ESSAY

REASONABLENESS REVIEW AFTER *BOOKER*

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About a year ago, the Supreme Court in *United States v. Booker*[1] declared a new standard for the appellate review of federal sentences—reasonableness. Justice Breyer, writing for the Court, asserted reassuringly that the reasonableness standard is not really new at all because judges had been applying it for years to review sentences for crimes lacking specific guidelines, sentences imposed after probation revocation, and, at least until 2003, sentences based upon departures from the recommended guideline range.[2] Like most new legal standards that take shape case-by-case through the appellate process, reasonableness review is developing incrementally, creeping more clearly into view with each passing month. This Essay offers five observations and suggestions about this evolving standard.

(1) The importance of separating reasonableness from harmlessness—the substance/procedure divide.

An essential feature of reasonableness review is that it is not the exclusive basis for reviewing sentencing by district judges. Appellate review remains available for errors in the sentencing

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1. United States v. Booker, 125 S. Ct. 738 (2005).

2. *Id.* at 766.

process, and relief for such error is still governed by Rule 52.[3] Whether the length, type, or terms of sentence are "reasonable" under 18 U.S.C. § 3553(a) is a separate question, providing an additional basis for relief.[4] Put differently, reasonableness review does not replace former standards for reviewing procedural error.

Procedural errors in sentencing include a violation of *Apprendi*,[5] Rule 32,[6] or another provision of the Sentencing Reform Act.[7] Error may result from a legal blunder in assessing the applicability or scope of a guideline, including a departure guideline. A judge may make a clearly erroneous determination of fact. It would also be a procedural error if a judge assumed the Guidelines were mandatory or failed to "consider" the Guidelines at all. Omitting the on-the-record statement explaining the specific reason for any sentence that is "not of the kind, or is outside the range [provided in the Guidelines]" as required by § 3553(c)(2), is a procedural error as well.[8]

Regrettably, some judges after *Booker* have occasionally blended review of these *procedural* errors into the review of the sentence for reasonableness.[9] Take two recurring situations. Assume a trial judge imposes a sentence she thinks falls outside the guidelines range, but miscalculates the guidelines range. If a party appeals the sentence and raises the miscalculation, it is tempting for the reviewing judges to say, "As long as the *ultimate* sentence was reasonable, there's no problem—the defendant

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3. FED. R. CRIM. P. 52.

4. 18 U.S.C. § 3553(a) (2000).

5. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that a fact, other than a prior conviction, that increases a sentence beyond the upper guideline limit must be proved beyond a reasonable doubt).

6. FED. R. CRIM. P. 32 (detailing proper post-sentencing protocol).

7. §§ 3551–3742.

8. § 3553(c) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence . . . ."); *see also* United States v. Newsom, 428 F.3d 685, 687–88 (7th Cir. 2005) (explaining that it is error when a court fails to "resolve [a] disputed material issue of fact that relate[s] to particular § 3553(a) factors that a defendant brings to the court's attention").

9. *See, e.g.*, United States v. Webb, 403 F.3d 373, 385 (6th Cir. 2005) (warning that "selecting the sentence arbitrarily" would require relief because it would not meet the reasonableness standard); United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005) (dicta) ("[R]eview for 'reasonableness' is not limited to consideration of the length of the sentence. If a sentencing judge committed a procedural error by selecting a sentence in violation of applicable law, and that error is not harmless and is properly preserved or available for review under plain error analysis, the sentence will not be found reasonable." (citation omitted)); *see also* United States v. Ingles, 408 F.3d 405, 409 (8th Cir. 2005) ("[W]hether § 3742 now permits a defendant to appeal on the ground that a district court error in determining the advisory Guidelines range produced an unreasonable post-*Booker* sentence, despite a substantial downward departure, is a question that seems fraught with uncertainty"—a question the court did not answer.).

didn't receive a Guidelines sentence anyway."[10] Or assume a sentence outside the guidelines range, imposed after a judge incorrectly concluded that the departure was authorized by the Guidelines. One might understand why an appellate judge would prefer to read *Booker*'s reasonableness review as obviating the need to review the departure decision under the Guidelines.[11]

