

**Doing *Kimbrough* Justice:  
Implementing Policy Disagreements  
with the Federal Sentencing Guidelines**

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ABSTRACT

Federal sentencing law is in the midst of a period of profound change. In 1984, responding to concerns about excessive judicial discretion in sentencing, Congress created the United States Sentencing Commission to promulgate the United States Sentencing Guidelines (Guidelines), a complex and mandatory schedule of federal criminal sentences based on a multitude of offense- and offender-specific factors. The Guidelines were introduced in 1987 and governed federal sentencing for nearly twenty years. But in 2005, the Supreme Court held that the Guidelines, by requiring judges instead of juries to find facts that could increase a defendant's sentence, violated the Sixth Amendment. The Court's remedy was to render the Guidelines advisory only—a starting point but not necessarily the endpoint for sentencing decisions.

Over the past several years, the Supreme Court and the lower federal courts have had to answer a range of questions about how the new advisory Guideline system would work in practice. Among the most consequential were the procedural question of how a district court should apply the now-advisory Guidelines, and the substantive question of whether a court could vary from the Guidelines on the basis of a policy disagreement with the Guidelines themselves rather than the circumstances of an individual defendant.

The Supreme Court answered these two crucial questions in the *Gall* and *Kimbrough* cases in December 2007, yet these two decisions seemed to talk past each other in terms of sentencing procedure. *Kimbrough* authorized policy-based variances. *Gall* instructed courts how to apply the advisory

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Guidelines in individual cases. But neither case explained how or when in the sentencing process courts should apply the policy-based variances the Court had just authorized. The result has been a lack of procedural uniformity among district courts applying policy-based variances, with most courts mingling policy and individualized considerations without specifying the role of each factor in determining sentences. Most courts have not even acknowledged, much less attempted to bridge, the gap between the substantive sentencing considerations authorized in *Kimbrough* and the procedural roadmap laid out in *Gall*. Academic discourse has likewise left this issue unaddressed.

This Article urges courts to reconcile *Kimbrough* and *Gall* by adding an analytical step to the sentencing process through which courts can explicitly apply policy considerations separately from, and prior to, individualized considerations. The blending of policy- and individual-based factors in sentencing adversely affects both the fairness of individual sentences and the development of the Sentencing Guidelines themselves. When courts blend different types of variances together, it is more difficult for them to exercise fully each type of discretion available under the advisory Guideline regime. Additionally, the Sentencing Commission relies on a continuing dialogue with district courts to fulfill its perpetual responsibility of refining the Guidelines based on empirical data and national experience; a clear articulation of courts' grounds for variance, therefore, provides vital information about how the Guidelines can be improved. The creation of an independent analytical step will ensure faithfulness to *Kimbrough* and due consideration of each facet of the sentencing court's discretion. The result will be a sentencing process that is more precise, more transparent, and ultimately fairer.

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*DOING KIMBROUGH JUSTICE*

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## I. INTRODUCTION

In 1987, pursuant to the Sentencing Reform Act of 1984, the new United States Sentencing Commission (Commission) inaugurated a new era in federal sentencing law by promulgating the United States Sentencing Guidelines (Guidelines).<sup>1</sup> The Guidelines are a complex system of federal sentencing rules that instruct judges to find particular aggravating and mitigating facts about each offense and weigh these facts according to a matrix of offense and offender characteristics that specifies a sentencing range expressed in numbers of months' imprisonment (e.g., a range of 57 to 71 months); judicial adherence to the Guidelines was mandatory from 1987 until 2005.<sup>2</sup>

The period of strict Guideline adherence came to an end with the watershed Supreme Court decision *United States v. Booker*,<sup>3</sup> which rendered the Guidelines advisory instead of mandatory and thereby freed sentencing judges to vary from the Guidelines on the basis of factors specific to individual criminal cases.<sup>4</sup> Following *Booker*, the Court has clarified the procedures by which an advisory-Guideline sentence ought to be imposed<sup>5</sup> and expanded the substantive reasons for which Guideline variances are permitted.<sup>6</sup> Unfortunately, the Supreme Court has not always given clear and comprehensive guidance about how district courts should carry out their new substantive responsibilities within the procedural framework the Court has prescribed. With respect to one particular aspect of the advisory-Guideline regime—a sentencing court's important power to vary from a Guideline based on a policy disagreement with the Guideline as a whole rather than its application to a particular offender—the Supreme Court's lack of clarity has led to inconsistency among district courts with respect to sentencing procedure, and has spawned sentencing practices that may inhibit district courts from exercising the full range of policy discretion the Supreme Court has authorized. To date, these shortcomings in federal sentencing practice have been little discussed either in academic literature or by sentencing courts themselves. This Article identifies procedural inconsistencies in federal sentencing practice and diminutions of the policy-variance power, and then proposes a new procedure that will facilitate fair and transparent exercise of policy-variance authority.

The divergent procedural practices we aim to address can be traced to two

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1. See *Mistretta v. United States*, 488 U.S. 361, 367-70 (1989).

2. See Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469, 472 n.3 (2011).

3. 543 U.S. 220 (2005).

4. See *id.* at 258-64.

5. See *Gall v. United States*, 552 U.S. 38, 49-52 (2007).

6. See *Kimbrough v. United States*, 552 U.S. 85, 108-10 (2007).

Supreme Court decisions issued on the same day in December 2007. In *Kimbrov v. United States*,<sup>7</sup> the Court held that sentencing judges could vary not only for individualized reasons specific to an offender and an offense—as was made clear from the start of the advisory-Guideline era, in *Booker*<sup>8</sup>—but also on the basis of a district court’s categorical policy disagreement with the Guidelines.<sup>9</sup> Such a policy-based variance need not be anchored to the facts of a particular case; the Court made clear that this type of variance is permissible even in a “mine-run” (i.e., run of the mill, or average) case.<sup>10</sup>

But on the same day it decided *Kimbrov*, the Supreme Court, in *Gall v. United States*,<sup>11</sup> also laid down a specific procedural framework for imposing sentences under the advisory-Guideline regime—and this framework did not include a step for application of a policy-based variance.<sup>12</sup> Today it is clear that both individualized and policy-based variances are permissible—and in fact, policy-based variances have been applied by district courts to a multitude of different types of offenses<sup>13</sup>—but there is no agreement on a procedure for integrating policy-based variances with variances based on individual offender characteristics.<sup>14</sup> In fact, in nearly every case in which district courts have

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7. 552 U.S. 85 (2007).

8. See *Booker*, 543 U.S. at 259-60 (discussing 18 U.S.C. § 3553(a)).

9. See *Kimbrov*, 552 U.S. at 108-10.

10. See *id.* at 110.

11. 552 U.S. 38 (2007).

12. See *id.* at 49-50.

13. See, e.g., *United States v. Herink*, No. 8:10CR169, 2012 WL 3112002, at \*5, \*7 (D. Neb. July 30, 2012) (bank fraud); *United States v. Garcia-Jaquez*, 807 F. Supp. 2d 1005, 1011-16 (D. Colo. 2011) (illegal reentry); *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at \*3-4 (S.D.N.Y. May 19, 2011) (ecstasy); *United States v. Fogle*, 694 F. Supp. 2d 1014, 1017-19 (E.D. Wis. 2010) (felon in possession of a firearm); *United States v. Riley*, 655 F. Supp. 2d 1298, 1304-06 (S.D. Fla. 2009) (child pornography); *United States v. Oldani*, No. 3:09-00010, 2009 WL 1770116, at \*5-6, \*8 (S.D. W. Va. June 16, 2009) (stealing from military); *United States v. Gully*, 619 F. Supp. 2d 633, 643-46 (N.D. Iowa 2009) (crack cocaine); *United States v. St. Cyr*, No. 8:08CR351, 2009 WL 1451572, at \*6-7 (D. Neb. May 18, 2009) (burglary and assault with a deadly weapon); *United States v. Urbina*, No. 06-CR-336, 2009 WL 565485, at \*2-3 (E.D. Wis. Mar. 5, 2009) (powder cocaine); *United States v. Lenagh*, No. 8:07CR346, 2009 WL 296999, at \*5 (D. Neb. Feb. 6, 2009) (health care fraud); *United States v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008) (securities fraud); *United States v. Grant*, No. 8:07CR242, 2008 WL 2485610, at \*4-8 (D. Neb. June 16, 2008) (second-degree murder); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1014-16 (D. Neb. 2008) (methamphetamine); see also *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) (affirming variance for firearms trafficking); *United States v. Gardellini*, 545 F.3d 1089, 1092 (D.C. Cir. 2008) (affirming variance for tax fraud).

14. Courts have been careful to distinguish between the concepts of “departure” and “variance.” Both denote circumstances in which a court imposes a sentence outside the prescribed Guideline range; the distinction is that a “departure” describes a situation in which a court differs from the prescribed Guideline range because of other factors or instructions *within* the Guidelines themselves, whereas a “variance” means that a court is imposing a sentence not tied to the Guideline range because of factors *outside of* the Guidelines. See, e.g., *Irizarry v. United States*, 553 U.S. 708, 714 (2008) (“‘Departure’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.”); *United States v. Jordan*, 544 F.3d 656, 671 n.12 (6th Cir. 2008) (“A sentence outside the Guidelines based on Chapter 5 of the Guidelines is a ‘departure’ or ‘Guideline departure,’ whereas a sentence outside the Guidelines based on the § 3553(a) factors is a ‘variance’ or ‘non-Guideline departure.’”); *United States v. Solis-Bermudez*, 501 F.3d 882, 884 (8th Cir. 2007) (“Since *Booker*, we have attempted to carefully distinguish between sentencing

applied policy-based *Kimbrough* variances, they have done so without analyzing or even mentioning the question of how the policy and individualized considerations interact.

The result is a jurisprudential hodgepodge in which the practical application of *Kimbrough* varies (no pun intended) from district to district. Some courts attempt to separate out the individual- and policy-based reasons that underlie Guideline variances. But most do not: Many courts merely name their policy disagreement with a Guideline as one among many factors, including factors specific to a given offender and offense, supporting a variance. Other courts express disapproval of a Guideline and announce they will afford it “less deference” than other Guidelines, without specifying what effect that determination has on a given sentence. As a result of the inconsistency in sentencing procedures around the country, defendants, lawyers, and appellate courts frequently cannot tell whether courts are exercising the full range of sentencing discretion that is now available to them. Are courts packaging policy-based concerns in the language of individualized consideration because they fear reversal under a procedurally murky Supreme Court jurisprudence in which policy-based variances are simultaneously authorized and omitted from the Court-mandated sentencing procedure? Are courts faithfully applying *Kimbrough* or sidestepping it? Of practical significance both to the ongoing development of the Guidelines themselves and to the sentencing of individual defendants, does a court’s conflation of individual- and policy-based variances produce a sentence that obscures, rather than elucidates, policy problems with the relevant Guideline, and (most concretely) yields too high or low a sentence?

In this Article, we aim both to document and to propose a solution to the tension between the scope of discretion permitted in *Kimbrough* and the failure of the *Gall* sentencing framework to identify a procedure for courts to exercise that discretion in the sentencing analysis. First, having examined *Kimbrough* sentencing decisions from around the country, we analyze how courts have wrestled with *Kimbrough* against the backdrop of other recent Supreme Court pronouncements on sentencing. Our descriptive conclusion is that courts are divided on a question most of them fail even to acknowledge, much less confront: If, as the Supreme Court has instructed, courts should make sentencing decisions by first calculating the range dictated by the Guidelines

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departures, which are provided for in [the Guidelines], and sentencing variances, which are non-Guidelines sentences based on the factors enumerated in 18 U.S.C. § 3553(a).”). Importantly, the permissible grounds for a “variance” are broader than those available within “departures” under the Guidelines. *See Irizarry*, 553 U.S. at 714-15; *see also* *United States v. Robinson*, 454 F.3d 839, 842 (8th Cir. 2006) (“There may well be cases that would not justify a departure under the Guidelines but which are appropriate for a variance. Likewise, there may be cases in which a combination of a Guidelines departure and other § 3553(a) factors may produce a lower reasonable sentence than a departure alone.”). Consistent with this understanding, we will employ the term “variance” to describe circumstances in which a sentencing court imposes a sentence outside of the Guideline range for reasons not prescribed in the Guidelines themselves.

and then varying as appropriate based on the individual characteristics of the offender, at what stage of the analysis and on what terms can a court interpose a categorical *Kimbrough* policy disagreement with the prescribed Guideline range? Unacknowledged divisions over that basic procedural question have led courts to inconsistent practices that can skew sentencing outcomes, obscure the reasons for the imposition of sentences, and minimize a critical aspect of sentencing courts' newfound discretion. We trace the origins of these divisions both to the Supreme Court's recent jurisprudence and to some of the ossified assumptions and practices left over from the pre-*Booker* era.

Second, we offer a normative prescription we hope will recommend itself to sentencing courts and to the advocates that appear before them. The first component is to urge district courts to reconcile *Kimbrough* and *Gall* by taking the approach applied by a small but growing handful of courts around the country: making room for a new step of the sentencing analysis in which policy disagreements can be considered and applied *before* individual offender characteristics are taken into account. Such a process would not only promote consistency within sentencing procedure and harmony within sentencing law, but also as a substantive matter would ensure that the parties can secure the benefits of the sentencing court's discretion along each of the dimensions the Supreme Court has identified as appropriate for judicial consideration in the new advisory-Guideline regime. In addition, encouraging judicial frankness about the bases for variance would help identify areas of the Guidelines that judges believe are in need of reform and thereby facilitate the dialogue between courts and the Commission that Congress expected when it enacted the Sentencing Reform Act of 1984,<sup>15</sup> and that the Supreme Court has hailed as a salutary by-product of the advisory-Guideline system.<sup>16</sup> The second component of our prescription is to urge appellate courts to refine the existing two-prong appellate standard of review—in which courts review advisory-Guideline sentences for compliance with *Gall* procedures and for substantive reasonableness—to build in procedural recognition of *Kimbrough* policy variances and substantive review of the bases for those variances that is both meaningful and sufficiently deferential. A revised standard will ensure that the Guidelines do not functionally revert to the mandatory operation the Supreme Court held unconstitutional in *Booker*.

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15. See, e.g., 28 U.S.C. § 994(o) (2006) (instructing Commission to “review and revise” Guidelines based on consultation with authorities on and participants in criminal justice system and “comments and data coming to its attention”); S. REP. NO. 98-225, at 80 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3263 (“The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.”); S. REP. NO. 98-225, at 151 (“[C]ase law development of the appropriate reasons for sentencing outside the guidelines . . . will assist the Sentencing Commission in refining the sentencing guidelines.”).

