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Federal Sentencing and the Uncertain Future of Reasonableness Review

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FEDERAL SENTENCING AND THE UNCERTAIN FUTURE OF REASONABLENESS REVIEW

INTRODUCTION

This spring, the United States Supreme Court will consider how appellate courts have implemented the United States Sentencing Guidelines ("Guidelines")[1] since rendering its opinion in *United States v. Booker*.[2] At issue is whether the courts have violated *Booker* by giving the Guidelines excessive weight when reviewing district court sentences.[3]

Issued in 2005, *Booker* held that mandatory Guidelines violated a defendant's Sixth Amendment right to a jury trial because they required judges instead of juries to find facts that enhanced sentences.[4] The Court remedied the constitutional violation in a separate opinion by excising two provisions from the federal sentencing statute.[5] The first, 18 U.S.C. § 3553(b)(1), had mandated guideline sentences.[6] Removing this provision rendered the Guidelines "effectively advisory,"[7] just one factor among several that district courts would "consult"[8] when imposing a sentence under 18 U.S.C. § 3553(a).[9] The court also excised a second

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1. U.S. SENTENCING GUIDELINES MANUAL (2006) [hereinafter USSG], *available at* http://www.ussc.gov/2006guid/TABCON06.htm.

2. 543 U.S. 220 (2005). The Supreme Court granted certiorari in two cases relating to the Guidelines: *United States v. Rita* (No. 06-5754) and *United States v. Claiborne* (No. 06-5618). Supreme Court of the United States, *Miscellaneous Orders of the Court (certiorari granted)*, November 3, 2006, http://www.supremecourtus.gov/orders/courtorders/110306pzr.pdf.

3. *See Miscellaneous Orders of the Court*, *supra* note 2.

4. *Booker*, 543 U.S. at 226–27 (finding that the Sixth Amendment applied to mandatory Guidelines). For an overview of *Booker*, see Craig Green, Booker *and* Fanfan: *The Untimely Death (and Rebirth?) of Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005).

5. *Booker*, 543 U.S. at 245, 259.

6. *Id.* at 245. Note that before *Booker*, district courts could depart from the Guidelines range, but only in certain limited circumstances. *See* 18 U.S.C. § 3553(b)(1) (2000).

7. *Booker*, 543 U.S. at 245.

8. *Id.* at 264.

9. 18 U.S.C. § 3553(a) reads:

> Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –

provision relating to appellate standards of review of the mandatory guideline sentences, 18 U.S.C. § 3742(e).[10] *Booker* articulated a new appellate standard whereby courts would review sentences for "unreasonableness" in light of the § 3553(a) factors.[11]

Though *Booker* was clear that the Guidelines' role in sentencing and appellate review had changed, it was unclear exactly *how*.[12] The Court did not explain what it would mean for judges to "consult" the "effectively advisory" Guidelines, nor did it explain what weight they would have among the § 3553(a) sentencing factors.[13] The now-amputated sentencing statute was similarly unclear, simply listing the Guidelines among the sentencing factors.[14] Lacking specific guidance from either *Booker* or the statute, federal courts themselves identified a place for the Guidelines in the post-*Booker* landscape.

Some courts interpreted *Booker* as inaugurating a "sea change in sentencing" and in the role of the Guidelines.[15] This "*Booker* maximalism"[16] viewed *Booker* as having transformed a guideline-centric sentenc-

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(A) the applicable category of offense committed by the applicable category of de fendant as set forth in the guidelines-

(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . . ; and

(ii) that, except as provided in section 3742(g), are in effect on the date the defen dant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guide lines or policy statements issued by the Sentencing Commission . . . taking into ac count any amendments made to such guidelines or policy statements by an act of Congress . . . ;

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by an act of Congress . . . ; and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Id.

10. *Booker*, 543 U.S. at 259.

11. *Id.* at 260–61. The § 3553(a) factors are listed *supra* note 9.

12. *See* David J. D'Addio, Note, *Sentencing After* Booker*: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 176 (2006); Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence after* Booker, 18 FED. SENT'G REP. 174 (2006); Frank O. Bowman, III, *The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1350 (2005) ("What *Booker* has done depends on what *Booker* means. If [the opinion] is prescribing 'advisory' guidelines in the purse sense of helpful, but legally nonbinding advice to sentencing judges, this ruling would certainly transform the nature of federal sentencing . . . .").

13. *See* sources cited *supra* note 12. The potential problem of this ambiguity did not go unnoticed at the time. *See Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part) ("[N]o one knows . . . how advisory Guidelines and 'unreasonableness' review will function in practice.").

14. The Guidelines are listed as the fourth factor, § 3553(a)(4). *See also Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting in part) (noting that the sentencing statute "provides no order of priority among all [the § 3553(a)] factors").

15. Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 666–67 (2006).

16. *Id.* at 666.

ing system into one where judges "exercise reasoned judgment in the course of a holistic sentencing decision-making process."[17] *Booker* maximalism relied on a plain reading of *Booker* and § 3553(a) in arguing that the Guidelines no longer had a privileged place in sentencing. Instead, they were "just one of a number of sentencing factors" for judges to consider.[18]

Other courts interpreted *Booker* as having made only a "modest adjustment" to the Guidelines' role in sentencing.[19] This "*Booker* minimalism"[20] saw the Guidelines, while no longer mandatory, as nevertheless meriting "considerable weight" in sentencing and on appellate review.[21] *Booker* minimalism had different contours among different courts,[22] but its essence was always the same—i.e., that the Guidelines have a disproportionate weight vis-à-vis the other § 3553(a) factors.[23] Courts justified this approach by arguing, for example, that the Guidelines accounted for the other § 3553(a) factors[24] or that they had a special role in promoting sentencing uniformity.[25]

Booker directed appellate courts to review district court sentences for "unreasonableness,"[26] and several circuits adopted distinctly *Booker* minimalist methods for doing so. One method treated guideline sentences as "presumptively reasonable" when reviewed on appeal.[27]

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17. Douglas A. Berman, *Sentencing and Punishment: Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 412 (2006).

18. United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005); *see also* Simon v. United States, 361 F. Supp. 2d 35, 40 (D.N.Y. 2005). The *Ranum* opinion was the most prominent early articulation of *Booker* maximalism. *See* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 57 (Supp. 2005).

19. McConnell, *supra* note 15, at 666–67.

20. *Id.* at 666.

21. United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (describing the prominent role of the Guidelines in sentencing); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) (describing the "heavy weight" given to the Guidelines on appellate review). The *Wilson* opinion, issued less than 24 hours after the Supreme Court handed down *Booker*, was the most prominent early articulation of *Booker* minimalism. *See* DEMLEITNER ET AL., *supra* note 18, at 56.

22. *See* discussion *infra* Part III.A–B, Part IV.B.1.

23. *See* McConnell, *supra* note 15, at 667.

24. *See, e.g.*, United States v. Johnson, 445 F.3d 339, 342–43 (4th Cir. 2006) (asserting that the Guidelines incorporate the § 3553(a) factors); United States v. Buchanan, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring) ("[T]he guidelines remain the one § 3553(a) factor that accounts for all § 3553(a) factors."); *Terrell*, 445 F.3d at 1265 (10th Cir. 2006) ("The Guidelines, rather than being at odds with the § 3553(a) factors, are instead the expert attempt of an experienced body to weigh those factors in a variety of situations.").

25. *See, e.g.*, *Wilson*, 350 F. Supp. 2d at 912; United States v. Jimenez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc) ("To construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective."); *Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) ("Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?"); United States v. Maloney, 466 F.3d 663, 668 (8th Cir. 2006).

26. *Booker*, 543 U.S. at 260–61.

27. Six circuits have held that guideline sentences are presumptively reasonable. *See* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 555 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk,

Courts would uphold these guideline sentences unless a party could show unreasonableness in light of other § 3553(a) sentencing factors.[28] A second popular *Booker* minimalist method of reasonableness review, "proportionality," required that district courts provide "compelling reasons" whenever a sentence "substantially varie[d]" from the guideline range.[29]

This spring, the Supreme Court will consider whether these two *Booker* minimalist methods—presumptive reasonableness and proportionality—can be part of a valid review for reasonableness.[30] An examination reveals that both are incompatible with *Booker* whenever there are nonfrivolous § 3553(a) factors present for which the Guidelines either fail to account or for which they inadequately account.

Part I of this comment outlines the Tenth Circuit's *Booker* minimalist approach to reasonableness review, including its adoption of both presumptive reasonableness and proportionality. Part II analyzes this approach and the justifications the court offers for it. It also critiques the court's apparent failure to address the "parsimony provision" at the heart of § 3553(a). Part III argues that *Booker* minimalism is not unique to the Tenth Circuit and that *all* of the other circuits share a guideline-centric approach. Differences among circuits that have and have not adopted presumptive reasonableness or proportionality, for example, tend to be superficial rather than substantive. Part IV reviews what this spring's two Supreme Court cases will mean for *Booker* minimalism. The superficiality of the circuit disagreements about the issues the Court will consider and the unusual facts in one of the cases raise interesting questions about just what impact the decisions will have. Even if the Supreme Court holds that presumptive reasonableness and proportionality are invalid methods of reasonableness review, it may have less of an impact on *Booker* minimalism than might appear. Finally, Part V offers one approach to reasonableness review that rejects presumptive reasonableness and proportionality whenever the Guidelines fail to account for or inadequately account for nonfrivolous factors that are properly considered under § 3553(a). This approach would provide an appropriate balance between guideline-centric *Booker* minimalism and the requirements of *Booker* and § 3553(a).

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415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

28. *See, e.g.*, *Mykytiuk*, 435 F.3d at 608; *Kristl*, 437 F.3d at 1055.

29. *See, e.g.*, United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); United States v. Collington, 461 F.3d 805, 808 (6th Cir. 2006); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005); United States v. Cage, 451 F.3d 585, 594 (10th Cir. 2006); United States v. Martin, 455 F.3d 1227, 1236–37 (11th Cir. 2006).

30. *See Miscellaneous Orders of the Court*, *supra* note 2.

I. *BOOKER* MINIMALISM AND THE TENTH CIRCUIT

United States v. Booker[31] requires appellate courts to review district court sentences for reasonableness in light of the sentencing factors in 18 U.S.C. § 3553(a).[32] These factors include the nature of the offense and characteristics of the defendant, as well as the need for the sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.[33] The statute also requires courts to consider the Guidelines.[34] If a sentence is unreasonable in light of these factors, it must be reversed.[35]

While the Guidelines are only one § 3553(a) sentencing factor, the essence of *Booker* minimalism is that they nevertheless have special weight compared to the other factors.[36] In its review of both guideline and non-guideline sentences, the Tenth Circuit has adopted this *Booker* minimalism. The court's preference for the Guidelines, though, is checked by procedural requirements that ensure consideration of other relevant § 3553(a) factors.

A. Components of Reasonableness Review and the Adoption of Presumptive Reasonableness

The Tenth Circuit outlined its approach to reasonableness review and embraced *Booker* minimalism in *United States v. Kristl*.[37] In *Kristl*, the defendant pled guilty to knowingly possessing a firearm after having been convicted of a felony.[38] The district court calculated his guideline range at 24–30 months, and sentenced him to 28 months.[39] The defendant challenged the district court's guideline calculation and argued that the sentence was unreasonable in light of *Booker*.[40] While all of the § 3553(a) factors guide reasonableness review,[41] *Kristl*'s guideline-specific appeal allowed the court to focus on the role of the Guidelines.

The court adopted a two-part approach to its sentencing review that identified both procedural and substantive components of reasonableness.[42] Procedural reasonableness asks whether a district court's sen-

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31. 543 U.S. 220 (2005).
32. *Booker*, 543 U.S. at 261.
33. 18 U.S.C § 3553(a)(1)-(2) (2000). All of the § 3553(a) factors a district court must consider are listed *supra* note 9.
34. § 3553(a)(4).
35. *Booker*, 543 U.S. at 261.
36. *See* McConnell, *supra* note 15, at 667.
37. 437 F.3d 1050 (10th Cir. 2006).
38. *Kristl*, 437 F.3d at 1052.
39. *Id.* at 1052–53.
40. *Id.* at 1053.
41. *Id.*
42. *Id.* at 1055 ("[T]he reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated.").

tence was "reasoned, or calculated using a legitimate method."[43] In addition to a properly calculated guideline range,[44] procedural reasonableness requires a district court to "consider[] the § 3553(a) factors and explain[] its reasoning" for imposing a particular sentence.[45] An improper guideline calculation or failure to consider a relevant § 3553(a) factor renders a sentence procedurally unreasonable and therefore reversible.[46] Because claims of procedural unreasonableness assert that the district court made a legal error, they are reviewed *de novo* on appeal.[47]

The second part of appellate reasonableness review is substantive.[48] It asks whether "the underlying facts and conclusions support [the] particular sentence [length]" in light of the § 3553(a) factors.[49] To assist in this review for substantive reasonableness, the Tenth Circuit adopted a *Booker* minimalist approach that gave the Guidelines a prominent role.[50] In particular, *Kristl* endorsed the approach of a number of other circuits in holding that sentences within the guideline range are presumed reasonable on appeal.[51] This presumption of reasonableness is a "deferential standard"[52] that either a defendant or the government can rebut in light of other § 3553(a) factors.[53] In the absence of such a rebuttal, however, a guideline sentence will be upheld as reasonable.[54]

After identifying the components of reasonableness review, *Kristl* turned to the defendant's sentence.[55] The court faulted the district court's guideline calculation, finding that it had improperly accounted for the defendant's criminal history.[56] This error rendered the sentence procedurally unreasonable and resulted in a remand for resentencing.[57]

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43. United States v. Cage, 451 F.3d 585, 591 (10th Cir. 2006); *see also Kristl*, 437 F.3d at 1054–55.

44. *Kristl*, 437 F.3d at 1055. The Guidelines must always be calculated in every sentencing decision, as they are listed in § 3553(a) as one of the factors that a sentencing judge must consider. *See* United States v. Gonzalez-Huerta, 403 F.3d 727, 748–49 (10th Cir. 2005).

45. *Cage*, 451 F.3d at 591.

46. *Id.*; *Kristl*, 437 F.3d at 1058–59.