Yet, a reading of the statute itself shows that reasonableness review has not displaced the review of guidelines calculations or departure authority. The statute no longer mandates relief for the failure to adhere to the Guidelines, but the *Booker* Court did not "excise" the portion of § 3742 that authorizes the appeal of errors in the calculation of the Guidelines and other violations of the law.[12] Instead, Justice Breyer's opinion states, "[D]espite the absence of § 3553(b)(1), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))."[13] The sections Justice Breyer cites authorize either party to appeal a sentence on the basis that the sentence "was imposed in violation of law" or "*as a result of* an incorrect application of the sentencing guidelines."[14]

So rather than skipping over allegedly faulty assumptions or applications and heading straight to the reasonableness of the sentence imposed, appellate courts must first sort out the probability that any error the judge made in calculating the guidelines range and permissible departures affected the sentence that was selected.[15] Only if the error was harmless

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10. *See, e.g.*, United States v. Rubenstein, 403 F.3d 93, 102 (2d Cir. 2005) (Cardamone, J., concurring) ("[B]ecause an incorrectly calculated Guidelines sentence might nonetheless be reasonable, vacatur of a sentence based on Guidelines errors would not automatically be warranted.").

11. *See, e.g.*, United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005) ("Johnson's framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.").

12. § 3742(a)–(b).

13. United States v. Booker, 125 S. Ct. 738, 765 (2005).

14. § 3742(a)(1)–(2), (b)(1)–(2) (emphasis added).

15. If the party objecting to the error preserved it in the trial court, then the burden is on the opposing party to demonstrate that the error did *not* influence the sentence. *See* United States v. Vonn, 535 U.S. 55, 62 (2002). The *Vonn* Court noted that Rule 52(a) provides for "consideration of error raised by a defendant's timely objection, but subject to an opportunity on the Government's part to carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights." *Id.*; *see also* FED. R. CRIM. P. 52(a). The exact showing required varies depending upon the type of procedural error claimed. For a constitutional error, the government must show beyond a

should the reviewing court reach the question of reasonableness.[16]

Under Rule 52, procedural errors are not sufficient grounds for sentencing relief unless they may have influenced the outcome.[17] The question is essentially one of cause and effect—how did the error in the process of determining the sentence affect the actual sentence imposed? Harmless error review requires a separate assessment of the influence of each procedural error on the ultimate sentence. By contrast, reasonableness review applies only once—to the actual sentence imposed.[18]

A sentence that was imposed *without* procedural error can be reasonable or unreasonable because reasonableness is measured in light of nonprocedural factors—those listed under § 3553(a). For example, in imposing a non-guidelines sentence, a judge may have considered nothing unlawful and committed no procedural error, but simply imposed a sentence too low or too high to be reasonable.[19]

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reasonable doubt that the error did not affect the sentence; but for a *non*constitutional error, like a violation of the Sentencing Reform Act, the government need only dispel any "'grave doubt'" by the judge that the error had a "'substantial and injurious effect or influence'" on the sentence. O'Neal v. McAninch, 513 U.S. 432, 437–38 (1995) (quoting Kotteakos v. United States, 328 U.S. 750, 764–65, 776 (1946)). Failure to preserve the claim in the district court means that the *party seeking relief* on appeal bears the burden of showing the error *did* make a difference under Rule 52's plain error standards. *Vonn*, 535 U.S. at 62–63; *see also* FED. R. CRIM. P. 52(b).

16. *See, e.g.*, United States v. Fuller, 426 F.3d 556, 561 & n.4 (2d Cir. 2005) (discussing whether the possibility of a different sentence given an appropriate application of the Guidelines is "remote" under Rule 52).

17. FED. R. CRIM. P. 52.

18. *See* United States v. Winingear, 422 F.3d 1241, 1245 (11th Cir. 2005) ("We do not apply the reasonableness standard to each individual decision made during the sentencing process; rather, we review the final sentence for reasonableness.").

19. A similar distinction was made in *Williams v. United States*, where the Court noted:

> [W]hen a district court relies upon an improper ground in departing from the guideline range, a reviewing court may *not* affirm a sentence based solely on its independent assessment that the departure is reasonable under § 3742(f)(2). Section 3742(f) specifies two circumstances in which a court of appeals must remand for resentencing: if the sentence was imposed as a result of an incorrect application of the Guidelines *or* if the sentence is an unreasonable departure from the applicable guideline range. The statute does not allow a court to focus on one remand provision to the exclusion of the other.
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> . . . [I]n determining whether a remand is required under § 3742(f)(1), a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.