16. See *Rita v. United States*, 551 U.S. 338, 358 (2007); *accord Kimbrough v. United States*, 552 U.S. 85, 107 (2007).

Part II of this Article briefly sketches the history of the jurisprudence governing federal sentencing in this age of new discretion, including *Booker*, *Gall*, and *Kimbrough*. Part III sets forth our descriptive thesis about the procedural lacuna between *Kimbrough* and *Gall*, catalogues district courts' divergent responses, and explores the substantive implications of the inconsistency in sentencing practice. Part IV explains our central prescription for resolving the apparent tension between *Kimbrough* and *Gall*: We propose that courts adopt a uniform framework that explicitly recognizes the opportunity for a policy variance as an independent step in the advisory-Guideline analysis. Such a step, which has been employed by a handful of district courts but not widely adopted, should be ratified and regularized in order to ensure transparency and consistency in sentencing procedure, to promote dialogue between courts and the Sentencing Commission, and to ensure that parties have the benefit of the full range of a sentencing court's discretion. We also identify a small set of sentencing scenarios in which our proposal would prove infeasible, and we qualify our recommendations accordingly. Part V explores appellate courts' role in filling in the gap between *Kimbrough's* substance and *Gall's* procedure by suggesting how the existing appellate review standard could be applied to allow for recognition and review of *Kimbrough* policy variances under both the procedural and substantive prongs of advisory-Guideline appellate review. Part VI offers brief concluding thoughts.

It is our hope that by proposing concrete answers to the thorny questions left open by *Kimbrough*, our work can guide courts toward developing a coherent, consistent, and fair method of exercising their new and important responsibilities under *Kimbrough*.

## II. THE *KIMBROUGH* POLICY VARIANCE IN THE ADVISORY GUIDELINE SYSTEM

A brief history of the past dozen years' worth of sentencing jurisprudence is necessary to understand the contours of the current conundrum, and how the Supreme Court gave two sets of instructions on the same day, in *Kimbrough* and *Gall*, that courts are still working to reconcile nearly five years later.

### A. *The Sentencing Revolution of 2005*

The Supreme Court ushered in the modern era of sentencing law when it held in *United States v. Booker*,<sup>17</sup> in January 2005, that the United States Sentencing Guidelines' system of mandatory sentencing ranges based on judge-found facts deprived defendants of their Sixth Amendment right to a jury trial. Over the course of the previous half-dozen years, the Court had become increasingly concerned with the role of judge-found facts in sentencing and

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17. 543 U.S. 220 (2005).

determined that the issue was of constitutional magnitude. The Court first identified the problem with judicial fact-finding in *Jones v. United States*,<sup>18</sup> which held that a federal carjacking statute must be interpreted to define three separate offenses, rather than a single offense with three potential sentences triggered by aggravating factors that need not be proved to a jury.<sup>19</sup> What drove the Court's interpretation was the desire to avoid the constitutional issue that it thought might arise if the maximum penalty for a crime could depend on facts found by a judge rather than by a jury.<sup>20</sup> In *Apprendi v. New Jersey*,<sup>21</sup> the Court faced the constitutional problem squarely and overturned a conviction under a hate crime statute because the sentencing court had applied an enhanced penalty provision based on its own—not a jury's—factual finding that the crime in question was a hate crime.<sup>22</sup> *Apprendi* articulated the first version of the rule that would ultimately spell the end of the federal mandatory-Guideline system: "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."<sup>23</sup> The Court applied the same principle to the death penalty in *Ring v. Arizona*,<sup>24</sup> holding that only the jury could find the facts necessary to impose a death sentence.<sup>25</sup>

In *Harris v. United States*,<sup>26</sup> a plurality of the Court identified a limit to the Sixth Amendment logic of *Apprendi*: The Court held that the jury right applies to all facts necessary to raise the *maximum* penalty to which a defendant is exposed, but not a mandatory *minimum* penalty, because the jury's factual finding of guilt authorizes the imposition of any sentence within the prescribed statutory range.<sup>27</sup> At least one aspect of the U.S. Sentencing Guidelines, then, appeared to be safe: Congress could require judges to sentence no lower than the Guidelines dictated based on facts about the crime that judges had found. But what about cases in which judge-found facts increased the high end of the sentencing range, i.e., exposed the defendant to a higher penalty?

The Court turned to this question in 2004, when it made a major interpretive choice about the reach of the *Apprendi* principle that would in short order bring about the end of the mandatory Guideline regime. In *Blakely v. Washington*,<sup>28</sup> the Court confronted a guideline system not unlike the federal one:

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18. 526 U.S. 227 (1999).

19. *Id.* at 229.

20. *See id.* at 239-48.

21. 530 U.S. 466 (2000).

22. *See id.* at 468-69, 497.

23. *Id.* at 490.

24. 536 U.S. 584 (2002).

25. *See id.* at 609.

26. 536 U.S. 545 (2002).

27. *See id.* at 563-64 (plurality opinion).

28. 542 U.S. 296 (2004).

Washington law provided a broad statutory sentencing range for a crime and within that range directed the sentencing judge to select between different sub-ranges based on the judge's own determination of whether certain aggravating factors were present.<sup>29</sup> The defendant in *Blakely* had been convicted of kidnapping and sentenced within the higher of two sub-ranges for the offense because the judge found the defendant acted with deliberate cruelty.<sup>30</sup> The question presented was essentially this: When the *Apprendi* Court required juries to find all the facts necessary to justify the maximum punishment to which the defendant was exposed, was the Court referring to the defendant's general exposure under the statute defining the *whole sentencing range for the crime*, or to the defendant's exposure under the more specific guideline sentencing provisions that channel the defendant's sentence *into a narrower range based on the details of the crime*?

A simple example should help illustrate the import of this question and its significance for sentencing guideline schemes. Consider a hypothetical statute criminalizing armed robbery and authorizing a sentence of anywhere between 5 and 40 years in prison. Then imagine a set of sentencing guidelines, created by an administrative body, that prescribe various sub-ranges based on the details of the offense (say, 5-10 years if the defendant merely carried the gun during the robbery, 10-15 if he pointed it at someone, 15-20 if he fired, and so on). If a jury finds a defendant guilty of armed robbery, without making any subsidiary findings about whether or how the defendant used the gun, has the jury constitutionally authorized the court to sentence the defendant anywhere between 5 and 40 years? Or does the existence of the guideline system mean that, without a finding that the defendant pointed the gun or fired it, the jury's verdict justifies only a sentence within the lowest range of 5-10 years?

In *Blakely*, the Court determined that the latter reading better reflected the realities of a mandatory guideline system; accordingly, the jury's guilty verdict could authorize a sentence only within the range prescribed for the facts encompassed within that verdict, not a range requiring the finding of additional facts.<sup>31</sup> To return to our hypothetical armed robbery case, *Blakely* means that if a jury convicts a defendant of armed robbery without making any additional findings about whether or how he used a gun, the defendant's actual exposure could be only the top of the lowest guideline range, 5-10 years. The guidelines do not merely inform, but rather control, the imposition of a sentence within the broader statutory range of 5-40 years. Forty years would not be an available

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29. *See id.* at 299.

30. *See id.* at 300-01.

31. *See id.* at 303-04 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.” (citations and internal quotation marks omitted)).

sentence based on the bare conviction alone: The guidelines require the finding of additional facts for that sentence. And where additional facts are required, the Sixth Amendment, as interpreted in *Blakely*, commands that these facts be found by a jury if they are to increase a defendant's exposure to punishment.<sup>32</sup>

In this manner, *Blakely* refined the *Apprendi* rule ("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."), by adding the gloss that "statutory maximum" means the "maximum [the judge] may impose without any additional findings."<sup>33</sup>

From this conclusion, the invalidity of the U.S. Sentencing Guidelines—which entailed a similar system of mandatory ranges determined by factual offense-conduct details found by judges not juries—quickly followed in *United States v. Booker*.<sup>34</sup> Under the U.S. Sentencing Guidelines, of course, just like the sentencing scheme at issue in *Blakely* (and our hypothetical armed robbery statute), the sentencing range depends on details about the offense found as facts by the judge, not the jury.<sup>35</sup> *Booker* reaffirmed the *Apprendi-Blakely* rule that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."<sup>36</sup> The Court therefore held that sentences imposed under the mandatory federal Sentencing Guidelines were unconstitutional.<sup>37</sup>

Whereas the interpretive move in *Blakely* made *Booker's* constitutional holding all but inevitable,<sup>38</sup> the remedy for the constitutionally defective Guidelines was anything but clear. The five-justice majority (Justices Stevens, Scalia, Souter, Thomas, and Ginsburg) that had decided *Apprendi*, *Ring*, *Blakely*, and the substantive aspect of *Booker*, broke apart, leading to the division of the *Booker* opinion itself. What has come to be known as the constitutional or substantive opinion of *Booker*, delivered by Justice Stevens for the *Apprendi* majority, announced the foreshadowed, but nonetheless momentous, conclusion that the U.S. Sentencing Guidelines were constitutionally defective. The second half of the opinion, which has come to be known as the *Booker* remedial opinion, was delivered by Justice Breyer, one of the original architects of the Sentencing Guidelines and a persistent

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32. See *Blakely*, 542 U.S. at 303-04; see also *id.* at 313 ("[E]very defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

33. See *id.* at 303.

34. 543 U.S. 220 (2005).

35. See *id.* at 235. Under the Guidelines, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 305 (2004)).

36. *Id.* at 244.

37. See *id.* at 226, 244.

38. See *Booker*, 543 U.S. at 233; see also *Blakely v. Washington*, 542 U.S. 296, 325 (2004) (O'Connor, J., dissenting).

opponent of the *Apprendi* majority. Justice Ginsburg was the only member of the Court to join both opinions.

The remedial opinion began by recognizing that the constitutional defect in the Sentencing Guidelines arose out of the confluence of two characteristics of the Guidelines: first, that myriad Guideline provisions permitted the use of judge-found facts to increase the maximum applicable penalty; and second, that the Guidelines system was mandatory, making the findings of the judge dispositive regarding which sentencing range applied and therefore what penalty the defendant faced.<sup>39</sup> Fixing the first problem would have required fundamentally distorting amendments to, or complete nullification of, the Guideline system.<sup>40</sup> But fixing the second problem was relatively easy. The Court saw that excising just two provisions of the Guidelines—18 U.S.C. § 3553(b) (*requiring* judges to impose Guideline sentences) and 18 U.S.C. § 3742(e) (setting forth the appellate standard of review for departures from Guidelines sentences)—and thus rendering the Guidelines advisory rather than mandatory, would solve the constitutional problem without entirely eliminating the Guidelines and erasing the Commission’s twenty years’ worth of work on federal sentencing ranges.<sup>41</sup>

This fix solved the problem in the following manner: As long as the Guidelines were not binding, the maximum penalties a defendant faced would ultimately be those set by the federal statute defining the crime, rather than the Guideline ranges whose applicability depended on facts found by the judge. Therefore the judge-found facts would not increase a defendant’s *maximum exposure*, only influence the judge’s *discretion* to sentence him within the broader statutory range set by Congress for a crime admitted or proven to a jury beyond a reasonable doubt.<sup>42</sup> The Court determined that the Guidelines must be treated as advisory in all cases, whether judicial fact finding would result in a Sixth Amendment violation or not, to avoid administrative complexities and unwarranted disparities that Congress would not have intended.<sup>43</sup>

What was left after *Booker*, therefore, was a system of advisory Guidelines in which judges retained ultimate authority to sentence an offender anywhere within the statutory sentencing range, with judicial discretion to be exercised by reference to a statutory framework including, but not limited to, the Guideline range. The factors to be considered, as prescribed by a key provision of the federal criminal sentencing statute, 18 U.S.C. § 3553(a), were: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense,

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39. *See Booker*, 543 U.S. at 232-33.

40. *See United States v. Booker*, 543 U.S. 220, 252, 263-64 (2005).

41. *See id.* at 258-64.

42. *See id.* at 233 (explaining why advisory Guidelines system constitutional).

43. *See id.* at 266.

deter criminal conduct by others, protect the public, and rehabilitate the defendant; (3) the kinds of sentences available; (4) the prescribed Guideline sentence; (5) policy statements of the Sentencing Commission; (6) the need to avoid unwarranted disparities among similar defendants found guilty of similar conduct; and (7) the need to provide restitution to victims of the offense.<sup>44</sup> The sentences imposed by district courts under the new regime would be reviewed by appellate courts for reasonableness.<sup>45</sup>

### B. Booker's Implications: Rita, Gall, and Kimbrough

*Booker* gave courts some direction but hardly a clear roadmap. Mandatory Guideline sentencing was out. The seven factors of 18 U.S.C. § 3553(a) (§ 3553 factors) were in. But just how advisory were the Guidelines? Could a judge reject the Guideline range entirely? If so, for what reasons? Conversely, could appellate courts attach a presumption of reasonableness to a within-Guideline sentence? How about a presumption of *unreasonableness* to a sentence *outside* of the Guidelines? The Supreme Court began to turn to these questions in a series of decisions in 2007.

First, in *Rita v. United States*,<sup>46</sup> the Court considered the permissibility of an appellate presumption that a within-Guideline system is a reasonable one for the purpose of the appellate review prescribed in *Booker*.<sup>47</sup> Several of the Justices found themselves uneasy with the presumption for a spectrum of reasons. Justice Souter feared (justifiably, it appears) that the Guidelines would continue to exert a “gravitational” force that would encourage district courts to follow them and thereby bring about a *de facto* return to the mandatory system *Booker* was supposed to have fixed.<sup>48</sup> Justices Scalia and Thomas did not believe that appellate review for substantive reasonableness was consistent with the holding in *Booker* in the first place, because some sentences could be upheld as reasonable only in light of facts found by the district judge, and thus once again a judge would find the facts necessary to impose the higher sentence.<sup>49</sup> Nonetheless, the Court approved the presumption of reasonableness

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44. See *Booker*, 543 U.S. at 259-60 (citing 18 U.S.C. § 3553).

45. See *id.* at 261.

46. 551 U.S. 338 (2007).

47. See *id.* at 341.

48. See *id.* at 390 (Souter, J., dissenting). Statistics from the Sentencing Commission indicate that in the fiscal year October 1, 2009 through September 30, 2010—five years after *Booker*—approximately eighty percent of sentences imposed either fell within the Guideline range or fell below the Guideline range only because of government-sponsored departures. See U.S. SENTENCING COMM’N, PRELIMINARY Q. DATA REP. 1 (2010), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2010\\_Quarter\\_Report\\_Final.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_Final.pdf); see also Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 589 (2009) (noting that Guidelines, though advisory, “continue to be very influential” and “most courts continue to sentence within or close to the Guidelines”).

