Fun with Numbers: *Gall*'s Mixed Message regarding Variance Calculations

Nicholas A. Deuschle†

> Figures often beguile me, particularly when I have the arranging of them myself.
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> Mark Twain[1]

INTRODUCTION

You are a federal court of appeals judge. A defendant calls on you to review his sixty-month prison sentence. The defendant's actions certainly merit punishment, as he produced and sold over 2,500 false identification documents. His sentence, however, remains in question. Although the lower court sentenced him to sixty months, his sentence was above the range recommended by the advisory United States Sentencing Guidelines (Guidelines), which endorse a sentence ranging between thirty-seven and forty-six months.

Under the Supreme Court's decision in *Gall v United States*,[2] you are to determine whether the lower court's sentence is "reasonable."[3] In addition, when a sentence falls above or below the Guidelines' recommended range, you are to examine "the extent of the deviation [from the Guidelines]."[4] When analyzing this deviation, however, you cannot apply "a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[5] But, at the same time, you must "ensure that the justification [for the lower court's deviation from the Guidelines] is sufficiently compelling to support the degree of the

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† BA 2010, Wake Forest University; JD Candidate 2014, The University of Chicago Law School.

1 Mark Twain, *Chapters from My Autobiography* 471 (Oxford 1996).

2 552 US 38 (2007).

3 Id at 40.

4 Id at 51.

5 Id at 47.

variance" because "major" variances from the Guidelines require more support than "minor" ones.[6]

You are left wondering: What does the Supreme Court mean by disallowing the use of "a rigid mathematical formula that uses the percentage of a departure" while still requiring examination of the "extent of the deviation" and "degree of the variance"?[7] As the reviewing judge, must you simply calculate the difference between the lower court's sentence and the Guidelines in absolute measurements of time? This would mean the defendant, with a prison sentence again of sixty months, was sentenced to only fourteen months above the Guidelines. You may find this measurement particularly persuasive given that the average federal prison sentence nationwide is fifty-seven months.[8] But, perhaps the terms "extent" and "degree" require an examination of the sentence's relative distance from the Guidelines. Such an analysis would require a percentage calculation. From the top of the Guidelines (46 months), the lower court's sentence of 60 months demonstrates a 30 percent deviation. Does this calculation change your assessment of the sentence's reasonableness? When framed in this way, a 30 percent deviation would seem to be a more substantial variance from the Guidelines than 14 months. Does the Supreme Court's language even require an explicit calculation of the Guidelines variance?

In *United States v Castillo*,[9] the Seventh Circuit faced this exact scenario.[10] According to the *Castillo* court, "the relative is generally more important than the absolute."[11] In support of its view, the Seventh Circuit found it "hard to see how a court can carry out the command of *Gall* to require a justification 'sufficiently compelling to support the *degree* of the variance'—'degree' being a relative rather than absolute measure—without at least considering the percentage deviation."[12] Like the Seventh Circuit, the Fourth, Sixth, Ninth, and Eleventh Circuits have accepted an interpretation of *Gall* that supports the use of

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6 *Gall*, 552 US at 50.

7 Id at 47, 50.

8 Department of Justice, *Federal Justice Statistics 2009—Statistical Tables* 27 (Dec 2011), online at http://www.bjs.gov/content/pub/pdf/fjs09st.pdf (visited Sept 12, 2013) (providing federal sentencing data from October 2008 to September 2009).

9 695 F3d 672 (7th Cir 2012).

10 See id at 673.

11 Id.

12 Id at 674 (citation omitted), citing *Gall*, 552 US at 50.

percentages as a component of reasonableness review in federal sentencing.[13]

An equal number of their sister courts disagree. Citing the Supreme Court's rejection of "a rigid mathematical formula that uses the percentage of a departure,"[14] the Second, Third, Fifth, Eighth, and DC Circuits disavow percentages.[15] These courts read *Gall* to demonstrate the Court's concern with percentages. Moreover, these courts view the introduction of percentage variance calculations into sentencing review as "'too simplistic' to effectuate the sentencing purposes of § 3553(a) [the federal sentencing statute]."[16]

This split has provoked a growing, yet overlooked, indeterminacy within federal sentencing jurisprudence. When district courts' sentences vary from the Guidelines, how should an appellate court evaluate "the extent of the deviation"? At its core, this question raises a fundamental framing problem. As psychologists Amos Tversky and Daniel Kahneman write, "[C]hanges in the formulation of choice problems cause[ ] significant shifts of preference."[17] Thus, how a court frames a variance matters for purposes of sentencing. An answer that resolves this framing issue not only will address the immediate split dividing appellate courts but also will provide perspective on a broader,

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13 See *United States v Whorley*, 550 F3d 326, 340–41 (4th Cir 2008) (using percentage variance calculations); *United States v Vowell*, 516 F3d 503, 511 (6th Cir 2008) (same); *United States v Ressam*, 679 F3d 1069, 1089–90 (9th Cir 2012) (same); *United States v Irey*, 612 F3d 1160, 1196 (11th Cir 2010) (same). The First Circuit also mentioned the percentage variance in one case. See *United States v Prosperi*, 686 F3d 32, 43 (1st Cir 2012) ("The heart of the government's argument is its repeated observation that the probationary sentences imposed are an eighty-seven-month (100%) variance from the bottom of the applicable guidelines range."). The First Circuit left unclear whether it thought the use of percentages was impermissible under *Gall*. Id at 49 ("We are mindful of how rare it is to encounter a variance of this magnitude.").

14 *Gall*, 552 US at 47.

15 See *United States v Verkhoglyad*, 516 F3d 122, 134 (2d Cir 2008) (rejecting percentages as a method of calculation for Guidelines variances); *United States v Tomko*, 562 F3d 558, 573 (3d Cir 2009) (same); *United States v Williams*, 517 F3d 801, 811–12 (5th Cir 2008) (same); *Ferguson v United States*, 623 F3d 627, 631 (8th Cir 2010) (same); *United States v Burns*, 577 F3d 887, 894 (8th Cir 2009) (same); *United States v Gardellini*, 545 F3d 1089, 1093 (DC Cir 2008) (same).

16 *Verkhoglyad*, 516 F3d at 134, quoting *United States v Rattoballi*, 452 F3d 127, 137 n 5 (2d Cir 2006).

17 Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci 453, 457 (1981). See also Daniel Kahneman and Amos Tversky, *Choices, Values, and Frames*, in Daniel Kahneman and Amos Tversky, eds, *Choices, Values, and Frames* 1, 10 (Cambridge 2000) ("Formulation effects can occur fortuitously, without anyone being aware of the impact of the frame on the ultimate decision.").

ever-evolving issue confronting sentencing law—the allocation of sentencing discretion between district and appellate courts.

This Comment attempts to resolve the current indeterminacy regarding variance calculations. Part I begins with the background of the Guidelines and the evolving relationship between district and appellate court sentencing power. Part II then outlines the various responses to *Gall* regarding variance calculation. Part III argues that the appellate practice of percentage calculation is inconsistent with *Gall*. Part III further contends that several nonpercentage options also conflict with *Gall*. Instead, this Comment provides a viable alternative calculation that both tracks the logic of *Gall* and offers a workable standard going forward post-*Gall*. In line with those goals, Part IV advocates the adoption of absolute variance calculations.

I. TRACING DISCRETION AND APPELLATE REVIEW THROUGH FEDERAL SENTENCING

Discretion is a deceptively irresolute term. At first glance, it would seem to be a straightforward concept. Discretion, however, varies in degree.[18] Along those varying degrees, discretion's strength, the ability to tailor outcomes to the facts of specific cases, will inversely adjust to its weakness, the potential for unwarranted disparity. A key feature of sentencing decision making is the allocation of discretion between district and appellate courts. More specifically, the standard by which an appellate court reviews sentences is a "crucial" determinant of the degree of discretion afforded sentencing judges.[19] To fully appreciate the division among circuit courts following *Gall*, one must first understand the continually shifting relationship between lower court discretion and appellate review in federal sentencing.

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[18] See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 243 (1993) (noting that the "degree" of district court discretion turns partially on the standard of appellate review). See also Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J Crim L & Criminol 883, 885 (1990) ("Discretion in its most simple terms is defined as the power of free decision or latitude of choice within certain legal bounds.").

[19] Stith and Koh, 28 Wake Forest L Rev at 243 (cited in note 18).

A. Historical Background of the Sentencing Guidelines

The origins of the current post-*Gall* split long predate the case's arrival on the federal docket in the Southern District of Iowa. Throughout much of American history, federal judges enjoyed nearly exclusive discretion in imposing criminal sentences.[20] To be more precise, a sentencing judge was only required to sentence within a range bounded by a statutorily prescribed maximum and minimum.[21] Appellate review thus played almost no part in the sentencing process.[22]

This lopsided allocation of discretion between district and appeals courts, however, ultimately spelled the model's demise. Reformers questioned the "almost unfettered discretion" all too common in sentencing decisions.[23] Namely, sentences evidenced inconsistencies along racial, gender, and socioeconomic lines.[24] Moreover, because district courts had such broad-ranging discretion, appellate courts presumed that "the sentencing judge [saw] more and sense[d] more" than they themselves could.[25] This view, in turn, led to "virtually unconditional deference on appeal."[26]

Recognizing these issues, Judge Marvin E. Frankel referred to the system as "law without order."[27] Sentencing reformers like Judge Frankel spurred the United States Senate to propose legislation fashioning a sentencing system free of "unwarranted disparity."[28] With concern mounting over sentencing disparities,

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20 See id at 225 & n 6, citing Nagel, 80 J Crim L & Criminol at 892–93 (cited in note 18).

21 See *Mistretta v United States*, 488 US 361, 364–65 (1989) (recognizing that, in the past, judges could sentence within "customarily wide range[s]").

22 See Stith and Koh, 28 Wake Forest L Rev at 226 (cited in note 18).

23 See *Mistretta*, 488 US at 364. See also Nora V. Demleitner, et al, *Sentencing Law and Policy: Cases, Statutes, and Guidelines* 139 (Aspen 2d ed 2007) (noting the broad-ranging sentencing power afforded judges).

24 See *Mistretta*, 488 US at 365 (noting "[s]erious disparities" in the pre-Guidelines system). See also Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 Notre Dame L Rev 21, 26 & n 8 (2000).

25 *Mistretta*, 488 US at 365 (quotation marks omitted) (explaining the deference given to district court judges).

26 Id. See also *Koon v United States*, 518 US 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.").

27 Marvin E. Frankel, *Criminal Sentences: Law without Order* 5 (Hill and Wang 1973) ("As to the penalty that may be imposed [during sentencing], our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a 'government of laws, not of men.'").