503 U.S. 193, 201–03 (1992) (emphasis added).

Consider a final example. The sentencing process requires a certain minimum *explanation* of the sentence, although there seems to be some disagreement about the scope of this particular requirement after *Booker*.[20] A judge's careless or skimpy explanation might indeed require resentencing, but resentencing would be required because the party with the burden of proving or disproving prejudice from the error under Rule 52 (depending upon whether the error was preserved) is unable to meet that burden. Resentencing would be required because the failure of process may have influenced the sentence imposed, not because the sentence imposed was "unreasonable."[21]

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20. *Compare* United States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005) (indicating that the trial court need not mention or discuss each of the § 3553(a) factors), United States v. Sanders, 141 F. App'x 489, 490 (7th Cir. 2005) (noting that a sentence inside the guidelines range is presumed reasonable and that "'[t]he defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in 18 U.S.C. § 3553(a)'" (quoting United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005))), *and* United States v. George, 403 F.3d 470, 472–73 (7th Cir. 2005) (stating that a judge "need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists," but must "explain why (*if* the sentence lies outside [the guidelines range]) this defendant deserves more or less" (emphasis added)), *with* United States v. Beck, 157 F. App'x 784, 787 (6th Cir. 2005) (reversing a guidelines sentence and invalidating an identical alternative sentence using the Guidelines as advisory (issued in case the Guidelines were held unconstitutional) because the magistrate judge "did not cite to 18 U.S.C. § 3553(a), or provide sufficient information with regard to that sentence to permit a reasonableness review"), *and* United States v. Jackson, 408 F.3d 301, 304–05 (6th Cir. 2005) (reversing probation and home confinement sentence as unreasonable because the sentence was outside the guidelines range and "did not include any reference to the applicable Guidelines provisions or further explication of the reasons for the particular sentence imposed" other than "a list of various characteristics of the defendant that it considered").

21. *See, e.g.*, United States v. Cunningham, 429 F.3d 673, 680 (7th Cir. 2005) (noting that although a guidelines sentence may be reasonable, the "inadequate explanation for the sentence precludes [an] affirmance"); United States v. Ayers, 428 F.3d 312, 314 (D.C. Cir. 2005) ("[I]n this case we are not certain beyond a reasonable doubt that the district court, when announcing its alternative sentence, understood its obligation to consider the factors in § 3553(a)."); United States v. Lewis, 424 F.3d 239, 245–46 (2d Cir. 2005) (clarifying that the failure to explain a sentence as required by § 3553(c) constitutes plain error, even when the length of the resulting sentence would otherwise be reasonable); United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005) ("If the sentence was imposed as the result of an incorrect application of the guidelines, we will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a)."); United States v. Crawford, 407 F.3d 1174, 1179 (11th Cir. 2005) ("A misinterpretation of the Guidelines by a district court 'effectively means that [the district court] has not properly consulted the Guidelines . . . .'" (quoting United States v. Hazelwood, 398 F.3d 792, 801 (6th Cir. 2005))). Consider also *United States v. Brady*, in which the court held that five years probation and home confinement, when the Guidelines called for twelve months, should be remanded due to error in calculation and noted:

> The fact that we find the district court's decision to depart in this case does not conform to the requirements of the Guidelines . . . would not necessarily render [defendant's] sentence unreasonable. However, here, we find that due to the nature and gravity of the court's procedural error—failure to engage in sufficient

As Judge Carnes has advised, the continued review of guidelines application on appeal *in addition* to reasonableness review does not necessarily mean "pointless reversals and unnecessary do-overs of sentence proceedings."[22] If a trial judge anticipates that a party may appeal some aspect of her guidelines application, the court can indicate whether a different resolution would have resulted in the same sentence.[23] "[I]f a sentencing court believes that how it resolves a particular guidelines issue does matter . . . the court can note that for the record as well."[24]

This distinction between the review of a sentence for reasonableness and the review of procedural error clarifies why courts are correct not to have accepted the invitation to adopt, for the review of sentences, the "reasonableness" standard used by federal courts to review state decisions under the habeas corpus statute.[25] Under that statute, a federal court must decide whether a state court's decision was a "reasonable application" of constitutional law.[26] The state court's application could be wrong—that is, incorrect if reviewed under normal appellate standards—but within the realm of reasonableness, and thus be insulated from federal interference.[27] Adopting the same approach for the appellate review of sentences would be contrary

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fact finding to support departure—and the lack of clear evidence that the district court would have imposed the same sentence as a non-Guidelines sentence, this case must be remanded.