47. *See Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that "consider[] the district court's application" of the Guidelines or the other § 3553(a) factors); *cf.* United States v. Brown, 450 F.3d 76, 80 (1st Cir. 2006) ("We review the district court's interpretation of the Guidelines *de novo*.").

48. *Kristl*, 437 F.3d at 1055.

49. D'Addio, *supra* note 12, at 178.

50. *Kristl*, 437 F.3d at 1055.

51. *Id.* at 1053–55 (citing the adoption of presumptive reasonableness for guideline sentences in the Fifth, Sixth, Seventh, and Eighth circuits, and adopting the presumption in the Tenth Circuit as well).

52. *Id.* at 1054.

53. *Id.* at 1055.

54. *See id.*

55. *Id.*

56. *Id.* at 1058–59.

57. *Id.* at 1059.

The framework for reasonableness review outlined in *Kristl* would guide the Tenth Circuit in subsequent inquiries.[58] In addition to identifying procedural and substantive components of reasonableness, *Kristl* held that guideline sentences are presumed substantively reasonable. This adoption of presumptive reasonableness marked the Tenth Circuit's endorsement of *Booker* minimalism. The presumption meant that the Guidelines would be the one § 3553(a) factor that always had to be considered and that would serve as the starting point in reasonableness review.[59] Presumptive reasonableness also gave the Guidelines a disproportionate weight among the § 3553(a) sentencing factors because it presumed—in the absence of other evidence—that the Guidelines correspond to reasonableness.[60] No other § 3553(a) factor had this special weight.[61]

B. Substantive Unreasonableness and Proportionality

The Tenth Circuit's method of reviewing non-guideline sentences provides more evidence of *Booker* minimalism's prominence in the court.

In *United States v. Cage*,[62] the court vacated a procedurally reasonable non-guideline sentence after finding it substantively unreasonable.[63] In that case, the defendant pled guilty to methamphetamine distribution charges.[64] Her offense level and criminal history yielded a guideline range of 46–57 months.[65] The district court imposed a six-day sentence,[66] however, citing mitigating § 3553(a) factors as justification for the variance.[67] The factors included the defendant's son's medical problems, the defendant's minor role in the conspiracy, her lack of criminal history, her education, employment history, and the unlikelihood she would reoffend.[68] *Cage* held that the district court properly considered

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58. A number of subsequent Tenth Circuit reasonableness review cases cited *Kristl*. *See, e.g.*, United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006); *Cage*, 451 F.3d at 591; United States v. Sanchez-Juarez, 446 F.3d 1109, 1116–17 (10th Cir. 2006).

59. *Kristl*, 437 F.3d at 1055; *Terrell*, 445 F.3d at 1264 ("The Guidelines continue to be the starting point . . . for this court's reasonableness review on appeal." (citing United States v. John H. Sitting Bear, 436 F.3d 929, 935 (8th Cir. 2006) (internal quotation marks omitted))).

60. *See Kristl*, 437 F.3d at 1055.

61. *See, e.g.*, *Cage*, 451 F.3d at 593 (noting that the Guidelines are "not just one factor among many"); *see also* discussion *infra* Part I.B–C.

62. 451 F.3d 585 (10th Cir. 2006).

63. *Cage*, 451 F.3d at 591. *Cage* was the Tenth Circuit's first substantively unreasonable sentence after *Booker*. *Id.* ("This is an issue of first impression for this court; we have neither explained what causes a sentence below the recommended guidelines range sentence to be unreasonable, nor how such decisions are treated on appeal."). Recall that in *Kristl*, the court vacated the defendant's sentence on procedural rather than substantive grounds. *Kristl*, 437 F.3d at 1058–59.

64. *Cage*, 451 F.3d at 587.

65. *Id.* at 588.

66. *Id.*

67. *Id.* at 588, 595.

68. *Id.* at 595.

these mitigating factors under § 3553(a).[69] The problem with the sentence, however, was in "the weight the district court placed on [the factors]."[70]

Cage then articulated a distinctly *Booker* minimalist method—proportionality—of evaluating the substantive reasonableness of non-guideline sentences.[71] Here, the six-day sentence was well below the guideline range and not entitled to a presumption of reasonableness.[72] The presumption of reasonableness for guideline sentences, however, "[spoke] to how [the court] should consider sentences *outside* the guidelines range" as well.[73] The court held that for a non-guideline sentence to withstand review for substantive reasonableness, the mitigating § 3553(a) factors must be proportional to the extent of the variance from the guideline range.[74] Thus, an extraordinary variance "must be supported by extraordinary circumstances."[75] Applying the method to the facts before it, *Cage* held that the sentence was unreasonable because the defendant's circumstances did not justify such an "extraordinary" variance.[76]

Though the variance in *Cage* was extreme, the case highlights the influence of *Booker* minimalism in the Tenth Circuit's reasonableness review. Regardless of the length of a sentence, the Guidelines are the central measure of reasonableness. Sentences falling within them are presumptively reasonable,[77] while those falling outside of them must be supported by justifications proportional to the variance.[78]

The Tenth Circuit's reasonableness review for guideline as well as non-guideline sentences therefore reflects a *Booker* minimalist approach.

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69. *Id.* The *Cage* court did not explore the fact that some of the mitigating § 3553(a) factors cited by the district court as reasons for varying the sentence downward were already accounted for in the Guidelines. For example, a defendant's guideline offense level is already lowered if a defendant had a "minimal" or "minor" role in the criminal activity. *See* USSG, *supra* note 1, § 3B1.2. The Guidelines also account for a defendant's lack of criminal history. *See id.* § 4A1.1.

70. *Cage*, 451 F.3d at 595.

71. This spring, the Supreme Court will review precisely the same standard that the *Cage* court elaborated here. *See Miscellaneous Orders of the Court*, *supra* note 2 (discussing certiorari in *United States v. Claiborne*).

72. *Cage*, 451 F.3d at 594.

73. *Id.* (emphasis added).

74. *Id.* (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.").

75. *Id.* (quoting United States v. Kendall, 446 F.3d 782 (8th Cir. 2006)). *Cage* emphasized that departures above the Guidelines as well as those below are subject to the same appellate scrutiny. *Id.* at 595 n.5.

76. *Id.* at 594.

77. *Kristl*, 437 F.3d at 1054–55.

78. Subsequent Tenth Circuit cases have described proportionality in terms of degrees of scrutiny. *See, e.g.*, United States v. Bishop, 469 F.3d 896, 907 (10th Cir. 2006) ("[T]he extremity of the variance between the actual sentence imposed and the applicable Guidelines range should determine the amount of scrutiny we give to the district court's substantive sentence.").

C. Justifications for Booker *Minimalism*

Although the Guidelines are only one of the § 3553(a) sentencing factors, the Tenth Circuit has justified giving them special weight in appellate review for three reasons.

First, the court has said that the Guidelines are the one § 3553(a) factor that accounts for the other § 3553(a) factors.[79] The Guidelines are "the expert attempt" of the United States Sentencing Commission ("USSC") to "weigh [the § 3553(a) sentencing] factors in a variety of situations."[80] As such, they "are generally an accurate application of [these] factors"[81] and merit special weight.[82]

Second, the court has said that in directing the USSC to promulgate Guidelines, Congress intended that sentencing discretion "be limited by the decisions of a publicly accountable body."[83] The Guidelines are therefore unique among the § 3553(a) factors because they are "an expression of popular political will about sentencing."[84] Furthermore, in saving the Guidelines by making them advisory, *Booker* "refus[ed] to use the Sixth Amendment to nullify the entirety of Congress's purpose" in establishing a responsive, democratic influence over sentencing.[85] Because that influence is represented in the Guidelines, they should continue to have a special place in appellate review.

Third, the court has asserted that *Booker* minimalism is important in preventing "vastly divergent sentences" among those committing similar crimes and having similar backgrounds.[86] The court has emphasized that Congress's intent in passing the 1984 Sentencing Act was promoting sentencing uniformity.[87] Because the Guidelines are the only sentencing

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79. *Cage*, 451 F.3d at 594 (citing *Terrell*, 445 F.3d at 1265); *see also Kristl*, 437 F.3d at 1054 (citing United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005)). The *Kristl* court quoted *Mykytiuk*'s argument that Guidelines informed the other § 3553(a) factors, but did not explicitly endorse this rationale itself, choosing instead to focus on the sentencing goal of uniformity. *Id.*

80. *Terrell*, 445 F.3d at 1265.

81. *Cage*, 451 F.3d at 594 (quoting *Terrell*, 445 F.3d at 1265).

82. *Id.* at 593. ("It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines . . . and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve" the § 3553(a)(2) purposes of sentencing. (quoting United States v. Wilson, 350 F. Supp. 2d 910, 915 (D. Utah 2005))).

83. *Cage*, 451 F.3d at 593.

84. *Id.*

85. *Id.*

86. *Kristl*, 437 F.3d at 1054 (quoting *Gonzalez-Huerta*, 403 F.3d at 738).

87. *Cage*, 451 F.3d at 593 ("The . . . approach, which we now adopt . . . make[s] the guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines to achieve." (quoting United States v. Booker, 543 U.S. 220, 246 (2005))).

factor that provide a "uniform measure" in sentencing, they deserve special weight among the § 3553(a) factors.[88]

D. Procedural Reasonableness as a Check on Booker *Minimalism*

While the Guidelines may have a special weight in the Tenth Circuit, deference to them is not absolute.[89] One important limitation comes in the distinction of procedural from substantive reasonableness.[90] The requirement that sentences be procedurally reasonable ensures that the Guidelines are not the only relevant § 3553(a) factor used in sentencing.[91]

Procedural reasonableness requires, among other things, that a district court consider a nonfrivolous argument based on § 3553(a) for a non-guideline sentence.[92] In *United States v. Sanchez-Juarez*,[93] the Tenth Circuit vacated a sentence because the district court had apparently failed to consider such an argument.[94] In that case, the defendant disputed a 16-level offense conduct increase in United States Sentencing Guideline ("USSG") § 2L1.2.[95] The defendant argued that the increase was improper because it inaccurately accounted for a previous conviction.[96] At sentencing, the district court noted that it "[had] considered the sentencing guidelines" but did not specifically address the argument

88. *See Wilson*, 350 F. Supp. 2d at 924 ("The only way of avoiding gross disparities in sentencing from judge-to judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines.").

89. The court has emphasized that the Guidelines cannot be "conclusively" reasonable because this would violate *Booker*'s holding that the Guidelines are advisory. *Kristl*, 437 F.3d at 1054; *see also Booker*, 543 U.S. at 245.

90. *Kristl*, 437 F.3d at 1055; *Cage*, 451 F.3d at 591. Other circuits have also made this distinction. *See* Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 143 (2006), http://www.thepocketpart.org/2006/07/berman.html; D'Addio, *supra* note 12, at 177, 179; *see also* United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005) (noting that reasonableness review "is not limited to consideration of the length of the sentence," but encompasses procedural considerations as well); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006) ("Reasonableness review involves both procedural and substantive components."); United States v. Webb, 403 F.3d 373, 383 (6th Cir. 2005) (arguing that appellate courts must consider "not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination"); United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005) ("[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed.").

91. *See Sanchez-Juarez*, 446 F.3d at 1117; United States v. Cunningham, 429 F.3d 673, 675–76 (7th Cir. 2005). Part IV examines why this distinction is important in this spring's Supreme Court case reviewing presumptive reasonableness.

92. *Sanchez-Juarez*, 446 F.3d at 1117; *cf.* United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006) ("[A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit (provided it has a factual basis) and the court fails to address it." (citation and quotation marks omitted)); United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006) ("Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it.").

93. 446 F.3d 1109 (10th Cir. 2006).

94. *Sanchez-Juarez*, 446 F.3d at 1118.

95. *Id.* at 1117. USSG § 2L1.2 is an offense conduct section in the Sentencing Guidelines Manual relating to unlawful entry or stay in the United States. USSG, *supra* note 1, § 2L1.2.

96. *Sanchez-Juarez*, 446 F.3d at 1117.

about USSG § 2L1.2.[97] The *Sanchez-Juarez* court held that this was procedurally unreasonable:

> [W]here a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that "the sentencing judge [did] not rest on the guidelines alone, but . . . consider[ed] whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors."[98]

Under the rule in *Sanchez-Juarez*, an unexplained guideline sentence will not substitute for the § 3553(a) analysis procedural reasonableness requires whenever a party makes a nonfrivolous argument about one of the § 3553(a) factors.[99]

The presumption of reasonableness for guideline sentences, therefore, does *not* apply to the procedural component of a sentence.[100] Instead, it applies only to the sentence's substantive (length) component.[101] This restriction on the scope of presumptive reasonableness is an important limitation on *Booker* minimalism because it ensures that district courts consider all relevant § 3553(a) factors rather than just the Guidelines.[102]

II. EVALUATING THE *BOOKER* MINIMALIST APPROACH

The Tenth Circuit's approach to reasonableness review is problematic on two major grounds. The first is that *Booker* minimalism lacks support in the language of either *United States v. Booker*[103] or the sen-

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97. *Id.* at 1112.

98. *Id.* at 1117 (quoting *Cunningham*, 429 F.3d at 676); *cf. Crosby*, 397 F.3d at 115 ("[A] sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to 'consider' the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a) . . . .").

99. *Sanchez-Juarez*, 446 F.3d at 1117; *cf. Richardson*, 437 F.3d at 554 ("Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it."); *Cunningham*, 429 F.3d at 675-76 ("[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.").

100. *See Sanchez-Juarez*, 446 F.3d at 1117; *see also Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that "consider[] the district court's application" of the Guidelines or the other § 3553(a) factors).

101. *See* discussion *infra* Part IV.B.1.

102. Note, however, that a party must argue the nonfrivolous § 3553(a) factor(s) at sentencing. A failure to do so may mean that a district court's guideline sentence will be upheld even if the court failed to make a formal § 3553(a) analysis. *See* United States v. Lopez-Flores, 444 F.3d 1218, 1222 (10th Cir. 2006) ("We do not require a ritualistic incantation to establish consideration of a legal issue, nor do we demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." (quoting United States v. Kelley, 359 F.3d 1302, 1305 (10th Cir. 2004))); *see also* United States v. Martinez, 455 F.3d 1127, 1132 (10th Cir. 2006) (holding that a sentencing court need not "consider individually each factor listed in § 3553(a) before issuing a sentence"); United States v. Paredes, 461 F.3d 1190, 1194 (10th Cir. 2006).

