 49 (Tomko's counsel explains that one immediate penalty from Tomko's indictment was the sudden loss of his line of credit at his long-time bank and subsequent rejection by 39 banks before he could find one to lend him the funds needed for restitution).
alternative sentences was, for a short time, a widely discussed and viable goal of uniform sentencing.

Gall and Kimbrough might also give criminal tax defendants room to argue about policy disagreements over differences in treatment of tax and other white collar offenders in § 2T1.1 and § 2B1.1 (though the disparities found here are minimal by crack/powder standards), high levels of incarceration available for use against white collar sentences in general, or the proportionately higher sentences meted out to first-time, non-violent white collar offenders than to certain violent criminal offenders.

Kimbrough, with Justice Ginsburg's nod to the Commission's development of the Guidelines "using an empirical approach based on data about past sentencing practices, including

\[246\] Kate Stith and Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223 (1993). Professor Stith and Mr. Koh note a subsequently discarded sentencing priority in a 1978 Senate Bill (S. 1437) that has regained urgency in the courts and Commission in recent years - strong encouragement of alternative, non-imprisonment sentences and judicial discretion to depart from guidelines and flexibly meet the challenge of aggravating and mitigating personal characteristics of defendants. Id. at 237-238.

\[247\] See, e.g., Frank O. Bowman, III, Economic Crimes: Model Sentencing Guidelines 2B1, 18 Fed. Sent. R. 330 (2006) "the fact that the guidelines contemplate life imprisonment - and then a bunch more - for such crimes [white collar] reveals the degree to which emotion has overtaken logic in this area. ...the overkill of the current economic crime guidelines is not limited to the most culpable offenders in the most exceptional cases." "the combination of political pressure and some failures of foresight on the part of those involved in revising the economic crimes guidelines in recent years has produced Guidelines sentencing ranges for moderate-to-serious white-collar offenders that simply cannot be rationally defended." See also, Ellen S. Podgor, Criminal Law: The Challenge of White Collar Sentencing, 97 CRIM. L. & CRIMINOLOGY 731 (Spring 2007) for a discussion of the sociological roots of white collar crime and the irrationality of subjecting nonviolent first time white collar offenders to sentences higher than those imposed for violent crimes such as murder or rape and failing in general to take the white collar offender's clean slate (lack of prior convictions) into account; and Ellen S. Podgor, Throwing Away the Key, 116 YALE L.J. POCKET PART 279, 284 (2007), http://thepocketpart.org/2007/02/21/podgor.html.
10,000 presentence investigation reports” and subsequent allowance of sentence deviation based on policy disagreements, due to the Commission's formation of the crack cocaine guidelines without "tak[ing] account of 'empirical data and national experience'” may also provide an avenue to policy disagreement and departure from the tax and other white collar Guidelines due to their shared origin in the Commission's stated desire to increase sentences over those commonly given in past practice and corresponding lack of basis in "empirical data and national experience".

Although, to concede the obvious at this point in history, these arguments are lacking the moral force and urgency of the racially and economically charged crack/powder disparity and would be offered to the public and courts at a time when high profile white collar and tax offenders are objects of little to no sympathy and continue to merit and receive stiff sentences.  

248 Kimbrough, 128 S. Ct at 567.

249 Id. at 575.

While commenters like Ellen Podgor are surely correct in predicting that white collar criminals like Bernie Ebbers will not backslide into repeated acts of crime, most likely because post-conviction they will never again have access to the high positions that facilitated their misdeeds, even Professor Podgor concedes elsewhere that the social harms from single courses of white collar criminal activities may be larger, and tied to enormous economic loss to victims. With loss of this magnitude, why would any defendant deserve a second bit at the apple?

However, one must acknowledge the inherent tension in increasing non-incarceration sentencing for white-collar offenders. On the one hand, some would argue that such a trend is motivated by preference of educated, white offenders. On the other hand, it will be a pyrrhic victory for the federal sentencing system when all offenders, violent and nonviolent, are sentenced to the maximum defensible terms of incarceration "in order to be fair" and also, unintentionally, overburdening the federal prison system to the point of financial crisis, human rights violations and arbitrary shortening of sentences or early releases motivated only by getting bodies out of the system.


C. A Modest Proposal - One Guideline Doesn't Fit All.

The few years between this Article and the Supreme Court's opinion in Booker have held almost more change in sentencing laws than the courts and scholars can absorb. From a known process that reduced judicial discretion to an "advisory" system and standards of procedural and substantive reasonableness of sentences on appeal that allow (or force, as the case may be) appellate courts to admit that they must uphold sentences that they would never have handed down themselves, were they in the district court sentencing judge's shoes (e.g., the Third Circuit en banc panel in Tomko), the landscape for judges and advocates has changed and left many disoriented.