49. See *Rita*, 551 U.S. at 369-70 (Scalia, J., concurring).

based on several key qualifying assumptions.<sup>50</sup> The presumption is permissible, according to the Court, because it is not binding on the appellate court, has no independent legal effect, cannot be treated as a presumption of unreasonableness for a *non*-Guideline sentence, and cannot be applied by a sentencing judge (only by an appellate court).<sup>51</sup> According to the Court, a within-Guideline sentence merely reflects a convergence of the Sentencing Commission's and district judge's independent determinations about the appropriate sentence and this "double determination significantly increases the likelihood that the sentence is a reasonable one."<sup>52</sup>

An important premise underlying the Court's tolerance of this appellate presumption of reasonableness was the likely reliability of the work of the Sentencing Commission. According to the Court, the Commission's "empirical approach" to setting the Guidelines "begin[s] with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like."<sup>53</sup> Additionally, in the Court's view, "[t]he Commission's work is ongoing."<sup>54</sup> The Court described in detail its vision of a Commission in continuous dialogue with the courts and lawyers that must apply its Guidelines:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.<sup>55</sup>

Integral, then, to the Supreme Court's understanding of and respect for the work of the Commission was that body's capacity to promulgate Guidelines based on empirical evidence and to revise the Guidelines in response to judicial feedback as the Guidelines are applied.

Several months after *Rita*, in *Gall v. United States*,<sup>56</sup> the Court considered whether appellate courts could apply the inverse of the presumption approved

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50. *See id.* at 347 (majority opinion).

51. *See id.* at 347, 350, 351, 354-55.

52. *Rita v. United States*, 551 U.S. 338, 347 (2007).

53. *Id.* at 349.

54. *Id.* at 350.

55. *Id.*

56. 552 U.S. 38 (2007).

in *Rita*—that is, whether courts could presume that a sentence *outside* of the Guidelines is *unreasonable*. The Court held that such a presumption is impermissible and that a court of appeals cannot not require “extraordinary circumstances” to justify a variance from the Guideline.<sup>57</sup> The Court noted that “[e]ven the Government has acknowledged that such a presumption [of unreasonableness] would not be consistent with *Booker*.”<sup>58</sup> It is not hard to see why: A presumption of unreasonableness for sentences outside the Guidelines would strongly discourage courts from using their *Booker* discretion to vary and would thus create the de facto mandatory system that Justice Souter, dissenting in *Rita*, had feared<sup>59</sup> (a concern echoed by Justice Scalia, in a concurring opinion in *Kimbrough*, on the day *Gall* was decided<sup>60</sup>). Dispensing with the appellate court’s presumption of unreasonableness, the Court found the sentence at issue in *Gall*—a probationary sentence for a drug conspirator—reasonable under the § 3553 factors because of the defendant’s withdrawal from the conspiracy and self-motivated rehabilitation thereafter.<sup>61</sup>

*Gall*’s central holding was not its only—or even its most influential—contribution to the still-developing body of post-*Booker* sentencing jurisprudence. Just as important as what *Gall* forbade (a presumption of unreasonableness for a non-Guideline sentence and an “extraordinary circumstances” requirement to overcome that presumption) was what *Gall* prescribed: a clearly delineated procedure for sentencing courts to follow when imposing a sentence under the advisory Guidelines.<sup>62</sup> *Gall* made clear that the heart of the court’s job at sentencing consists of two discrete analytical tasks: First, the court must correctly calculate the advisory Guideline range, which (though not binding) serves as “the starting point and initial benchmark”; and second, the court must apply the § 3553 factors to the individual offender in order to arrive at a sentence, which must be “adequately explain[ed]” by the court “to allow for meaningful appellate review and to promote the perception of fair sentencing.”<sup>63</sup> Lower courts have subsequently characterized this procedure as involving various numbers of steps (depending on whether the granting of opportunities for the parties to argue and the consideration of those arguments count as “steps”).<sup>64</sup> But no court has understood *Gall* as instructing

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57. *See id.* at 47.

58. *Id.*

59. *See Rita v. United States*, 551 U.S. 338, 390 (2007) (Souter, J., dissenting).

60. *See Kimbrough v. United States*, 552 U.S. 85, 113-14 (2007) (Scalia, J., concurring) (“If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court’s application of the § 3553(a) factors is entirely reasonable; then the ‘advisory’ Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.”).

61. *See Gall v. United States*, 552 U.S. 38, 56-59 (2007).

62. *See id.* at 47, 49-50.

63. *Id.* at 49-50.

64. *See, e.g., United States v. Arrelucea-Zamudio*, 581 F.3d 142, 146 (3d Cir. 2009) (three-step process,

district courts to undertake more than two *analytical tasks*, nor have courts disagreed about what those tasks entail. The *Gall* court thus offered sentencing judges clear instruction about both the continuing significance of the Guidelines (an advisory starting point) as well as how to avoid treating them as mandatory (application of the § 3553 factors).

On the same day as *Gall*, in *Kimbrough v. United States*,<sup>65</sup> the Supreme Court identified another dimension of sentencing courts' post-*Booker* discretion: Courts are free to disagree with a Guideline sentence prescribed for an offender not only, as *Gall* explained, because of the nature of the offender and that individual's conduct, but also because of the nature of particular Guidelines themselves.<sup>66</sup> *Kimbrough* involved the 100:1 "crack/powder disparity"—a term referring to the provisions of law, enacted as part of the Anti-Drug Abuse Act of 1986<sup>67</sup> and in effect until revision by the Fair Sentencing Act of 2010,<sup>68</sup> treating 5 grams of crack cocaine (cocaine base) the same as 500 grams of powder cocaine for the purpose of triggering a mandatory-minimum sentence.<sup>69</sup> (The Fair Sentencing Act reduced the disparity to 18:1 following decades of judicial, political, and scholarly criticism.<sup>70</sup>) The 100:1 disparity, though reflected in only two sets of statutory

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middle step of which is to "formally rule on the motions of both parties and state on the record whether [the court is] granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force"); *United States v. Bolds*, 511 F.3d 568, 579-80 (6th Cir. 2007) (three-step process, in which second step includes "[giving] both parties opportunity to argue for whatever sentence they deem appropriate" along with consideration of the § 3553 factors, and third step is "impos[ing] a sentence and . . . explain[ing] [the] reasons for selecting the sentence imposed"); see also *United States v. Stern*, 590 F. Supp. 2d 945, 948 n.3 (N.D. Ohio 2008) (observing that various courts describe the process in two, three, or four steps); cf. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 57-58 (2011) (prepared testimony of Judge Patti B. Saris, Chair, U.S. Sentencing Commission) (three-step process, middle step of which is to rule on Guideline departures as distinct from rest of Guideline calculation).

65. 552 U.S. 85 (2007).

66. See *id.* at 108-10. This holding was foreshadowed in dicta in *Rita v. United States*, 551 U.S. 338, 351 (2007).

67. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (1986).

68. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2(a), 4(a), 124 Stat. 2372 (2010).

69. Compare 21 U.S.C. § 841(b)(1)(B)(ii)(II) (2006 & Supp. 2009) (penalty for 500 grams of cocaine), with 21 U.S.C. § 841(b)(1)(B)(iii) (2006 & Supp. 2009) (penalty for five grams of crack).

70. See 21 U.S.C. § 841(b)(1)(A)(iii) (2006 & Supp. 2011) (applying same penalty to 280 grams of crack as to 5000 grams of powder); 21 U.S.C. § 841(b)(1)(B)(iii) (2006 & Supp. 2011) (applying same penalty to 28 grams of crack as to 500 grams of powder). For a small sampling of judicial criticism of the 100:1 ratio over the years, see *United States v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (noting that "crack cocaine is the only drug for which such harsh penalties are imposed on low-level offenders" and that "high penalties for relatively small amounts of crack cocaine divert federal resources away from high-level traffickers toward low-level dealers"); *United States v. Petersen*, 143 F. Supp. 2d 569, 580 (E.D. Va. 2001) ("Congress has not altered the 100 to 1 ratio, notwithstanding its knowledge that the ratio is having a disparate impact based on the suspect classification of race . . ."); *United States v. McMurray*, 833 F. Supp. 1454, 1463 (D. Neb. 1993) ("A by-product of this inordinate disparity [between crack and powder sentences] is that members of the African American race are being treated unfairly in receiving substantially longer sentences than caucasian

mandatory minimums (one at the quantity threshold of 5 grams of crack or 500 grams of powder, the other at the threshold of 50 grams of crack or 5000 grams of powder<sup>71</sup>), was extrapolated by the Sentencing Commission to all other quantities of powder and crack cocaine.<sup>72</sup> The issue in *Kimbrough* was whether a sentencing court could vary from the Guidelines based on a policy disagreement with the 100:1 ratio.<sup>73</sup> The Supreme Court answered this question in the affirmative, explaining that a sentencing court could vary from the Guidelines for this reason alone, even in a mine-run case (an average case with no distinguishing circumstances or offender characteristics bearing on

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males who traditionally deal in powder cocaine, and this disparity simply is not justified by the evidence.” (citation omitted)).

For political criticism, see *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Judiciary Comm.*, 111<sup>th</sup> Cong. (Apr. 29, 2009) (statement of Sen. Patrick Leahy, Chair, S. Judiciary Comm.), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da147afe1&wit\\_id=e655f9e2809e5476862f735da147afe1-0-1](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da147afe1&wit_id=e655f9e2809e5476862f735da147afe1-0-1) (“We know that there is little or no pharmacological distinction between crack and powder cocaine, yet the resulting punishments for these offenses is radically different and the resulting impact on minorities has been particularly unjust.”); Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Prepared Remarks at the D.C. Court of Appeals Judicial Conference (June 19, 2009), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090619.html> (“It is the view of this Administration that the 100-to-1 crack/powder sentencing ratio is simply wrong. It is plainly unjust to hand down wildly disparate prison sentences for materially similar crimes.”); U.S. SENTENCING COMM’N, REPORT TO CONG.: COCAINE AND FEDERAL SENTENCING POLICY 103 (May 2002), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) (noting that 100:1 ratio “fosters disrespect for and lack of confidence in the criminal justice system” because of perceived racial disparity); *Jeff Sessions: “We’re Going to Do That Crack Cocaine Thing,”* HUFFINGTON POST (Aug. 16, 2009), [http://www.huffingtonpost.com/2009/07/16/jeff-sessions-were-going\\_n\\_236326.html](http://www.huffingtonpost.com/2009/07/16/jeff-sessions-were-going_n_236326.html) (“We’re going to reduce the burden of penalties in some of the crack cocaine cases and make them fair.”).

For scholarly criticism, see Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines’ Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994); Samuel L. Myers, *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?* 64 U. COLO. L. REV. 781, 789-90 (1993); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

For a comprehensive critique of Congress’s decision in 2010 to replace the 100:1 ratio with an 18:1 ratio, instead of eliminating the crack/powder disparity entirely, see *United States v. Williams*, 788 F. Supp. 2d 847, 866-90 (N.D. Iowa 2011). As Judge Bennett explained in that decision, “whatever new information Congress had or new investigation Congress did appear to support complete elimination of the 100:1 disparity. Only political compromise resulted in the passage of the 18:1 ratio, for which no specific justification can be found in the legislative history.” *Id.* at 879.

71. Compare 21 U.S.C. § 841(b)(1)(B)(ii)(II) (2006 & Supp. 2009) (5-year mandatory minimum for 500 grams of cocaine), with 21 U.S.C. § 841(b)(1)(B)(iii) (2006 & Supp. 2009) (5-year mandatory minimum for 5 grams of crack); compare 21 U.S.C. § 841(b)(1)(A)(ii)(II) (2006 & Supp. 2009) (10-year mandatory minimum for 5 kilograms, i.e. 5000 grams of cocaine), with 21 U.S.C. § 841(b)(1)(A)(iii) (2006 & Supp. 2009) (10-year mandatory minimum for 50 grams of crack).

72. See *Kimbrough v. United States*, 552 U.S. 85, 97 (2007) (noting that the Guidelines “go further” than the statutory mandatory minimums “and set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio” (citation and internal quotation marks omitted)).

73. See *id.* at 91.

sentencing).<sup>74</sup>

The Court began by reciting at length the troubled history of the 100:1 ratio, including its original establishment by Congress in mandatory minimum statutes applicable to two sets of particular quantity thresholds, the Commission's extrapolation of all sentencing ranges for all other quantities of cocaine from that ratio, racial disparities in the resulting sentences, mounting criticism of the ratio by district judges and others, Commission efforts at reform and their obstruction by Congress, eventual congressional acceptance of halting steps toward reform, and then, post-*Booker*, district judges' decisions to use their newfound discretion to depart from the 100:1 ratio entirely.<sup>75</sup> Of critical importance to the Court's analysis was the fact that the Guidelines reflecting the disparity were not a product of the "empirical approach" the Court had lauded in *Rita* but rather were the product of a simple mathematical extension of the ratio from the two mandatory minimum thresholds set by Congress to all other quantities of cocaine.<sup>76</sup> Echoing its characterization of the Commission's function from *Rita*, the Court noted that Congress had established the Commission "to formulate and constantly refine national sentencing standards," taking advantage of an institutional capacity "to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."<sup>77</sup> Because the Commission, in formulating the crack Guidelines, had eschewed "empirical data and national experience" in favor of a mere mathematical extension of a ratio found in a handful of mandatory minimums, the Court found that these Guidelines did not "exemplify the Commission's exercise of its characteristic institutional role."<sup>78</sup> Therefore it would not be an abuse of discretion, the Court held, for a district court "to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."<sup>79</sup>

The Court also expressly rejected the government's argument that 18 U.S.C. § 3553(a)(6), which directs sentencing courts to consider the need to avoid unwarranted disparities, foreclosed discretion to vary from 100:1-ratio Guidelines because of the risk that different judges would exercise that discretion differently; the "proper solution is not to treat the crack/powder ratio as mandatory," the Court explained, but for district courts to balance various types of disparity (including disparities in sentencing among different courts) with other § 3553 factors and "any unwarranted disparity created by the

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74. *See id.* at 109-10.

75. *See id.* at 94-100.

76. *See Kimbrough*, 552 U.S. at 96-97.

77. *Id.* at 108-09 (citation and internal quotation marks omitted).

78. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

79. *Id.* at 110 (quoting 18 U.S.C. § 3553(a)).

crack/powder ratio itself.”<sup>80</sup> “[O]ngoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”<sup>81</sup> Having thus identified the Guidelines themselves as the source of unwarranted disparity and implied that variance, as opposed to strict adherence, could more effectively carry out the sentencing court’s role after *Booker*, the Court in *Kimbrough* approved the district court’s rejection of the 100:1 ratio and variance from it in Derrick Kimbrough’s case.<sup>82</sup> The Court thereby opened the door for courts to express policy disagreements and vary in any crack cocaine case, and indeed any case involving a Guideline that did not “exemplify the Commission’s exercise of its characteristic institutional role.”<sup>83</sup>

Substantively, then, *Gall* and *Kimbrough* are nicely complimentary: *Gall* affirmed district courts’ latitude in applying offender-based variances from the Guidelines, and *Kimbrough* recognized district courts’ authority to apply categorical, policy-based variances as well. The *Gall* court even made the explicit suggestion that policy-based variances beyond the crack cocaine context would be warranted: The Court noted that “not all of the Guidelines are tied to . . . empirical evidence” of the type *Kimbrough* found necessary for the Commission to act in its institutional role, and—putting an even finer point on the matter—the Court declared, without qualification, that “the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses.”<sup>84</sup> In principle, the paired pillars of judicial discretion, in both retail (*Gall*) and wholesale (*Kimbrough*) forms are consistent, both with each other and with *Booker*’s rejection of a mandatory guideline system as the remedy for the Sixth Amendment violation created by a regime of escalating sentencing ranges based on judge-found facts.