28 Stith and Koh, 28 Wake Forest L Rev at 231 (cited in note 18).

Congress enacted the Sentencing Reform Act of 1984[29] (SRA), establishing the statutory framework for a federal sentencing system. Three years later, in tandem with the SRA, the newly established United States Sentencing Commission (Commission) developed the Guidelines destined to be the standard in sentencing for almost the next twenty years.[30]

B. The Federal Sentencing Guidelines: "Sentencing by the Numbers"[31]

To realize the intended purposes behind the Guidelines' creation, the Commission designed the Guidelines to promote uniformity and allow for structured sentencing through limitations on judicial discretion.[32] The result was the birth of a "modified real offense system."[33] In such a system, the judge calculates a "presumptive sentencing range" based on numerical values assigned to both the offense(s) of conviction ("offense levels") and a defendant's criminal history in conjunction with "relevant conduct" factors.[34] "Relevant conduct" includes a defendant's "uncharged, dismissed, and (sometimes acquitted) conduct."[35]

This new system was quick to become a fixture in federal sentencing jurisprudence.[36] At the district court level, the Guidelines mandated the imposition of a sentence within the Guidelines range.[37] This requirement effectively relegated sentencing courts to "procedural" computations of the Guidelines range.[38] Even the Guidelines' grant of sentencing discretion could largely be described as circumscribed. While judges had the discretion to determine a sentence anywhere within the Guidelines range,

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29 Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

30 See Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 SLU L J 299, 305 (2000).

31 Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L Rev 751, 752 (1992).

32 United States Sentencing Commission, *Guidelines Manual* 2–3 (GPO 2012).

33 Frank O. Bowman III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after* Booker, 43 Houston L Rev 279, 284 (2006).

34 Id.

35 Bowman, 44 SLU L J at 307 (cited in note 30).

36 See *Mistretta*, 488 US at 412 (upholding the Guidelines as constitutionally valid).

37 18 USC § 3553(b)(1) (directing that courts "shall impose a sentence of the kind, and within the range" established under the Guidelines).

38 See David C. Holman, Note, *Death by a Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment*, 50 Wm & Mary L Rev 267, 273 (2008).

the Commission had predesignated that range. Also, district courts could "depart" from the provided range but only in a narrowly circumscribed subset of cases.[39] In short, the Guidelines were far more than "guiding" for district courts.

At the appellate level, sentencing review bifurcated. For those sentences falling within the Guidelines' range, the SRA required a deferential standard of appellate review. That is, unless a within-Guidelines sentence violated the law or incorrectly applied the Guidelines, the SRA required appellate courts to affirm the sentence.[40] This sentencing system thus incentivized district courts to sentence within the Guidelines to receive appellate deference.[41]

For those sentences falling outside the Guidelines, however, the appellate standard remained in a rather constant state of flux. An early version of the SRA simply authorized reviewing courts to: (1) overturn a sentence that was "clearly erroneous" and (2) "give due deference to the district court's application of the guidelines to the facts."[42] In *Koon v United States*,[43] the Court interpreted those requirements to adopt implicitly an abuse-of-discretion standard of review.[44] In articulating that standard, the Court appeared to afford district courts liberal discretion to depart from the Guidelines, stating: "We agree that Congress was concerned about sentencing disparities, but . . . [the SRA] manifests an intent that district courts retain much of their traditional sentencing discretion."[45] The implementation of this deferential appellate standard for Guidelines departures, however, was short lived. In 2003, Congress passed the PROTECT Act,[46] which among its changes adopted the Feeney

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39 18 USC § 3553(b)(1) (prescribing the circumstances under which a court could depart from the Guidelines). See also Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 72–77 (Chicago 1998) (outlining features of the Guidelines' rules on departures).

40 18 USC § 3742(f) (providing that an appellate court "shall" affirm a sentence not in violation of the law or outside the Guidelines' range).

41 See Stith and Cabranes, *Fear of Judging* at 73 (cited in note 39).

42 18 USC § 3742(e). Section 3742(e) was held unconstitutional by *United States v Booker*, 543 US 220, 259 (2005).

43 518 US 81 (1996).

44 Id at 98–99.

45 Id at 97.

46 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub L No 108-21, 117 Stat 650, codified in various sections of Title 18 and the US Sentencing Guidelines.

Amendment.[47] This amendment invalidated *Koon*'s abuse-of-discretion standard of review and replaced it with a far more searching de novo standard.[48] Yet, just two years later, the de novo standard itself became a nullity following the Court's decision in *United States v Booker*.[49]

C. *Booker*: Plunged Down the "Rabbit Hole"[50]

The Supreme Court's *Booker* decision turned sentencing law on its head.[51] In *Booker*, the Court held that the Guidelines' real-offense system violated the Sixth Amendment by allowing a judge to find facts increasing a defendant's sentence beyond what was authorized by a jury verdict.[52] To remedy this constitutional violation, the Court excised two provisions of the SRA.[53] First, the *Booker* Court removed the portion of the statute that required district courts to sentence within the Guidelines' prescribed ranges.[54] This excision rendered the Guidelines "effectively advisory."[55]

Second, and important for purposes of this Comment, the Court removed 18 USC § 3742(e) of the SRA, which set forth the de novo standard of review for sentences imposed outside the Guidelines.[56] The Court supplanted § 3742(e)'s de novo review with a new standard—"reasonableness."[57] Under this revised standard, the Court established a system wherein appellate courts assessed only the "reasonableness" of a sentence—whether within or outside the Guidelines—according to 18 USC § 3553(a), which requires consideration of seven sentencing factors.[58]

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47 Bowman, 43 Houston L Rev at 288 (cited in note 33) (describing the effect of the Feeney Amendment). See also PROTECT Act § 401(m), 117 Stat at 675.

48 See Bowman, 43 Houston L Rev at 288 (cited in note 33).

49 543 US 220 (2005).

50 Frank O. Bowman III, *"The Question Is Which Is to Be Master—That's All": Cunningham, Claiborne, Rita, and the Sixth Amendment Muddle*, 19 Fed Sent Rptr (Vera) 155, 155 (2007).

51 See Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 Houston L Rev 341, 344 (2006).

52 *Booker*, 543 US at 226–27, 235.

53 Id at 245.

54 Id at 259–60 (explaining the removal of 18 USC § 3553's mandatory provision).

55 Id at 245–46.

56 *Booker*, 543 US at 260–62.

57 Id at 261–62.

58 These seven factors are: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the purposes of punishment (such as deterrence and retribution); (3) "the kinds of sentences available"; (4) the Guidelines; (5)

Pressing logistical questions confronted courts implementing this newly crafted sentencing regime. Congress had fashioned much of the SRA under the operating assumption that the Guidelines were mandatory.[59] How were the now "advisory" Guidelines supposed to function in practice? *Booker* left this looming question markedly unanswered.

D. The Supreme Court's Attempts to Clarify the "Discordant Symphony of Different Standards"[60]

In his dissenting opinion in *Booker*, Justice Antonin Scalia ominously predicted that *Booker*'s reasonableness review would "produce a discordant symphony of different standards."[61] Unfortunately, this prediction has proved all too clairvoyant. As a result of its *Booker* opinion, the Supreme Court has had to address a number of issues relating to applications of reasonableness review.

The first question testing the parameters of this new sentencing regime was whether appellate courts could apply a presumption of reasonableness to a sentence falling within the now-advisory Guidelines range. Appellate courts split on the issue. The Supreme Court resolved the split in *Rita v United States*,[62] where it held that the courts of appeals could apply a presumption of reasonableness to within-Guidelines sentences, but were not required to do so.[63] Importantly, though, this presumption could only apply at the appellate level, and district courts "[could] not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[64] Regardless of whether appeals courts even applied the presumption, the Court made clear that no such inverse presumption of unreasonableness could be applied to outside-Guidelines sentences, because such a

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any Commission policy statement; (6) "the need to avoid unwarranted sentence disparities"; and (7) "the need to provide restitution to any victims of the offense." 18 USC 3553(a). See also Anne Louise Marshall, Note, *How Do Federal Courts of Appeals Apply* Booker *Reasonableness Review after* Gall*?*, 45 Am Crim L Rev 1419, 1424 (2008) (describing the use of § 3553(a)'s factors post-*Booker*).

59 See *Booker*, 543 US at 265 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system.").

60 Id at 312 (Scalia dissenting).

61 Id (Scalia dissenting).

62 551 US 338 (2007).

63 Id at 347.

64 Id at 351.

presumption would likely work toward reinstituting mandatory Guidelines.[65]

Six months after *Rita*, the Court turned its attention to a district court's ability to vary from the Guidelines based on policy disagreements with the Guidelines themselves. In *Kimbrough v United States*,[66] a district court had sentenced a defendant outside the Guidelines range based on its dispute with the Guidelines' disparate treatment of crack cocaine as compared to powder cocaine. Known as the "100-to-1" disparity, the Guidelines subjected defendants convicted of crack cocaine offenses to sentences equal to those imposed on defendants possessing one hundred times the amount of powder cocaine.[67] The Fourth Circuit, however, had held that variances resulting from disagreement with this policy were "per se unreasonable."[68] Limiting its decision to disputes with the 100-to-1 disparity, the Supreme Court disagreed.[69] It permitted district courts to deviate based on this policy disagreement with the Guidelines, reasoning that the 100-to-1 disparity did not "exemplify the Commission's exercise of its characteristic institutional role."[70]

E. *Gall*: The *Booker* Confusion Continues

On the same day it issued *Kimbrough*, the Supreme Court also decided *Gall*. In *Gall*, the Court attempted to clarify further *Booker*'s standard of review for sentences imposed outside the Guidelines. In doing so, *Gall* rejected a "proportionality test," which required justifications for an outside-Guidelines sentence to be "proportional to the extent of the difference between the advisory range and the sentence imposed."[71] Applying this proportionality test, the Eighth Circuit had held that a district court's sentence of probation amounted to a "100% downward variance" from the Guidelines' recommended range of thirty to thirty-six months' imprisonment.[72] According to the Eighth Circuit, such an "extraordinary" variance had to be supported by

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65 Id at 354–55.

66 552 US 85 (2007).

67 Id at 102–08.

68 *United States v Kimbrough*, 174 Fed Appx 798, 799 (4th Cir 2006).

69 *Kimbrough*, 552 US at 91.

70 See id at 109.

71 *Gall*, 552 US at 40–41, 45.

72 *United States v Gall*, 446 F3d 884, 889 (8th Cir 2006).

"extraordinary circumstances," but the district court had failed to do so.[73]

In rejecting the proportionality test, *Gall* left a collection of ambiguities rivaling those of *Booker*. First, the Supreme Court described the Eighth Circuit's approach as coming "too close to creating an impermissible presumption of unreasonableness" without clearly indicating what an alternative, permissible approach might be.[74] While allowing appellate courts to "take the degree of variance into account and consider the extent of a deviation from the Guidelines" during reasonableness review, *Gall* prohibited "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[75] Similarly, appellate courts could not require "extraordinary circumstances" to justify a sentence outside the Guidelines range, but district courts must nevertheless explain why "an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."[76]

Even the Supreme Court's explanation of the proportionality test it was rejecting is unclear. The Court described the proportionality test as a "rigid mathematical formula," suffering from "infirmities of application."[77] Authoring the majority opinion, Justice John Paul Stevens first asserted that the proportionality test's use of percentages mischaracterizes variances as "more extreme" when the Guidelines range is low.[78] For example, "a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years."[79] Justice Stevens then argued that "the mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications."[80] That is, by saying that "X" reason justifies "Y" percentage, the proportionality test conceptually argues that "X" reason equates to "Y" percentage. Yet, as Justice Samuel Alito's dissent contended, Justice Stevens's description of the proportionality test may attack "straw men" because it is uncertain whether appellate courts

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73 Id.

74 *Gall*, 552 US at 47.