103. 543 U.S. 220 (2005).

tencing statute. The second is that the court's *Booker* minimalism has not accounted for the parsimony provision in § 3553(a), which requires that every sentence be the lowest necessary to achieve a number of sentencing goals.

The justifications the court has offered for its approach only partially address these problems. That the Guidelines reflect the § 3553(a) factors and represent a democratic influence in sentencing are justifications that inaccurately account for the nature of the Guidelines. The court's assertion that *Booker* minimalism promotes sentencing uniformity, however, represents a stronger (albeit imperfect) justification for a guideline-centric approach.

A. Lack of Textual Support for Booker *Minimalism*

When *Booker* excised the mandatory sentencing provision from the sentencing statute,[104] it left the Guidelines as only one of several § 3553(a) sentencing factors.[105] The Tenth Circuit nevertheless continued to view the Guidelines as "not just one factor among many."[106] Part I showed that the Guidelines retained a disproportionate weight in appellate review compared to the other § 3553(a) factors.[107]

The *Booker* opinion provides little textual support for *Booker* minimalism.[108] One could argue that it hinted at the approach when it instructed courts to "consider Guidelines ranges" and to "*tailor the sentence in light of other* [§ 3553(a)] statutory concerns."[109] This could be construed as instructing courts to give the Guidelines a prominent weight. *Booker* minimalism does require that courts "consider" the Guidelines as a starting point before "tailoring" them with the other § 3553(a) factors.[110] One problem with this interpretation is that it rests on a single ambiguous phrase from the opinion. Moreover, interpreting it this way appears to conflict with other parts of *Booker* that do not indicate that any one factor has special weight.[111] For example, another part of the same opinion observes that without the mandatory provision, the

104. 18 U.S.C. § 3553(b)(1) (2000).

105. *Booker*, 543 U.S. at 264.

106. United States v. Cage, 451 F.3d 585, 593 (10th Cir. 2006).

107. *See* discussion *supra* Part I.A–B.

108. *See, e.g.*, Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 FED SENT. R. 170 (2006) (noting that the Supreme Court's remedial opinion in *Booker* "appears to specifically contemplate a reasonableness review unfettered by" *Booker* minimalism and appellate review approaches such as presumptive reasonableness for guideline sentences).

109. *Booker*, 543 U.S. at 245–46 (emphasis added).

110. *See* United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) ("The Guidelines continue to be the 'starting point' for district courts and for this court's reasonableness review on appeal."); *Cage*, 451 F.3d at 592 (quoting *Booker*, 543 U.S. at 245–46); United States v. Andrews, 447 F.3d 806, 812 (10th Cir. 2006).

111. *See, e.g., Booker*, 543 U.S. at 261 ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

sentencing statute requires judges to "take account of the Guidelines *together with other sentencing goals*."[112]

Nor does *Booker* minimalism follow from a plain reading of § 3553(a).[113] The statute lists the Guidelines as the fourth of seven primary factors that a district court must consider when imposing a sentence.[114] It does not indicate a hierarchy among these factors[115] or a preference for any.[116] Along with *Booker*'s silence about a minimalist approach, the sentencing statute's plain language provides critics with a strong argument against *Booker* minimalism.[117]

B. Lack of Consideration of the "Parsimony Provision"

Another problem with the Tenth Circuit's *Booker* minimalism is that it has generally failed to address the "parsimony provision" in § 3553(a). The provision directs district courts to "impose a sentence sufficient, *but not greater than necessary*"[118] to further policy goals in § 3553(a)(2).[119] These goals include the need for a sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.[120] The Tenth Circuit has inadequately explored how its approach relates to the parsimony provision's requirement that sentences be the lowest necessary to achieve these sentencing goals.[121]

At times the court has appeared to confuse its appellate review for reasonableness with a district court's obligation to impose a "sufficient, but not greater than necessary" sentence. In *United States v. Terrell*,[122] the court held that "just as we presume on appeal that a sentence within the applicable guideline range is reasonable, so are district courts free *to*

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112. *Id.* at 259 (emphasis added).

113. 18 U.S.C. § 3553(a) (2000). The statute is reprinted *supra* note 9.

114. *Id.* § 3553(a)(4).

115. *Id.* § 3553(a); *see also Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting in part) (noting that the sentencing statute "provides no order of priority among all [the § 3553(a)] factors").

116. *See* Berman, *supra* note 90, at 143 ("Congress's nuanced sentencing instructions in § 3553(a) provide no textual basis for appellate courts to presume that all Guideline sentences are reasonable.").

117. *See id.* at 142–44; Lamparello, *supra* note 12, at 174; Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, YALE L.J. POCKET PART, 137, 140 (2006), http://www.thepocketpart.org/2006/07/gertner.html.

118. § 3553(a) (emphasis added).

119. *Id.* § 3553(a)(2).

120. *Id.* In their entirety, the section's policy provisions detail the need for a sentence imposed:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant;
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Id.

121. *Id.* § 3553(a).

122. 445 F.3d 1261 (10th Cir. 2006).

make the same presumption . . . ."[123] *Booker*, however, discussed reasonableness in the context of appellate review of sentences, not in the district courts' imposition of those sentences.[124] Reasonableness, and by extension the presumption of reasonableness, are *appellate* rather than sentencing devices.[125] A district court's responsibility under § 3553(a) is not to impose a "reasonable" sentence, but to impose the lowest sentence necessary to achieve the policy objectives in § 3553(a)(2).[126] Reasonableness is the standard by which the appellate court "judg[es] whether a district court has accomplished [that] task."[127]

The problem with the Tenth Circuit's confusion of the district and appellate court roles is that it incorrectly tells district courts that a sentence need only be "reasonable" rather than "sufficient, but not greater than necessary." Shifting the district courts' focus to reasonableness can lead to sentences that withstand appellate review for reasonableness but nevertheless violate § 3553(a) because they are longer than necessary. This problem is illustrated in *United States v. Begay*,[128] where the Tenth Circuit noted that a district court "*may* impose a non-Guidelines sentence if the sentencing factors set forth in § 3553(a) warrant it, even if a Guidelines sentence might also be reasonable."[129] Under § 3553(a)'s parsimony provision, however, the district court *must* impose the lower sentence.[130] The sentencing statute does not allow the district court to choose a sentence from within a range of reasonable sentences; rather, it requires a specific sentence. That specific sentence is the one "sufficient, but not greater than necessary," to meet the goals of the sentencing statute. The Tenth Circuit has therefore improperly extended the concept of reasonableness from the appellate level to the district court level.

Conflicts between *Booker* minimalism and the parsimony provision are likely to occur whenever there are circumstances unaccounted for by the Guidelines[131] but properly considered under other § 3553(a) fac-

123. *Terrell*, 445 F.3d at 1265 (emphasis added).

124. *Booker*, 543 U.S. at 260–61.

125. United States v. Buchanan, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring); *see also* United States v. Foreman, 436 F.3d 638, 644 n.1 (6th Cir. 2006) ("[A] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2).").

126. § 3553(a); *see also* United States v. Demaree, 459 F.3d 791, 794–95 (7th Cir. 2006) ("The [sentencing] judge is not required—or indeed permitted—to 'presume' that a sentence within the guidelines range is the correct sentence . . . . All he has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a)." (internal citations omitted)).

127. *Buchanan*, 449 F.3d at 740 (Sutton, J., concurring) (quoting *Foreman*, 436 F.3d at 644 n.1).

128. 470 F.3d 964 (10th Cir. 2006).

129. *Begay*, 470 F.3d at 975-76 (emphasis added).

130. *See* United States v. Ministro-Tapia, 470 F.3d 137, 142 (2d Cir. 2006) ("[I]f a district court were explicitly to conclude that two sentences equally served the statutory purpose of § 3553, it could not, consistent with the parsimony clause, impose the higher.").

131. The Guidelines acknowledge that they fail to account for a number of possibly mitigating "offender characteristics" that are properly considered under § 3553(a), such as a defendant's age,

tors.[132] The court has held that the Guidelines are "not just one factor among many,"[133] and that they have a "heavy weight" in sentencing and in appellate review.[134] Yet it is unclear how or even whether the Guidelines account for a district court's primary § 3553(a) responsibility of imposing a "sufficient, but not greater than necessary" sentence.[135] When there are mitigating circumstances present for which the Guidelines do not account, the "heavy weight" given to Guidelines may therefore result in a district court wrongly giving a sentence that is greater than necessary.

The Tenth Circuit has also apparently failed to explore how the parsimony provision specifically bears on its appellate review for reasonableness. A search of reported Tenth Circuit cases following *Booker* shows that the court has rarely referenced the parsimony provision, except when reprinting it as part of § 3553(a).[136] Only in *United States v. Cage*[137] did the court discuss the parsimony provision as part of a district court's sentencing responsibility.[138] Even then, though, the reference was in passing and did not explore how the provision might relate to the Guidelines.[139] Not knowing how the Guidelines relate to the parsimony provision but nevertheless giving the Guidelines "heavy weight" impairs the appellate court's judgment about the reasonableness or unreasonableness of a district court's determination that a particular sentence was "sufficient, but not greater than necessary."

This apparent failure to explore the relationship between the Guidelines and the parsimony provision is a result of the Tenth Circuit's *Booker* minimalist approach. By endorsing presumptive reasonableness and proportionality, the Tenth Circuit gave the Guidelines an important weight in determining the reasonableness (or unreasonableness) of district court sentences.[140] Yet it appears that in some instances the approach may incorrectly associate reasonableness with the guideline

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educational skills, mental or physical condition, or family ties. *See* USSG, *supra* note 1, § 5H1.1–1.6; *see also* discussion *infra* Part II.C.1.

132. A number of the § 3553(a) sentencing factors permit broad inquiry into the defendant's characteristics. *See, e.g.*, § 3553(a)(1) (instructing the district court to consider "the history and characteristics of the defendant" when sentencing that defendant).

133. *Cage*, 451 F.3d at 593.

134. *Terrell*, 445 F.3d at 1264.

135. The USSC has also not addressed this issue. *See* Berman, *supra* note 90, at 143 ("The central command of § 3553(a) directs sentencing courts to 'impose a sentence sufficient, but not greater than necessary, to comply with the purposes' of punishment . . . . The U.S. Sentencing Commission has never fully explored—nor even formally addressed—whether the Guidelines serve this mandate.").

136. *See, e.g.*, United States v. Clark, 415 F.3d 1234, 1249 n.3 (10th Cir. 2005); United States v. Resendiz-Patino, 420 F.3d 1177, 1184 n.6 (10th Cir. 2005); United States v. Valtierra-Rojas, 468 F.3d 1235, 1238 n.5 (10th Cir. 2006).

137. 451 F.3d 585 (10th Cir. 2006).

138. *Cage*, 451 F.3d at 588.

139. *Id.*

140. *See, e.g.*, *Kristl*, 437 F.3d at 1055; *Cage*, 451 F.3d at 593.

range, possibly pushing district courts to impose sentences longer than necessary.

C. *Evaluating the Tenth Circuit's Justifications for* Booker *Minimalism*

The justifications that the court has offered for its *Booker* minimalism address the problems outlined above to varying degrees. As discussed previously, the Tenth Circuit has asserted that the Guidelines: (1) reflect the other § 3553(a) factors,[141] (2) reflect a democratic influence in sentencing,[142] and (3) promote sentencing uniformity.[143] Implicit in these justifications is that while *Booker* and § 3553(a) may not explicitly endorse *Booker* minimalism, the Guidelines nevertheless have a unique status among the § 3553(a) factors that justifies giving them special weight.

1. The Guidelines Reflect the § 3553(a) Factors

The Tenth Circuit has asserted that the Guidelines are "generally an accurate application of the factors listed in § 3553(a)."[144] The Guidelines are the product of "careful consideration" by an expert body—the USSC—weighing and applying the sentencing factors "in a variety of situations."[145] As such, the court has said, they merit special weight in appellate review for reasonableness.[146]

When sentencing a defendant, a district court takes into account two types of considerations: "offense conduct" and "offender characteristics."[147] Offense conduct relates to a defendant's actions on a particular occasion: the type of crime committed, the harm that occurred, the weapon used, the size of the financial loss, etc.[148] Offender characteristics relate to a defendant's history or personal circumstances and can include criminal history, employment status, physical or mental condition, or family and community ties.[149]

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141. *Terrell*, 445 F.3d at 1265.

142. *Cage*, 451 F.3d at 593.

143. *Kristl*, 437 F.3d at 1054.

144. *Cage*, 451 F.3d at 594 (citing *Terrell*, 445 F.3d at 1265). This justification is not unique to the Tenth Circuit. *See also Buchanan*, 449 F.3d at 735 (Sutton, J., concurring) ("[T]he guidelines remain the one § 3553(a) factor that accounts for all § 3553(a) factors.").

145. *Terrell*, 445 F.3d at 1265. The USSC also views the Guidelines as reflecting the other § 3553(a) factors. *See* Statement of the Honorable Ricardo H. Hinojosa (United States Sentencing Commission Chairman) before the House Subcommittee on Crime, Terrorism, and Homeland Security, February 10, 2005, at 4, *available at* http://judiciary.house.gov/media/pdfs/hinojosa021005.pdf ("[T]he factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.").

146. *Cage*, 451 F.3d at 594.

147. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 277 (2005).