But in practice, it has not been clear how the mandates of *Gall* and *Kimbrough* fit together. In fact, the two cases leave a procedural gap that has significant substantive consequences. The remainder of this Article explores the source of this procedural gap and its significance in sentencing practice, and then recommends a structure for dealing with the apparent tension between the two cases while maintaining fidelity both to the advisory Guideline regime instituted by *Booker* and fleshed out by *Gall*, and the principle of policy-based judicial discretion embodied in *Kimbrough*.

### III. DISTRICT COURTS’ RESPONSES TO *KIMBROUGH* AND *GALL*

Despite their compatibility about the *substance* of sentencing discretion, *Kimbrough* and *Gall* seemed to be—remarkably for decisions issued on the

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80. *Id.* at 108.

81. *Id.* at 107 (internal citation omitted).

82. See *Kimbrough*, 552 U.S. at 110-11.

83. *Id.* at 109.

84. *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007).

same day—talking past each other in terms of sentencing *procedure*. *Gall* instructed sentencing courts to take two analytical steps at sentencing: (1) correctly calculate the range prescribed by the Guidelines, and (2) apply the § 3553 factors to the individual offender.<sup>85</sup> *Kimbrough*, meanwhile, invited sentencing courts to do something else altogether: reject the prescribed Guideline range itself as unsound. Certainly this is no part of the first step of *Gall*, i.e., the calculation of the prescribed range; in fact, *Kimbrough* permits district courts to nullify or discount the product of that first step. Nor, it would seem, is the application of a policy disagreement a subset of the second step of *Gall*: Under *Gall*, a judge applies the § 3553 factors to the individual offender, whereas *Kimbrough* permits courts to reject or discount a Guideline range on a categorical basis, applicable to any defendant. So, after *Kimbrough* and *Gall*, courts could exercise their discretion to reject Guideline ranges for both individualized and categorical reasons, but it was unclear how the exercise of the second type of discretion fit into the sentencing analysis.

The Supreme Court's most recent discussion of the contours of policy variances, in *Spears v. United States*,<sup>86</sup> helped clarify the contours of *Kimbrough* but did not fill in the procedural gap between *Gall* and *Kimbrough*. In *Spears*, the Court considered whether a district court could, under *Kimbrough*, not only reject the 100:1 crack/powder ratio but also substitute a ratio of its own choosing.<sup>87</sup> The Court found that the permissibility of such a practice followed *a fortiori* from *Kimbrough*:

A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio.<sup>88</sup>

Acknowledging that *Kimbrough* might have sent a signal to the contrary by noting approvingly that the district court in that case had not specified a replacement ratio, the Court in *Spears* disavowed the implication that a replacement ratio was impermissible.<sup>89</sup> Importantly, one of the key policy reasons the Court cited in support of courts' ability to select a replacement ratio

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85. As mentioned above, appellate courts often characterize this procedure as containing more than two steps, because they count as "steps" such tasks as hearing and ruling on arguments from the parties, considering the applicable law, and stating the reasons for the court's conclusions. See *supra* note 64 and accompanying text. We believe that the process prescribed in *Gall* is best characterized as involving two *analytical* steps: (1) the determination of the prescribed Guideline range, and (2) the application of the § 3553 factors.

86. 555 U.S. 261 (2009) (per curiam).

87. See *id.* at 262-63.

88. *Id.* at 265.

89. See *id.* at 265-66.

was the importance of avoiding a circumstance in which courts would vary from the Guidelines but “mask[] their categorical policy disagreements as ‘individualized determinations’”—a practice the Court denounced as “institutionalized subterfuge.”<sup>90</sup> The Court thus simultaneously reaffirmed the categorical discretion afforded in *Kimbrough* and reiterated the importance of the type of transparent and reviewable sentencing process laid out in *Gall*. Yet the Court never explained how or when *Kimbrough* discretion was to be exercised within the *Gall* framework.

That question has continued to divide sentencing courts. The remainder of this Part will examine courts’ divergent approaches to applying *Kimbrough* in light of the *Gall* procedural framework.

### A. Courts’ Divergent Approaches to Policy-Variance Procedure

The procedural gap between *Gall* and *Kimbrough* has led sentencing courts to take differing approaches when applying policy disagreements, both before and after *Spears*. At least three approaches can be identified.

The most common approach is to mix a *Kimbrough* policy disagreement with all of the other § 3553 factors at the second step of the *Gall* analysis. Many courts correctly calculate the Guideline sentence as required by the first step of the *Gall* process, then move on to analyze all reasons for variance at the second stage, rolling together all such justifications—including a *Kimbrough* policy disagreement—and then announcing a sentence meant to reflect all of the justifications named.<sup>91</sup> Typical of such decisions is the practice of listing a series of considerations related to the individual offender, discussing a categorical flaw in the applicable Guideline, and then concluding with a statement such as: “Accordingly, for the reasons stated above and on the record at the . . . sentencing hearing, the Court determines that a sentence of 90 months’ imprisonment is sufficient, but not greater than necessary to advance the goals of sentencing under [18 U.S.C. § 3553],”<sup>92</sup> or “For the reasons set forth above, based upon those factors, I conclude that a sentence of sixty

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90. *Spears*, 555 U.S. at 266.

91. See, e.g., *United States v. Price*, No. 09-CR-30107, 2012 WL 966971, at \*10-13 (C.D. Ill. Mar. 21, 2012) (child pornography); *United States v. Evans*, No. 08-CR-172, 2010 WL 2287054, at \*2-4 (E.D. Wis. June 7, 2010) (crack); *United States v. Fogle*, 694 F. Supp. 2d 1014, 1017-19 (E.D. Wis. 2010) (felon in possession of a firearm); *United States v. Riley*, 655 F. Supp. 2d 1298, 1304-06 (S.D. Fla. 2009) (child pornography); *United States v. Stern*, 590 F. Supp. 2d 945, 951-63 (N.D. Ohio 2008) (child pornography); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1014-16 (D. Neb. 2008) (methamphetamine); *United States v. Ontiveros*, No. 07-CR-333, 2008 WL 2937539, at \*2-8 (E.D. Wis. July 24, 2008) (child pornography); *United States v. Neal*, No. 1:07-CR-60, 2008 WL 724790, at \*7-8 (W.D. Mich. Mar. 14, 2008) (crack).

92. *Neal*, 2008 WL 724790, at \*8 (imposing sentence approximately one-third of median sentence recommended by Guidelines, after citing small quantity of crack involved in particular transactions, defendant’s age, relatively minor nature of defendant’s criminal history, and harshness of 100:1 crack/powder disparity).

months . . . is sufficient but not greater than necessary,”<sup>93</sup> or “[u]nder all the circumstances, I found a sentence of 24 months sufficient but not greater than necessary.”<sup>94</sup>

A second category of cases, a close cousin of the first, includes those decisions in which a court stops short of expressing a policy disagreement with the relevant Guideline but affords it “less deference” than it would other Guidelines, en route to a sentence justified by some amorphous blend of the individualized circumstances of the offender and the lack of “deference” afforded to the Guideline.<sup>95</sup> Although this second approach seems hard to distinguish from the first functionally, because both types of cases involve a variance that is based in unspecified proportions on a policy disagreement with the Guideline and on the circumstances of the individual defendant, courts have suggested that these two types of cases differ in the degree to which they indicate a wholesale rejection of a Guideline.<sup>96</sup>

Inherent in both the first (blending Guideline policy disagreements with individualized factors) and second (affording the Guidelines “less deference” on policy grounds as courts consider individualized factors) approaches is the premise that *Kimbrough*-based policy variances and variances based on individualized offender and offense characteristics are to be considered together. Epitomizing this view, one court taking the “less deference” approach blended the two types of variances completely, explaining that it

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93. *Ontiveros*, 2008 WL 2937539, at \*8 (imposing sentence just over half median sentence recommended by Guidelines after discussing defendant’s voluntary deletion of pornographic images, cooperation with police, and lack of criminal history, along with court’s policy disagreement with child pornography Guidelines).

94. *Evans*, 2010 WL 2287054, at \*4 (imposing sentence equal to half Guideline-recommended sentence, after discussing defendant’s strong family ties but also his attempt to mislead pretrial services regarding his employment, and considering fact that sentencing range would have been 24-30 months if defendant had committed powder cocaine rather than crack offense).

95. *See, e.g.*, *United States v. Schinbeckler*, No. 1:09-CR-77, 2011 WL 4537907, at \*5-9 (N.D. Ind. Sep. 29, 2011) (child pornography); *United States v. Urbina*, No. 06-CR-336, 2009 WL 565485, at \*2-3 (E.D. Wis. Mar. 5, 2009) (powder cocaine); *United States v. McElheney*, 630 F. Supp. 2d 886, 901 (E.D. Tenn. 2009) (child pornography); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1043 (E.D. Wis. 2009) (child pornography); *United States v. Pahua-Martinez*, Nos. 8:08-CR-415 & 8:09-CR-40, 2009 WL 2003241, at \*7 (D. Neb. July 2, 2009) (illegal reentry); *United States v. St. Cyr*, No. 8:08CR351, 2009 WL 1451572, at \*6-7 (D. Neb. May 18, 2009) (burglary and assault with a deadly weapon); *United States v. Lenagh*, No. 8:07CR346, 2009 WL 296999, at \*5 (D. Neb. Feb. 6, 2009) (health care fraud); *United States v. Shipley*, 560 F. Supp. 2d 739, 743-46 (S.D. Iowa 2008) (child pornography); *United States v. Grant*, No. 8:07-CR-242, 2008 WL 2485610, at \*4-8 (D. Neb. June 16, 2008) (second-degree murder).

96. *See, e.g.*, *United States v. Cameron*, No. 1:09-CR-00024, 2011 WL 890502, at \*6 (D. Me. Mar. 11, 2011) (“This Court joins other courts which have expressed unease with § 2G2.2 and the escalating impact of its enhancements. At the same time, it notes that judicial criticism has not resulted in a wholesale rejection of the guideline ranges for the appropriate case. . . . [This Court will] proceed to the § 3553(a) analysis, aware of the guideline sentence and the Court’s view that the guideline sentence enhancements in § 2G2.2 are flawed. . . .”); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D. W. Va. 2009) (noting distinction between courts that have “categorically rejected” child pornography Guideline and those that have “recognize[d] that it is due less weight than empirically based Guidelines”; court joined latter camp despite being “tempted to join those courts that have categorically rejected” Guideline).

“could not conclude that *under the circumstances of this case*, given *all the flaws in the guideline* discussed above, that the range deserved deference.”<sup>97</sup>

One sentencing court—perhaps the only court to reference explicitly any *Kimbrough-Gall* tension—opined, en route to affording “less deference” to the child pornography Guideline, that “*Kimbrough* . . . leaves unaltered the steps to be taken by the sentencing court: after calculating and considering the advisory guidelines range the court must address the relevant § 3553(a) factors.”<sup>98</sup>

Opposed to this view are a handful of courts that conduct a *Kimbrough* variance analysis and determine a new sentencing range *before* considering individualized factors—essentially creating an intermediate analytic step between the two identified in *Gall*.<sup>99</sup> In these cases, courts tend to be more explicit about naming their methodology than the courts that do not separate policy and individualized considerations,<sup>100</sup> although there are a number of decisions in which the choice to separate is not a subject of discussion.<sup>101</sup> Only one judge, Mark W. Bennett of the Northern District of Iowa, has undertaken to discuss *and justify* his choice of the intermediate *Kimbrough* step. In *United States v. Gully*,<sup>102</sup> Judge Bennett explained the importance of the extra step this way:

[W]hether a defendant is an Eagle Scout or a street thug is irrelevant to the determination of the appropriate crack-to-powder ratio in a particular case, because the ratio should not be a proxy for factors that should properly be considered separately pursuant to 18 U.S.C. § 3553(a). Moreover, [combining individualized factors with policy considerations] . . . would rob sentencing in

97. *United States v. Hanson*, 561 F. Supp. 2d 1004, 1011 (E.D. Wis. 2008) (emphasis added).

98. *United States v. Grober*, 595 F. Supp. 2d 382 (D.N.J. 2008).

99. *See, e.g.*, *United States v. Escolastico-Pena*, No. 11 Cr. 81-01, 2011 WL 4448956, at \*6 (S.D.N.Y. Sep. 26, 2011) (illegal reentry); *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at \*1-5 (S.D.N.Y. May 19, 2011) (ecstasy); *United States v. Greer*, 699 F. Supp. 2d 876, 880 (E.D. Tex. 2010) (crack); *United States v. Edwards*, 693 F. Supp. 2d 575, 582-84 (S.D. W. Va. 2010) (crack); *United States v. Tews*, No. 09-CR-309, 2010 WL 1608951, at \*4-5 (E.D. Wis. Apr. 20, 2010) (child pornography); *United States v. Williams*, No. 09-CR-30099, 2010 WL 1325229, at \*8 (S.D. Ill. Mar. 30, 2010) (crack); *Henderson v. United States*, 660 F. Supp. 2d 751, 753-54 (E.D. La. 2009) (crack); *United States v. Lewis*, 623 F. Supp. 2d 42, 47 (D.D.C. 2009) (crack); *United States v. Gully*, 619 F. Supp. 2d 633, 643-46 (N.D. Iowa 2009) (crack); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1107-08 (N.D. Iowa 2009) (child pornography); *United States v. Owens*, Crim. No. 08-48, 2009 WL 2485842, at \*3-\*4 (W.D. Pa. Aug. 12, 2009) (crack); *United States v. Luck*, No. 3:04-CR-00047-06, at \*2 (W.D. Va. Aug. 10, 2009) (crack); *United States v. Oldani*, No. 3:09-00010, 2009 WL 1770116, at \*5-6, \*8 (S.D. W. Va. June 16, 2009) (stealing from the military); *United States v. Dozier*, No. S1 08 Cr. 08-02, 2009 WL 1286486, at \*6-7 (S.D.N.Y. May 8, 2009) (crack); *United States v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464, at \*1-3 (N.D. Ill. Feb. 17, 2009).

100. *See, e.g.*, *Lewis*, 623 F. Supp. 2d at 47 (enumerating steps of analysis, including “calculat[ing] an alternative sentencing range” before considering “relevant factors set forth in 18 U.S.C. § 3553(a) as they apply to the individual defendant”); *Owens*, 2009 WL 2485842, at \*3.

101. *See, e.g.*, *McCarthy*, 2011 WL 1991146, at \*1; *Tews*, 2010 WL 1608951, at \*4-5; *Dozier*, 2009 WL 1286486, at \*6-7; *Edwards*, 693 F. Supp. 2d at 582-84.