417 F.3d 326, 336 (2d Cir. 2005) (citation omitted); *see also* United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) ("An error in determining the applicable Guideline range or the availability of departure authority would be the type of procedural error that could render a sentence unreasonable under *Booker*."); United States v. Skoczen, 405 F.3d 537, 549 (7th Cir. 2005) ("[I]f a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error and thus . . . remand would be required just as before.").

22. United States v. Williams, 431 F.3d 767, 775 (11th Cir. 2005).

23. *Id.*

24. *Id.*

25. United States v. Garza-Lopez, 410 F.3d 268, 277 (5th Cir. 2005) (Garza, J., concurring) ("[I]n determining whether a sentencing court committed error, courts of appeals are to 'review sentencing decisions for *unreasonableness*.' Because our review is for unreasonableness, it is not enough to say that . . . the sentencing court incorrectly interpreted or applied the Guidelines." (quoting United States v. Booker, 125 S. Ct. 738, 767 (2005))); United States v. Creech, 408 F.3d 264, 275 (5th Cir. 2005) (Garza, J., concurring in part and dissenting in part) ("In reviewing for reasonableness, we must remember that 'the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000))).

26. 28 U.S.C. § 2254(d) (2000).

27. *See Williams*, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

to the provisions of the Sentencing Reform Act that provide for the appellate review of procedural error, apart from the reasonableness of the sentence.

(2) Avoid equating reasonableness review with "abuse of discretion" review as developed under § 3742(e)(3) for the review of departures—use revocation standard.

As examples of reasonableness review, the Court in *Booker* held out three contexts: review of departures, revocation sentences, and sentences for crimes without a designated guideline.[28] In all three, courts of appeals had applied "abuse of discretion" as the stated standard,[29] but these standards are not fungible. They are not the same on their face, nor have they been equivalent as applied. The revocation standard is more deferential, derived from the statutory phrase "plainly unreasonable," while the departure standard (at least the standard that the Court invoked prior to 2003) applied the word "reasonable."[30]

Some judges have opted to use the more familiar review standard that they have developed for departures,[31] instead of looking to revocation cases.[32] This is a mistake. In practice, the two standards can be quite different. The abuse of discretion review that courts applied under § 3742(e)(3) before *Booker* was appropriate only when a sentence departed from the Guidelines. As such, it was specifically limited by the Guidelines themselves, and courts regularly required trial judges to tie their explanations for departures *to specific guidelines factors as*

28. *Booker*, 125 S. Ct. at 766.

29. *See, e.g.*, United States v. White Face, 383 F.3d 733, 737 (8th Cir. 2004) (using abuse of discretion standard in reviewing a revocation sentence); United States v. Cook, 291 F.3d 1297, 1299 n.2, 1302 (11th Cir. 2002) (reviewing a departure from guidelines under an abuse of discretion standard).

30. United States v. Kirby, 418 F.3d 621, 625 n.3 (6th Cir. 2005) (declining to decide if there is any difference between plainly unreasonable and reasonable). As Justice Stevens has noted, Congress specifically changed the standard for reviewing departures from clearly unreasonable to unreasonable. *Booker*, 125 S. Ct. at 784 n.12.

31. *See, e.g.*, United States v. Saldana, 427 F.3d 298, 312 (5th Cir. 2005); United States v. May, 413 F.3d 841, 844–45 (8th Cir. 2005). On the history of departure review standards, see *United States v. Castillo*, 430 F.3d 230, 238 (5th Cir. 2005) (noting the appropriate standard for reviewing the basis of a departure is abuse of discretion). *See also* United States v. Simkanin, 420 F.3d 397, 415–16 (5th Cir. 2005) (citing United States v. Smith, 417 F.3d 483, 489–92 (5th Cir. 2005)); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005).