148. *Id.*

149. *Id.*

The Guidelines tend to focus on offense conduct[150] while simultaneously restricting consideration of offender characteristics.[151] Section 2 of the Guidelines, devoted entirely to offense conduct,[152] requires district courts to determine how numerous aspects of offense conduct correspond to forty-three possible "offense levels."[153] At the same time, the Guidelines indicate that a number of offender characteristics are "not ordinarily relevant" to a guideline range calculation.[154] These "not ordinarily relevant" characteristics include: age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities (§ 5H1.6); previous military, public, or charitable service (§ 5H1.11); and lack of guidance as a youth (§ 5H1.12).[155] Interestingly, the primary exception to the Guidelines' general exclusion of offender characteristics is a defendant's criminal history, an aggravating factor that when combined with the relevant offense level yields the guideline sentencing range.[156]

While these offender characteristics may not be "ordinarily relevant" to a guideline range calculation, they are *always* relevant to a sentencing determination. The sentencing statute requires a district court to "consider . . . the history and characteristics of the defendant" when determining a sentence.[157] Yet as reviewed above, § 5H of the Guidelines declares that much of this history and many of these characteristics are "not ordinarily relevant" to a guideline calculation.[158]

The Tenth Circuit's assertion that the Guidelines reflect the other § 3553(a) factors is therefore problematic because the Guidelines specifically exclude many offender characteristics relevant to a § 3553(a) sentencing inquiry.[159] By extension, the court's guideline-centric methods of reasonableness review (including the presumption of reasonableness and proportionality) are also problematic whenever there are offender characteristics unaccounted for by the Guidelines.[160]

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150. *Id.* at 282.
151. *See id.*; Bowman, *supra* note 12, at 1347.
152. USSG, *supra* note 1, § 2.
153. Berman, *supra* note 147, at 282.
154. USSG, *supra* note 1, § 5H (introductory commentary).
155. *Id.* § 5H1.1–1.12; *see also* United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005) (identifying these and other characteristics not taken into account by the Guidelines).
156. Bowman, *supra* note 12, at 1324; Berman, *supra* note 147, at 283.
157. § 3553(a)(1).
158. USSG, *supra* note 1, § 5H (introductory commentary).
159. *See* Jason Hernandez, *Presumptions of Reasonableness for Guideline Sentences After Booker*, 18 FED SENT. R. 252 (2006) ("[T]he section 3553(a) factors . . . tend to favor mitigating circumstances due to restrictions on mitigating factors found in the Guidelines.").
160. *See* discussion *infra* Part V.A.

The Tenth Circuit has implicitly recognized that the Guidelines imperfectly reflect the other § 3553(a) factors.[161] In *United States v. Cage*,[162] for example, the district court justified a variance by citing a number of mitigating offender characteristics, including the defendant's educational level, work history, and extenuating family circumstances.[163] Section 5H of the Guidelines specifically excludes "education or vocational skills," "employment record," and "family ties and responsibilities" from the guideline calculation.[164] Yet § 3553(a)(1) *required* the district court to consider these circumstances when sentencing because they related to the defendant's "history" and "characteristics."[165] *Cage* recognized this, observing that although the district court erred in the weight it had given these factors, *that* they had been properly considered under § 3553(a) was "beyond doubt."[166] In another case, *United States v. Mares*,[167] the court noted that a defendant's health problems could be considered personal "history and characteristics" relevant under § 3553(a)(1).[168] The Guidelines, however, specifically exclude physical condition from the guideline calculation.[169]

The court's assertion that the Guidelines accurately reflect the other § 3553(a) factors is therefore flawed. They may generally reflect the factors relating to *offense conduct*, but they specifically exclude numerous *offender characteristics* relevant under § 3553(a).[170]

2. The Guidelines Reflect a Democratic Influence

The Tenth Circuit has also argued that the Guidelines are unique because they reflect a democratic influence in sentencing.[171] According to the court, Congress directed the USSC to promulgate the Guidelines so that sentencing discretion would "be limited by the decisions of a publicly accountable body."[172] Because the Guidelines represent this "expression of popular political will," they deserve a special place among the § 3553(a) factors.[173]

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161. Congress explicitly recognized this, having noted the need to "maintain[] sufficient flexibility to permit individualized sentences" whenever warranted "by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (2000).

162. 451 F.3d 585 (10th Cir. 2006). This case was discussed *supra* Part I.B.

163. *Cage*, 451 F.3d at 595.

164. USSG, *supra* note 1, § 5H1.2, § 5H1.5, § 5H1.6.

165. § 3553(a)(1) says that a sentencing court "shall consider" the "history and characteristics of a defendant" when imposing a sentence. § 3553(a)(1).

166. *Cage*, 451 F.3d at 595.

167. 441 F.3d 1152 (10th Cir. 2006).

168. *Mares*, 441 F.3d at 1161.

169. USSG, *supra* note 1, § 5H1.4.

170. Berman, *supra* note 147, at 282.

171. *Cage*, 451 F.3d at 593.

172. *Id.*

173. *Id.*

One problem with this justification is how it conceives of the USSC. The Commission was originally intended to be "a body of experts . . . insulat[ed] from the distorting pressures of politics" rather than a reflection of politics.[174] From this insulated position, the USSC was to fashion the Guidelines to meet the "purposes of sentencing as set forth in [§ 3553(a)(2).]"[175] The USSC has, however, come under the influence of "popular political will" in a way that some have argued is detrimental. Over the years, the "power to make and influence sentencing rules has migrated . . . from the U.S. Sentencing Commission . . . toward political actors in Congress and [the Department of Justice]."[176]

The USSC's ability to independently fashion the Guidelines in accordance with its Congressional mandate has therefore been weakened.[177] Furthermore, those external political forces tend to be "uniformly aligned in one direction—that of increasing penalties."[178] In some cases this brings the political influences in conflict with the policy objectives in § 3553(a)(2), which require judges to adjust sentences in light of a defendant's individual circumstances.[179]

The court's argument that the Guidelines deserve a special weight because they reflect a democratic influence in sentencing is therefore also problematic.

3. The Guidelines Promote Uniformity

Finally, the court has justified its *Booker* minimalism by arguing that the Guidelines promote sentencing uniformity.[180] Though imperfect, this justification does provide the court with a compelling basis for its guideline-centric approach.

The strength of the uniformity justification is in the origin of the sentencing statute and the Guidelines. After over a decade of debate about disparity in sentencing, Congress enacted the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984.[181] The

174. Bowman, *supra* note 12, at 1324 (internal citations omitted).

175. § 991(b)(1)(A). These are the same purposes in sentencing that judges are required to consider when imposing a sentence—i.e., the need for the sentence to reflect the seriousness of the offense, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment. § 3553(a)(2).

176. Bowman, *supra* note 12, at 1319; *see also* Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 236 (2005); Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker: *Why and How the Guidelines Do Not Comply With § 3553(a)*, 30 CHAMPION 32, 35-36 (2006) (noting, among other things, that the Department of Justice and other law enforcement agencies "are allowed to communicate with the [USSC] in secret").

177. Bowman, *supra* note 12, at 1340–42 (discussing both the Justice Department's "decreasing deference" to the USSC as well as Congressional usurpation of the USSC's role).

178. *Id.* at 1345.

179. *See* § 3553(a)(2), reprinted *supra* note 9.

180. *Kristl*, 437 F.3d at 1054; *Cage*, 451 F.3d at 593.

181. UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005) [hereinafter USSC OVERVIEW], *available at*

legislation established the USSC and charged it with promulgating the Federal Sentencing Guidelines.[182] In doing so, Congress intended primarily to structure the previously "unfettered sentencing discretion accorded to federal trial judges" so as to achieve more uniformity and certainty in sentencing.[183] Congress specifically instructed the USSC to draft Guidelines to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[184]

Some have argued, however, that the inconspicuous placement of sentencing uniformity among the § 3553(a) factors[185] means that the Guidelines should be weighted as "only one of seven distinct sentencing considerations."[186] The difficulty with this argument is that does not account for the primary historical motivation of the sentencing statute, which was promoting sentencing uniformity.[187] *Booker* itself explicitly acknowledged that "Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."[188] Indeed, the importance Congress placed on the Guidelines furthering uniformity was evidenced by the pre-*Booker* requirement that that judges impose guideline sentences in most circumstances.[189]

The goal of uniformity cannot justify the types of Sixth Amendment violations that *Booker* prohibited.[190] Yet *Booker* was clear that "the application of a 'reasonableness standard' was intended to . . . [achieve] 'honesty,' 'uniformity,' and 'proportionality' in sentencing, and to help in avoiding 'excessive sentencing disparities.'"[191] The Guidelines are uniquely capable of promoting these goals.[192] Even critics of *Booker* minimalism acknowledge that the Guidelines "can help frame, inform,

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http://www.ussc.gov/general/USSCoverview_2005.pdf. For a more detailed review of how the Federal Sentencing Guidelines came to be enacted, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

182. USSC OVERVIEW, *supra* note 181, at 1.

183. *Id.* at 1–2; *see also* Bowman, *supra* note 12, at 1324 (indicating that one of Congress's intentions in creating the USSC was drafting a "rationalized federal criminal code"). One prominent proponent of the Sentencing Reform Act was federal judge Marvin Frankel, who had described the prior discretionary sentencing system as being "at war with such concepts . . . as equality, objectivity, and consistency in the law." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 10 (1973).

184. § 991(b)(1)(B).

185. § 3553 (a)(6).

186. Berman, *supra* note 17, at 421–22.

187. *See supra* note 184.

188. *Booker*, 543 U.S. at 253.

189. 18 U.S.C. 3553(b)(1) (2000). *Booker* excised this provision. 543 U.S. at 245.

190. *See Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

191. United States v. Maloney, 466 F.3d 663, 668 (8th Cir. 2006) (citing *Booker*, 543 U.S. at 264); *see also* Bowman, *supra* note 12, at 1322 (outlining Congress's motivations in reforming the sentencing system).

192. *Maloney*, 466 F.3d at 668 (noting that the Guidelines serve as "a benchmark" in reasonableness review). *See* discussion *infra* Part IV.A.

and regularize the exercise of reasoned judgment by different sentencing judges."[193] The numerous considerations, tables, and calculations provide an important means of achieving the sentencing uniformity that Congress envisioned.[194]

The Guidelines thus provide a mechanism for achieving uniformity. The mechanism, though, may not always be perfect.[195] As detailed above, in many instances a guideline range will fail to reflect important offender characteristics.[196] Yet by providing a calculated and uniform numerical measure in the guideline ranges, the Guidelines have an important role in furthering Congress's original goals. This important role justifies a prominent place for the Guidelines in appellate review.

Part V presents a standard of reasonableness review that accounts for the strength of the Guidelines as well as their weaknesses.

III. *BOOKER* MINIMALISM IN THE OTHER CIRCUITS

Guideline-centric *Booker* minimalism likely originated in the Tenth Circuit. The day after the Supreme Court handed down *United States v. Booker*,[197] a United States District Court Judge in Utah, Paul Cassell, articulated a strong argument for *Booker* minimalism.[198] The need for sentencing uniformity justified giving the Guidelines heavy weight, Judge Cassell argued, and variances should occur only "in unusual cases for clearly identified and persuasive reasons."[199] This *Booker* minimalism viewed *Booker* as having made only a "modest adjustment" to the Guidelines' role.[200] While no longer mandatory, the Guidelines would nevertheless continue to have a disproportionate weight in sentencing.[201]

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193. Berman, *supra* note 90, at 144.

194. *See* United States v. Wilson, 350 F. Supp. 2d 910, 924 (D. Utah 2005) ("The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines."); *see also Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) ("Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?"); United States v. Jimenez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc) ("To construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective.").

195. Some have questioned how effective the Guidelines are at achieving uniformity. *See generally* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2006).

196. *See* discussion *supra* Part II.C.1.

197. 543 U.S. 220 (2005).

198. United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005). *See* DEMLEITNER ET AL., *supra* note 18, at 56 ("Leading sentencing judges were quick to see the importance of illuminating the relevance of the guidelines in a post-*Booker* world. Within 24 hours of the *Booker* ruling, U.S. District Judge Paul Cassell . . . had issued a long opinion on exactly this point."). The Tenth Circuit endorsed *Wilson* and has incorporated it into its argument for *Booker* minimalism. *See* United States v. Cage, 451 F.3d 585, 593 (10th Cir. 2006).

199. *Wilson*, 350 F. Supp. 2d at 912.

200. McConnell, *supra* note 15, at 666–67.

201. *Id.* at 667; *Wilson*, 350 F. Supp. 2d at 912.

Booker minimalism was not universal, though, and a number of other district courts quickly rejected it.[202] In doing so, they argued that *Booker* significantly changed the role of the Guidelines and had dramatically increased judges' sentencing discretion.[203] Under this *Booker* maximalist approach, the Guidelines were "just one of a number of sentencing factors."[204]

By the summer of 2005, *Booker* minimalism had moved to the appellate level as several circuits held that guideline sentences were presumptively reasonable on appeal.[205] Some circuits declined to endorse this presumption out of concern that it might conflict with the § 3553(a) sentencing analysis that *Booker* mandated.[206] Other differences among the circuits arose as some adopted proportionality when reviewing non-guideline sentences, holding that "the farther the judge's sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a)" must be.[207]

At first, these circuit splits appeared to highlight very different approaches to reasonableness review.[208] However, an examination of the relevant case law in the two years since *Booker* reveals that these differences among the circuits tended to be more superficial than substantive.[209] *Booker* maximalism did not move to the appellate level as *Booker* minimalism had. Indeed, *all* of the circuits eventually adopted a *Booker* minimalist approach to reasonableness review that gave the Guidelines special weight among the § 3553(a) factors.[210] Whether a circuit adopted presumptive reasonableness or proportionality was therefore less significant than might otherwise seem since the Guidelines remained prominent in appellate review.[211]

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202. *See, e.g.*, United States v. Ranum, 353 F. Supp. 2d 984, 985–86 (E.D. Wis. 2005); Simon v. United States, 361 F. Supp. 2d 35, 40 (D.N.Y. 2005).

203. McConnell, *supra* note 15, at 666 (describing how, under *Booker* maximalism, "district courts are liberated to sentence criminal defendants in accordance with the judge's sense of individualized justice, with the Guidelines merely taken into 'consideration' for what they are worth").

204. *Ranum*, 353 F. Supp. 2d at 985; *see also Simon*, 361 F. Supp. 2d at 40.

205. Sady, *supra* note 108, at 170 (citing United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) and United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005) as among the first cases endorsing presumptive reasonableness).

206. *See, e.g.*, United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *see also* United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005).

207. United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); *cf.* United States v. Rattoballi, 452 F.3d 127, 134 (2d Cir. 2006) ("[W]e note that several other circuits have endorsed a rule that requires district courts to offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range . . . . [W]e have yet to adopt this standard as a rule in this circuit, and do not do so here.").

208. *See, e.g.*, DEMLEITNER ET AL., *supra* note 18, at 65.