102. 619 F. Supp. 2d 633 (N.D. Iowa 2009).

“crack” cases of any predictability or uniformity whatsoever, because it would be unclear what ratio would be applicable in any particular case. . . . [A] sentencing scheme that requires a sentencing court to make a “seat-of-the-pants judgment in each mine-run case about how much to vary from the advisory guidelines based solely on the ‘crack/powder disparity’” does not advance the goal of a reasoned sentencing process, in either honesty, uniformity, or transparency.<sup>103</sup>

None of the courts applying different methodologies has offered a competing theory in support of mixing individualized and policy considerations.

To the extent appellate courts have spoken to *Kimbrough*'s place in the *Gall* framework, they have done so only incidentally, either in brief descriptions of the meaning of *Kimbrough*,<sup>104</sup> or by affirming a district court decision that separately addressed policy and individualized considerations.<sup>105</sup> None of these courts has directly confronted the question of whether the *Kimbrough* policy analysis should take place separately from the consideration of individualized factors.

The split among district courts, and silence from the circuit courts, on this basic question of the mechanics of the *Kimbrough* policy variance is troubling for several reasons. First, and most obviously, the divergence of methodologies across courts leads to inconsistency and unpredictability, not only in different districts but even among different judges in a single district. Second, and no less important, courts' methodological choices regarding the *Kimbrough* policy variance are hardly ever conscious choices at all: Rather, in the vast majority of cases, courts simply do what they do without considering which approach is most appropriate or even acknowledging the split of opinion on the matter. Third, and most concretely, courts' frequent failure to separate the policy and individualized bases for variance may result in a failure to consider fully each basis for variance. It is difficult to know whether courts are exercising the full

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103. *Id.* at 643-44 (internal citations omitted); see also *United States v. Williams*, 788 F. Supp. 2d 847, 890-91 (N.D. Iowa 2011) (Bennett, J.) (reaffirming this rationale in context of crack sentencing subsequent to the Fair Sentencing Act of 2010).

104. See, e.g., *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008) (“The district court must make an individualized assessment based on the facts presented and must start by calculating the applicable guidelines range. This individualized assessment necessarily means that the sentencing court is free to conclude that the applicable guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy.” (citations and internal quotation marks omitted)); *United States v. Rodriguez*, 527 F.3d 221, 231 (1st Cir. 2008) (“*Kimbrough* makes manifest that sentencing courts possess sufficient discretion under section 3553(a) to consider requests for variant sentences premised on disagreements with the manner in which the sentencing guidelines operate.”); *United States v. Wise*, 515 F.3d 207, 221 (3d Cir. 2008) (“In *Kimbrough*, the Supreme Court held that district courts are free to consider, as part of their analysis of the § 3553(a) factors, the disparity in the Guidelines ranges for offenses involving crack cocaine compared to those for powder cocaine.”).

105. See *United States v. Herrera-Zuniga*, 571 F.3d 568, 586 (6th Cir. 2009).

range of discretion that the Supreme Court has held to be required of the advisory-Guideline system in order to avoid slipping back into a regime of guidelines that are either mandatory or exert a strong “gravitational” effect.<sup>106</sup>

### *B. Underpinnings of the Blended Approach*

Why do a majority of courts apply *Kimbrough* and *Gall* by mixing policy and individualized considerations in the sentencing analysis? The answer, we suspect, stems from the complicated history of the Guidelines and the nature of the statutory section that guides sentencing courts in the era of advisory Guidelines, 18 U.S.C. § 3553(a).

The first contributing factor is the product of two decades of mandatory-Guideline culture in the federal judiciary. Under the mandatory Guidelines, policy variances did not and could not (officially) exist—the very argument endorsed in *Kimbrough* regarding the inherent unfairness of the crack cocaine Guideline, for instance, was expressly foreclosed by appellate courts under the mandatory Guideline regime.<sup>107</sup> The few tightly constrained departures the Guidelines allowed were either tied to particular factual circumstances specified in the Guidelines (such as a defendant’s cooperation with the government<sup>108</sup>) or were based on a court’s determination that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines”<sup>109</sup> such that the case was “a special, or unusual, case” that fell “outside the Guidelines’ ‘heartland.’”<sup>110</sup> Thus, the only permitted deviations from the prescribed range under the mandatory Guideline system—even the nebulous “outside the heartland” departure—were tied to facts of individual cases. Having been trained and acclimated to this regime in which Guideline deviations had to be linked to narrowly defined facts approved by the Commission, judges and lawyers have been understandably sluggish in articulating full-throated policy variances even after *Kimbrough*.

The second factor that might contribute to judges’ tendency to blend categorical and individualized bases for variance flows from the structure of § 3553 itself. The fact that both policy and individualized factors can be

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106. *Rita v. United States*, 551 U.S. 338, 390 (2007) (Souter, J., dissenting); *see also Kimbrough v. United States*, 552 U.S. 85, 113-14 (2007) (Scalia, J., concurring).

107. *See, e.g., United States v. Lattimore*, 974 F.2d 971 (8th Cir. 1992) (rejecting equal protection attack on the crack/powder disparity); *United States v. Galloway*, 951 F.2d 64, 65-66 (5th Cir. 1992) (same); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (same); *see also United States v. Turner*, 928 F.2d 956, 959-60 (10th Cir.) (rejecting due process challenge), *cert. denied*, 502 U.S. 881 (1991).

108. *See U.S. SENTENCING GUIDELINES MANUAL* § 5K1.1 (2011) (government-sponsored departure for defendant’s substantial assistance to law enforcement).

109. 18 U.S.C. § 3553(b) (2000), *invalidated by United States v. Booker*, 543 U.S. 220 (2005).

110. *Koon v. United States*, 518 U.S. 81, 95 (1996) (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

considered under the seven different enumerated factors in § 3553(a) does not mean that they must or should be intermingled (as we argue in Part IV, below, they should not). But because the § 3553 factors that discuss Guideline ranges and policy considerations—such as the prescribed Guideline sentence; policy statements of the Sentencing Commission; and the need to avoid unwarranted disparities among similar defendants found guilty of similar conduct<sup>111</sup>—are mixed in with more individualized factors—such as the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, deter others, and rehabilitate the defendant; and the need to provide restitution to victims of the offense<sup>112</sup>—it is understandable that judges might not separate them in a § 3553 analysis, absent specific instruction.

Thus, the procedural uncertainty attending the implementation of the Court's holdings in *Kimbrough* and *Gall* reflects both the patterns set by pre-*Booker* sentencing cases and the structure of § 3553, which does not separate factors that implicate policy from more individualized factors. Further appellate guidance is required to establish a consistent sentencing practice among the district courts.

#### IV. RECONCILING POLICY-BASED AND OFFENDER-BASED VARIANCES

The individual-based discretion underscored by *Gall* and the categorical discretion permitted by *Kimbrough* do not conflict in substance. And they need not get in each other's way procedurally, either. Indeed, though most courts applying *Kimbrough* variances do not differentiate between categorical and individualized bases for variance, some courts have recognized the need to separate the two types of variances, individualized and policy, in order to consider both fully. Courts need only, as some have done already, turn the *Gall* two-step into a *Kimbrough/Gall* three-step, in which a court (1) calculates the Guideline-prescribed range; (2) varies from the range based on the type of policy grounds approved in *Kimbrough*; and (3) considers offender characteristics under § 3553, using the adjusted range as the starting point for any § 3553 variance.

##### A. *The Virtues of an Extra Analytical Step*

Separating the different types of variances into distinct analytic steps has several virtues. First, it promotes transparency in sentencing. A district court's choice to blend policy and individualized factors is understandable in light of the Supreme Court's lack of guidance on this point, but blending does not help elucidate how each of the relevant considerations contributes to a criminal

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111. 18 U.S.C. § 3553(a)(4)-(6) (2006).

112. *Id.* § 3553(a)(1), (2), (7).

sentence. As the Court explained in *Gall*, sentences must be “adequately explain[ed]” by the court both “to allow for meaningful appellate review and to promote the perception of fair sentencing.”<sup>113</sup> Both individual defendants and the public are entitled to know the precise reasons for criminal sentences. The one judge to have articulated his reasons for applying the bifurcated approach stressed transparency as the most significant justification.<sup>114</sup> And courts have been cognizant of the need to ensure transparency in applying *Kimbrough* generally: For instance, one appellate court reviewing a policy variance found procedural error where the district court’s explanation of its policy disagreement was so unclear that “the extent to which [the court’s] disagreement with the scope of [the Guideline] ultimately affected [the defendant’s] sentence remains a mystery.”<sup>115</sup>

Second, and relatedly, the benefits of transparency in sentencing extend beyond openness for its own sake. Courts, the Sentencing Commission, and Congress all respond to each other; as the Court explained in *Rita*, they are designed to be in dialogue regarding the fairness of the sentencing ranges set forth in the Guidelines.<sup>116</sup> If there is something inherently wrong with a Guideline, the more courts highlight that problem—instead of burying it within a determination about how a particular defendant is “less culpable” than the “average” offender, where a court actually believes that the Guideline sentence for an “average” offender is too high—courts, the Commission, and Congress can all take note and, if they agree, take steps to increase the fairness of sentencing. Indeed, the *Rita* Court explicitly anticipated that after “[t]he sentencing courts, applying the Guidelines in individual cases . . . depart” from the Guidelines and “set forth their reasons,” the Commission will “collect and examine the results” and “can revise the Guidelines accordingly.”<sup>117</sup>

This process of dialogue and adjustment can take different forms, and recent years have seen large-scale sentencing reforms grow organically from seeds sown by the district courts. The most prominent example is in the area of the 100:1 crack/powder disparity. In that field, the work of courts prompted two

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113. *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

114. *See United States v. Gully*, 619 F. Supp. 2d 633, 643 (N.D. Iowa 2009) (noting that if courts mix individual- and policy-based factors together in crack context, “it would be unclear what [crack/powder] ratio would be applicable in any particular case”); *id.* at 643-44 (noting that mixing factors “does not advance the goal of a reasoned sentencing process, in either honesty, uniformity, or transparency”); *id.* at 645 (rejecting what court referred to as approach of “varying (probably downward) some unpredictable amount from the 100:1 ratio guideline range based, in part, on rejection of the 100:1 guideline ratio on policy grounds, with the ultimate crack-to-powder ratio obscured by consideration of other factors”).

115. *United States v. Merced*, 603 F.3d 203, 219 (3d Cir. 2010).

116. *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”).

117. *Id.*; *see also Adelman & Deitrich*, *supra* note 48, at 589 (encouraging courts to “play a significant role” in Guideline reform); *cf. Gully*, 619 F. Supp. 2d at 644 (arguing that specifying alternative crack/powder ratio helps sentencing process “evolve”).

separate phases of reform. Before *Booker*, the explicit complaints of district courts (along with policymakers, commentators, and others) at the harsh sentences and racial disparities produced by the 100:1 ratio under the mandatory Guideline system, helped prompt the Sentencing Commission to attempt to amend the ratio three separate times, finally succeeding in 2007 in promulgating Guidelines incorporating ratios that varied (depending on the offense level) between 25:1 and 80:1.<sup>118</sup> Then, district courts, freed of the shackles of the 100:1 ratio first under the Guidelines themselves and, soon thereafter, because of their new discretion to disagree with the Guidelines on a categorical basis after *Kimbrough*, began pushing further toward parity between crack and powder sentences.<sup>119</sup> This pattern of decisions—in part because of the explicit statement of reasons for rejecting the 100:1 ratio, both in *Kimbrough* itself and in the decisions that followed it—contributed to a growing consensus among policymakers that the 100:1 ratio was unfair, and ultimately led to legislative reform.<sup>120</sup> In 2010, Congress passed the Fair Sentencing Act, which reduced the disparity substantially (from 100:1 to 18:1).<sup>121</sup> And the Sentencing Commission magnified the scope of the reform by revising the Guidelines downward and applying this change retroactively.<sup>122</sup> Had judges kept their concerns about the fairness of 100:1 swaddled in the language of individual offender characteristics, a powerful and empirically based voice for reform would have been muted and the momentum for legislative action might not have materialized.<sup>123</sup>

Another example of a recent sentencing reform wave has taken place mainly among courts themselves. In significant numbers, courts around the country have begun to recognize problems with Guideline section 2G2, which governs sentences for possession of child pornography.<sup>124</sup> As the Second Circuit summarized in reversing a *within*-Guideline child pornography sentence for unreasonableness:

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118. See *Kimbrough v. United States*, 552 U.S. 85, 94-101 (2007).

119. See, e.g., *Spears v. United States*, 555 U.S. 261, 266 (2009) (per curiam) (affirming district court that substituted 20:1 ratio); *United States v. Edwards*, 693 F. Supp. 2d 575, 582 (S.D. W. Va. 2010) (20:1); *United States v. Williams*, No. 09-CR-30099, 2010 WL 1325229, at \*8 (S.D. Ill. Mar. 30, 2010) (1:1); *Henderson v. United States*, 660 F. Supp. 2d 751, 754 (E.D. La. 2009) (1:1); *United States v. Owens*, Crim. No. 08-48, 2009 WL 2485842, at \*3 (W.D. Pa. Aug. 12, 2009) (1:1); *United States v. Dozier*, No. S1 08 Cr. 08-02, 2009 WL 1286486, at \*6 (S.D.N.Y. May 8, 2009) (20:1); *United States v. Perry*, 389 F. Supp. 2d 278, 301-08 (D.R.I. 2005) (20:1); *United States v. Smith*, 359 F. Supp. 2d 771, 777-82 (E.D. Wis. 2005) (20:1).

120. See *supra* note 69 and accompanying text.

121. See *supra* notes 66-69 and accompanying text.

122. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c) (as amended June 30, 2011) (listing Amendment 750 as having retroactive effect); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (revising crack cocaine Guideline ranges downward in response to Fair Sentencing Act of 2010).

123. Judicial criticism of the Fair Sentencing Act's 18:1 ratio as a politically expedient, empirically unjustified half-measure may yet help spark further reform in this area. See, e.g., *United States v. Shull*, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011); *United States v. Williams*, 788 F. Supp. 2d 847, 879 (N.D. Iowa 2011).

124. U.S. SENTENCING GUIDELINES MANUAL § 2G2 (2011).

[M]any of the § 2G2.2 enhancements apply in nearly all cases. Of all sentences under § 2G2.2 in 2009, 94.8% involved an image of a prepubescent minor (qualifying for a two-level increase pursuant to § 2G2.2(b)(2)), 97.2% involved a computer (qualifying for a two-level increase pursuant to § 2G2.2(b)(6)), 73.4% involved an image depicting sadistic or masochistic conduct or other forms of violence (qualifying for a four-level enhancement pursuant to § 2G2.2(b)(4)), and 63.1% involved 600 or more images (qualifying for a five-level enhancement pursuant to § 2G2.2(b)(7)(D)). . . . An ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction. Consequently, adherence to the Guidelines results in virtually no distinction between the sentences for [average] defendants . . . and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories.<sup>125</sup>

These problems with the child pornography Guideline have now been identified by dozens of district and appellate courts, many citing back to the earlier courts that grappled with these issues; as more courts make their policy disagreements explicit, additional courts are emboldened to apply policy-based variances.<sup>126</sup> Again, had courts remained silent about the problems with the child pornography possession Guideline, the key communicative function of their decisions would have been lost, and other courts would have been more hesitant to take up the same reforms.<sup>127</sup>

The third respect in which the separation of policy-based from individualized reasons would be beneficial is in its potential to enhance fairness

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125. *United States v. Dorvee*, 616 F.3d 174, 186-87 (2d Cir. 2010) (footnotes, citations, and internal quotation marks omitted).