32. United States v. Livingston, 140 F. App'x 886, 889 (11th Cir. 2005); United States v. Ramirez-Rivera, 241 F.3d 37, 40 n.4 (1st Cir. 2001) (collecting cases on revocation review).

analogies, not to § 3553(a).[33] The Court in *Booker* declared that the § 3553(a) factors "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."[34] The problem is appellate courts were *not* always guided by § 3553(a) factors in assessing departures. Instead, they applied a standard that resembled a "Where's Waldo" game with the Guidelines manual, looking for some statement, analogy, or factor that arguably supports or undercuts a departure. This is

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33. *See, e.g.*, United States v. Jones, 332 F.3d 1294, 1300–01 (10th Cir. 2003) ("In determining whether to depart from the Sentencing Guidelines, a district court must determine whether the case falls within the 'heartland' of cases embodying the conduct contemplated by each guideline . . . ." (citations omitted)); United States v. Crouse, 145 F.3d 786, 792 (6th Cir. 1998) ("The extent of any departure must be tied to the structure of the Guidelines."); United States v. Collins, 122 F.3d 1297, 1309 (10th Cir. 1997) ("The district court 'may use any "reasonable methodology hitched to the Sentencing Guidelines to justify the reasonableness of the departure,"' which includes using extrapolation from or analogy to the Guidelines." (quoting United States v. Jackson, 921 F.2d 985, 991 (10th Cir. 1990))); United States v. Horton, 98 F.3d 313, 317 (7th Cir. 1996) ("Although we have recognized the impossibility of formulating precise rules for determining whether the extent of an upward departure is reasonable, this court and others have approved of a method that involves calculating the defendant's sentence by analogy to existing guideline provisions. Thus, a district court determines the extent of an upward departure by comparing the seriousness of the aggravating factors that motivate the departure with the adjustments in base offense level prescribed by the guideline provisions that apply to conduct most closely analogous to the defendant's offense conduct. By linking the extent of the departure to the structure of the Guidelines in this way, a district court avoids the types of large disparities in sentencing that the Guidelines were designed to prevent, and gives the appellate court a basis for conducting a principled review of the reasonableness of the extent of the departure." (citations omitted)). The Supreme Court's most detailed statement about what this departure review for reasonableness meant can be found in the 1992 case, *Williams v. United States*:

> The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing. In assessing reasonableness under § 3742(f)(2), the Act directs a court of appeals to examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence. A sentence thus can be "reasonable" even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure.

Williams v. United States, 503 U.S. 193, 203–04 (1992); *see also* Koon v. United States, 518 U.S. 81, 113 (1996).

34. *Booker*, 125 S. Ct. at 766–67 ("The system remaining after excision . . . retains other features that help to further these objectives. . . . The courts of appeals review sentencing decisions for unreasonableness."). Justice Scalia points this out, stating, "[a]lthough a 'reasonableness' standard did appear in § 3742(e)(3) until 2003, it never extended beyond review of deliberate departures from the Guidelines range." *Id.* at 793 (Scalia, J., dissenting in part). "Deciding whether a departure from a mandatory sentence (for a reason not taken into account in the Guidelines) is 'unreasonable' . . . differs *toto caelo* from determining, in the absence of *any mandatory scheme*, that a particular sentence is 'unreasonable.'" *Id.* at 794 n.9.

an incomplete and truncated method of reviewing the reasonableness of sentences imposed after *Booker*.[35]

The phrases "abuse of discretion" or "plainly unreasonable" may be useful ways to describe reasonableness review, but the content of that standard must not be tied to the Guidelines themselves. The revocation standard in use before *Booker* is a better model for reasonableness review than the departure review standards.[36]

(3) Use presumptions—rebuttable, not irrebuttable.

The government continues to ask courts to hold that any sentence within range is per se reasonable. Fortunately, courts are not going along.[37] An irrebuttable presumption that in-range sentences are reasonable should be rejected, but not because it "would effectively re-institute mandatory adherence to the Guidelines."[38] Finding one set of sentences reasonable does not

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35. Consider as an example the decision by the Seventh Circuit in *United States v. Castro-Juarez*, 425 F.3d 430 (7th Cir. 2005). There, the court reviewed a sentence of four years imposed for illegal reentry, which has a ten-year statutory maximum and a recommended range of twenty-one months. *Id.* at 431. The court expressly adopted its pre-*Booker* departure analysis, which was keyed to the Guidelines, as "a useful starting point in evaluating the reasonableness" of the post-*Booker* sentence. *Id.* at 434. Several paragraphs of tedious guidelines analysis later, the court concluded,

> Accordingly, if this appeal had reached us before *Booker*, we would have concluded that [the] sentence is *not* adequately tied to the structure of the guidelines.
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> . . . All that is necessary now to sustain a sentence above the guideline range is "an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant."