209. *See* discussion *infra* Part III.A–C. Note that while *circuit* courts may have adopted *Booker* minimalism, not all *district* courts have done so. Some weigh the Guidelines the same as any other § 3553(a) factor. *See, e.g.*, *Ranum*, 353 F. Supp. 2d at 986; *Simon*, 361 F. Supp. 2d at 40.

210. *See* discussion *infra* Part III.A–C.

211. Part IV explores how this relates to the particular issues that the Supreme Court will consider this spring.

A. Reasonableness Review and the Presumption of Reasonableness

The clearest indicator of a court's *Booker* minimalist approach to appellate review is its presumption of reasonableness for guideline sentences.[212] The Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits all endorse this presumption of reasonableness.[213] In these circuits, a party challenging a guideline sentence must rebut the presumption of reasonableness in light of other § 3553(a) factors.[214] While the presumption can function differently among these circuits,[215] in all of them the presumption gives the Guidelines a disproportionate weight compared to the other sentencing factors.[216]

Five of the circuit courts—the First, Second, Third, Ninth, and Eleventh—have declined to adopt this presumption of reasonableness for guideline sentences, finding it "[un]helpful to talk about the guidelines as 'presumptively' controlling."[217] Though they formally reject the presumption, these courts tend to exhibit the same type of guideline-centric *Booker* minimalism as those circuits that endorse it. For example, in all circuits the Guidelines are the threshold consideration in sentencing as well as in appellate review for reasonableness.[218] Furthermore, the circuits declining to endorse presumptive reasonableness nevertheless tend to equate reasonableness with the Guidelines. The Second Circuit has observed that "in the *overwhelming majority of cases*, a Guidelines sentence . . . would be reasonable in the particular circumstances."[219] Simi-

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212. *See* discussion *supra* Part I.A.

213. United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 555 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

214. *See, e.g.*, *Alonzo*, 435 F.3d at 554; *Mykytiuk*, 415 F.3d at 608; *Kristl*, 437 F.3d at 1055.

215. See discussion about the different meanings of presumptive reasonableness *infra* Part IV.B.1.

216. *See, e.g.*, United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); *Cage*, 451 F.3d at 593.

217. United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); 440 F.3d at 518; *see also* United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005); 397 F.3d at 115; United States v. Cooper, 437 F.3d 324, 329–30 (3d Cir. 2006); United States v. Zavala, 443 F.3d 1165, 1168–70 (9th Cir. 2006); United States v. Talley, 431 F.3d 784, 787 (11th Cir. 2005).

218. *See, e.g.*, *Jimenez-Beltre*, 440 F.3d at 518 ("[T]he district court will have to calculate the applicable guidelines range . . . *before* deciding whether to exercise its . . . discretion to impose a non-guidelines sentence. (emphasis added)); *Cooper*, 437 F.3d at 331 ("[The Guidelines] provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct."); United States v. White, 405 F.3d 208, 219 (4th Cir. 2005) ("[The] guideline range remains the starting point for the sentencing decision."); United States v. Vargas-Garcia, 434 F.3d 345, 349 (5th Cir. 2005) ("[W]e must first consider the district court's calculation of the Guidelines before turning to the broader reasonableness issues."); United States v. Cantrell, 433 F.3d 1269, 1279 (9th Cir. 2006) (explaining that the first step in a reasonableness review is determining whether the sentencing court correctly calculated the guideline range); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) ("The Guidelines continue to be the starting point . . . for this court's reasonableness review on appeal."); United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005) ("First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines.").

219. United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (emphasis added).

larly, the Third Circuit has held that a guideline sentence is "more likely to be reasonable than one outside the guidelines range."[220] According to the Ninth Circuit, "it is very likely that a Guideline calculation will yield a site within the borders of reasonable sentencing territory."[221] And the Eleventh Circuit has said that it would ordinarily "expect a sentence within the Guidelines range to be reasonable."[222]

One prominent critic of *Booker* minimalism has argued that "*nearly all* circuit court decisions are focused excessively on the guidelines when judging reasonableness."[223] The special weight the circuits give the Guidelines in relation to the other § 3553(a) factors is also reflected in how they describe the Guidelines. For example, the First Circuit—which has rejected presumptive reasonableness—has held that "the Guidelines are more than just 'another [§ 3553(a)] factor.'"[224] The Second Circuit, another court rejecting presumptive reasonableness, describes the Guidelines as not "just 'another factor' in the statutory list."[225] This language is strikingly similar to that of the Tenth Circuit, which has adopted presumptive reasonableness and has described the Guidelines as "not just one factor among many."[226] In language and in use, therefore, all of the circuits implement the Guidelines in much the same way.

B. Non-Guideline Sentences: Proportionality and Unreasonableness

Examining how circuits review non-guideline sentences for reasonableness provides more evidence of the prominence of *Booker* minimalism. One method of reviewing these sentences is proportionality. Under proportionality, "the farther the judge's sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a)" must be.[227]

Not surprisingly, all of the circuits that have adopted presumptive reasonableness for guideline sentences also evaluate non-guideline sentences using proportionality.[228]

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220. United States v. Lloyd, 469 F.3d 319, 321–22 (3d Cir. 2006) (upholding a district court's sentence when the sentencing judge indicated that "the guideline range is the thing that I should be looking to primarily").

221. *Zavala*, 443 F.3d at 1170.

222. *Talley*, 431 F.3d at 787.

223. Sentencing Law and Policy Blog, http://sentencing.typepad.com/ (Aug. 22, 2006, 8:57AM).

224. *Jimenez-Beltre*, 440 F.3d at 518. While the *Jimenez-Beltre* court justified its special reliance on the Guidelines as "the only integration of the multiple factors," it emphasized that by themselves the Guidelines are inadequate. *Id.*

225. *Rattoballi*, 452 F.3d at 133.

226. *Cage*, 451 F.3d at 593.

227. *Dean*, 414 F.3d at 729.

228. United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); United States v. Duhon, 440 F.3d 711, 715 (5th Cir. 2006); United States v. Davis, 458 F.3d 491, 495-497 (6th Cir. 2006); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005); United States v. Cage, 451 F.3d 585, 594 (10th Cir. 2006).

Significantly, two circuits that have formally rejected presumptive reasonableness have nevertheless adopted proportionality. The First Circuit has held that the farther a sentence varies from the guideline range, "the more compelling the justification based on factors in section 3553(a)" must be.[229] The Eleventh Circuit has also held that "an extraordinary reduction" from the guideline range "must be supported by extraordinary circumstances."[230] More circuits have therefore adopted proportionality than have adopted presumptive reasonableness.

Only the Second, Third, and Ninth Circuits have declined to formally adopt either method of reasonableness review. However, even these circuits use the Guidelines in a similar way to those endorsing proportionality—i.e., as an important metric in evaluating the reasonableness of a non-guideline sentence. For example, in *United States v. Rattoballi*,[231] the Second Circuit expressly declined to adopt proportionality[232] but emphasized the special weight of the Guidelines and their role "in calibrating the review for reasonableness."[233] These circuits, like those that use proportionality, closely examine a district court's variance from the Guidelines by evaluating the "statement of reasons (or lack thereof) for the sentence that it elect[ed] to impose."[234]

The Guidelines thus have a central role in measuring reasonableness in virtually all appellate review of district court sentencing.

C. Booker *Minimalism and Post-*Booker *Sentencing Statistics*

The Guidelines' place in appellate review among the circuits raises an important issue in light of *Booker*'s holding that mandatory Guidelines violate the Sixth Amendment.[235] Per se unreasonableness for non-guideline sentences would be constitutionally problematic under *Booker*.[236] Yet the circuits' treatment of the Guidelines may render them outcome-determinative, an essentially mandatory regime indistinguishable from the one *Booker* struck down.

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229. United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006) (citing the Seventh Circuit's *Dean*, 414 F.3d at 729).

230. United States v. Martin, 455 F.3d 1227, 1236–37 (11th Cir. 2006) (citing United States v. McVay, 447 F.3d 1348, 1357 (11th Cir. 2006)).

231. 452 F.3d 127 (2d Cir. 2006).

232. *Rattoballi*, 452 F.3d at 134 ("[W]e have yet to adopt this [proportionality] standard as a rule in this circuit, and do not do so here.").

233. *Id.* at 133; *see also* United States v. Ministro-Tapia, 470 F.3d 137, 142 (2d Cir. 2006) (noting that the Guidelines are to be used as the "benchmark" when considering a sentence).

234. *Rattoballi*, 452 F.3d at 134; *cf. Mares*, 402 F.3d at 519 ("[W]hen the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific . . . .").

235. *Booker*, 543 U.S. at 226–27.

236. *Id.* at 311 (Scalia, J., dissenting in part) ("[A]ny system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional.").

One concern expressed about the presumption of reasonableness and proportionality is the message that they send to district courts. While § 3553(a) obligates district courts to impose a sentence "sufficient, but not greater than necessary,"[237] these popular appellate methods of reasonableness review may have the effect of discouraging non-guideline sentences.[238] As we have seen, however, even those circuits rejecting presumptive reasonableness or proportionality tend to focus their appellate review around the Guidelines. According to critics, the atmosphere of appellate review among every circuit "encourage[es] the sort of rote, mechanistic reliance on the Guidelines that [the *Booker* substantive] opinion found constitutionally problematic."[239]

Sentencing statistics bolster arguments that *Booker* failed to "radically transform[] essential federal sentencing dynamics" and that "post-*Booker* sentencing may not be too different from pre-*Booker* sentencing."[240] In March 2006, the USSC issued a report about the impact of *Booker* on federal sentencing.[241] The report concluded that "*Booker* has not radically altered many central features of the federal sentencing system: Guideline calculations based on judicial fact-finding, and within-guideline sentencing outcomes, remain the norm."[242] When guideline sentences were combined with below-range sentences sponsored by the Government, they equaled approximately 86 percent of all sentences.[243] One particularly telling statistic is that since *Booker*, only one court has vacated a guideline sentence for substantive unreasonableness.[244] The rarity of such a holding reflects the prominence of the Guidelines among circuit courts.

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237. 18 U.S.C. § 3553(a) (2000).

238. United States v. Buchanan, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring) ("If I have one anxiety about the presumption [of reasonableness], it is the risk that it will cast a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment.").

239. Berman, *supra* note 90, at 143.

240. Douglas A. Berman, *Assessing Federal Sentencing After* Booker, 17 FED. SENT. R. 291, 291–92 (2005); *see also* Gertner, *supra* note 117, at 140 (noting the similarities between pre-*Booker* decisions and those in circuits that had adopted presumptive reasonableness); Frank O. Bowman, III, *'Tis a Gift to be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. R. 301 (2006) ("[T]he federal sentencing debate . . . since *Booker* has mostly been about whether the post-Booker guidelines are really any different from the pre-Booker guidelines." (citation omitted)).

241. U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, March 2006, [hereinafter USSC FINAL REPORT], *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf.

242. Douglas A. Berman, *Now What? The Post-*Booker *Challenge for Congress and the Sentencing Commission*, 18 Fed. Sent. R. 157 (2006); *see also* USSC FINAL REPORT, *supra* note 241, at vi ("The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines.").

243. USSC FINAL REPORT, *supra* note 241, at 46; *see also* Statement of the Honorable Ricardo H. Hinojosa before the House Subcommittee on Crime, Terrorism, and Homeland Security, March 16, 2006, at 6, *available at* http://www.ussc.gov/booker_report/03_16_06Booker%20Testimony.pdf. Note that there are greater variances among district courts than among the circuits themselves. *See* USSC FINAL REPORT, *supra* note 241, at 85–86.

244. United States v. Lazenby, 439 F. 3d 928, 934 (8th Cir. 2006).

A review of case law and sentencing statistics therefore reveals that *Booker* minimalism suffuses virtually all of appellate review.[245] In *every* circuit, guideline sentences "are accorded a greater degree of deference, and engender far less scrutiny" than those outside of the Guidelines.[246] Differences between the circuits that have adopted presumptive reasonableness or proportionality and those that have not tend to be superficial rather than substantive.

This case law and these statistics raise a question about what impact it would have if the Supreme Court declares this spring that presumptive reasonableness or proportionality are unconstitutional when even those circuits not adopting them embrace guideline-centric *Booker* minimalism.

IV. THE SUPREME COURT AND THE FUTURE OF *BOOKER* MINIMALISM

The Supreme Court will address the presumption of reasonableness and proportionality in two cases this spring. The cases have the potential to widely impact reasonableness review in the circuit courts. Whether they will have this impact, though, is uncertain.

A. Introduction: Rita, Claiborne, *and the Tension and Competing Goals of Sentencing*

Congress created the USSC and charged it with establishing policies in the federal sentencing system to address specific purposes.[247] These included the need for a sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide defendants with needed treatment.[248] Congress intended that the Guidelines would "provide certainty and fairness" in meeting these purposes, and that they would "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[249]

Congress also recognized the limitations of a structured sentencing system. To meet its intended purposes, the system would also need to "maintain[] sufficient flexibility to permit individualized sentences" whenever warranted by circumstances unaccounted for by the Guidelines.[250] Sentencing would also need to account for the parsimony provision at the heart of § 3553(a), which required district courts to impose the

245. *See* Eric Citron, *Sentencing Review: Judgement, Justice, and the Judiciary*, 115 YALE L.J. POCKET PART 150, 150 (2006), http://www.thepocketpart.org/2006/07/citron.html (noting that despite the fact some circuits have nominally rejected presumptive reasonableness for Guidelines sentences, "one can comb through mountains of case law from any circuit before finding a guideline sentence reversed as unreasonable").

246. Lamparello, *supra* note 12, at 174.

247. 28 U.S.C. § 991(b)(1)(A) (2000).

248. *Id.* (referencing 18 U.S.C. § 3553(a)(2) (2000)).

249. § 991(b)(1)(B).

250. *Id.*

lowest sentence needed ("sufficient, but not greater than necessary") in each case.[251] Reaching this lowest sentence requires a district court to consider how each defendant's unique "history and characteristics" relate to the § 3553(a) sentencing factors.[252]

There is thus a tension in sentencing between the uniformity promoted by the Guidelines on one side, and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the other. The popularity of the presumption of reasonableness and proportionality among the circuit courts serves to highlight this tension.