126. *See, e.g.*, *United States v. Henderson*, 649 F.3d 955, 960-63 & n.4 (9th Cir. 2011) (affirming variance and “join[ing] several of our sister circuits” in doing so); *United States v. Grober*, 624 F.3d 592, 603 (3d Cir. 2010) (noting, in affirming variance, that Second Circuit and numerous district courts have found § 2G2.2 flawed); *United States v. Donaghy*, No. 09-CR-243, 2010 WL 2605375, at \*2 (E.D. Wis. June 24, 2010) (referring to § 2G2.2 as “a provision that courts across the country have recognized is seriously flawed” and citing cases); *United States v. Riley*, 655 F. Supp. 2d 1298, 1304-06 (S.D. Fla. 2009) (departing from child pornography Guideline based on analysis contained in *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. 2008)); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009) (citing, “in chronological order to suggest the increasing recognition of flaws in the child pornography guideline,” eleven cases from six different district courts). *But cf.* *United States v. Bistline*, 665 F.3d 758, 761-64 (6th Cir. 2012) (holding that district court did not sufficiently justify decision to vary from child pornography Guideline).

127. A similar consensus is beginning to emerge regarding the unfairness of the Guideline for the offense of illegal reentry, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, which effectively instructs courts to double-count a defendant’s prior offenses in determining the offense level. *See United States v. Escolastico-Pena*, No. 11 Cr. 81-01 (RWS), 2011 WL 4448956, at \*5-6 (S.D.N.Y. Sep. 26, 2011) (explaining problem and collecting cases from around country that granted Guideline variances for this reason).

in sentencing. The Supreme Court has recognized the importance of courts' ability to exercise discretion along two different dimensions—policy considerations (*Kimbrough*) and individualized considerations (*Gall*)—both to increase fairness and to implement the overarching congressional command to impose a sentence “sufficient, but not greater than necessary” to achieve the purposes of sentencing.<sup>128</sup> Discretion is also vital to ensuring the Guidelines remain truly advisory and do not operate as a system of de facto mandatory guidelines of the type the Supreme Court found unconstitutional in the first place.<sup>129</sup>

When a court applies a *Kimbrough* policy variance separately and in advance of its consideration of the § 3553 factors, the result is that the sentencing range, which serves as “the starting point and initial benchmark,”<sup>130</sup> changes *before* the offender's individual characteristics are taken into account. At that point, a court may choose to vary further based on an individual defendant's circumstances—thus giving full effect to both types of variances permitted by the Supreme Court, i.e., a *Kimbrough* policy variance and a variance based on individual circumstances. By contrast, when policy and individualized considerations are applied at once, there is only one opportunity for a variance, and so all of the factors may be thrown together in a way that does not allow full expression of each.<sup>131</sup>

Social science research on the phenomenon of “anchoring” shows that when people—including judges—“make numerical estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price),” and “[t]hat initial value tends to ‘anchor’ their final estimates.”<sup>132</sup> As sentencing decisions are generally not susceptible to mathematical precision, particularly in the post-*Booker* world, a sentencing decision is in a sense no more than a “numerical estimate” of what a particular offense committed by a particular offender is “worth.” Thus the numbers (the sentencing range) a judge uses as the starting point at sentencing can have an “anchoring” effect on the final result—as demonstrated by the continued prevalence of within-Guideline sentences after *Booker*, according to Sentencing

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128. 18 U.S.C. § 3553(a) (2006).

129. *See* *United States v. Booker*, 543 U.S. 220, 233 (2005); *see also* *Kimbrough v. United States*, 552 U.S. 85, 113-14 (2007) (Scalia, J., concurring); *Rita v. United States*, 551 U.S. 338, 390 (2007) (Souter, J., dissenting).

130. *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

131. *Cf.* *United States v. Friedman*, 658 F.3d 342, 360-61 (3d Cir. 2011) (explaining that sequence of sentencing steps important, both for reasons of logic and fairness, because § 3553 factors cannot be applied before Guideline range calculated).

132. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787-88 (2001); *cf.* *United States v. Wernick*, 691 F.3d 108, 117 (2d Cir. 2012) (recognizing that Guideline miscalculation resulting in fifty percent higher sentencing range “had a potentially serious impact on the sentence imposed” even though court could have imposed same sentence notwithstanding error).

Commission data.<sup>133</sup> In light of this trend, Justice Souter's concern about the enduring gravitational force of the Guidelines is hard to ignore.<sup>134</sup> Given the persistently strong influence of the Guidelines in driving sentences, it is not difficult to conclude that some "anchoring" is taking place. It follows that when a judge attempts to take both categorical and individualized factors into account, but begins with the Guideline-prescribed ranges, the result will likely be closer to the original prescribed range than if the judge began by substituting a different range and only then taking account of the defendant's particular circumstances.

It is not possible, of course, to pinpoint any particular case as an instance of this phenomenon, because the uniqueness of each offender and offense makes each case different, because policy variances may occur across a wide range of Guidelines for various offenses,<sup>135</sup> and because one can never know whether the judge would have sentenced differently under the bifurcated approach. This gap in our argument, however, only underscores the first problem with the blended approach: It diminishes transparency and obscures the degree to which each factor plays a role in determining outcomes.

Moreover, a closer look at some of the cases that *have* separated policy and individualized analyses suggests that distinct consideration of each type of variance does result in more nuanced consideration of sentences.<sup>136</sup> For instance, in the case of crack defendant Shannon Dozier, the Guidelines called for a sentence of 168-210 months.<sup>137</sup> The court rejected the 100:1 crack/powder ratio and recalculated the range based on a 20:1 ratio, yielding a range of 135-168 months.<sup>138</sup> The court then varied further downward to 120 months (the statutory minimum), in light of the defendant's young age, his sincere interest in turning his life around, and the influence of his older brother on his crime.<sup>139</sup> Thus, the defendant received the benefit of both policy and individualized variances, which might not have occurred under a blended approach. Likewise, in the case of crack defendant Michael Edwards, the court acknowledged the prescribed sentencing range of 63-78 months, expressed a

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133. See *supra* note 48 (discussing sentencing statistics for fiscal year 2010); see also Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENTENCING RPTR. 326, 326-28 (2011) (presenting data showing that "sentences imposed continue to be driven by the now-advisory guidelines" and that "[f]or the most part, changes in sentence lengths continue to closely mirror changes in the guidelines' recommendations").

134. See *Rita*, 551 U.S. at 390 (Souter, J., dissenting).

135. See *supra* note 13 (citing offenses for which policy-based variances have been granted).

136. The examples that follow are all drug cases, but the same reasons that make the separate consideration of policy and individualized factors advisable in the drug context apply with equal force in the context of other offenses. Drug examples are discussed here simply because the policy disagreements are more easily quantified and therefore the effect of policy disagreements is more easily shown.

137. *United States v. Dozier*, No. S1 08 Cr. 08-02, 2009 WL 1286486, at \*5 (S.D.N.Y. May 8, 2009).

138. *Id.* at \*6-7.

139. *Id.* at \*7.

policy disagreement with the crack/powder disparity, and recalculated the range at a 10:1 ratio, yielding a range of 46-51 months.<sup>140</sup> The court then departed all the way down to a sentence of time served plus six months' home confinement, in light of the defendant's significant responsibilities to his large family, his ability to hold down jobs since his arrest, his work on the board of his church, and his mental limitations that lessened his culpability.<sup>141</sup> Once again, both the policy and individualized factors were significant, and each played a role in reducing the sentence.

In the case of defendant Sean McCarthy, who was charged with making a single delivery of MDMA (the chemical compound most common in the drug ecstasy), the court held that a Guideline variance was appropriate because the court found, after a two-day evidentiary hearing with scientific testimony, that the Commission had established the Guideline based on "opportunistic rummaging" through the scientific record, resulting in a Guideline based on a "selective and incomplete" analysis "incompatible with the goal of uniform sentencing based on empirical data."<sup>142</sup> The MDMA Guideline operates by applying a large multiplier (500) to the quantity of MDMA at issue, then sentencing the defendant as if he had trafficked in that multiplier-adjusted quantity of marijuana; in *McCarthy*, the court varied from the MDMA Guideline by substituting a 60% lower multiplier.<sup>143</sup> The effect of the court's policy-based variance was to reduce the Guideline range from which the court began: Instead of the 63-78 month range prescribed by the Guidelines, the court began with a 51-63 month range resulting from its substituted ratio, and only at that point proceeded to consider the individualized facts of the offense and the offender to vary further, down to an ultimate sentence of 26 months.<sup>144</sup> Thus, the policy variance brought the median Guideline sentence down by more than a year before the court even considered the individual defendant's circumstances and granted a further reduction of approximately two years from the bottom of the adjusted range. The two-month separation in time between the judge's decision to vary on policy grounds and the ultimate imposition of sentence brings the effect of the extra step into sharp focus: By first evaluating the Guidelines and subsequently focusing on individualized considerations, the court was able to receive separate briefing and argument on each aspect of its discretion, consider each aspect separately, and explain its reasons clearly.<sup>145</sup>

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140. *United States v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464, at \*1-3 (N.D. Ill. Feb. 17, 2009).

141. *See id.* at \*3-7.

142. *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at \*3-4 (S.D.N.Y. May 19, 2011).

143. *See id.* at \*1, \*5; *see also* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MDMA DRUG OFFENSES, EXPLANATION OF RECENT GUIDELINE AMENDMENTS 5-6 (2001).

144. *See* Transcript of Sentencing, *McCarthy*, No. 09 Cr. 1136 (S.D.N.Y. July 15, 2011); Judgment, *McCarthy*, No. 09 Cr. 1136 (S.D.N.Y. July 21, 2011).

145. *See McCarthy*, 2011 WL 1991146, at \*1 (noting holding of evidentiary hearing on Guideline issue alone); Transcript of Sentencing, *McCarthy*, No. 09 Cr. 1136 (S.D.N.Y. July 15, 2011).

Not all separations of policy and individualized factors work to the benefit of defendants, and it is perhaps cases in which one type of consideration (policy) prompts a downward variance while another type (individualized factors) moves the court to modify a sentence upward, that best illustrate the benefits of the bifurcated approach in terms of a court's capacity to weigh all the relevant factors. In the case of crack defendant Demetrius Gully, the court rejected the prescribed 108-135 month Guideline range on policy grounds because of the crack/powder disparity and substituted the 30-37 month range that would result from a 1:1 crack/powder ratio.<sup>146</sup> But then the court took note of the defendant's history of violence, continued drug dealing while on pretrial release, irresponsible personal and employment history, attempt to shift responsibility for a previous assault onto his sister, and repeat criminal offenses; for these reasons, the court imposed an 84-month sentence, more than double the high end of the 1:1 range but below the 100:1 range.<sup>147</sup> As the court noted, considering the two types of factors separately allowed for clearer consideration of each, and avoided a "seat-of-the-pants judgment in each mine-run case about how much to vary from the advisory guidelines based solely on the 'crack/powder disparity'"—an approach that "does not advance the goal of a reasoned sentencing process, in either honesty, uniformity, or transparency."<sup>148</sup> Following this methodology has enabled other courts, as well, to give effect to their disagreement with the crack/powder disparity while still considering aggravating factors particular to individual defendants—resulting in downward variances from the 100:1 Guideline range, then upward variances from the reduced range, to reflect the interplay of policy and individualized factors.<sup>149</sup>

For all of the reasons discussed—transparency, communication with the Sentencing Commission, and overall fairness—we recommend adding an extra step to the advisory-Guideline process to enable courts to focus on policy considerations separately from individualized factors.

#### *B. When the Blended Approach Remains Appropriate*

Our proposal requires an important qualification in light of the different types of policy variances available to district courts and the different types of Guidelines from which courts can vary. Thus far, our discussion has concerned

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146. *United States v. Gully*, 619 F. Supp. 2d 633, 645 (N.D. Iowa 2009).

147. *Id.* at 645-46.

148. *Id.* at 643-44 (citation and internal quotation marks omitted).

149. *See, e.g., United States v. Golden*, 679 F. Supp. 2d 980, 987-91 (N.D. Iowa 2010) (prescribed Guideline range for crack offense 135-168 months; modified range at 1:1 ratio 51-63 months; sentence of 180 months imposed because "but for Golden's poor aim, he would likely be serving a life sentence for murder"); *Henderson v. United States*, 660 F. Supp. 2d 751, 752, 754-55 (E.D. La. 2009) (prescribed Guideline range for crack offense 77-96 months; modified range at 1:1 ratio 18-24 months; sentence of 72 months imposed because of "remarkable" criminal history).

the type of Guideline that is the most frequent object of policy variances: Guidelines that set offense levels. In the Guideline system, offense levels are the starting point for calculating individual penalties and represent the Commission's evaluation of the harm of a specific type of criminal conduct. Guidelines setting offense levels are particularly susceptible to discrete, specifically-articulated policy disagreements such as "this Guideline unjustifiably punishes a particular offense more harshly—i.e., sets a higher offense level—than another Guideline for a similar offense" or "this Guideline raises offense levels based on irrelevant characteristics of the offense." For instance, the *Kimbrrough* decision was based on a critique of the offense level assigned to crack cocaine. The argument that the crack levels needed to be equalized to those of powder cocaine<sup>150</sup> exemplifies the type of policy disagreement that is directed at a Guideline setting an offense level. Another example of a disagreement with an offense-level provision is the widespread attack on the child pornography possession Guideline. As discussed, the major criticisms concern provisions that raise the offense level based on specific offense characteristics (i.e., facts specific to the manner in which a particular offender committed the crime) that are so typical of the crime of child pornography possession itself that they apply to nearly all offenders.<sup>151</sup>

The distinction between policy and individualized considerations in Guideline sentencing becomes far hazier when it is applied to Guideline principles that instruct courts how to analyze individual offenders rather than types of crimes. Such principles are found in the "policy statements" of Chapter 5 of the Guidelines Manual, which tells courts what types of facts about an individual defendant or the defendant's particular criminal act may be taken into account in reducing or increasing the sentence from the otherwise applicable Guideline range. For example, policy statements address questions such as what mitigating role a defendant's addiction or family circumstances should have on the imposition of a sentence.<sup>152</sup> Policy statements cannot preclude a variance under the new advisory Guideline regime.<sup>153</sup> So, when a court is asked to apply a policy statement that the court finds inappropriate in

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150. See *Kimbrrough v. United States*, 552 U.S. 85, 94-100 (2007).