75 Id.

76 Id at 45–47.

77 Id at 47–48.

78 *Gall*, 552 US at 47–48.

79 Id at 48.

80 Id at 49.

were applying a problematic "mathematical approach" or instead simply considering "the extent of the difference," as the *Gall* majority itself commands.[81]

Despite these ambiguities, *Gall* did attempt to clarify some aspects of both district and appellate sentencing standards. At the district court level, the Supreme Court required that judges calculate "the applicable Guidelines range" but noted that "[t]he Guidelines are not the only consideration."[82] Sentencing courts must also "consider all of the § 3553(a) factors," not just § 3553(a)(4), which requires examination of the Guidelines.[83] Using the § 3553(a) factors, sentencing courts should then conduct "individualized assessment[s] based on the facts presented."[84] If a district court does "settl[e] on [an] appropriate sentence" outside the Guidelines range, such a sentence should still reflect consideration of "the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[85] The Court's instructions concluded by noting that a district court's "major departure [from the Guidelines] should be supported by a more significant justification than a minor one."[86]

At the appellate level, the Supreme Court distinguished two standards of review—procedural and substantive.[87] As to procedure, appellate courts must confirm that "the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence."[88] At the substantive level, appellate review should "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range."[89] But, while appellate courts "may consider the extent of the deviation," they "must give due deference to the district court's decision that the § 3553(a) factors, on

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81 Id at 71–72 (Alito dissenting).

82 *Gall*, 552 US at 49 (majority).

83 Id at 49–50.

84 Id at 50.

85 Id.

86 *Gall*, 552 US at 50.

87 As Professor Douglas A. Berman describes, the Court "requires appellate courts to ensure [that] sentences are both reasoned and reasonable." Douglas A. Berman, *Reasoning through Reasonableness*, 115 Yale L J Pocket Part 142, 142 (2006).

88 *Gall*, 552 US at 51.

89 Id.

a whole, justify the extent of the variance."[90] Most importantly, the Court reaffirmed that, whether a sentence is within or outside the Guidelines, appellate courts must review sentences under "a deferential abuse-of-discretion standard."[91]

Even with these instructions, confusion persists after *Gall*. When assessing sentences outside the Guidelines, how exactly should an appellate court calculate the "extent of the variance"? Since *Gall*, the Supreme Court had an opportunity in *Pepper v United States*[92] to resolve these issues but neglected to do so.[93] Instead, both district and appellate courts have been left to wonder about the contours of reasonableness review after *Gall*.

F. Note on Terminology

Before continuing further, a clarification must be made to account for recent changes in federal sentencing vernacular. After *Gall*, the Court distinguished "variances" from "departures." A 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."[94] That is, the Guidelines themselves contemplate specific circumstances in which a sentence not within the Guidelines range is appropriate. For example, Guidelines provision § 5K1.1 enumerates a "departure" from the Guidelines for when the defendant provides "substantial assistance in the investigation or prosecution of another person."[95] A "variance," on the other hand, "refers to a non-Guidelines sentence *outside* the Guidelines framework."[96] This Comment focuses on variances and will use that term in line with the Court's sentencing parlance.

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90 Id.

91 Id at 41.

92 131 S Ct 1229 (2011).

93 Id at 1241. The Supreme Court in *Pepper* did describe a "departure" from the Guidelines in terms of a percentage. Id at 1250. The Court's use of a percentage, however, has little bearing on this Comment. The *Pepper* Court did not calculate "the extent of the variance" under *Gall* or even apply its reasonableness review. Rather, the Court used the district court's own description of its departure to decide an unrelated sentencing issue. See id (holding that the law of the case doctrine did not require a district court to provide the same departure during resentencing).

94 *Irizarry v United States*, 553 US 708, 714 (2008) (emphasis added).

95 United States Sentencing Guidelines (USSG) § 5K1.1.

96 *Pepper*, 131 S Ct at 1245 n 12 (emphasis added).

II. PERCENTAGES OR NOT PERCENTAGES: APPLYING *GALL*

As Justice Scalia's dissent in *Booker* prophetically cautioned, "The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice."[97] Several years after both *Booker* and *Gall*, Justice Scalia's words ring true. Appellate courts remain at a loss as to how reasonableness review should be applied.[98] This Comment addresses a specific concern within this broader uncertainty: How should appellate courts calculate Guidelines variances in light of *Gall*'s reasonableness-review instructions?

This question is significant because of the function variance calculations play in the sentencing system. After *Booker*, how appellate courts address variance calculations has implications for the allocation and future of sentencing discretion. Inconsistency in the way appellate courts calculate variances from the Guidelines undercuts laborious legislative and judicial efforts to decrease sentencing disparities and promote uniformity. Moreover, ad hoc invocations of differing standards by appellate courts likely work to the detriment of district court discretion—placed in a more positive light since *Booker*—as appellate courts opportunistically use various approaches to prop up their review of lower-court sentences. In short, variance calculations are a determinative factor in addressing the distinct roles of the courts in a post-*Booker*, and now post-*Gall*, world.

Since *Gall*, appellate courts have generally split into two camps over how to calculate variances properly. Five circuits contend that percentages can and do matter in reviewing sentencing decisions after *Gall*. Holding otherwise, an equal number of circuits read *Gall* to preclude the use of percentage deviations in determining a sentence's reasonableness. These courts have fashioned a variety of alternative approaches in lieu of percentages. This Part first discusses the competing sides of this divide. Then, it examines two proposals presently offered that could resolve the split.

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[97] *Booker*, 543 US at 311 (Scalia dissenting).

[98] See, for example, *United States v Levinson*, 543 F3d 190, 197 (3d Cir 2008) ("[W]e find it difficult to give direction when we are ourselves endeavoring to understand our role in reviewing sentences.").

A. The "Percentages Allowed" Camp

1. The rationale.

The Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have each adopted a reasonableness approach that incorporates the use of percentage calculations after *Gall*.

A recent opinion in the Seventh Circuit elucidates this position. In *United States v Castillo*, the court affirmed a sentence that it had calculated as a 30 percent variance from the Guidelines range.[99] Grappling with the Supreme Court's language in *Gall*, the *Castillo* court held that not only are percentages significant in sentencing review, but that "the relative is generally more important than the absolute."[100] In support of this interpretation, the Seventh Circuit cited *Gall*'s language requiring "sufficiently compelling" justifications for any "degree of [ ] variance" from the Guidelines.[101] Focusing on the Court's use of the word "degree," the *Castillo* court noted that this term is "a relative rather than absolute measure."[102]

The Seventh Circuit found further support for its position in the Commission's relationship to sentencing courts. In an appeal for institutional deference, the court described variances from the Guidelines as "challenging the Commission's penal judgment."[103] Reasoning further, the *Castillo* court stated, "[G]iven that the Commission's knowledge of penology exceeds that of most judges, the judge needs to provide more in the way of justification [were he to depart significantly from the Guidelines] than if he were departing incrementally."[104] Thus, for the Seventh Circuit, consideration of a sentence's percentage deviation from the Guidelines follows logically from *Gall*'s emphasis on "the relative" and the deferential position of sentencing courts toward the Commission.

The Fourth, Sixth, Ninth, and Eleventh Circuits have similarly justified their use of percentages. In addition to the Seventh Circuit's arguments, these courts relied on the words of *Gall* that "a major departure should be supported by a more

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99 See *Castillo*, 695 F3d at 673.

100 Id.

101 Id at 674 (emphasis omitted), quoting *Gall*, 552 US at 50.

102 *Castillo*, 695 F3d at 673.

103 Id.

104 Id.

significant justification than a minor one."[105] Using this language, these circuits have attempted to distinguish, by way of percentages, between "major" and "minor" sentencing variances.[106]

No appellate court, however, has attempted to reconcile its use of percentages with *Gall*'s prohibition of "a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[107] The Fourth, Sixth, and Seventh Circuits simply omit this language from their opinions.[108] While the Ninth and the Eleventh Circuits recite *Gall*'s prohibition, they do so without contemplating its bearing on percentage variance calculations.[109]

2. Applications.

Although these circuits generally agree about the appropriateness of percentage variance calculations in reasonableness review, their approaches to these calculations have been strikingly dissimilar. For one, the Fourth Circuit appears to have adopted percentage variance calculations after initially rejecting such calculations. In *United States v Evans*,[110] the Fourth Circuit clearly stated, "*Gall* similarly forecloses Evans' heavy reliance on the fact that the 125–month sentence that the district court imposed is over 300 percent above the high end of the advisory Guidelines range."[111] However, just a few months later in *United States v Whorley*,[112] the Fourth Circuit introduced percentages into its reasonableness review.[113] In fact, the *Whorley* court paradoxically cited the *Evans* opinion, which rejected percentages,

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[105] See *United States v Evans*, 526 F3d 155, 161 (4th Cir 2008) (using *Gall*'s "major" versus "minor" distinction to justify its holding); *United States v Zobel*, 696 F3d 558, 569 (6th Cir 2012) (same); *United States v Ressam*, 679 F3d 1069, 1089 (9th Cir 2012) (same); *United States v Irey*, 612 F3d 1160, 1186 (11th Cir 2010) (same).

[106] See, for example, *Evans*, 526 F3d at 161; *Irey*, 612 F3d at 1186; *Zobel*, 696 F3d at 569; *Ressam*, 679 F3d at 1089.

[107] *Gall*, 552 US at 47.

[108] See *United States v Whorley*, 550 F3d 326, 342 (4th Cir 2008) (laying out *Gall*'s reasonableness review but omitting relevant variance language); *Zobel*, 696 F3d at 569 (same); *Castillo*, 695 F3d at 674 (same).

[109] See *Ressam*, 679 F3d at 1090; *Irey*, 612 F3d at 1186.

[110] 526 F3d 155 (4th Cir 2008).

[111] Id at 166 & n 5.

[112] 550 F3d 326 (4th Cir 2008).

[113] Id at 340.

as supportive of its percentage calculation.[114] Needless to say, the Fourth Circuit's approach to variance calculations is less than clear.

The Fourth Circuit's reasonableness review, though, is by no means the sole approach accepted by these appellate courts. The language of another approach, taken by the Seventh Circuit, appears to mirror the proportionality test rejected in *Gall*. In *United States v Miller*,[115] the Seventh Circuit weighed the sufficiency of the lower court's justifications for its variance in light of the calculated percentage deviation.[116] Specifically, the Seventh Circuit stipulated, "[A] sentencing judge should support an above-guidelines sentence with compelling justifications."[117] Applying this "compelling justifications" rule, the Seventh Circuit held that the district court had "failed to provide sufficient support for a sentence that was fifty percent above the high end of the advisory Guidelines range."[118]

Another approach adopted by the Sixth and Eleventh Circuits has introduced percentage variance calculations as a basis of comparison with intra- and intercircuit sentencing precedent. In *United States v Zobel*,[119] the Sixth Circuit, having calculated the district court's deviation to be 11 percent, compared this 11 percent figure with previously accepted deviations of 100 and 242 percent.[120] The Sixth Circuit reasoned that the sizeable (relative) difference between the 11 percent calculation and Sixth Circuit precedent of 100 and 242 percent justified its decision to uphold the lower court's sentence as reasonable.[121]

In *United States v Irey*,[122] the Eleventh Circuit took this comparative analysis one step further by analyzing its percentage calculation against those of its sister circuits.[123] After pegging the lower court's variance at 42 percent, the *Irey* court found this deviation to be "major" and thus required "more

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[114] Id at 342 (quoting *Evans* but, in doing so, inserting bracketed material containing a percentage calculation).