The Supreme Court has chosen *United States v. Rita* and *United States v. Claiborne* as the vehicles for addressing the proper balance between the Guidelines and the other § 3553(a) sentencing factors.[253] *Rita* asks whether *Booker* prohibits applying a presumption of reasonableness to guideline sentences, and *Claiborne* asks whether *Booker* prohibits proportionality as a method of evaluating non-guideline sentences.[254]

A closer examination of *Rita* and *Claiborne* raises questions about how they might impact *Booker* minimalism as it exists in the circuit courts. Part of the uncertainty stems from the unusual definition of presumptive reasonableness in *Rita*. Because the "presumption of reasonableness" in *Rita* functions differently than it does in most other circuits, the Supreme Court could issue a narrow ruling that would preserve the presumption as it exists in these other circuits.

Claiborne reflects a mainstream approach to proportionality, but it too leaves questions about its impact. Part III detailed how circuit courts have uniformly embraced *Booker* minimalism's guideline-centric approach. This is true even though only some have formally adopted proportionality. This raises the question of what impact it would have if the Court finds that proportionality violates *Booker*. How would this affect circuits that have not formally endorsed it as a method of reasonableness review but nevertheless employ a guideline-centric approach? A similar question arises with *Rita* and presumptive reasonableness—i.e., if the presumption is struck down, can courts nevertheless continue to give the Guidelines disproportionate weight among the sentencing factors?

It is unclear to what extent *Rita* and *Claiborne* will address these questions. The Supreme Court could choose to narrow the scope of its rulings to promote unanimity on what has been a contentious issue.[255] A

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251. § 3553(a).
252. *Id.* § 3553(a)(1).
253. *Miscellaneous Orders of the Court*, *supra* note 2.
254. *Id.*
255. Chief Justice John Roberts has emphasized the importance of the Court deciding issues on the "narrowest possible ground" so as to "promote[] clarity and guidance for . . . the lower courts." Chief Justice John Roberts, Commencement Address at the Georgetown University Law Center

narrow ruling, though, may portend an uncertain future for both *Booker* minimalism and reasonableness review.

B. United States v. Rita *and the Presumption of Reasonableness*

The impact of *Rita* will depend on whether the Supreme Court chooses to review the presumption of reasonableness as it relates only to the procedural component of a sentence, or if the Court chooses to review how it relates to the substantive component of a sentence as well. This is an important distinction because it marks the difference between an opinion that would have a broad effect and one that would have only a limited effect.

1. Two Different Approaches to the Presumption of Reasonableness

When reviewing district court sentences, the majority of circuits have divided reasonableness into procedural and substantive components.[256] Procedural reasonableness asks whether the district court correctly calculated the applicable guideline range[257] and whether it "considered the § 3553(a) factors and explained its reasoning" when imposing a particular sentence.[258] Substantive reasonableness considers whether the length of the sentence was reasonable in light of the facts of the case and relevant § 3553(a) factors.[259]

(May 21, 2006). The contentiousness of the issue is apparent in the fact that both the substantive and remedial *Booker* opinions split 5–4. *See* McConnell, *supra* note 15, at 677–78.

256. Berman, *supra* note 90, at 143; D'Addio, *supra* note 12, at 177, 179; *see also* United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006) ("Reasonableness review involves both procedural and substantive components."); United States v. Webb, 403 F.3d 373, 383 (6th Cir. 2005) (arguing that appellate courts must consider "not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination"); United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005) ("[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed."); United States v. Shannon, 414 F.3d 921, 923 (8th Cir. 2006) (discussing procedural and substantive errors in sentencing); United States v. Kristl, 437 F.3d 1050, 1055 (10th Cir. 2006) ("[T]he reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated.").

257. *See, e.g.*, *Kristl*, 437 F.3d at 1055.

258. United States v. Cage, 451 F.3d 585, 591 (10th Cir. 2006) (internal quotation marks omitted) (citing *Kristl*, 437 F.3d at 1054-55); *see also* United States v. Dexta, 470 F.3d 612, 614–15 (6th Cir. 2006) ("[A] sentence is procedurally reasonable if the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion"). Circuits that have not adopted presumptive reasonableness have also recognized that reasonableness has a procedural component. *See* United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005) ("[A] sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to 'consider' the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a) . . . ."); United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2005) ("To determine if the court acted reasonably in imposing the resulting sentence, we must first be satisfied the court exercised its discretion by considering the relevant factors.").

259. *See, e.g.*, United States v. Gale, 468 F.3d 929, 934 (6th Cir. 2006) (noting the substantive component of reasonableness review relates to "the length of the sentence") (internal citations and quotation marks omitted); *Paladino*, 401 F.3d at 488 (noting that one aspect of reasonableness is "the length of the sentence"); United States v. Mateo, 471 F.3d 1162, 1166 (10th Cir. 2006) ("We

As discussed in Part I, procedural reasonableness is a check on *Booker* minimalism because in theory it prohibits courts from relying solely on the Guidelines.[260] An important part of procedural reasonableness is "ensur[ing] that a sentencing court explains its reasoning to a sufficient degree to allow for reasonable appellate review."[261] Section 3553(c) of the sentencing statute requires a district court "at the time of sentencing" to "state in open court the reasons for the imposition of the particular sentence."[262] The district court must therefore show that it accounted for not only the Guidelines, but any other relevant § 3553(a) factors raised by a defendant or by the government.[263] A district court's failure to address a nonfrivolous § 3553(a) argument renders the sentence procedurally unreasonable and it should be vacated.[264]

In most circuits, the presumption of reasonableness does *not* attach to the procedural component of a district court's sentence, even if that sentence falls within the Guidelines.[265] In fact, claims of procedural un-

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determine substantive reasonableness by reference to the actual length of the sentence imposed in relation to the sentencing factors enumerated in § 3553(a).").

260. *See* discussion *supra* Part I.D.

261. *Dexta*, 470 F.3d at 614.

262. 18 U.S.C. § 3553(c) (2000).

263. *See, e.g.*, United States v. Cunningham, 429 F.3d 673, 676 (7th Cir. 2005) ("[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors."); Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 146 (2006) http://www.thepocketpart.org/2006/07/chanenson.html ("[T]he sentencing judge must explain his reasons, and meaningfully document how he grappled with the § 3553(a) factors to reach the sentence imposed.").

264. Chanenson, *supra* note 263, at 148 ("[A] number of appellate panels have enforced the statutory reasons requirement and reversed in cases in which the judge failed to provide a sufficient explanation of the logic behind the sentence."); *see also Moreland*, 437 F.3d at 434 (holding that a district court's sentence "may be procedurally unreasonable . . . if the district court provides an inadequate statement of reasons [under § 3553(a)]"); United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006) ("Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it."); *Cunningham*, 429 F.3d at 676 ("[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors."); United States v. Sanchez-Juarez, 446 F.3d 1109, 1117 (10th Cir. 2006) ("[W]here a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence . . . we must be able to discern from the record that the sentencing judge [did] not rest on the guidelines alone." (citation and internal quotation marks omitted)). Circuits rejecting presumptive reasonableness have held the same. *See, e.g.*, *Cooper*, 437 F.3d at 329 ("[A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit (provided it has a factual basis) and the court fails to address it." (citation and quotation marks omitted)); United States v. Diaz-Arqueta, 447 F.3d 1167, 1171 (9th Cir. 2006) (reversing the district court's sentence because it failed to consider relevant § 3553(a) factors). Note that despite these strong authorities, sentencing statistics suggest that violations of procedural reasonableness are not always reversed on such grounds. *See* discussion *supra* Part III.C; *see also* Comment Post of Jeff Hurd to Sentencing Law and Policy Blog, http://sentencing.typepad.com/ (Jan. 20, 2007, 10:15 EST) and Response Post of Douglas Berman (Jan. 20, 2007, 10:15 EST) (noting that while many circuits claim to reverse for procedural unreasonableness, sentencing statistics suggest they rarely do).

265. *See, e.g.*, *Richardson*, 437 F.3d at 554 (noting that the presumption of reasonableness "does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence"); United States v. Davis, 458 F.3d 491, 496 (6th

reasonableness assert that the district court made a legal error, and as such they are reviewed *de novo* on appeal.[266] This is because while the Guidelines might be an important factor in reasonableness review, "[a] district court *may not* presume that they produce the 'correct' sentence."[267] *Booker* itself indicated that part of reasonableness review requires considering whether the district court accounted for relevant § 3553(a) factors: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable."[268]

A district court's failure to indicate how it considered relevant § 3553(a) factors would leave the appellate court unable to determine whether the district court weighted those factors reasonably or unreasonably.[269] For this reason an appellate court may *not* presume the procedural reasonableness of a sentence simply because it falls within the guideline range.[270] Instead, the court must be able to determine clearly from the record that the district court considered any relevant § 3553(a) factors raised by a party.[271]

That most appellate courts do not presume a guideline sentence is procedurally reasonable means that the presumption applies only to the substantive component of a sentence—i.e., its length.[272] Indeed, it is only *after* the appellate court is satisfied that the district court's sentence was procedurally reasonable that the presumption of reasonableness ordinarily becomes relevant.[273]

Cir. 2006) (discussing the presumption of reasonableness in the context of substantive reasonableness); *Cunningham*, 429 F.3d at 675-76; *Sanchez-Juarez*, 446 F.3d at 1117.

266. *See, e.g.*, *Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that "consider[] the district court's application" of the Guidelines or the other § 3553(a) factors).

267. United States v. Demaree, 459 F.3d 791, 794-95 (7th Cir. 2006) (emphasis added); *Cunningham*, 429 F.3d at 675–76.

268. *Booker*, 543 U.S. at 261.

269. *See* Chanenson, *supra* note 263, at 148 ("The key is to provide a window into the discretionary sentencing process and to afford appellate courts something substantive to review.").

270. *See, e.g.*, *Cunningham*, 429 F.3d at 679 ("[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, *before we can conclude that the judge did not abuse his discretion*, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." (emphasis added)); *Demaree*, 459 F.3d at 794-95.

271. *Cunningham*, 429 F.3d at 679; *Richardson*, 437 F.3d at 554; *Sanchez-Juarez*, 446 F.3d at 1117.

272. *Dexta*, 470 F.3d at 614–15 (discussing the presumption of reasonableness in the context of substantive reasonableness); *Davis*, 458 F.3d at 496 (discussing the presumption of reasonableness in the context of substantive reasonableness); *Cage*, 451 F.3d at 591 (distinguishing procedural from substantive reasonableness and discussing the presumption of reasonableness in a substantive context); *Mateo*, 471 F.3d at 1166 ("We determine substantive reasonableness by reference to the actual length of the sentence imposed in relation to the sentencing factors enumerated in § 3553(a).").

273. *See, e.g.*, United States v. Buchanan, 449 F.3d 731, 734 (6th Cir. 2006) (discussing the presumption of reasonableness in the context of substantive reasonableness); *Davis*, 458 F.3d at 496 (discussing the presumption of reasonableness in the context of substantive reasonableness). Further evidence for this comes in the fact that when the district court's error is procedural, courts do not usually apply the presumption of reasonableness. *See, e.g.*, *Cunningham*, 429 F.3d at 680 (vacating

Significantly, not all circuits treat the presumption of reasonableness this way. The Fifth Circuit in particular appears to have adopted a more dramatic *Booker* minimalist approach to appellate review. Under the Fifth Circuit's approach, a district court's guideline calculation encompasses *both* procedural and substantive reasonableness.[274] If a sentence falls within the guideline range, on appeal the court "infer[s] that the [district court] has considered all the [§ 3553(a) sentencing] factors."[275] The district court's failure to address a defendant's specific and non-frivolous § 3553(a) arguments for a variance would not necessarily constitute procedural error.[276] Instead, "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required."[277]

The Fifth Circuit's application of presumptive reasonableness to both procedural and substantive components of a sentence is unusual, however, and other circuits have explicitly rejected it.[278] That the approach exists, though, is significant in the *Rita* case.

2. *United States v. Rita*

Although *United States v. Rita* comes from the Fourth Circuit, it represents the unusual type of presumptive reasonableness that conflates the procedural and substantive components of a sentence. Under the majority rule outlined in the previous section, the facts in *Rita* would in theory have led most circuits to vacate the sentence as procedurally unreasonable.[279] Interestingly, this means that they would have decided the case without presumptive reasonableness ever being relevant.[280]

In *Rita*, the court reviewed a defendant's appeal from a jury conviction and sentence on charges of perjury, obstruction of justice, and making false statements.[281] The district court had sentenced the defendant to 33-months' imprisonment, which was within the guideline range.[282] On

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the lower court's sentence but neither discussing presumptive reasonableness nor "express[ing] [any] view on the proper sentence"); *Sanchez-Juarez*, 446 F.3d at 1117 (failing to consider presumptive reasonableness when the error was procedural).

274. United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); *see also* United States v. Sam, 467 F.3d 857, 864 (5th Cir. 2006) ("When the district court imposes a sentence falling within a properly calculated Guidelines range, that sentence is presumptively reasonable and 'little explanation is required.'" (quoting *Mares*, 402 F.3d at 519)).

275. *Mares*, 402 F.3d at 519.

276. *See id.*

277. *Id.*

278. *See, e.g.*, *Cooper*, 437 F.3d at 329–30 ("At least one court has held a sentencing judge is presumed to have considered all of the § 3553(a) factors if a sentence is imposed within the applicable guidelines range. *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). We decline to follow this approach.").

279. *See* discussion *supra* Part IV.B.1.

280. This is because the presumption of reasonableness typically becomes relevant only *after* the appellate court has determined that a district court's sentence was procedurally reasonable. *See* discussion *supra* Part IV.B.1.