Id. at 436 (emphasis added) (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005)). Nevertheless, the court went on to find that the district court's general comments about criminal history, "d[id] not fully explain" the sentence, and found it unreasonable. *Id.*

36. *See, e.g.*, United States v. Carr, 421 F.3d 425, 429 (6th Cir. 2005); United States v. Livingston, 140 F. App'x 886, 889 (11th Cir. 2005); United States v. Carter, 408 F.3d 852, 854 (7th Cir. 2005); United States v. Cotton, 399 F.3d 913, 915–16 (8th Cir. 2005); United States v. McClellan, 164 F.3d 308, 309–10 (6th Cir. 1999); United States v. Pelensky, 129 F.3d 63, 68 (2d Cir. 1997).

37. *See, e.g.*, United States v. Winingear, 422 F.3d 1241, 1246 (11th Cir. 2005) (declining to address the issue of the level of deference due a sentence imposed within guidelines range, despite the request by the government).

38. United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005); *see also* United States v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005) ("[W]e also decline to hold that a sentence within a proper Guidelines range is per-se reasonable. Such a per-se test is not only inconsistent with the meaning of 'reasonableness,' but is also inconsistent with the Supreme Court's decision in *Booker*, as such a standard 'would effectively re-institute mandatory adherence to the Guidelines.'" (citations omitted) (quoting *Crosby*, 397 F.3d at 115)).

make all other sentences unreasonable.[39] The problem with rubber stamping all guidelines-compliant sentences as irrebuttably reasonable is rather that it is possible that an in-guidelines sentence, free from procedural error, may not be "reasonable" under § 3553(a) at all.[40]

As the Seventh Circuit explained, § 3553(a)(6) requires the court to take into account "'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'"[41] It is at least possible that the application of the Guidelines in an individual case creates a disparity that is "unwarranted." The Seventh Circuit seemed to suggest this when it stated that even though "[p]rior to *Booker*, disparities resulting from the proper application of the Guidelines were *not* a permissible reason for a departure from a properly calculated sentencing range . . . comparison of sentences has become a permissible part of the overall sentencing determination."[42]

This is an issue for sentencing differences created by the government's decision to seek or withhold a downward departure for substantial assistance,[43] by the absence or presence of an approved fast-track program, and by the provisions governing

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39. For example, Judge Kennedy, dissenting in *Webb*, stated,

> I question whether a sentence within the Guidelines' range can ever be anything other than reasonable in light of the Sentencing Commission's congressionally mandated mission to develop appropriate sentences based on all factors related to the conviction.
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> . . . [I]t does not follow that a sentence outside the Guidelines' range is per-se unreasonable, a necessary prerequisite to making the Guidelines effectively mandatory.

Webb, 403 F.3d at 386 (Kennedy, J., concurring in part and dissenting in part).

40. United States v. Williams, 425 F.3d 478, 481 (7th Cir. 2005) ("We have left room for the possibility that there will be some cases in which a sentence within the Guidelines range, measured against the factors identified in section 3553(a), stands out as unreasonable. But those cases . . . will be rare."). For one possible example, see United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006) (described in note 46 *infra*).

41. United States v. Newsom, 428 F.3d 685, 688 (7th Cir. 2005) (quoting 18 U.S.C. § 3553(a)(6) (2000)).

42. *Id.* (emphasis added).

43. *See* United States v. Jimenez-Gutierrez, 425 F.3d 1123, 1127 (8th Cir. 2005) (Colloton, J., concurring) ("It seems to me that there is a substantial question whether a district court may, in essence, create a 'sentence disparity' by granting a reduction under the now-advisory guidelines to one defendant based on the provision of substantial assistance, and then 'reasonably,' within the meaning of *United States v. Booker*, vary from the advisory guidelines based solely on this 'disparity' when sentencing another defendant who declined an opportunity to provide such assistance. Congress clearly thought it appropriate that defendants who provide substantial assistance should receive lower sentences than would otherwise be imposed, so it is difficult to conclude that Congress at the same time believed that such reductions in sentence would cause 'unwarranted sentence disparities' that need to be avoided." (citations omitted)).

crack cocaine as opposed to powder cocaine.[44] A court need not find the application of one of these guidelines as inherently unreasonable in order to find that *in a particular case* its application creates unwarranted disparity under § 3553(a), especially when disparity is considered along with the very first command in § 3553(a) that a sentence should be no more severe than necessary (the "parsimony" provision).