Recent cases such as Tomko and Gardellini have shown retrenchment by the Government in emphasizing deterrence above all other § 3553(a) factors to be considered in rendering a sentence, and courts such as those in Tomko, Coughlin and Gardellini issuing - and sometimes upholding on appeal - sentences for large-dollar tax loss criminal tax defendants that feature little or no time in prison. On the one hand, such sentences may be seen as too lenient, on the other hand, commenters such as Professor Podgor and Judge Nancy Gertner recognize that white collar defendants suffer other, and substantial, punishments in the restrictions inherent in probation, social shaming, extreme difficulty in raising the funds required for restitution to the IRS and loss of the ability to hold jobs in their customary line of work again. In fact,
Podgor suggests that non-incarceration sentences may be acceptable for white collar defendants because notorious offenders like Bernie Ebbers will never again have access to a position of trust that would allow the commission of white collar crime.

These arguments could be stereotyped as the watchdog Government versus wily defense counsel, if they did not occur in the context of a Guidelines system that, over time, became increasingly driven by political agendas (the enhanced white collar sentences post Sarbanes-Oxley or the crack-cocaine disparity are two examples) and motivated more by number-crunching and departure horse-trading than the goal of reaching individualized sentences that were only "sufficient but no greater than necessary" to further the purposes of § 3553(a) (only one of which is deterrence). With the Commission calling for flexibility in sentence to hold down the ballooning price of the federal prison system, and the recognition post-Gall that a sentence may be procedurally and substantively reasonable though unpopular with certain appellate judges, this seems to be a poor time to wish for a renewal of the Guidelines through Congressional action. Instead, while occasionally unpopular and humanely flawed, district court sentencing judges, coupled with the availability of appellate review for reasonableness, appear post-Rita and Gall to be the federal criminal sentencing system's best hope at crafting individualized sentences that take into account all of offense, offender and state of the system.
Accordingly, this writer proposes renewed commitment to the development of federal criminal tax (as well as white collar) sentencing through case law, and looks forward to additional federal appellate application of *Gall* and *Kimbrough* to tax sentencing cases. One may bring order from chaos, just as the courts may bring enlightenment from the *Tomko* en banc opinion and others of its kind.

In addition, a commitment to judicial law making in this area should avoid the worst excesses of the Bush-Obama era of heightened partisan politics and suspicion. Just as the legislative intent behind the Sentencing Reform Act shows changes in priority and policy, so could Congressional attempts to "fix" the Guidelines post-*Booker* result in unexpected and truly unpalatable results. Legislators don't sentence every day, and may never have met a tax or white collar defendant (all joking about their close colleagues and primary donors aside). The sentencing judges are in the trenches with the Guidelines every day, and thanks to the Supreme Court, with little but compasses and multi-purpose tools. At least they are in the trenches at all.

V. **Conclusion.**

In the aftermath of decades of Congressionally-directed sentencing legislation, and the recent burst of discretion, departures, returns to convention and dissent, the state of federal sentencing of criminal tax defendants in 2009 is murky. The future is difficult to forecast, with the presumption, on one
hand, that the Democratic administration may make Supreme Court appointments (for at the very least departing Justice Souter) from the left (stereotyped to be more amenable to flexible sentencing and rehabilitation) and the suspicion, on the other, that public outrage over notable white collar crimes during the worst economic recession in memory will affect the near-term course of sentencing (towards stiffer penalties and fewer opportunities for judicial discretion to free high-living tax offenders like William Tomko, Jr.). Competing social and political agendas of this kind could produce the kind of flip-flops in pre-Guidelines sentencing policy seen in the 1970s and 1980s and discussed in Section II.A. above.

However, this writer maintains that buried in the murk remains the goal of individualized sentencing appropriate to the offense and offender and driven by the sentencing judge’s greater familiarity with the defendant. Staying the course of post-Booker, advisory Guidelines sentencing, driven by Supreme Court holdings and influenced by the occasional federal circuit en banc opinion, will produce imperfect and occasionally unpalatably lenient sentences. But it will produce sentences that, in large part, honestly and accurately reflect all of the § 3553(a) factors - not limited to deterrence - and avoid the "barbarities" of the kind memorialized in Adelson. 253

253 United States v Adelson, 441 F. Supp 2d 506 at 510 (2006). "The [Sentencing] Commission has never explained the rationale underlying any of its identified specific offense characteristics . . . or the weights it has chosen to assign . . . . Here, their combined effect -- an added 20 points under the Guideline's approach -- ill-fits the situation of someone like
The cliché says that bad facts make bad law, but no more so than hardened positions and refusal to look at the big picture. Sentences under the Guidelines were intended to be "sufficient, but not greater than necessary" to comply with the diverse purposes and goals of § 3553(a), and while humans are imperfect, our imperfect district court judges stand a better chance of producing the most reasoned and rounded sentences than party-bound legislators. To borrow a metaphor from our outgoing president, federal sentencing should "stay the course" of case law development unless or until it becomes untenable.

Adelson. It represents, instead, the kind of "piling-on" of points for which the guidelines have frequently been criticized." "Even the Government blinked at this barbarity," id at. 511.