281. United States v. Rita, 177 Fed. Appx. 357, 358 (4th Cir. 2006).

282. *Rita*, 177 Fed. Appx. at 358.

appeal, the *Rita* court noted that a guideline sentence was entitled to presumption of reasonableness.[283] The court held that the district court correctly calculated the guideline range, "consider[ed] the factors set forth in § 3553(a)," and consequently affirmed.[284]

Despite the *Rita* court's assertion that the district court had "consider[ed] the factors set forth in § 3553(a)," the record appeared to show that it had not.[285] Before sentencing, the defendant argued for a below-guideline variance based on his military service record, various health problems, that he did not represent a threat to the public, and that he would be a "likely . . . target" in prison for having worked as a law enforcement officer with the United States Immigration and Naturalization Service.[286] Prior to imposing its sentence, however, the district court noted only that it was "unable to find that the sentencing guideline range . . . is an inappropriate guideline range [for the crimes] . . . and under 3553, certainly the public needs to be protected."[287] The record did not reflect any consideration of the defendant's arguments based on his military record, physical condition, or service as a law enforcement officer.[288]

Each of the defendant's arguments for a mitigated sentence were unaccounted for in the Guidelines and would be properly considered under § 3553(a). The guideline policy statements indicate that the Guidelines do not account for a defendant's physical condition (§ 5H1.4), employment record (§ 5H1.5), or previous military service (§ 5H1.11).[289] Yet § 3553(a) says that these factors "shall" be considered "in determining the particular sentence to be imposed"[290] because they relate to "the history and characteristics of the defendant."[291] Additionally, the district court failed to address the defendant's argument that his physical safety in prison would be jeopardized because he had been a law enforcement officer. Under § 3553(a)(2)(D), however, the district court must consider the need to provide the defendant with "correctional treatment in the most effective manner."[292] As such, all of the defendant's § 3553(a) arguments that the district court ignored were relevant and nonfrivolous.

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283. *Id.* (citing United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)).
284. *Id.*
285. Brief for Petitioner at 48, Rita v. United States, No. 06-5754 (Dec. 18, 2006), *available at* http://www.fpdmdnc.org/Rita/RitaMeritsBrief.Final.pdf.
286. Petition for Writ of Certiorari, at 13–16, Rita v. United States, No. 06-5754 (Dec. 18, 2006).
287. Brief for Petitioner, *supra* note 285, at 48.
288. *Id.*
289. USSG, *supra* note 1, § 5H1.4, § 5H1.5, § 5H1.11.
290. 18 U.S.C. § 3553(a) (2000).
291. *Id.* § 3553(a)(1).
292. *Id.* § 3553(a)(2)(D).

In asserting that the district court had "consider[ed] the factors set forth in § 3553(a)" when the record appeared to reflect that it had not, the *Rita* court conflated procedural and substantive reasonableness in a way similar to that of the Fifth Circuit.[293] Instead of vacating the sentence for procedural unreasonableness, *Rita* "infer[red] that the [district court] [had] considered all the [§ 3553(a) sentencing] factors" [294] simply because the sentence was a guideline sentence. *Rita* presumed that because the sentence was a guideline sentence, it was both procedurally and substantively reasonable.

As detailed above, in most circuits a district court's failure to consider a defendant's arguments about mitigating § 3553(a) factors would render the sentence procedurally unreasonable.[295] In fact, the Fourth Circuit itself has stated this as well. In *United States v. Moreland*,[296] the court held that "[r]easonableness review involves both procedural and substantive components," and a district court's sentence "may be procedurally unreasonable . . . if the district court provides an inadequate statement of reasons [under § 3553(a)]."[297] Under the approach used by most circuits—including the Fourth—the district court's sentence in *Rita* should therefore have been reversed as procedurally unreasonable.[298]

3. The Uncertain Effect of *Rita*

That the "presumption of reasonableness" in *Rita* means something different than what it means in most circuits leaves a question about what impact it would have if the Supreme Court were to rule that the presumption violates *Booker*. According to the order list in *Rita*,[299] the Court will review three questions: (1) whether the district court's sentence was reasonable, (2) whether *Booker* prohibits the presumption of reasonableness for guideline sentences, and (3) whether the presumption can justify a sentence unaccompanied by an explicit analysis of relevant § 3553(a) factors.[300] To affirm, the Supreme Court would have to find that a presumption of reasonableness can validly apply to *both* procedural (Question 3) and substantive (Question 2) components of a sentence.

To vacate the sentence, however, the Court may—but need *not*—decide the procedural and substantive questions. The facts in *Rita* would allow the Court to remand the case on either (or both) of these issues.

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293. *See* discussion *supra* Part IV.B.1.
294. *Mares*, 402 F.3d at 519.
295. *See* discussion *supra* Part IV.B.1.
296. 437 F.3d 424 (4th Cir. 2006).
297. *Moreland*, 437 F.3d at 434.
298. In theory these courts would have reversed on these facts. In practice, though, procedurally unreasonable sentences are sometimes affirmed even though they are procedurally unreasonable. *See supra* note 264 (discussing how statistics seem to indicate that at least some procedurally unreasonable sentences are nevertheless affirmed).
299. *See Miscellaneous Orders of the Court*, *supra* note 2.
300. *Id.*

The Court could narrow the scope of its opinion by holding only that the appellate court improperly applied the presumption of reasonableness to the *procedural* component of the sentence. This would leave the question of whether the presumption can apply to a sentence's *substantive* component unanswered.

If the Court narrows its opinion in this way and holds only that *Rita* erred in affirming the sentence because the district court did not consider the defendant's § 3553(a) arguments, it would not represent a dramatic departure from what most circuits already claim to be doing. Most circuits treat procedural reasonableness as a prerequisite to presumptive reasonableness.[301] Unlike in *Rita*, these circuits generally do not presume a sentence is procedurally reasonable simply because it falls within the Guidelines. Only *after* the appellate court is satisfied that the district court's sentence was procedurally reasonable does the presumption of reasonableness become relevant—i.e., as it relates to the substantive (length) component of the sentence.[302] A decision striking down *Rita* on narrow procedural reasonableness grounds would therefore leave the majority of circuits exactly where they are currently.

At least one member of the Supreme Court has expressed a desire to narrow the scope of the Court's rulings to promote unanimity on contentious issues.[303] A narrow opinion in *Rita* focused only on procedural reasonableness may promote such unanimity within the Court, but it would come at the price of a lost opportunity to clarify what role the Guidelines should have in the substantive aspect of reasonableness review. An opinion addressing how presumptive reasonableness applies substantively to a sentence would have a much broader effect and would assist courts in identifying the proper role of the Guidelines after *Booker*.

Part V proposes one approach to reasonableness review that addresses this substantive issue.

C. United States v. Claiborne *and Proportionality*

In the second *Booker* minimalism case to be decided this spring, *United States v. Claiborne*,[304] the Supreme Court will review proportionality and whether it is consistent with *Booker* to require that a district court show extraordinary circumstances whenever its sentence substantially varies from the Guidelines.[305] As detailed in Part III, all of the circuits except the Second, Third, and Ninth have adopted proportionality as a part of their reasonableness review.[306] The central issue that *Clai-*

301. *See* discussion *supra* Part IV.B.1.
302. *Id.*
303. Chief Justice John Roberts in particular has expressed this inclination. *See supra* note 255.
304. 439 F.3d 479 (8th Cir. 2006).
305. *See Miscellaneous Orders of the Court*, *supra* note 2.
306. *See* discussion *supra* Part III.B.

borne presents is whether *Booker* permits an approach wherein the Guidelines serve as *the* metric for determining if a sentence is unreasonable.

As in *Rita*, the important question in *Claiborne* is how the Supreme Court addresses the issue before it. Depending on how narrowly or broadly the Court frames *Claiborne*, the case may or may not have a substantial impact on guideline-centric *Booker* minimalism among the circuits.

1. *United States v. Claiborne*

In *Claiborne*, the district court correctly calculated a 37–46 month guideline range resulting from the defendant's guilty pleas for possession of cocaine base.[307] The court acknowledged the guideline range but sentenced the defendant to 15 months.[308] It justified the variance based on the defendant's lack of criminal history, youth, the small quantity of drugs involved, and the court's opinion that he was unlikely to commit similar crimes in the future.[309] The government appealed the 15-month sentence as unreasonable under § 3553(a).[310]

On appeal, *Claiborne* vacated the district court's below-guideline sentence as substantively unreasonable.[311] The court examined the reasons the district judge had cited for the variance and criticized some on the ground that they had already been accounted for in the Guidelines.[312] While the district court had "properly considered" the unlikelihood the defendant would reoffend as a basis for its variance, *Claiborne* disputed the weight that the finding should have based on the fact that the defendant had been charged with possession of cocaine on more than one occasion in the past.[313] The *Claiborne* court did not comment on the district court's other justification about the defendant's young age, but nevertheless found that the district court's reasons for varying the sentence were not "extraordinary."[314] Because a district court's reasons for varying a sentence must be compelling "to the extent of the difference between the [Guidelines] advisory range and the sentence imposed,"[315] the district court's "60 percent" downward variance from the lower end of the Guideline range was "extraordinary . . . [and] not supported by comparably extraordinary circumstances."[316]

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307. *Claiborne*, 439 F.3d at 480.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 481.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* (citing United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005)).
316. *Id.* The discrepancy between a sentence and the applicable guideline range is typically described as either a percentage of a sentence's variance from the guideline range or simply the

2. Proportionality: Non-Guideline Sentences Presumptively *Un*reasonable?

Proportionality in *Claiborne*, as in other circuits, employs levels of scrutiny when evaluating non-guideline sentences. District courts must justify such sentences by citing extenuating offender characteristics or offense conduct proportional to the extent of the variance.[317] Proportionality asks if, in light of the extenuating § 3553(a) factors, the non-guideline sentence was reasonable.[318]

Appellate review of non-guideline sentences is an important issue because it relates to the extent judges have discretion to individually tailor sentences.[319] That the Guidelines were "advisory" and that judges had more discretion to vary sentences is precisely what prevented the Guidelines from being declared unconstitutional in *Booker*.[320] Examining proportionality is therefore important because "it is the non-Guideline presumptions, rather than the guideline presumptions, that express most clearly the threat of appellate reversal associated with this exercise of discretion."[321]

If proportionality means that non-guideline sentences are presumed *un*reasonable on appeal, then post-*Booker* sentencing begins to look like the mandatory system that *Booker* struck down.[322] *Claiborne* arises from the Eighth Circuit, which has held that guideline sentences are presumptively reasonable.[323] When a court adopting presumptive reasonableness also adopts proportionality, the question naturally arises whether there is a presumption of *un*reasonableness for non-guideline sentences. The circuit courts that have addressed this question have held that non-guideline sentences are *not* presumptively *un*reasonable.[324] The courts

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number of months' difference between the sentence and the guideline range. *Compare Claiborne*, 439 F.3d at 481 (focusing on the "60 percent" variance from the lower end of the guideline range), *with* United States v. Maloney, 466 F.3d 663, 668 (8th Cir. 2006) (focusing on the "number of the number of offense levels traversed by a variance").

317. *See* discussion *supra* Part III.B; *see also* United States v. Bishop, 469 F.3d 896, 907 (10th Cir. 2006) ("[T]he extremity of the variance between the actual sentence imposed and the applicable Guidelines range should determine the amount of scrutiny we give to the district court's substantive sentence.").

318. *Cage*, 451 F.3d at 594–95.

319. Citron, *supra* note 245, at 151.

320. *Booker*, 543 U.S. at 245.

321. Citron, *supra* note 245, at 151.

322. Hernandez, *supra* note 159, at 252.

323. *Lincoln*, 413 F.3d at 716.

324. *See, e.g.*, United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006); United States v. Ferguson, 456 F.3d 660, 664-665 (6th Cir. 2006) ("Although sentences within the Guidelines range are afforded a presumption of reasonableness, sentences falling outside the Guidelines range are neither presumptively reasonable nor presumptively unreasonable."); United States v. Howard, 454 F.3d 700, 703 (7th Cir. 2006); United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006); United States v. Valtierra-Rojas, 468 F.3d 1235, 1239 (10th Cir. 2006) (stating that although guideline sentences are presumptively reasonable, it "does not mean, however, that a variance sentence is presumptively unreasonable" (citation omitted)).

recognize that such a holding "would transform an 'effectively advisory' system . . . into an effectively mandatory one" that violates *Booker*.[325]

Interestingly, though, courts do not ignore the fact that guideline sentences are presumptively reasonable when weighing non-guideline sentences.[326] Indeed, in some cases "the presumption in favor of guideline sentences has been cited as a decisional factor in several cases where the sentence imposed was a downward variance."[327]

> The fact that the presumption for Guideline sentences was even cited in these cases suggests that the presumption's influence has begun to creep into judges' consideration of all sentences . . . . In other words, the very inference that should not be drawn from the presumption—that non-Guideline sentences are presumptively unreasonable—may be taking hold.[328]

Regardless of what the circuit courts have asserted, using presumptive reasonableness as a method of evaluating guideline sentences along with proportionality as a method of evaluating *non*-guideline sentences may be creating an implicit presumption of unreasonableness for non-guideline sentences. This is an important issue that *Claiborne* allows the Supreme Court to consider.

Part V proposes one approach to reasonableness review that would refine the use of proportionality and address the concern that it inhibits judicial discretion in violation of *Booker*.

3. Impact of *Claiborne*

The difficulty in evaluating proportionality is that the nature of its inquiry—whether circumstances are sufficiently extraordinary to justify a substantial variance—"is not one that allows for precision in measurement."[329] The Tenth Circuit, for example, has noted that "there are no strict guideposts that invoke certain levels of scrutiny; there is no formula into which we input the degree of divergence in order to generate precisely how compelling the district court's reasons need be."[330] The rule requiring "extraordinary circumstances" for "substantial variances" may be so vague that it means very little outside the fact-specific context of each particular case.

In *Claiborne*, the Supreme Court therefore faces the difficulty of weighing an issue that is admittedly ambiguous and that varies in every

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325. *Valtierra-Rojas*, 468 F.3d at 1239-40 (quoting *Moreland*, 437 F.3d at 433).

326. Hernandez, *supra* note 159, at 252; *see, e.g.*, *Cage*, 451 F.3d at 593 ("Our holding in *Kristl*, that within-the-guidelines sentences are entitled to a presumption of reasonableness, *speaks to how we should consider sentences outside the guidelines range*." (emphasis added)).

327. Hernandez, *supra* note 159, at 252.

328. *Id.* (internal footnote omitted).

329. *Valtierra-Rojas*, 468 F.3d at 1240.

330. *Id.*

instance. The Court will be reviewing whether circuits have erred in requiring "extraordinary" circumstances when sentences "substantially" vary from the Guidelines. Yet the circuits themselves have acknowledged that these are difficult terms to define in a way that would allow for a ruling that applies in every circuit.