Already dozens of trial judges have rejected the crack/cocaine sentencing recommendations of the Guidelines as creating unwarranted disparity and are imposing lower sentences for defendants convicted of involvement with crack.[45] It is too early to know how these departures and non-guidelines sentences will fare in the courts of appeals, although it is likely that at least some of these sentences will be upheld as reasonable. The issue of whether a guidelines sentence can be unreasonable will be presented most starkly when a reviewing court holds that it was unreasonable *not* to depart.[46]

While an irrebuttable presumption of reasonableness would be unwise, rebuttable presumptions of reasonableness are useful and appropriate. One such presumption has been explicitly or implicitly adopted in most circuits: a sentence that is within the guidelines range and free from procedural error is presumptively reasonable.[47] Other, unidirectional presumptions are possible as

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44. *See, e.g.*, Pamela A. MacLean, *Cracking the Code: After* Booker, *Judges Reduce Crack Cocaine Sentences*, NAT'L L.J., Oct. 3, 2005, at 1 (discussing the decreasing disparity between crack cocaine and powder cocaine sentences after *Booker*).

45. *See* United States v. Perry, 389 F. Supp. 2d 278, 304–07 (D.R.I. 2005) (discussing the district courts' rejection of the advisory guidelines range for crack-related offenses).

46. In March of 2006, one court of appeals came close to doing so, but left room for the district court to impose a within-guidelines sentence. The court reversed a within-guidelines sentence in a methamphetamine case under very unusual circumstances. The court concluded that in selecting the within-guidelines sentence "the district court did not adequately consider a number of relevant factors." It remanded the within-guidelines sentence for one defendant only after first holding that her coconspirator's below-guidelines sentence was unreasonable. The court recognized in remanding both defendants' cases for resentencing the district judge's legitimate concern in taking into account a coconspirator's sentence when sentencing another coconspirator. United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006).

47. *See* United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (holding that a sentence within the guidelines range "is entitled to a rebuttable presumption of reasonableness"); United States v. Lincoln, 413 F.3d 716, 717–18 (8th Cir. 2005) (holding that a sentence within the guidelines range is presumptively reasonable); United States v. Gonzalez, 134 F. App'x 595, 598 (3d Cir. 2005) (concluding that a sentence falling within the range prescribed by the Guidelines is presumptively reasonable); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines."). *But see* United States v. Spencer, 150 F. App'x 15, 16 (2d Cir.

well. For example, a court might choose to presume that below-range sentences are not unreasonably high, requiring unusually compelling mitigating circumstances before disturbing a below-range sentence.[48]

Presumptions are helpful also because they allow the courts of appeals to develop guidelines for what showing must be made in order to rebut those presumptions. Courts may decide, for example, to invite parties to point out inconsistencies in a judge's use of a particular reason for departing among defendants in the same case, something like a prosecutor asked to justify a peremptory challenge after *Miller-El*.[49] Or, a court may decide that a showing sufficient to overcome the presumption in a case of slight departure or variance might be insufficient to overcome the presumption in a case of more significant deviation.[50] Presumptions could be keyed to numerical multipliers or percentage deviations, from guidelines ranges, sentence maxima, or median sentences, on a nationwide or more local basis. It is not uncommon for reviewing courts to use such presumptions in reviewing compliance with other standards in criminal cases—consider the statistical showing of underrepresentation that shifts the burden of production in a jury discrimination claim or the showing of delay needed to trigger an inquiry into a violation of the Speedy Trial Clause. Presumptions can bring structure to what might otherwise appear to be an amorphous, wholly unpredictable standard.

(4) Scrutinize stipulations as to reasonableness.

A sentence is not reasonable just because the parties say so. What parties may agree upon as a fair settlement may be quite

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2005) (declining the invitation to employ a rebuttable presumption of reasonableness with respect to sentences falling within accurately calculated guidelines ranges).

48. *Cf.* United States v. George, 403 F.3d 470, 473 (7th Cir. 2005) (dicta) ("It is hard to conceive of below-range sentences that would be unreasonably high."); *see also* United States v. Ingles, 408 F.3d 405, 408 (8th Cir. 2005).