[115] 601 F3d 734 (7th Cir 2010).

[116] Id at 740.

[117] Id (brackets in original), quoting *United States v Gooden*, 564 F3d 887, 890–91 (7th Cir 2009).

[118] *Miller*, 601 F3d at 740.

[119] 696 F3d 558 (6th Cir 2012).

[120] Id at 569 (calculating the percentage variance from the upper end of the Guidelines range).

[121] Id.

[122] 612 F3d 1160 (11th Cir 2010).

[123] Id at 1196.

significant justification than a minor one."[124] To justify its determination that the deviation was "major," the Eleventh Circuit cited to both the Fourth and Eighth Circuits, which had held deviations of 40 and 33 percent to be "major."[125] The Eleventh Circuit went on to overturn the district court's Guidelines variance relying, in part, on this comparison.[126]

The Eleventh Circuit's reasonableness review also points to a final use of percentages. The *Irey* court, as well as two other appellate courts adopting percentage variance calculations, has calculated sentences relative to a convicted offense's statutory minimum and maximum. In *United States v Vowell*,[127] the Sixth Circuit calculated a district court's Guidelines variance as 160 percent above the statutory minimum.[128] Extending this analysis, the Eleventh Circuit in *Irey* calculated a lower court's sentence relative to the statutorily prescribed range of 15 to 30 years.[129] The Eleventh Circuit gauged the lower court's sentence of 17 and ½ years as being 83 percent away from the statutory maximum, but only 17 percent from the statutory minimum.[130] In a similar vein, the Ninth Circuit in *United States v Ressam*[131] provided two percentage variance calculations.[132] First, the *Ressam* court noted the sentence's "two-thirds" downward variance from the Guidelines.[133] Second, and unique to the Ninth Circuit, the court also calculated the Guideline deviation that subtracted the years sentenced due to a mandatory minimum—resulting in an even greater, "more than three-fourths" deviation.[134]

B. The "Percentages Not Allowed" Camp

1. The rationale.

The Second, Third, Fifth, Eighth, and DC Circuits have interpreted *Gall* to eschew just what other circuits think the deci-

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[124] Id (calculating the percentage variance from the lower end of the Guidelines range).

[125] Id.

[126] *Irey*, 612 F3d at 1224.

[127] 516 F3d 503 (6th Cir 2008).

[128] Id at 511.

[129] *Irey*, 612 F3d at 1180.

[130] Id.

[131] 679 F3d 1069 (9th Cir 2012).

[132] Id at 1089.

[133] Id.

[134] Id.

sion accepts—application of percentage deviations in determining the reasonableness of criminal sentences. On several occasions, these courts have rejected appeals focused on variance percentages. For example, in *United States v Burns*,[135] the Eighth Circuit stated, "As we read *Gall*, the Court there was concerned about the heightened standard of review that appellate courts had imposed through the application of concepts such as extraordinary/exceptional circumstances, departure percentages, proportionality review, and the like."[136] Noting *Gall*'s rejection of "mathematical formulas," the Second Circuit likewise spurned percentages as part of its reasonableness review, observing that "numerical rules are 'too simplistic' to effectuate the sentencing purposes of § 3553(a)."[137] Lastly, taking up *Gall*'s reasoning concerning the infirmities of application with percentage variance calculations, the Third Circuit considered the description of a probationary sentence as "a 100–percent variance" to be "misleading."[138] Embodying these courts' central logic, the Fifth Circuit summarized, "The extent of a departure is a matter of informed judgment, not mathematical precision."[139]

2. Applications.

Like their sister circuits applying percentage measures, those circuits rejecting such calculations have been far from uniform or even coherent. For one, the DC Circuit appears to have evolved toward a firmer stance against percentages. In 2008, the court plainly stated, "The fact that eighteen months is twice the Guidelines maximum matters."[140] In dissent, Judge Brett Kavanaugh criticized the "undue weight" that the majority placed on the lower court's Guidelines variance.[141] In support of his position, Judge Kavanaugh pointedly wrote, "Although the *absolute* amount of a departure or variance is apparently relevant under *Gall* . . . , the percentage increase from the departure or variance is not."[142] Just five months later in *United States v*

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135 577 F3d 887 (8th Cir 2009).

136 Id at 894.

137 *United States v Verkhoglyad*, 516 F3d 122, 134 (2d Cir 2008), quoting *United States v Rattoballi*, 452 F3d 127, 137 n 5 (2d Cir 2006).

138 *United States v Tomko*, 562 F3d 558, 573 (3d Cir 2009).

139 *United States v Hernandez*, 633 F3d 370, 376 (5th Cir 2011).

140 *In re Sealed Case*, 527 F3d 188, 192 (DC Cir 2008).

141 Id at 197 (Kavanaugh dissenting).

142 Id at 197–98 (Kavanaugh dissenting).

Gardellini,[143] Judge Kavanaugh—now writing for the majority—appeared to reverse the DC Circuit's position on percentages in favor of the one that he had previously advocated in dissent.[144] Citing *Gall*, Judge Kavanaugh calculated the lower court's variance in absolute terms of months.[145] The opinion also notably reformulates other circuit courts' percentage calculations into absolute calculations.[146] Finally, although not explicitly rejecting percentages, Judge Kavanaugh noted that *Gall* rejected "Guidelines-centric appellate approaches" while also reemphasizing the deference due district courts after *Gall*.[147]

Judge Kavanaugh is not the first to have limited variance calculations to absolute terms, nor is his position the only accepted approach. Like the DC Circuit, though, each of the circuits rejecting percentages has, at one time, limited its reasonableness analysis to absolute measurements.[148] For example, in *United States v Cavera*,[149] the Second Circuit described a variance from the Guidelines as "exceed[ing] the top end of the Guideline range by just six months."[150] Similarly tackling reasonableness review in absolute terms, the Fifth Circuit found a Guidelines variance to be "four years, three months longer than the top of the Guidelines range, and six years, three months longer than the bottom of the Guidelines range."[151] Among these examples, a few courts have gone further using absolute calculations as means of comparison between variances.[152]

But again, not all appellate courts uniformly calculate variances in months or years. A few appellate court decisions appear to have, at least implicitly, advanced an analysis without a vari-

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143 545 F3d 1089 (DC Cir 2008).

144 Id at 1093.

145 Id at 1095 (comparing *Gall*'s probationary sentence from a "30–to–37–month Guidelines range" with a "10–to–16–month range").

146 Id at 1094 n 5 (describing the Sixth Circuit's *Vowell* opinion in absolute terms rather than in the percentage figures used by the Sixth Circuit).

147 *Gardellini*, 545 F3d at 1093.

148 See note 15.

149 550 F3d 180 (2d Cir 2008).

150 Id at 197.

151 *United States v Williams*, 517 F3d 801, 811–12 (5th Cir 2008). The Fifth Circuit, however, has been more equivocal on its rejection of percentage variance calculations. See *United States v Broussard*, 669 F3d 537, 555 (5th Cir 2012) (calculating a "three hundred percent increase" variance).

152 See, for example, *United States v Richart*, 662 F3d 1037, 1055 (8th Cir 2011) (comparing absolute variance calculations across circuits); *Ferguson v United States*, 623 F3d 627, 631 (8th Cir 2010) (same); *United States v Jaramillo-Avelino*, 344 Fed Appx 978, 980 (5th Cir 2009) (same).

ance calculation in any metric.[153] While noting the instructions for appellate review laid out in *Gall*, the Second Circuit in *United States v Stewart*[154] made no attempt to explicitly calculate the lower court's variance.[155] When compared to its dissent, *Stewart*'s indifference to variance calculation proves particularly poignant. Perhaps motivated by the lack of consideration paid to the "degree of variance" by the majority, the *Stewart* dissent calculated the variance as both an "extraordinary 92 percent reduction" and a "large" 232-month reduction.[156]

Finally, a few circuit court decisions have recommended using an offense-level approach.[157] This approach calculates the severity of a variance by the number of Guidelines offense levels traversed by the variance.[158] With respect to *Gall*, the Eighth Circuit noted that "[n]othing" in the Court's decision suggested that the approach "is an inappropriate means to distinguish a 'major departure' from a 'minor one.'"[159] The Eighth Circuit further reasoned that the offense-level approach is "more in keeping with the structure and theory of the sentencing guidelines."[160] The Eighth Circuit, however, provided no further explanation as to why its approach was "more in keeping" with the Guidelines.[161] Demonstrating an application of the offense-level approach, the Fourth Circuit—a circuit also adopting percentage variance calculations—determined that "the district court had to vary downward by at least 14 [offense] levels" in order to reach its reasonableness holding.[162]

C. Proposals Beyond the Circuit Divide

Even outside of appellate court decisions, reactions to *Gall* have been wide-ranging, with a cacophony of voices opining as to

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153 See *United States v Stewart*, 590 F3d 93, 137 (2d Cir 2009) (describing a variance as "a significant downward variance"); *United States v Duhon*, 541 F3d 391, 398–99 (5th Cir 2008) (providing no variance calculation).

154 590 F3d 93 (2d Cir 2009).

155 Id at 137.

156 Id at 165–66 & n 3 (Walker concurring in part and dissenting in part).

157 *Burns*, 577 F3d at 905 n 8 (advocating for use of the "offense level" approach); *Castillo*, 695 F3d at 675 (same). The Fourth Circuit, which has allowed for the use of percentages, has at times adopted the offense-level approach as well. See *United States v Morace*, 594 F3d 340, 345 (4th Cir 2010).

158 See *Castillo*, 695 F3d at 675.

159 *Burns*, 577 F3d at 905 n 8, citing *Gall*, 552 US at 50.

160 *Burns*, 577 F3d at 905 n 8.

161 Id.

162 *Morace*, 594 F3d at 345.

the correct approach to reasonableness review. Some seem to suggest a return to a pre-*Gall* proportionality review.[163] Others advance the introduction of entirely new variance metrics.[164] This Part will address two such attempts to clarify the proper form of variance calculation.

1. A proposed return to proportionality review.

To remedy the current appellate confusion, the Commission proposes that Congress enact a "more robust" appellate standard that "should require that the greater the variance from a guideline the greater should be the sentencing court's justification for the variance."[165] In support of its proposal, the Commission cites the need to gather a greater quantity of "relevant [sentencing] information."[166] According to the Commission, its proposed rule would provide such information and thus "help the Guidelines constructively evolve over time."[167]

This proposal, however, appears to be a thinly veiled challenge to the Supreme Court's *Gall* decision. For one, the purported motive behind the Commission's proposal—to collect greater sentencing information—is suspect. If the Commission desires greater information, it could simply review sentencing transcripts. Alternatively, the Commission could revise its "statement of reasons" form, which it already requires judges to file when their sentences deviate from the Guidelines, to require that judges provide whatever additional information the Commission deems necessary.[168] More importantly, the Commission's proposal attempts to wholly resurrect the proportionality review rejected by the Supreme Court. *Gall* clearly instructed that a "rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion

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[163] See *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Cong, 1st Sess 10–11 (2011) (testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission) ("Post-Booker Hearing").