The *Claiborne* case, like *Rita*, leaves the Court with significant latitude in deciding the issue before it. What the decision will mean for lower courts depends on how broadly the Supreme Court defines proportionality. How would its rejection of proportionality affect those circuits who do not explicitly adopt proportionality but nevertheless find the Guidelines helpful "in calibrating the review for reasonableness"?[331] Would courts still be permitted to identify the Guidelines as "not just another factor" and as deserving "heavy weight" in reasonableness review?[332]

These questions relate to the basic issue that *Booker* minimalism presents—i.e., whether the Guidelines have a special weight in sentencing and in appellate review among the § 3553(a) factors. If the Court rules on proportionality but fails to address the underlying issue of *Booker* minimalism, the pattern of guideline sentences that has occurred in the aftermath of *Booker* may continue.

V. BALANCING *BOOKER* MINIMALISM WITH *BOOKER* AND § 3553(a)

As previously discussed,[333] *Rita* and *Claiborne* highlight the tension existing between *Booker* minimalism on one side and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the other. The specific issues in these cases—presumptive reasonableness and proportionality—are the vehicles that allow for the Supreme Court to consider this tension.

A. A New Standard of Reasonableness Review

One way to balance this tension would be for district courts to impose non-guideline sentences whenever the Guidelines fail to account for or inadequately account for offense conduct or offender characteristics. This would mean that the presumption of reasonableness and proportionality violate *Booker* whenever nonfrivolous circumstances exist for which the Guidelines do not already account or for which they inadequately account.[334] This approach would provide an appropriate balance between guideline-centric *Booker* minimalism and the requirements of *Booker* and § 3553(a). It may also represent an improved approach to

331. *Rattoballi*, 452 F.3d at 133.

332. *See Cage*, 451 F.3d at 593; United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006).

333. *See supra* Part IV.A.

334. I am sincerely grateful to Benji McMurray for providing this basic formulation and for assisting in developing it. *See* United States v. Sosa-Acosta, 06–4174, Appellant's Br. at 12-13.

reasonableness review in the Tenth Circuit and is one way of addressing *Rita* and *Claiborne*.

The Guidelines already account for a number of factors properly considered under § 3553(a).[335] This is not surprising considering that Congress explicitly instructed the USSC to promulgate Guidelines that would meet the "purposes of sentencing as set forth in [§ 3553(a)(2)]."[336] These are the same purposes that all of the § 3553(a) factors are directed toward—i.e., the need for a sentence to reflect the seriousness of the offense, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.[337] So, for example, the Guidelines contain a number of "adjustments" that can be made to a guideline calculation based on the role that a defendant had in a crime.[338] If the defendant's role was "minimal" or "minor," it may justify up to a four-level decrease in that defendant's offense level.[339] Or, a defendant admitting guilt is entitled to a three-level decrease in his or her offense level calculation.[340] A defendant's previous criminal history or lack thereof is also already part of the guideline calculation.[341]

When the Guidelines account for all relevant § 3553(a) factors in a particular case, a guideline-centric approach is appropriate. In such cases, a presumption of reasonableness for guideline sentences would not violate *Booker* because the Guidelines reflect the relevant offender characteristics and offense conduct.[342] For the same reason, proportionality would be a valid method of reviewing the sentence if it fell outside the Guidelines.

As detailed in Part II, the Guidelines expressly avoid consideration of a number of possibly mitigating offender characteristics.[343] Because these characteristics "are difficult to measure systematically and cannot be easily plotted on a sentencing chart,"[344] they are not ordinarily reflected in a guideline range. Such characteristics include, among others, a defendant's age, physical or mental status, education, and military or civil service.[345]

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335. *See, e.g.*, United States v. Buchanan, 449 F.3d 731, 735–36 (6th Cir. 2006) (Sutton, J., concurring) (detailing how the Guidelines reflect other § 3553(a) factors); United States v. Wilson, 350 F. Supp. 2d 910, 915 (D. Utah 2005).

336. 28 U.S.C. § 991(b)(1)(A) (2000).

337. 18 U.S.C. § 3553(a)(2) (2000).

338. USSG, *supra* note 1, § 3B1.2.

339. *Id.*

340. *Id.* § 3E1.1.

341. *Id.* § 4A1.1.

342. Note that this presumption would apply only to the substantive as opposed to the procedural component of the sentence. *See* discussion *supra* Part IV.A.1.

343. *See supra* Part II.C.1.

344. Berman, *supra* note 147, at 290.

345. *See* USSG, *supra* note 1, § 5H1.1-1.12.

Whenever such circumstances are present, the presumption of reasonableness and proportionality inhibit the judicial discretion required by *Booker* and § 3553(a).[346] The reason these circumstances are not included in the Guidelines is precisely because they require the type of individualized judicial consideration that Congress had envisioned in § 3553(a) and that *Booker* had mandated. Their presence in a particular case means that the Guidelines, by themselves, inadequately reflect the relevant sentencing concerns. In such cases, presumptive reasonableness and proportionality impair appellate courts' reasonableness review by unjustifiably centering it around the Guidelines.

B. Cases Where the Guidelines Inadequately Reflect § 3553(a) Factors

Even in those cases where the Guidelines account for all relevant § 3553(a) factors, presumptive reasonableness and proportionality may yet be inappropriate.

In particular, they should not be used whenever the Guidelines *inadequately* account for either offense conduct or offender characteristics.[347] These situations can arise frequently. The most prominent and criticized example of the Guidelines inadequately accounting for offense conduct is the 100:1 crack/powder cocaine disparity in sentencing.[348] Under this system, it takes 100 times less crack cocaine than it does powder cocaine to equal the same offense level.[349] Though the crack/powder cocaine disparity may receive the most attention, other examples can be found as well. One federal district court sentenced a defendant to time served plus three months of supervised release for illegal possession of a sawed-off shotgun even though the guideline range called for a 20–30 month sentence.[350] In justifying this variance, the court cited the "almost innocent circumstances surrounding the shorten-

346. This applies only to nonfrivolous circumstances and arguments. *See, e.g.*, United States v. Cunningham, 429 F.3d 673, 678 (7th Cir. 2005) ("A sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." (citations omitted)).

347. Amy Baron-Evans, National Sentencing Resource Counsel for the Federal Public and Community Defenders, has compiled a number of instances where courts have determined that the Guidelines inaccurately account for offense conduct or offender characteristics. See *Sentencing Post*-Booker, Apr. 10, 2006, at 13–14, http://www.fd.org/pdf_lib/sentencing41006.pdf. The *Myers* example given in this paragraph comes from Baron-Evans's compilation.

348. *Id.* at 15–16. The United States Sentencing Commission has questioned whether this disparity is justified. *See* UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002) [hereinafter USSC SPECIAL REPORT], *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; *see also* AMERICAN CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), *available at* http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

349. USSC SPECIAL REPORT, *supra* note 348, at iv. Note that this is an issue in *Claiborne* as well. United States v. Claiborne, 439 F.3d 479, 480–81 (8th Cir. 2006).

350. United States v. Myers, 353 F. Supp. 2d 1026, 1032 (S.D. Iowa 2005).

ing of the Defendant's gun" as one of a number of circumstances inadequately accounted for in the Guidelines.[351]

Courts have also recognized that the career offender Guideline (USSG § 4B1.1) in particular "can produce a penalty greater than necessary to satisfy the purposes of sentencing."[352] For example, the Second Circuit has noted that:

> In some circumstances, a large disparity in [the relationship between the Guideline-mandated increase and the nature of the previous crime] might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present "to a degree" not adequately considered by the Commission.[353]

In at least one instance the Tenth Circuit has expressed "grave misgivings" about whether the § 4B1.1 career offender Guideline accurately accounted for the facts in a particular case.[354] In an opinion authored by Judge McConnell, the court questioned whether a procedurally proper 16-level guideline enhancement for a previous conviction was nevertheless unreasonable in light of the nature of that previous crime.[355] Though the defendant's attorney failed to raise the issue, the court on its own indicated that this would be an instance where "an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case."[356]

Presumptive reasonableness and proportionality thus violate *Booker* not only when the Guidelines fail to address particular circumstances, but also when the they fail to address the circumstances adequately. Prohibiting these methods of appellate review in such instances ensures that *all* relevant offense conduct and offender characteristics are taken into account and that courts are able to appropriately exercise the judicial discretion required by § 3553(a).[357]

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351. *Myers*, 353 F. Supp at 1032.

352. United States v. Fernandez, 436 F. Supp. 2d 983, 988 (E.D. Wis. 2006) (citing United States v. Mishoe, 241 F.3d 214, 220 (2d Cir. 2001)).

353. *Mishoe*, 241 F.3d at 220.

354. United States v. Hernandez-Castillo, 449 F.3d 1127, 1131 (10th Cir. 2006).

355. *Hernandez-Castillo*, 449 F.3d at 1131.

356. *Id.* at 1132. Note that the *Sanchez-Juarez* case, which outlined the requirements of procedural reasonableness in the Tenth Circuit, resulted from a defendant arguing that the Guidelines inadequately accounted for a previous conviction. United States v. Sanchez-Juarez, 446 F.3d 1109, 1117 (10th Cir. 2006). *See* discussion *supra* Part I.D.

357. *Cf.* Berman, *supra* note 147, at 288 ("[N]o matter what theories or goals are pursued within a sentencing system, both offense conduct and offender characteristics should play a significant role in sentencing decisionmaking.").

CONCLUSION

United States v. Booker rendered the Guidelines "effectively advisory," but post-*Booker* case law and sentencing statistics indicate that courts nevertheless continued to view them as more than advisory. Indeed, most adopted a "*Booker* minimalist" approach that interpreted the case as having made only a modest adjustment to the role of the Guidelines. Though no longer mandatory, the Guidelines maintained a special weight in sentencing and in appellate review compared to the other § 3553(a) sentencing factors.

The Tenth Circuit provides an example of how many appellate courts adopted a *Booker* minimalist approach in reviewing district court sentences for reasonableness. The court presumes that guideline sentences are reasonable, but requires district courts to justify non-guideline sentences by citing extenuating circumstances proportional to the extent of the variances. Not all circuits adopted the "presumption of reasonableness" and "proportionality" methods of reviewing guideline and non-guideline sentences. But even these circuits exhibit a *Booker* minimalist approach to their review that tends to equate the Guidelines with reasonableness.

This spring, the Supreme Court will consider the presumption of reasonableness and proportionality in the *Rita* and *Claiborne* cases. At issue is whether these methods of appellate review violate *Booker*. The prominence of *Booker* minimalism among even those circuits that reject presumptive reasonableness and proportionality raises an important question about what effect it would have if the Court were to strike down either method. If the Court fails to address the underlying issue of *Booker* minimalism—i.e., that the Guidelines have a special weight among the § 3553(a) factors—the post-*Booker* pattern of guideline sentences may continue.

In addition, the unusual definition of "presumption of reasonableness" in *Rita* means that the Supreme Court could fashion a narrow opinion that would have only a limited impact. Whereas in almost every circuit the presumption of reasonableness applies only to the substantive (length) component of a district court's sentence, in *Rita* it applies to the procedural component as well. The Court could reject the presumption as it applies to procedural reasonableness without addressing its ordinary application to substantive reasonableness. A narrow opinion focused only on this procedural component might achieve greater unanimity within the Court, but it would come at the price of a lost opportunity to address how the presumption of reasonableness ordinarily functions in appellate review.

The underlying issue in the *Rita* and *Claiborne* cases is the tension that exists between *Booker* minimalism on one side and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the

other. One compelling justification for guideline-centric *Booker* minimalism is the important role of the Guidelines in promoting sentencing uniformity. The justification is imperfect, though, because the Guidelines do not account for a number of circumstances that judges must always consider when fashioning a "sufficient, but not greater than necessary" sentence under § 3553(a). The Guidelines do not account for these circumstances precisely because they merit individualized judicial consideration. Furthermore, even when the Guidelines account for certain circumstances, they may do so inadequately. Common examples include the 100:1 crack/powder cocaine disparity and the occasionally rigid career offender guideline section. The individualized judicial consideration required by *Booker* and § 3553(a) is therefore undermined by *Booker* minimalism whenever the Guidelines fail to account for or inadequately account for all relevant sentencing considerations.

One way to balance this tension would be for district courts to impose non-guideline sentences whenever the Guidelines fail to account for or inadequately account for offense conduct or offender characteristics. This would mean that appellate courts should refrain from using the presumption of reasonableness or proportionality whenever nonfrivolous circumstances exist for which the Guidelines do not already account or for which they inadequately account. Rejecting presumptive reasonableness or proportionality when these circumstances are present prevents courts from unjustifiably centering their appellate review around the Guidelines.

The approach to reasonableness review outlined here incorporates the goal of sentencing uniformity but ensures that courts also account for defendants' individual circumstances. A *Booker* minimalist approach can aid courts in pursuing uniformity, but true uniformity can only be achieved when circumstances that the Guidelines ignore or inaccurately reflect are also considered. The sentencing statute, after all, calls for avoiding *unwarranted* sentencing disparities, not sentencing disparities per se.[358] Rejecting presumptive reasonableness or proportionality in these cases may not yield a "formal outcome equality,"[359] but any disparities that result would not be unwarranted.[360] Uniformity would thus be achieved not by requiring equal sentencing outcomes, but by ensuring that every defendant's sentence reflects the proper balance of sentencing considerations. District courts should be secure in their ability to exer-

358. § 3553(a)(6).

359. Marc L. Miller, *The Foundations of Law: Sentencing Equality Pathology*, 54 EMORY L.J. 271, 277 (2005)

360. § 3553(a)(6); *see also* Miller, *supra* note 359, at 275 (noting that "[Congress] sought to reduce 'unwarranted' sentencing disparities though guidelines" and that *variations were implicitly warranted* in the "listing [of] various factors for the Commission to consider . . . .").

cise "reasoned judgment"[361] in sentencing whenever the Guidelines fail to account for important § 3553(a) factors.

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361. Berman, *supra* note 17, at 388; *see also* Gertner, *supra* note 117, at 140–41 ("Reasonableness review should mean . . . interpreting the Guidelines not as atomistic civil code rules, but in context, in the light of all the § 3553(a) purposes.").

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