151. See *supra* notes 123-26 and accompanying text.

152. See U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.4, 5H1.6 (2011).

153. These principles are reflected in both *Gall v. United States*, 552 U.S. 38 (2007), and *Pepper v. United States*, 131 S. Ct. 1229 (2011). In *Gall*, the Court pointedly ignored Guideline policy statements in approving the district court's consideration under § 3553 of factors, including the defendant's age and family support, that Guideline policy statements do not permit except in unusual cases. Compare *Gall*, 552 U.S. at 43-44, 53, 58 (approving district court's § 3553 analysis, including specifically discussion of defendant's immaturity at time of offense), with U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1 (2011) (age not usually considered) & 5H1.6 (family ties not usually considered), and *Gall*, 552 U.S. at 69-70 (Alito, J., dissenting) (objecting that majority did not apply Guideline policy statements). In *Pepper*, the Court went further, not only approving the consideration of a factor disapproved by a policy statement, but also explicitly "reject[ing] th[e] invitation" "to elevate" policy statements over all the rest of the § 3553 factors. See *Pepper*, 131 S. Ct. at 1247-49.

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the context of an individual case, how—and at what stage of the analysis—should the court’s assessment of the policy statement be factored into the sentencing calculus?

Each Guideline announcing a policy statement represents a general sentencing principle, rather than an effort to address one category of criminal conduct, and in that sense, policy statements seem quite general. But a court’s application of a Guidelines policy statement is frequently difficult to divorce from the facts of an individual defendant’s case. Whereas a policy disagreement with an offense level affects the calculation of the initial Guideline range, and therefore can be considered in isolation from the facts of an individual case, disagreement with a policy statement will leave the applicable total offense level and Guideline range undisturbed and instead affect how a court considers the facts of an individual case. Thus (perhaps paradoxically given the name), many policy *statements* can be the subject of policy *disagreements* only through the consideration of individualized facts. From a procedural standpoint, then, policy disagreements in this arena cannot occur in a manner conceptually distinct from—or, more to the point here, at a separate analytical step than—a court’s consideration of facts about a particular offender and his particular offense.

Several examples help illustrate the point. Section 5H1.6 of the Guidelines, for instance, provides that family responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range.<sup>154</sup> But what if a sentencing court expresses a policy disagreement with this principle? Can such a disagreement be actualized prior to the consideration of the facts of a particular person’s case? It would appear not. Consider the factual scenario in *United States v. Rubashkin*.<sup>155</sup> The defendant sought a variance in part based on the extraordinary family circumstance that he had an autistic son who depended on him for support.<sup>156</sup> Although the district court found that applicable circuit case law interpreting section 5H1.6 sharply limited the occasions under which family circumstances are considered extraordinary, and therefore precluded a Guideline-based departure in *Rubashkin*,<sup>157</sup> the court noted that under the advisory Guideline system, a *variance* is possible even where the Guidelines would not permit a *departure*.<sup>158</sup> If the trial judge had in fact varied from the Guidelines in order to mitigate the harm to Rubashkin’s family (in the actual

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154. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2011).

155. 718 F. Supp. 2d 953 (N.D. Iowa 2010), *aff’d*, 655 F.3d 849 (8th Cir. 2011).

156. See 718 F. Supp. 2d at 984.

157. See *id.* at 984-85 (citing *United States v. Spero*, 382 F.3d 803, 805 (8th Cir. 2004)).

158. See *id.* at 985; see also *United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009) (“[W]e now clarify that departure precedent does not *bind* district courts with respect to variance decisions, it is merely persuasive authority.”). See *generally supra* note 14 (distinguishing between variances and departures).

case, she did not vary<sup>159</sup>), should the resulting variance be considered a mere application of individualized considerations or, given the conflict with the policy statement in the Guidelines, would the judge also necessarily be expressing a policy disagreement with section 5H1.6? If the latter, it is difficult to imagine how such a disagreement could be implemented separately from the judge's considerations of the particular facts of the defendant's case. The policy disagreement would not implicate the offense level and therefore would not affect the Guideline range, nor any upward or downward adjustments prescribed in the Guidelines. In such a case, the blending of policy and individualized considerations would be not only advisable but probably inevitable.<sup>160</sup>

Another policy statement illustrative in this context is section 5H1.4. This Guideline limits a court's ability to vary based on a defendant's drug dependence.<sup>161</sup> If, contrary to this policy statement, a court varies from the Guidelines in a drug case because the defendant's participation in the offense was driven by her addiction, how should the court describe the basis for a variance? Again, it is easy to see how such a variance could be conceptualized as a policy variance from the Guideline expressing the policy statement: A court could easily find that section 5H1.4 limitations result in sentences that are "greater than necessary" to promote the purposes of sentencing,<sup>162</sup> and on that basis reject that Guideline as a categorical matter.<sup>163</sup> Once again, such a categorical disagreement could only find expression through the judge's consideration of the defendant's individualized circumstances; for this reason, the extra sentencing step we have proposed would not be possible. Of course, this is not to say that every time a court acts contrary to a Guideline policy statement, it must necessarily express a policy disagreement; rather, a court may determine that, in the mix of § 3553 factors as applied to an individual defendant, other considerations trump the guidance offered by the policy

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159. See *Rubashkin*, 718 F. Supp. 2d at 986.

160. If a variance that conflicts with a Guideline policy statement is indeed considered a policy disagreement, an additional set of questions arises. Must such a policy disagreement be predicated upon a flaw in the empirical basis for the Guideline? It would seem not, because the Guideline is nothing but a policy judgment of the Commission. Policy statements are less likely to be either supported or contradicted by science and national experience. The judge's policy disagreement, likewise, would reflect a worldview rather than a fact that may be disproved in court. Despite the differences in the factual basis and reasoning between a court's policy disagreement with a Guideline policy statement and a court's policy disagreement with a Guideline setting an offense level, the former would seem as permissible as the latter if the Guidelines are to remain truly advisory.

161. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2011).

162. See 18 U.S.C. § 3553(a) (2006).

163. While the Sentencing Commission's 2010 Amendment permitting a departure for a treatment purpose, see U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, May 3, 2010, opens the door to reductions without an accompanying policy critique, it obviously excludes many circumstances in which defendants were motivated by addiction to commit a crime. Therefore, in many variances based on addiction, courts will necessarily be rejecting § 5H1.4 itself.

statements. The pertinent point here is simply that if a court *does* reject a policy statement categorically (i.e., express a policy disagreement with it), it would not be feasible to do so separately from its consideration of individualized factors.<sup>164</sup>

A final example adds one more twist to the question of when and how to distinguish categorical from individual-based variances. In *United States v. Cavera*,<sup>165</sup> a court sentencing a defendant for firearms trafficking applied an upward variance based on the local impact of the offense in New York City, and the Second Circuit affirmed.<sup>166</sup> *Cavera* illustrates the complexity that is sometimes involved in trying to distinguish categorical from individualized bases for variance. The variance in *Cavera* is neither entirely categorical nor entirely individualized: It is categorical in its application to all defendants trafficking weapons in urban areas, but it is fact-specific in that a district court must consider the particular facts of a case to determine the relevant geography. How should courts proceed in cases involving this type of hybrid policy variance? Is this type of policy disagreement more like an offense-level disagreement (the bulk of policy variances) or a disagreement with a Guideline policy statement? We think probably the former. In contrast to a case involving a disagreement with a policy statement, it *is* conceptually possible to separate policy and individualized considerations in a case like *Cavera*. As with offense-level disagreements, a court applying a locality-based variance can adjust the range based on policy factors and then begin with the new range when considering all other facts of the particular case. Because of the strong

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164. Another situation in which separating individualized and policy considerations may be difficult is in the context of what has come to be called the “fast track disparity.” This term refers to the disparity of treatment that results from the implementation in some districts, but not in others, of a “fast-track” program for immigration offenses that allows offenders to obtain an additional downward departure as part of an expedited disposition. See U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2011); *United States v. Lopez-Macias*, 661 F.3d 485, 486-87, 491-92 (10th Cir. 2011) (explaining issue and concluding that disparity of treatment of similarly situated defendants in different districts, arising from operation of fast-track programs in some districts but not others, justifies a *Kimbrough* policy-variance); see also *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-21 (7th Cir. 2010) (permitting courts to vary based on fast-track disparity); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 157 (3d Cir. 2009) (same). See generally Thomas M. Hardiman & Richard L. Heppner, Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 25-26 (2012) (noting circuit split). Such a variance cannot be applied as a categorical reduction in the base offense level at the outset of the sentencing analysis, because the availability of the variance itself depends on individual defendants’ circumstances. See *Lopez-Macias*, 661 F.3d at 494 (“Defendant surely must make a minimum showing that a defendant charged with the same crime in a fast-track district would qualify for fast-track treatment. For example, Defendant might have contacted federal public defender offices in districts with fast-track programs to inquire about program eligibility requirements. Defendant also might have examined plea agreements of similarly situated defendants in fast-track districts.”); *Arrelucea-Zamudio*, 581 F.3d at 156-57 (“To justify a reasonable variance by the district court, a defendant must show at the outset that he would qualify for fast-track disposition in a fast-track district. . . . Additionally, a defendant must demonstrate that he would have taken the fast-track guilty plea if offered . . .”).

165. 550 F.3d 180 (2d. Cir. 2008) (en banc).

166. See *id.* at 184.

interests that support our proposal of the extra analytical step in policy variance cases, courts should undertake such a step when possible, including in geography-based policy variance cases.

The lesson we draw from these examples is an important qualification to our proposal that sentencing courts separate policy and individualized considerations in the advisory-Guideline analysis. The qualification is this: Although most policy variances are susceptible to an analysis distinct from, and logically prior to, any variances based on individualized considerations, there are some types of policy variances (at a minimum, policy disagreements with Guideline policy statements) in which the categorical and the individualized factors are necessarily intertwined. Courts applying policy variances should use the extra analytical step whenever possible but should not do so where it would be infeasible or illogical. Because most policy-variance cases involve variances from Guidelines setting offense levels for particular types of crimes or specific offense characteristics, our proposal should apply in the vast majority of policy-variance cases.

### C. Practicality

Our proposal, though significant in its effects, will not require a great deal of work to implement at the district court level. The separate policy-variance step we propose will not be required in every case, only those in which the defense adequately argues for a policy variance. In the absence of a defense motion, courts are not required to inquire *sua sponte* whether the Guideline is adequately supported or to state whether they agree with it.<sup>167</sup> And, applying normal rules for determining whether an argument has been properly raised, courts need not discuss unsupported or conclusory assertions that a Guideline is flawed.<sup>168</sup> Although courts are free to disagree with any Guideline,<sup>169</sup> policy-based challenges are not regularly raised with respect to all Guidelines. If the four years after *Kimbrough* are any guide, the challenges will focus primarily on drug, child pornography, and other Guidelines that set an offense by

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167. This proposition has seemed so self-evident to appellate courts that they have brushed aside arguments to the contrary in memorandum dispositions. See *United States v. Hernandez*, 351 F. App'x 305, 307 (10th Cir. 2009) ("We know of no authority suggesting that a district court is required to *sua sponte* consider a variance when it is not requested."); *United States v. Marshall*, 259 F. App'x 855, 863 (7th Cir. 2008) ("Marshall essentially argues that Judge McCuskey erred by not, *sua sponte*, rejecting the 100:1 ratio and the career offender guidelines. This is not what *Kimbrough* requires.").

168. See, e.g., *Gross v. Town of Cicero*, 619 F.3d 697, 704 (7th Cir. 2010) ("[I]t is not this court's responsibility to research and construct the parties' arguments, and conclusory analysis will be construed as waiver." (citation and internal quotation marks omitted)); *N.W. Enters. v. Houston*, 352 F.3d 162, n.24 (5th Cir. 2003) ("A litigant's failure to provide legal or factual analysis results in waiver."); *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1227 (10th Cir. 2001) ("This court will not make arguments for [a party] that he did not make himself.").

169. See *United States v. Mitchell*, 624 F.3d 1023, 1028 (9th Cir. 2010); *United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc).

reference to a statutory mandatory minimum or congressional directive.<sup>170</sup> Finally, *Kimbrough* permits, but does not require, a court to vary from a Guideline on policy grounds.<sup>171</sup> A district court that exercises its discretion not to vary commits procedural error only if it “fails to appreciate its *Kimbrough* discretion to vary . . . based on a categorical policy disagreement.”<sup>172</sup> Thus, the policy-variance step will occur only in a fairly small number of cases.

Where the policy-variance step must occur—that is, where a defendant raises a substantial policy-based challenge to a Guideline—the degree of effort required on the part of the court will vary considerably, and in general will probably decrease over time. In a few instances, courts may wish to hold evidentiary hearings—the same procedure that courts have always used to resolve disputed issues of material fact—to explore fully the proffered policy objections to a particular Guideline.<sup>173</sup> But the courts’ task will be increasingly simplified as each Guideline is subjected to scrutiny.<sup>174</sup> The relevant evidentiary presentations will repeat themselves, often focusing on the work of the same experts and reiterating debates from prior cases. For instance, after years of similar attacks on the crack cocaine and child pornography Guidelines, courts can now handle those expediently, often simply citing the opinions of other courts that have considered the issues in more detail.<sup>175</sup> In the crack cocaine context, courts can simply note they are adopting the analysis of *Kimbrough* itself. And following extensive considerations of the child pornography Guideline by three different courts of appeals (in the *Dorvee*, *Grober*, and *Henderson* cases<sup>176</sup>), district courts may take notice of the variance arguments made in those cases and use them as shorthand to grant or reject variances from the child pornography Guideline.<sup>177</sup> Even one court’s thorough consideration of a Guideline can give rise to a record that will justify a variance by other courts: For instance, even before the written decision in *United States*

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170. The distribution of policy-based challenges by issue is roughly reflected in the subject-matter of the sentencing cases cited in this Article.

171. See, e.g., *United States v. Moore*, 624 F.3d 875, 877 (8th Cir. 2010); *United States v. Caldwell*, 585 F.3d 1347, 1355 (10th Cir. 2009); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 148-49 (3d Cir. 2009).

172. *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011); see also, e.g., *United States v. Stone*, 575 F.3d 83, 89 (1st Cir. 2009) (“[A]fter *Kimbrough*, a district court makes a procedural error when it fails to recognize its discretion to vary from the guideline range based on a categorical policy disagreement with a guideline.”).

173. See *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146 (S.D.N.Y. May 19, 2011); *United States v. Grober*, 595 F. Supp. 2d 382 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010).

174. Cf. *Rita v. United States*, 551 U.S. 338, 357 (2007) (“Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation.”).

175. See *supra* notes 119, 126 (citing decisions developing policy case against crack and child pornography Guidelines, respectively).