[164] See Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing after* Booker *and* Rita, 85 Denver U L Rev 79, 83–91 (2007).

[165] *Post-Booker Hearing*, 112th Cong, 1st Sess at 11 (cited in note 163).

[166] Id at 67 (statement of Judge Patti B. Saris, Chair, United States Sentencing Commission), quoting *Rita*, 551 US at 357.

[167] *Post-Booker Hearing*, 112th Cong, 1st Sess at 67 (cited in note 163), quoting *Rita*, 551 US at 357.

[168] See 18 USC § 3553(c). See also 28 USC § 994(w)(1)(B).

in [*Booker*]."[169] Yet, the Commission advocates just such a rule. By instructing that "the greater the variance . . . the greater should be the sentencing court's justification," the Commission's proposal in effect requires a standard no different from the kind rejected in *Gall*. In sum, the Commission's proposed statutory rule sharply conflicts with *Gall* and thus provides an untenable answer to the questions surrounding Guidelines variance calculation.

2. A view from the bench.

Another influential actor, Sixth Circuit Judge Jeffrey Sutton, has also weighed in on the variance question. With *Gall* before the Supreme Court, Judge Sutton proposed a solution that would essentially bifurcate appellate review of sentencing variances into "modest" and "extreme" variances.[170] In his article, Judge Sutton bases this distinction on lower courts' ability or inability to provide "reasoned distinctions" between defendants while still promoting sentencing consistency.[171] For "modest" variances, Judge Sutton sees "little room" for appellate review as he believes lower courts to be better positioned than appellate courts to make such "reasoned distinctions" based on § 3553(a)'s sentencing factors.[172] For Judge Sutton, appellate courts can, however, better draw "reasoned distinctions" between "extreme variances" and should review for reasonableness only in those limited cases where such "extreme" deviations occur.[173]

Notably, in describing this distinction between "modest" and "extreme" variances, Judge Sutton's approach avoids percentages, describing the difference between "modest" and "extreme" variances as "not a numerical one—with downward variances of, say, 20% receiving little substantive review and downward variances of, say, 80% receiving more rigorous review."[174] Rather, for Judge Sutton, the distinction is "functional" and based on district and appellate courts' varying abilities to draw "reasoned distinctions" between defendants.[175]

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169 *Gall*, 552 US at 46.

170 Sutton, 85 Denver U L Rev at 83–90 (cited in note 164).

171 Id at 84–85.

172 Id at 84.

173 Id at 84–91.

174 Sutton, 85 Denver U L Rev at 85 (cited in note 164).

175 Id.

The sharpest criticism that one can level against Judge Sutton's proposal is that it replaces percentages, absolute measures, and all other potential measures with an even more problematic metric—"reasoned distinctions." While the proposal offers a definitive solution for measuring variances, it does so at the expense of contradicting *Gall*. Judge Sutton's suggestion provides a metric so vague that it effectively provides appellate courts with the de novo review standard that *Gall* (and *Booker*) explicitly rejected.[176] Moreover, variances acquiring the label of "extreme" will likely carry with them a presumption of unreasonableness much like sentences categorized as "extraordinary"—a presumption rejected in *Gall*. While Judge Sutton's proposal highlights the importance of variance calculations in relation to sentencing discretion, his solution, as it relates to variance calculations, would do little to alleviate *Gall*'s concerns regarding appellate review of Guidelines variances.

III. REACHING INTO THE "GRAB BAG OF POSSIBLE SOLUTIONS"[177]

Given that extant outside proposals for variance calculation directly conflict with the dictates of *Gall*, the uncertainty engulfing appellate courts remains. How should these courts assess variance calculations? This Part addresses the three approaches currently adopted by appellate courts to answer this question. Part III.A first argues that percentage variance calculations contradict *Gall*. After rejecting percentages, this Part then turns to nonpercentage alternatives. Specifically, Part III.B rejects the use of both an offense-level approach and a "no variance calculation" option.

A. Variance Percentages Contradict *Gall*

Citing *Gall*'s "degree of the variance" language, some circuit courts conclude that "the relative is generally more important than the absolute" in variance calculation.[178] In doing so, these courts continue to incorporate percentage deviations into their reasonableness review. But can they?

Four considerations necessitate the rejection of percentages. First, a close analysis of *Gall*'s text reveals that current appellate

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[176] See Holman, Note, 50 Wm & Mary L Rev at 303–05 (cited in note 38).

[177] *Evans*, 526 F3d at 168 (Gregory concurring) (noting that appellate courts must interpret *Gall*'s ambiguities).

[178] *Castillo*, 695 F3d at 673.

justifications for the use of percentages do not conform to the Supreme Court's holding or underlying rationales. Next, *Gall*'s oral argument provides further insight into the Court's apprehension over the use of percentage variance calculations. Third, the Court's own application of reasonableness review provides no support for these calculations. Lastly, a number of practical considerations also militate against the use of percentages.

1. *Gall*'s text reexamined.

Support for the rejection of percentages begins with a close examination of *Gall*'s text. Such an analysis, however, must be careful to avoid the pitfalls plaguing both sides of the circuit split. More specifically, appellate courts that accept or reject percentage variance calculations simply cite a choice phrase from *Gall*—for instance, "the degree of variance" or a "rigid mathematical formula"—to support their conclusions without further reasoning or justification.[179] Such reasoning fails to account for *Gall*'s complexities and likely deepens the current split. Determining the proper approach to variance calculations requires much more in the way of concrete and comprehensive analysis.

First, it is worth exploring precisely what *Gall* removed from consideration during appellate review and its rationale for doing so. Second, it is also worth examining the Supreme Court's instructions on how sentencing and sentencing review should be conducted.

a) The first rejection of "a rigid mathematical formula." *Gall* first rejected "a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[180] A key question facing appellate courts is what exactly this rejection rejects.

On the one hand, the Supreme Court's holding appears to be straightforward: courts cannot use percentage variance calculations as a measure of reasonableness. Indeed, appellate courts eliminating percentage calculations have cited this argument as support for their position.[181] Yet, combined with the Court's later

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[179] See, for example, *Irey*, 612 F3d at 1196 (citing *Gall* as support for the use of percentage variance calculations); *Burns*, 577 F3d at 892 (rejecting percentage variance calculations because of *Gall*'s rejection of "rigid mathematical formula").

[180] *Gall*, 552 US at 47.

[181] See, for example, *Evans*, 526 F3d at 166 n 5.

statements regarding "the extent of the deviation," some courts have argued that *Gall* does not categorically reject the use of percentages.

Justice Alito's dissent in *Gall* typifies this latter view, contending that describing the Eighth Circuit's approach as a "rigid mathematical formula" is "unfair."[182] For him, the Eighth Circuit's use of percentages simply assessed "the extent of the difference between a particular sentence and the recommended Guidelines range."[183] That is, the "mathematical approach" that the *Gall* majority rejected does exactly what *Gall* now directs appellate courts to do—"ensure that the justification is sufficiently compelling to support the degree of the variance."[184] Importantly, appellate courts applying percentages to reasonableness review post-*Gall* have embraced this argument.[185] These courts similarly suggest that they are simply calculating percentages to examine the "*degree* of the variance" per the command of *Gall*.[186]

Justice Alito and subsequent appellate courts, however, mischaracterize *Gall* by confusing the *what* with the *how*. The Supreme Court did not prohibit this "rigid mathematical formula" because appellate courts were examining "the extent of the deviation."[187] In fact, *Gall* reaffirmed that an appellate court's ability to consider the "extent of the difference" was "surely relevant."[188] Rather, the Court rejected the approach because of *how* appellate courts conducted that examination. The *Gall* majority rejected the "rigid" notion that an appellate court could calculate a Guidelines variance as a percentage and subsequently examine a lower court's reasoning in light of that percentage.[189] In this sense, the rigidity of the mathematical approach came not from consideration of "the extent of deviation" itself but from characterizing a variance as a given percentage in an attempt to assess the reasonableness of a sentence.

A simple reading of *Gall* thus accounts for its seemingly conflicting language: while the extent of the deviation is "surely relevant," how that deviation is calculated and assessed is subject

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182 *Gall*, 552 US at 71–72 (Alito dissenting).

183 Id at 72 (Alito dissenting).

184 Id at 49–50 (majority).

185 See, for example, *Castillo*, 695 F3d at 674.

186 Id.

187 *Gall*, 552 US at 51.

188 Id at 41.

189 Id at 47.

to limitation. That limitation on variance calculation, as the Supreme Court itself states, is the rejection of percentage variances "as the standard for determining the strength of the justifications required for a specific sentence."[190] In sum, the Court's rejection is plain: percentages cannot be the standard for assessing variances.

b) The second rejection of "extraordinary circumstances." *Gall* also discarded the appellate practice of requiring "extraordinary circumstances to justify a sentence outside the Guidelines range."[191] This second rejection provides much-needed context for the Supreme Court's requirement that "a major departure should be supported by a more significant justification than a minor one."[192] Since *Gall*, a number of courts have read this latter statement to provide appellate courts with the license to erect variants of the proportionality test and its percentage variance calculations.[193] These courts interpret *Gall* as literally splitting variances into either "major" or "minor" deviations while also validating the requirement that justifications be "sufficiently compelling" for outside-Guidelines sentences.[194] In doing so, these courts base their "major" and "minor" distinction on percentages.[195] A summary of this interpretation reads: a sentence found to be "major" (in terms of percentage deviation) must have "sufficiently compelling" justifications.

This type of reasoning, however, is not conceptually distinct from describing a variance as either "extraordinary" or not extraordinary.[196] By interpreting *Gall* to provide a distinction between "major" and "minor" variances, appellate courts have effectively made *Gall*'s "extraordinary circumstances" prohibition a nullity. Although the Supreme Court specifically states that these types of distinctions are "inconsistent" with the abuse-of-discretion standard, appellate courts read *Gall* as having adopted exactly what it rejected: a rule that designates variances as "extraordinary"—or in this case "major"—in order to subject

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190 Id.

191 *Gall*, 552 US at 47 (quotation marks omitted).

192 Id at 50.

193 See Part II.A.2.

194 See *Miller*, 601 F3d at 739–40; *Irey*, 612 F3d at 1196.

195 See, for example, *Zobel*, 696 F3d at 569; *Irey*, 612 F3d at 1196.

196 See Reply Brief of Petitioner, *Gall v United States*, No 06-7949, *16–17 (US filed Sept 25, 2007) (available on Westlaw at 2007 WL 4983974) (describing statements including "extraordinary circumstances" as "sloganeering, devoid of substantive content and of little value to courts").

those variances to heightened appellate review.[197] In sum, the Court's second rejection of an "extraordinary circumstances" requirement discredits the continued categorization of sentences as either "extraordinary" or "major" to support continued percentage use.

c) The Supreme Court's instructions going forward. Finally, the Supreme Court's instructions to lower courts going forward place its two rejections in better perspective. Most importantly, these instructions lay out separate directions for district courts and appellate courts. For district courts, *Gall* again stipulates that the Guidelines are "the starting point and the initial benchmark" in sentencing but that they are "not the only consideration."[198] When a sentence does fall outside the Guidelines range, however, the district court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[199]

Notably, *Gall* provided appellate courts with different instructions. Unlike district courts, they were not told that they "*must* consider the extent of the deviation."[200] Rather, *Gall* simply stated that appellate courts "*may* consider the extent" of a variance but that they "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[201] Providing further clarity to this deferential standard of review, the Court went on to state, "[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable."[202]

The distinction between these instructions is "important," as it underscores the Supreme Court's vision for post-*Booker* appellate review.[203] The Court does not envision a sentencing system in which district and appellate courts are on equal footing. Instead, as Amy Baron-Evans and Professor Kate Stith write, *Gall* places appellate courts "in a different position."[204] According to *Gall*, district courts have an "institutional advantage" over appellate courts when it comes to sentencing, which puts them in a

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197 *Gall*, 552 US at 47–50.