176. See *supra* notes 125-26 and accompanying text.

177. See, e.g., *United States v. Brasfield*, No. 11-CR-96, 2011 WL 3844181, at \*3 (E.D. Wis. Aug. 29, 2011) (“The guidelines called for a term of 97-121 months, but that range derived from the application of U.S.S.G. § 2G2.2, a seriously flawed provision worthy of little deference. Courts have explained these flaws in detail, a discussion I need not duplicate.” (citations omitted)).

*v. McCarthy*<sup>178</sup> varying from the MDMA Guideline, another judge in a different district cited the evidentiary hearing transcript in *McCarthy* to support a decision to vary from the same Guideline,<sup>179</sup> and another judge has followed *McCarthy* since it was decided.<sup>180</sup> Of course, if a new argument is presented, the court can hold an evidentiary hearing as needed; the resulting decisions will, in turn, smooth the way for future courts considering similar issues.

Finally, district courts have proven they need not engage in extensive analysis in order to separate individualized from policy considerations and explain the reasons for their sentences. For example, in *United States v. Owens*,<sup>181</sup> a four-page opinion, the court recounted the crack/powder disparity and its unfairness,<sup>182</sup> substituted a 1:1 ratio, recalculated the alternative sentencing range,<sup>183</sup> and then expeditiously explained its decision to sentence above the bottom of that new range, noting simply that the defendant “was a large scale supplier of cocaine to the Erie, Pennsylvania area.”<sup>184</sup> Likewise, in *United States v. Tews*,<sup>185</sup> a child pornography case, the court in a five-page decision summarized prior decisions explaining the problems with the applicable Guideline,<sup>186</sup> decided to revert to the sentencing range that would have applied before the Guideline amendments created the enhancement that the court found problematic,<sup>187</sup> and then explained in a footnote that it would impose a sentence in the middle of the substituted range “[g]iven the type and number of images [possessed by the defendant], and defendant’s admission of swapping.”<sup>188</sup> Thus, separating policy and individualized considerations can be expeditious at the same time that it is precise and transparent about the court’s reasoning process in arriving at a sentence.

#### V. APPELLATE COURTS’ ROLE IN DOING *KIMBROUGH* JUSTICE

Though a handful of district judges have already adopted the reform we propose, what exists now is a patchwork system in which the degree of separation between policy and individualized considerations is left to the discretion of district courts, and appellate courts have not provided guidance on the subject. An important condition for widespread adoption of the *Kimbrough/Gall* three-step analysis is the active involvement of appellate

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178. No. 09 Cr. 1136, 2011 WL 1991146 (S.D.N.Y. May 19, 2011).

179. See Transcript of Sentencing 2-4, 6-8, 14-16, *United States v. Phan*, No. CR10-27 (W.D. Wash. Mar. 3, 2011).

180. See *United States v. Qayyem*, No. 10 Cr. 19, 2012 WL 92287, at \*3-5 (S.D.N.Y. Jan. 11, 2012).

181. Crim. No. 08-48, 2009 WL 2485842 (W.D. Pa. Aug. 12, 2009).

182. *Id.* at \*2.

183. *Id.* at \*3.

184. *Id.* at \*4.

185. No. 09-CR-309, 2010 WL 1608951 (E.D. Wis. Apr. 20, 2010).

186. *Id.* at \*3-4.

187. *Id.* at \*4.

188. *Id.* at \*5 n.2.

courts in enforcing it, rather than simply affirming whatever sentences and processes the district courts apply. Without appellate enforcement of the policy/individual separation, district courts have no incentive to practice it, and in fact—given that so far only a minority of district courts have separated policy from individualized considerations formally in the sentencing process—the fear of reversal for excessive procedural innovation probably pushes courts the other way.

Appellate courts (and ultimately, if necessary, the Supreme Court) should recognize the importance of separating policy and individualized grounds for variance, and hold that the only way for district courts to comply with *Kimbrough*, *Gall*, and *Spears* at the same time is to analyze separately each type of proposed variance (except in the small set of cases in which that procedure is infeasible, as discussed in Part IV.B above). Appellate holdings to this effect would have several virtues. First, they would call attention to an important procedural issue that many district courts seem not to have considered, and thereby help district courts harmonize their sentencing practices. Second, a clear order-of-battle enforced by appellate courts would free district courts from having to fill gaps in the Supreme Court's post-*Booker* jurisprudence in order to apply both policy and individualized variances in the same case. Finally, and most importantly, appellate enforcement would serve all the interests served by our proposal itself, including transparency, effective communication with the Sentencing Commission, and full consideration of all factors judicially cognizable under the advisory-Guideline regime.

So, what should appellate review look like if the *Gall* two-step gives way to the *Kimbrough/Gall* three-step we propose? Appeals courts already review advisory-Guideline sentences for both procedure and substance;<sup>189</sup> in this Part, we aim to clarify what each of these types of review would entail in a three-step framework.

In evaluating the procedural soundness of a sentencing proceeding in which a party has requested a policy-based variance, appellate courts should verify that the district court has taken three analytical steps. First, the appellate court should start by asking (as courts already do) if the district court calculated the advisory-Guideline sentence accurately before applying any variances.<sup>190</sup> The appellate court should next consider whether the district court addressed any requests for a policy variance, including acknowledging its discretion to vary where asked to do so, and (as we advocate in Part IV.A above) applying any policy variance prior to individualized considerations. Finally (again, mirroring current practice) the appellate court must consider whether the court took into account the § 3553 factors, stating its reasoning clearly on the

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189. See *Gall v. United States*, 552 U.S. 38, 51 (2007).

190. See *id.*

record.<sup>191</sup> It should be noted that this procedure would differ from the current practice only in the addition of a single step, the middle one, and that this step would not come into play except in the still-uncommon cases in which the sentence under review involved a policy variance.<sup>192</sup>

If the court has followed the correct procedure, another question needs to be asked and a different standard applied: The court must address the substantive reasonableness of the ultimate sentence.<sup>193</sup> The application of a reasonableness standard is complicated by questions that will be embedded in every appeal of a policy variance decision. First, the district court will probably have to address the question of whether a Guideline lacks an empirical basis, as defined by *Kimbrough* and its progeny. (We add the “probably” qualification here because there is some suggestion in the appellate case law that “any” Guideline is subject to variance<sup>194</sup>—which could mean that the question of whether a Guideline lacks an empirical basis is not a necessary precondition for a Guideline variance. Whether this reasoning will prevail remains to be seen as courts continue to apply *Kimbrough* and its progeny.) In the context of crack cocaine variances, the empirical-basis inquiry was a relatively easy one, since the historical record from the Commission clearly supported a finding that the Guideline lacked an empirical basis.<sup>195</sup> The lack-of-empirical-basis criterion will be easily satisfied for Guidelines created in response to a congressional directive and/or a mandatory minimum without independent empirical research on the part of the Commission.

The question becomes somewhat harder where the Commission engaged in some independent process that is now alleged to be flawed or overtaken by subsequent research.<sup>196</sup> Where a court finds that subsequent scientific data or national experience has undermined an existing Guideline and that a variance is warranted, the factual determinations underlying the court’s decision should be reviewed for clear error (following the Supreme Court’s application of this standard of review in the sentencing context<sup>197</sup> and appellate review practice

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191. *See id.*

192. *Cf. Hofer, supra* note 133, at 328 fig.2 (showing that, according to Sentencing Commission data, approximately four of five sentences do not involve variance of *any* kind, individual- or policy-based).

193. *See Gall*, 552 U.S. at 51.

194. *See United States v. Mitchell*, 624 F.3d 1023, 1028 (9th Cir. 2010); *United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc); *cf. United States v. Garcia-Jaquez*, 807 F. Supp. 2d 1005, 1013 (D. Colo. 2011) (“[F]ew guidelines can be shown to be based on actual preguideline sentencing practice or on Commission research and expertise.” (quoting Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 578 (2009))).

195. *See Kimbrough v. United States*, 552 U.S. 85, 96-97, 108-110 (2007).

196. *See United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at \*3-4 (S.D.N.Y. May 19, 2011).

197. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (“[T]he appellate court must . . . ensure that the district court committed no significant procedural error, such as . . . selecting a sentence based on clearly erroneous facts . . .”).

more generally<sup>198</sup>), and the substantive reasonableness of the sentence should be reviewed for abuse of discretion. This is the standard the Third Circuit applied in *United States v. Grober*,<sup>199</sup> where the district court granted an extensive variance based on the defense's contention that the Guideline for child pornography possession lacked an empirical basis in part because the enhancing specific offense characteristics are present in virtually every case.<sup>200</sup> The Third Circuit praised the thorough consideration the district court provided to both parties' evidence, reviewed the stated basis for the sentence, and found that the court had appropriately exercised its discretion.<sup>201</sup>

Where the court denies a variance following a defense request, the standards should be no different: Clear error for factual findings, and abuse of discretion for the substantive reasonableness of the sentence. Although a court is not obliged to grant a policy variance,<sup>202</sup> appellate review in such a case is not toothless, because the resulting sentence in the absence of a variance might be substantively unreasonable. For instance, in the child pornography case *United States v. Dorvee*,<sup>203</sup> the district court imposed a within-Guideline sentence, but the Second Circuit found the sentence to be substantively unreasonable in large part because the Guideline concentrates all offenders at or near the statutory maximum.<sup>204</sup> The court concluded that the Guideline is beset with "irrationality" to such a degree that "unless applied with great care, [it] can lead to unreasonable sentences that are inconsistent with what § 3553 requires."<sup>205</sup>

The deferential standards of reasonableness and abuse-of-discretion are not the only backstop against insufficiently explained or insufficiently justified policy variances: Where a court fails to explain or justify its policy variance, appellate courts may reverse for procedural error. In *United States v. Merced*,<sup>206</sup> for instance, the district court's policy variance from the career offender Guideline<sup>207</sup> suffered from failings of both explanation and justification. The core of the district judge's explanation of his policy variance was this statement: "[I] kind of reserve career offender status for violent, significant drug deals, that type of thing, even though the guidelines may advise that it's appropriate."<sup>208</sup> But "[t]he court did not explain either how it arrived at

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198. See *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985).

199. 624 F.3d 592 (3d Cir. 2010).

200. See *id.* at 596-99.

201. See *id.* at 595, 609.

202. See *supra* note 171.

203. 616 F.3d 174 (2d Cir. 2010).

204. See *id.* at 183, 186-88.

205. *Id.* at 184, 187.

206. 603 F.3d 203 (3d Cir. 2010).

207. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2011).

208. *Merced*, 603 F.3d at 211 (quoting sentencing transcript) (internal quotation marks and emphasis deleted).

this personal sentencing policy, or why it believed that the contrary policies reflected in the Guidelines were out of line.”<sup>209</sup> The Third Circuit reversed for two different types of procedural error. First, the court held, the district judge’s statement that he “kind of” reserved the career-offender Guideline for “violent, significant drug deals” failed to explain adequately the scope of his policy disagreement because he did not clarify how broadly or under what circumstances his criteria applied or what it meant to “kind of” apply them.<sup>210</sup> Second, the appellate court found that the district court had not adequately justified the policy disagreement, because the judge “offered little more than a conclusory statement of personal belief that career offender status should be reserved for violent or large-scale drug dealers.”<sup>211</sup> As the *Merced* case illustrates, the deferential standards of appellate review for reasonableness do not prevent appellate courts from policing ill-defined or idiosyncratic policy disagreements as procedurally erroneous; the appellate standards and steps we advocate would in no way diminish appellate courts’ authority in this regard.

Probably the most complicated scenario is when an appellate court second-guesses a district court’s denial of a variance because the appellate court is concerned, in part, with flaws in the Guideline itself. For instance, in finding that a within-Guideline sentence was substantively unreasonable, the Second Circuit in *Dorvee* relied heavily on the flaws in the Guideline itself<sup>212</sup>—in other words, a policy disagreement. The mixing of policy and individualized factors in the reasonableness determination *on appeal*, however, does not raise the same types of concerns as a blended approach in the trial court. On appeal, the court is not imposing a sentence, merely reviewing one, and so the appellate court’s ruling does not require the same precision as the district court’s. The appellate court need only pronounce the sentence under review “reasonable” or “unreasonable,” whereas the district court must arrive at a specific sentence—usually a specific number of months of incarceration—and so the careful weighing of each type of variance requested is necessary. At the same time, it is just as appropriate for an appellate court as for a district court to consider and analyze policy problems with a Guideline. The soundness of the relevant Guideline, no less than the individual defendant’s conduct and circumstances, will help guide the appellate court’s decision whether a particular sentence is reasonable, and in expressing its views the appellate court makes its own contribution to the ongoing dialogue between the judiciary and the Sentencing Commission. As the Supreme Court put it, “[t]he statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and

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209. *Id.* at 211-12.

210. *See id.* at 219.

211. *Id.* at 222 (citation and internal quotation marks omitted).

212. *See supra* notes 203-05 and accompanying text.

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*courts of appeals* in that process.”<sup>213</sup> It is open to debate whether *Kimbrough* authorizes an appellate court to go further and render a categorical policy judgment that would *force* district judges within its jurisdiction to vary from a particular Guideline in every case.<sup>214</sup> But a policy flaw in a Guideline is certainly a valid reason to find a particular sentence “unreasonable,” and therefore well within the scope of appellate courts’ consideration in their review of the reasonableness of a criminal sentence.

As the scope of policy variances widens and courts employ the discretion afforded by *Kimbrough* and its progeny more broadly across the Guidelines, appellate courts will further clarify the standards of review that apply to the evolving procedure regarding variances. For purposes of our main concern here—the procedure for applying policy variances—what is important is that appellate courts specify for district courts a clear order-of-battle that requires the separate consideration and application of policy- and individual-based variances.

## VI. CONCLUSION

Decades of a mandatory-Guideline culture in the federal courts have ingrained the notion that the Guidelines are not to be questioned on the basis of policy; in the old regime, such considerations, if applied at all, had to be infused into the sentencing calculus surreptitiously, in the guise of other justifications. But now that *Kimbrough* has legitimized policy-based variances, it benefits the parties, the public, and the Commission for district courts to make explicit the extent to which policy considerations help determine a sentence. Clearly distinguishing policy-based from individualized reasons for a variance will enhance sentencing fairness and transparency by ensuring the consideration and thoughtful weighing of all relevant factors and by producing a clear explanation of the entire reason for a sentence. Additionally, the more lucidly courts explain the nature and extent of their policy disagreements, the better informed the Commission will be as it continually revises the Guidelines. Courts should therefore integrate the policy-variance authority of *Kimbrough* with the sentencing process of *Gall* not by shoehorning policy arguments into their consideration of the § 3553 factors, but instead by adding another analytical step to the *Gall* framework that gives judges the opportunity to do *Kimbrough* justice.

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213. See *Rita v. United States*, 551 U.S. 338, 350 (2007) (emphasis added).

214. See *United States v. Johnson*, 643 F.3d 545, 550-51 (7th Cir. 2011) (rejecting this argument).