198 Id (describing the district court's role in sentencing).

199 Id at 50.

200 Id (emphasis added).

201 *Gall*, 552 US at 51 (emphasis added).

202 Id at 59.

203 See *Gardellini*, 545 F3d at 1093 n 4.

204 Amy Baron-Evans and Kate Stith, Booker *Rules*, 160 U Pa L Rev 1631, 1737 (2012).

"superior position" to make sentencing determinations.[205] For this reason, the *Gall* Court emphasized the "due deference" appellate courts must afford district courts under its current abuse-of-discretion sentencing standard.[206]

This renewed emphasis on granting deference to district courts' exercise of their sentencing discretion is inconsistent with the use of percentages in appellate review. Percentage variance calculations enable appellate practices that "more closely resemble[ ] *de novo* review" than the proper abuse-of-discretion standard.[207] That is, percentages allow appellate courts to fashion artificial barriers—the "exceptional circumstances" requirement and the "rigid mathematical formula"—that excessively inhibit district court sentencing discretion.[208] The continued use of percentage variances in the assessment of a sentence's reasonableness thus fails to account for the message of appellate deference emanating from the Supreme Court's instructions.

2. Outside the text: *Gall*'s oral argument.

Gall's oral argument provides further support for the interpretation that the opinion precludes percentage variance calculations. Criticizing the Eighth Circuit's "mathematical" approach of measuring proportionality in percentage terms, Justice Stephen Breyer disparaged the use of percentages as unconstructive in determining a sentence's reasonableness. He stated:

> [The mathematical approach] must be wrong because the same degree of departure could result from a view of an abuse of a vulnerable victim as could result from a total misunderstanding of what robbery is about. Now, it's not the percentage there that matters. It's the rationale. It is what the judge did.[209]

Even the Government recognized the weaknesses associated with percentage variance calculations. After being asked how an appellate court should measure the strength of a lower court's justifications, Deputy Solicitor General Michael

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205 *Gall*, 552 US at 51–52.

206 Id at 51–52.

207 Id at 56.

208 Id at 49.

209 Transcript of Oral Argument, *Gall v United States*, No 06-7949, *38–39 (US Oct 2, 2007) (available on Westlaw at 2007 WL 2847118) ("*Gall* Transcript").

Dreeben responded, "It is more of a [holistic] and judgmental process than a mathematical one. . . . And I am reluctant to offer percentages because I don't want to be mistaken for saying there is some litmus test with superguidelines[ ] ranges."[210]

Perhaps most enlightening is an exchange between Justice Stevens (the author of the majority opinion) and Deputy Solicitor General Dreeben. Attempting to illustrate the point he makes in *Gall* that percentages "suffer[ ] from infirmities of application,"[211] Justice Stevens asked, "[If a sentence] wipes [prison time] out entirely, does that make this case different or like a case in which the maximum was say . . . 30 years instead of 30 months? Are they both to be judged by the same standard on the justification?"[212] The dialogue below followed:

Mr. Dreeben:	Well, in this case, because the government believes that the guidelines provide a reference point for proportionality review, a sentence——
Justice Stevens:	Supposing the guidelines provided 30 years? Would the justification for probation in that case have to be just as strong as in this case?
Mr. Dreeben:	Stronger, I would say, because if the guidelines——
Justice Stevens:	Because the percentage is really irrelevant——
Mr. Dreeben:	Excuse me.
Justice Stevens:	It would——then the percentage is irrelevant, if you said it has to be stronger in that case.
Mr. Dreeben:	Yes, I think that——that's why I don't think you can confine it to percentage.[213]

This back and forth between Deputy Solicitor General Dreeben and Justice Stevens evinces a general concern that percentages do little to elucidate "the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[214] While not conclusive, the Supreme Court's statements

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210 Id at *50.

211 *Gall*, 552 US at 47.

212 *Gall* Transcript at *52.

213 Id.

214 *Gall*, 552 US at 51.

suggest that percentages detract from appellate review by obfuscating the extent of the variance.

3. The Supreme Court's own reasonableness review.

The Supreme Court's application of its appellate standard further buttresses a careful examination of *Gall*'s text and oral argument. The Court has applied reasonableness review to outside-Guidelines sentences in two cases—*Gall* and *Kimbrough*. In *Gall*, the Court interestingly goes without explicitly calculating the sentencing court's variance in conducting its reasonableness review.[215] Instead, *Gall* broadly refers to the district court's sentence as a "marked deviation" and "significant variance."[216] Granted, the absence of percentages is hardly conclusive of the Court's rejection of percentage variance calculations, but, at the very least, this omission indicates no intention to continue the calculation of percentage variances in appellate reasonableness review.

The Supreme Court's *Kimbrough* opinion provides a more illuminating view of the Court's vision for variance calculation. Assessing the reasonableness of a district court's variance from the Guidelines, the *Kimbrough* Court describes this downward variance as "4.5 years below the bottom of the Guidelines range."[217] Later, in its analysis, the Court again refers to the variance as "the 4.5-year sentence reduction."[218] While not dispositive of the Court's intention regarding variance calculations, *Kimbrough* provides a clear example of the Court reviewing a sentence for substantive reasonableness without using percentage variance calculations.

4. The "infirmities of application"[219] in using percentages.

Lastly, two prudential concerns militate toward an interpretation of *Gall* that precludes percentages as a means of calculating variances. An initial consideration is a concern over a potential return to the proportionality test *Gall* rejected. For example, the Sixth Circuit's *Zobel* decision characterized a sentencing court's 11 percent variance as "relatively minor," rather than

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215 See id at 56–60.

216 Id at 56, 59.

217 *Kimbrough*, 552 US at 111.

218 Id.

219 *Gall*, 552 US at 47.

"major," and subsequently allowed the sentencing court to provide less justification for its "minor" percent variance.[220] The resemblance between *Zobel*'s analysis and the proportionality test that *Gall* rejected is remarkable.[221] Like *Zobel*, proportionality review would use percentages to categorize variances as "extraordinary" and thus subject those variances to higher scrutiny requiring "extraordinary circumstances." Both approaches therefore use percentages to categorize variances (as "extraordinary," "major," or "minor") and then assign varying levels of justification corresponding to that categorization.

Zobel and other courts after *Gall* justify this similarity by citing *Gall*'s direction that "a major departure should be supported by a more significant justification than a minor one."[222] However, by using percentages in this way, courts like *Zobel* render *Gall* a nullity. Labeling a percentage variance as "minor" or "major" is no different than proportionality review's description of a variance as "extraordinary" or not extraordinary. Thus, using percentages in this way requires one to accept the unlikely conclusion that the Supreme Court in *Gall* implicitly permitted the very approach it expressly forbade.

Second, even assuming appellate courts uniformly reject the proportionality test, litigants have also attempted to use percentages, inconsistent with *Gall*. For example, in *Evans*, the defendant seemingly miscalculated the district court's upward variance from the Guidelines to exaggerate the "extent of the deviation."[223] Rather than using the percentage calculation to measure the extent of the deviation *from* the upper end of the Guidelines as required by *Gall*, the defendant described the imposed sentence as a percentage *of* the upper end of the Guidelines.[224] This resulted in a 100 percent difference in the variance. Stated numerically, 125 months (the sentence imposed) is 316 percent *greater than* 30 months (the upper end of the Guidelines)—but 416 percent *of* the recommended 30 months. Although the appellate court observantly caught and corrected this

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220 See *Zobel*, 696 F3d at 569.

221 See Part III.A.1.

222 See, for example, *Zobel*, 696 F3d at 569; *Irey*, 612 F3d at 1186.

223 See *Evans*, 526 F3d at 158 n 1. See also *Whorley*, 550 F3d at 340–41 (correcting a defendant's characterization of a variance as 250 percent when the variance was actually only a more modest 33 percent).

224 *Evans*, 526 F3d at 158 n 1.

percentage miscalculation, other courts have not been so fortunate.[225]

* * *

Percentages cannot form the basis of variance calculation. A reading of *Gall*'s text and oral argument precludes such a conclusion. Moreover, the Supreme Court's subsequent *Kimbrough* decision provides no support for the continued calculation of these variances. Finally, the implementation problems associated with percentage variance calculations weigh against their inclusion in *Gall*'s reasonableness review.

B. Nonpercentage Alternatives

If *Gall*'s instructions cannot be read to allow percentages, what type of calculation does examination of the "extent of the deviation" permit? Outside of percentage variance calculations, three options remain: (1) an offense-level approach (that is, calculating variances in terms of the number of Guidelines offense levels); (2) the use of no overt variance calculations at all; or (3) absolute variance calculations (that is, variances calculated in terms of months or years). This Section argues that the first two options—the offense-level approach and the no-variance calculation option—are not viable alternatives to percentage variance calculations following *Gall*. Part IV concludes that the third option—absolute variance calculations—best adheres to *Gall* while also reducing the implementation concerns associated with other variance calculations.

1. The offense-level approach.

For many of the reasons that percentages conflict with *Gall*'s instructions, the offense-level approach adopted by some appellate courts similarly fails to provide a workable method of Guidelines variance calculation. Admittedly, little direct information exists regarding the Supreme Court's view of this approach.[226] Yet, the noticeable similarities between the offense-level approach and percentage variance calculations render the offense-level approach impermissible under *Gall*.

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[225] See, for example, *Irey*, 612 F3d at 1180 (correcting a district court's percentage calculation).

[226] *Burns*, 577 F3d at 905 n 8 (noting that the Court has said "nothing" about such an approach).

By having appellate courts gauge variances based on Guidelines offense levels, the offense-level approach requires an examination of changes in offense level. The significance of offense-level changes is, however, far from clear. For example, what does movement from an offense level of twenty-two to an offense level of ten mean? This uncertainty largely stems from the "arbitrary" nature of the Guidelines.[227] That is, holding the criminal history category constant, each offense level consists of an artificially segmented range of months that increases in length of time as the offense level increases.[228] For example, assuming a criminal history of I,[229] an offense level of twenty-two produces a range of ten months—from forty-one to fifty-one months' imprisonment.[230] By comparison, a greater offense level of twenty-eight with the same criminal history generates a range of nineteen months—from seventy-eight to ninety-seven months' imprisonment.[231] In short, the Guidelines' offense levels are only proxies for a circumscribed number of months. Why then should courts resort to examining arbitrary ranges of months rather than directly calculating the variance in terms of months? An approach requiring such analysis unnecessarily dilutes the relative simplicity of calculating the variance in terms of years or months.

Prudentially speaking, the offense-level approach suffers from pitfalls similar to that of percentages calculations.[232] As the offense level increases, the length of time between the lower and upper ends of given Guidelines ranges likewise increases. Because these offense levels' ranges become increasingly elongated in terms of time,[233] the offense-level approach poses an "infirmit[y]" like that of percentage variance calculations.[234] For example, assuming again a criminal history of I, a downward variance of sixteen months could result in a reduction of only one offense level (from offense level thirty-four to level thirty-three) or thirteen offense levels (from offense level fourteen to level

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227 *Castillo*, 695 F3d at 673.

228 See 28 USC § 994(a) (providing the Commission with the singular authority to promulgate the Guidelines).

229 Criminal history is based on the number of prior offenses committed within a recent time period and translated onto a scale of I (low) to VI (high). See United States Sentencing Commission, *Criminal History Primer* *2 (Apr 2013), online at http://www.ussc.gov/Legal/Primers/Primer_Criminal_History.pdf (visited Sept 12, 2013).

230 See USSG § 5A, Sentencing Table.

231 USSG § 5A.

232 See Part III.A.4.

233 See USSG § 5A, Sentencing Table.

234 See *Gall*, 552 US at 47.

one) depending on the range of imprisonment the Guidelines create.[235] Therefore, like percentages, offense-level reductions will "appear more extreme . . . when the [Guidelines] range itself is low."[236]

In sum, this approach contemplates a calculation structure based on unnecessary (and artificial) proxies. This type of calculation also creates unnecessary opportunism for manipulation on the part of courts. Irony ultimately colors this approach given that a variance itself is a rejection of the Guidelines in favor of an alternative sentence.

2. The no-variance calculation option.

Several appellate decisions have come close to conducting reasonableness review without performing any variance calculation.[237] These decisions simply refer to lower-court deviations as "significant" or "substantial" without explicitly calculating the extent of the variance.[238] Certainly, this position has some merit. The Supreme Court's recent sentencing jurisprudence indicates a movement away from the Guidelines, and *Gall* definitely follows this trend.[239] Moreover, one reading of *Gall* suggests that describing a variance as significant or substantial may satisfy *Gall*'s direction to examine the "extent of the deviation."[240] In *Gall*, the Court conducted its reasonableness review devoid of any explicit variance calculation.[241] Instead, the Court simply referred to the sentencing court's variance as "significant" and "a marked deviation."[242]

Despite these points, the no-variance calculation option appears ill suited to provide "meaningful" appellate review post-*Gall*.[243] First, reliance on *Gall*'s lack of variance calculation is questionable. *Gall* openly criticized the Eighth Circuit's analysis for characterizing the district court's sentence as a 100 percent variance and noted "the difference between a sentence of probation and the bottom of [the recommended] Guidelines range of

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235 USSG § 5A, Sentencing Table.

236 *Gall*, 552 US at 47–48.

237 See, for example, *Stewart*, 590 F3d at 137.

238 Id at 137, 140.

239 See *Gall*, 552 US at 59.

240 Id at 51.

241 See Part III.A.3.

242 *Gall*, 552 US at 56, 59.

243 Id at 50.

30 months."[244] Thus, when the Court later conducted its reasonableness analysis using the terms "significant" and "marked," it likely used those terms to simply reference its earlier notation of the variance. Reading any deeper meaning into the Court's lack of a variance calculation during its reasonableness review is questionable.

Kimbrough, *Gall*'s companion case, further supports this conclusion. In *Kimbrough*, the Supreme Court twice provided an unambiguous variance calculation. In no uncertain terms, the *Kimbrough* Court stated, "The sentence the District Court imposed on Kimbrough was 4.5 years below the bottom of the Guidelines range."[245] Shortly thereafter, the Court again referenced the sentencing court's variance as a "4.5-year sentence reduction" during its reasonableness review.[246] Thus, concluding that *Gall* authorizes the no-variance calculation option cannot be reconciled with the Court's analysis in *Kimbrough*.

Providing no formal variance calculation presents several practical challenges as well. Most importantly, simply describing a variance as "significant" encourages inconsistent appellate sentencing review and, frankly, provides an opportunity for courts to assess variances however they see fit. Such a result runs counter to *Gall*'s "deferential" vision of the appellate reasonableness standard.[247] Consider the Fifth Circuit's description of a lower court's variance as "substantial."[248] Is that "substantial" variance a 100 percent downward deviation? A 17 offense-level decrease? A 60-month deviation? Relatedly, the failure to provide a formal variance calculation engenders incongruous comparisons. That is, the description "substantial" provides future courts little guidance as to how to differentiate between "degree[s] of variance." Would a hypothetical deviation be less "substantial" (or perhaps insubstantial) if it only varied from the Guidelines by ten offense levels? What if it varied just 40 percent from the Guidelines? What if it varied just 25 months from the Guidelines? In sum, this type of "sloganeering" through

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[244] Id at 45.

[245] *Kimbrough*, 552 US at 111.

[246] Id.

[247] *Gardellini*, 545 F3d at 1093–94 (suggesting that substantive reasonableness review is deferential and not tied to the Guidelines alone post-*Gall*). See also *Gall*, 552 US at 51–52 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

[248] *United States v Duhon*, 541 F3d 391, 398–99 (5th Cir 2008).

vague adjectives does little to foster effective appellate sentencing review.

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If percentage calculations, the offense-level approach, and the no-variance calculation option remain unviable after *Gall*, how should appellate courts gauge the "degree of the variance"? Part IV proposes an answer to that question.

IV. ABSOLUTE VARIANCE MEASUREMENTS: THE "APPARENTLY RELEVANT" CALCULATION[249]

Providing the only affirmative acceptance of absolute variances, DC Circuit Judge Kavanaugh superficially concluded, "[T]he *absolute* amount of a departure or variance is apparently relevant under *Gall*."[250] Yet, why are absolute variances "relevant" to appellate view? This Comment elucidates the "apparent[ ]" relevance of absolute variance calculations post-*Gall*. In doing so, this Comment argues that absolute variance calculations both reconcile the seemingly contradictory text of *Gall* and provide fewer opportunities for manipulation and mischaracterization of Guidelines variances. First, absolute variance calculations most closely conform to the text of *Gall*. Second, the use of absolute measurements finds conclusive support in the Supreme Court's own reasonableness review in *Kimbrough*. Finally, and as a matter of practicality, absolute variance calculations reduce the opportunity for manipulation and mischaracterization of variances more than any other option.

A. Absolute Measurements Reconcile *Gall*'s Apparent Textual Contradictions

The circuit split at issue stems from *Gall*'s seemingly contradictory language. How can the rejection of "a rigid mathematical formula that uses the percentage of a departure as the standard" for assessing Guidelines variances be reconciled with the requirement that appellate courts examine the "extent of the deviation" and "degree of variance"?[251] *Gall*'s apparent contradiction reflects the larger difficulty of balancing the level of discretion between appellate and district courts in sentencing.

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[249] *In re Sealed Case*, 527 F3d 188, 197 (DC Cir 2008) (Kavanaugh dissenting).

[250] Id (Kavanaugh dissenting).

[251] *Gall*, 552 US at 47–52.

Importantly, variance calculations influence this balancing. While some appellate courts have implicitly held that absolute variance calculations are "apparently relevant" after *Gall*, their rationale for approving those calculations rests simply on the view that percentage use is incompatible with *Gall*.[252] These courts, however, fail to recognize that absolute variance calculations best reflect the Supreme Court's sentencing jurisprudence and also best achieve the broader balances *Gall* sought.

Absolute variance calculations strike the proper balance between district and appellate court discretion that the Supreme Court desires. As courts have noted,[253] *Gall* grants district courts greater discretion in sentencing decision making. The *Gall* Court made this clear in its selection of an abuse-of-discretion standard of review over the more vigilant de novo standard.[254] The Court's citation to its earlier decision in *Koon* further supports this view of sentencing discretion allocation.[255] Noting *Koon*, the *Gall* Court first emphasized the individuality and "uniqueness" of every individual case.[256] Moreover, *Gall* notes that district courts "have an institutional advantage over appellate courts."[257] Nonetheless, as the Fourth Circuit writes, "[*Gall*] was not a decision wholly without nuance or balance. If *Gall* had intended to dispense with any semblance of meaningful review, there would have been no need for the decision to say what it did."[258] Therefore, under *Gall*, appellate courts still have the ability to "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[259] *Gall* thus offers twin goals for sentencing discretion: (1) provide greater discretion to sentencing courts; but (2) still allow for continued, albeit limited, appellate review.

Although the Seventh Circuit held that "the relative is generally more important than the absolute" in following *Gall*,[260] the reverse is true. Absolute variance calculations afford sentencing courts the greatest amount of discretion while still allowing appellate courts some necessary review power. With respect to

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252 See, for example, *In re Sealed Case*, 527 F3d at 197–98.

253 See *United States v Jones*, 531 F3d 163, 170–72 (2d Cir 2008).

254 *Gall*, 552 US at 47.

255 For a discussion of *Koon*, see notes 43–48 and accompanying text.

256 *Gall*, 552 US at 52.

257 Id, quoting *Koon*, 518 US at 98.

258 *United States v Abu Ali*, 528 F3d 210, 265–66 (4th Cir 2008).

259 *Gall*, 552 US at 51.

260 *Castillo*, 695 F3d at 673.

Gall's first goal, evaluating absolute variance calculations promotes the "institutional advantage" and "superior position" of district courts better than either percentage variance calculations or the offense-level approach. Namely, absolute variance calculations reduce the importance of intercircuit, intracircuit, and Guidelines comparisons, while instead focusing courts on the goal of "individualized" sentencing.

With percentage calculations, appellate courts can (and readily do) make variance comparisons both within and across circuits.[261] For example, in *Zobel*, the Sixth Circuit upheld a sentence as substantively reasonable in part because of the lower court's variance of 11 percent in contrast to other "major" percentage variances.[262] The relative, in short, encourages comparison.[263] As applied in *United States v Morace*[264] and *Castillo*, the offense-level approach similarly promotes comparison but, in this instance, across Guideline levels.[265] With these offense-level calculations, the uniform federal application of the Guidelines facilitates comparison.

Absolute variance calculations instead properly focus appellate review on the "uniqueness" of each individual sentencing decision. This is because an approach limiting variance calculation to months and years does not allow for the same level of comparison as percentages or offense-level variances do. Comparing absolute variances across cases and circuits is much like measuring apples to oranges.

To provide a concrete example, consider the Eleventh Circuit's decision in *Irey*. The *Irey* court held a sentence varying 42 percent from the Guidelines range to be substantively unreasonable. In doing so, the court cited in support other circuits' similarly unreasonable variances.[266] Specifically, the court re-

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261 See *Zobel*, 696 F3d at 569 (comparing percentage variances to other cases within the same circuit); *Irey*, 612 F3d at 1196 (same). Comparisons were also at the heart of proportionality review. See *United States v Gall*, 446 F3d 884, 889 (8th Cir 2006), revd 552 US 38 (2007).

262 See *Zobel*, 696 F3d at 569.

263 See Thomas Mussweiler, *'Everything Is Relative': Comparison Processes in Social Judgment*, 33 Eur J Soc Psych 719, 720 (2003) (describing the importance of relativity to the comparative decision making process). This point has also been made by scholars in a variety of fields. See, for example, Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* 75 (Random House 1934) (highlighting the importance of relative wealth comparisons to the phenomenon of "conspicuous consumption").

264 594 F3d 340 (4th Cir 2010).

265 See *Castillo*, 695 F3d at 675; *Morace*, 594 F3d at 345.

266 See *Irey*, 612 F3d at 1196.

ferred to a Fourth Circuit case with a similar variance of 40 percent.[267] In absolute terms, however, this comparison was problematic. The Fourth Circuit's 40 percent variance masked an absolute variance of 30 years.[268] And, while the district court in *Irey* varied by 42 percent from the Guidelines, the absolute variance was a much more modest 12 and ½ years.[269]

These absolute figures make clear the illogicality of the percentage variance comparison. The percentage variances—again 40 and 42 percent—were indeed relatively similar. This similarity, though, obscured the absolute difference of 17 and ½ months between the two sentences—a significant difference for any defendant. Percentages thus allow for a level of abstraction beyond the actual time of imprisonment a variance imposes on defendants.

The likelihood of inapt comparison dissipates with absolute variance calculations. With percentage calculations, the basis for comparison is a variance's relative distance from the Guidelines.[270] With absolute calculations, however, the basis for comparison is a variance's additional or reduced time of imprisonment—the actual consequence of varying from the Guidelines. In short, rather than focusing comparison on a variance's *relative distance* from the Guidelines, measuring variances in absolute figures compels examination of the *actual time* deviated by the variance. While this point may be mathematically intuitive, its logic has an important implication for variance calculation in federal sentencing. Namely, rather than considering a defendant's conduct in relation to abstract percentages, absolute variance calculations require appellate courts to directly reconcile the time varied—the defendant's actual punishment—with the defendant's conduct. Put differently, measuring a variance in absolute terms rather than percentages more readily connects Guidelines variances to the underlying conduct of each individual defendant.[271]

While this limitation on relative percentage comparison may seem like a drawback to absolute calculations, focusing

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[267] Id.

[268] See *Abu Ali*, 528 F3d at 260.

[269] See *Irey*, 612 F3d at 1196. Other cases similarly demonstrate this faulty proportionality comparison. See, for example, *Whorley*, 550 F3d at 342 (using a 46 percent variance, of 3 years, to justify the reasonableness of an only 33 percent variance, of a larger 5-year variance).

[270] For example, in *Irey*, a 12 and ½ year variance became a 42 percent variance. See *Irey*, 612 F3d at 1196.

[271] See *Booker*, 543 US at 250.

appellate courts on time variation (and thus actual conduct) best promotes *Gall*'s emphasis on "individualized" sentencing.[272] This aspect of absolute variance calculation is critical, as it focuses both district and appellate courts on the "individualized assessment" of the facts emphasized in *Gall* by hindering the ability to make percentage comparisons.[273] Further, as the Supreme Court in *Gall* notes, "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[274] Therefore, adopting a variance measure that focuses appellate review on the individual determination of the district court best observes *Gall*'s instructions.

At the same time, absolute variance calculations still provide appellate courts some, though limited, leeway to assess reasonableness. Unlike the no-variance calculation option, absolutes still supply appellate courts with a concrete means to "take into account . . . the extent of any variance."[275] Absolute variance calculations therefore reach the middle ground of discretion sought by *Gall*, providing greater discretion to sentencing courts while still preserving some room for appellate review of variances.

B. *Kimbrough*: Actions Speak (Even) Louder than Words

Kimbrough further supports an interpretation of *Gall* that adopts absolute variance calculations. Citing *Gall*'s own application of reasonableness review, *Kimbrough* unambiguously calculates the district court's variance as a "4.5-year sentence reduction."[276] In an even more conspicuous illustration of the Supreme Court's support for absolute variance measurements, *Kimbrough* candidly states, "The sentence the District Court imposed on Kimbrough was 4.5 years below the bottom of the Guidelines range."[277]

Despite these statements, no appellate court has reconciled its use of percentages with *Kimbrough* or, even more surprisingly, cited the decision to bolster its use of a nonpercentage

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272 *Gall*, 552 US at 50, 52.

273 Id at 50.

274 Id at 52, quoting *Koon*, 518 US at 113.

275 *Gall*, 552 US at 51.

276 *Kimbrough*, 552 US at 111.

277 Id.

alternative. Outside of *Gall*, however, *Kimbrough* represents the Supreme Court's only application of its reasonableness review to a Guidelines variance. Moreover, for three reasons, *Kimbrough*'s statements are persuasive evidence in favor of the absolute variance approach. First, its calculations come directly on the heels of *Gall*, with that decision fresh on the Court's agenda. Second, and relatedly, *Kimbrough* must be considered in light of *Gall*. The coherence of absolute variance calculations with *Gall*'s text, as previously noted, suggests that the Court's later use of absolute variances in *Kimbrough* was not an aberration. Rather, this congruity between *Kimbrough*'s use of absolute variance calculations can (and should) be read as an explanatory complement to *Gall*. Finally, the fact that the Court did not discuss the percentage variance, even though that calculation would have bolstered its analysis, underscores the Court's reluctance to use relative comparisons. The percentage variance of Kimbrough's sentence—20 percent[278]—was well below the national median variance of 33 percent.[279] Accordingly, one would expect the Court to have noted this fact in support of its determination of reasonableness. That it did not note this fact suggests that the Court viewed the use of percentages as irrelevant to its reasonableness determination.

C. Absolute Variance Calculations Curb Variance Manipulation

Compared to the three alternatives—the offense-level approach, the no-variance calculation option, and percentages calculations—absolute variance calculations most severely limit the opportunities for variance manipulation. First, the offense-level approach relies on artificially constructed ranges of time. In contrast, absolute variance calculations provide unaltered measurements of time. By cutting out the Guidelines' arbitrary ranges, absolute variance calculations avoid the offense-level approach's uncertainty regarding offense-level changes and its potential to overstate variances from the low end of the Guidelines ranges.[280] Second, while the no-variance option offers a standard based on vague descriptions like "significant" and

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[278] A variance of 48 months from the 228-month Guidelines limit.

[279] United States Sentencing Commission, *2007 Annual Report* *31 (2007), online at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2007/Chap5_07%28optimized%29.pdf (visited Sept 12, 2013).

[280] See Part III.B.1.

"substantial,"[281] absolute calculations provide a concrete and straightforward measure—the number of months and years—to assess the extent of a variance.

Finally, absolute variance calculations reduce the manipulation problems associated with percentage calculation. The value of absolute calculations rests in their avoidance of *Gall*'s "infirmities of application."[282] Simply put, percentages can be manipulated through means that absolutes cannot. A percentage can imprecisely assess the degree of variance. As *Gall* itself notes, "[D]eviations from the Guidelines range will always appear more extreme—in percentage terms—when the range itself is low."[283] Practically speaking, one might also think that courts and litigants will be less likely to commit calculation errors when using absolute figures in comparison to percentages.[284] Granted, absolutes can be manipulated in some of the ways percentages can.[285] Yet, absolute figures appear to be less tempting than percentages in terms of manipulation, as no examples of these manipulations exist in the decisions of courts that reject percentage figures.

D. Appellate Sentencing Review Framed under Absolute Variance Calculations

If variances are indeed best calculated in absolute terms, a question of implementation remains. *Gall* directs appellate courts to "consider the extent of the deviation" from the Guidelines when assessing a sentence's reasonableness.[286] Thus, under an absolute variance framework, how will an appellate court "consider the extent of the deviation"? First, the appellate court will not calculate the variance in metrics—like percentages and offense levels—that conflict with the text and logic of *Gall*. Given *Gall*'s clear instruction, however, the reviewing court should

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281 See Part III.B.2.

282 *Gall*, 552 US at 47.

283 Id at 47–48.

284 See Jonathan Baron, *Thinking and Deciding* 500–02 (Cambridge 3d ed 2000) (describing the general confusion between relative and absolute risk in the context of risk assessment). This point has been made in a variety of scholarly fields. See, for example, Ofer H. Azar, *Relative Thinking in Consumer Choice between Differentiated Goods and Services and Its Implications for Business Strategy*, 6 Judgment & Dec Making 176, 183 (2011); David J. Malenka, et al, *The Framing Effect of Relative and Absolute Risk*, 8 J Gen Internal Med 543, 547 (1993).

285 See notes 223–25 and accompanying text.

286 *Gall*, 552 US at 50.

provide *a* variance calculation. For the reasons discussed above, that variance calculation will be an absolute figure measured in terms of months and years. When calculating this absolute variance, the appellate court will be remiss to forget, though, that the absolute variance is calculated *from the Guidelines*.[287] That is, the appellate court will calculate the variance from the lower end of the Guidelines, if the variance is downward, or from the upper end of the Guidelines, if the variance is upward.

With this correctly calculated absolute figure as the frame for considering the extent of the variance, the appellate court will then continue in its reasonableness review of the § 3553(a) factors.[288] Constrained by the limited comparative value behind the absolute variance calculation, the appellate court will focus on the district court's "individualized assessment" of the defendant. Most importantly, as *Gall* instructs, the appellate court may "consider the extent of the deviation" while also "giv[ing] due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[289]

CONCLUSION

Gall injected new uncertainties into federal sentencing even as it purported to bring clarity. The decision failed to provide clear guidance to lower courts as to how sentencing and its review should function. Specifically, it left open the question of how appellate courts should analyze variance calculations in light of *Booker*'s "advisory" holding. Some courts emphasize the use of percentages to best implement the instructions of *Gall*. Others reject percentages and offer a variety of alternatives: (1)

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[287] See id at 47. This also means that the reviewing court will not subtract mandatory minimum prison terms in its variance calculation or measure the variance in relation to statutory minimums or maximums. As noted in Part II.A.2, rather than simply measuring "the extent of any variance from the Guidelines range," several appellate courts have calculated variances relative to an offense's mandatory minimum or maximum or subtracted mandatory minimums during variance calculation. See, for example, *Irey*, 612 F3d at 1180; *Ressam*, 679 F3d at 1089. While courts manipulating variances through the introduction of statutory minimums and maximums have uniformly been the courts adopting percentage calculations, this problem is not specific to percentage calculation. That is, absolute variances calculation can also involve the use of statutory minimums and maximums. Therefore, given *Gall*'s direction that variance should be calculated from the Guidelines, the use of statutory minimums and maximums cannot be part of either percentage, absolute, or any other variance calculation.

[288] See note 58 and accompanying text.

[289] *Gall*, 552 US at 51.

a no-variance calculation option; (2) an offense-level approach; and (3) absolute measurements of time.

This Comment advocates for the rejection of percentages and the adoption of the third alternative—absolute variance calculations. In doing so, this Comment first highlights the worrisome conceptual and practical problems of a percentage standard post-*Gall*. This Comment then provides a similar critique—in terms of legal and prudential concerns—of both the offense-level approach and the no-variance calculation option. In reaching the conclusion that absolute variance calculations follow the instructions of *Gall*, this Comment focuses on variance calculations' role in balancing sentencing discretion, arguing that absolute variance calculations best effectuate the balanced goals of *Gall* while also providing the most reliable calculation standard.