49. *See* Miller-El v. Dretke, 125 S. Ct. 2317, 2332, 2340 (2005) (reversing a denial of habeas relief upon finding that the prosecution applied separate reasoning to potential black and potential white jurors).

50. *See* United States v. Johnson, 427 F.3d 423, 426–27 (7th Cir. 2005) ("Sentences varying from the guidelines range, as this one does, are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." (citations omitted)). The Eighth Circuit has decided in the context of reviewing departures that a 73% reduction for a substantial assistance departure will trigger a higher burden of justification than a more modest 40% reduction. United States v. Coyle, 429 F.3d 1192, 1193–94 (8th Cir. 2005). Something similar might be adopted for reasonableness review.

far afield from a reasonable sentence when assessed in light of § 3553(a). The problem is that parties do not strike deals with the factors of § 3553(a) in mind. They may have entirely different goals, different reasons for choosing a certain sentence, which have never been approved as legitimate reasons to allocate punishment either by Congress or the Commission.[51] Reasonableness is defined in part by comparison to other cases. The parties have little incentive to choose a sentence for consistency's sake.

For related reasons, trial judges may decide to refuse to accept plea agreements that contain waivers of reasonableness review. The wisdom of enforcing appeal waivers generally is a controversial subject among sentencing practitioners and judges today, as it has been for at least a decade. In some districts, virtually all plea agreements include waivers of the review of sentences; in others, very few do.[52] This uneven application of appellate review has prompted some to call for Congress to prohibit sentence appeal waivers, a highly unlikely scenario.[53] If a judge believes the new appellate standard requires development and consistent enforcement, one option is rejecting reasonableness waivers.

(5) Give "reas" a chance.

Reasonableness review depends upon more than separating harmlessness from reasonableness, looking beyond the old standards for reviewing departure sentences, and developing useful presumptions. Reasonableness review will require two resources in short supply: data and patience.

As for data, the Commission recently released some preliminary information about post-appeal modifications under the reasonableness standard as part of its report on post-*Booker* sentencing.[54] While helpful, the Commission's report describes

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51. *See* Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 302 (2005).

52. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. (forthcoming 2006) (manuscript at 33–35, on file with Houston Law Review), *available at* http://ssrn.com/abstract=772884 (discussing the varying frequency of waivers among jurisdictions).

53. *See* Steven L. Chanenson, *Guidance From Above and Beyond*, 58 STAN. L. REV. 175, 177 (2005) ("[C]ongress should ban sentence appeal waivers from plea agreements . . . .").

54. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (released in March 2006).

"selected appellate decisions."[55] What we have yet to learn is the percentage of sentences appealed by the defense and the government that have been vacated as unreasonable, not vacated due to a procedural flaw. Such statistics will take some time to gather, but this is just the sort of information that sentencing as well as reviewing courts need.[56]

Based on this reader's impression, which means little unless tested empirically, courts seem to be giving real teeth to reasonableness review. Remands due to unreasonableness are regular, not rare. Also, even though unusually low sentences have been upheld,[57] and unusually high sentences reversed,[58] it appears that courts are more likely to agree with government allegations of unreasonableness[59] than with allegations of

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55. *Id.* at 30, exhibit 2.

56. *See* Marc L. Miller & Ronald F. Wright, *"The Wisdom We Have Lost": Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 370 (2005) ("If more judges and attorneys could see their cases in light of data about the entire system, their influence on the direction of the sentencing system would be better informed and easier to coordinate.").

57. *See, e.g.*, United States v. Maese, 146 F. App'x 276, 281 (10th Cir. 2005) (upholding an eight-level downward departure when the judge stated that the defendant "was unique among all of the defendants [he] had sentenced in the last ten years" due to his history of service, making it "an extraordinary case"); United States v. Briceno, 136 F. App'x 856, 858–59 (6th Cir. 2005) (upholding a six-level downward departure based partially upon the defendant's "family circumstances, his compliance with pretrial services, and the time since his previous felony" and noting that "[a]lthough these factors were inappropriate for consideration under the mandatory guidelines, they provide a justification for a sentence decrease under the now-discretionary guidelines"); United States v. Hadash, 408 F.3d 1080, 1083–84 (8th Cir. 2005) (upholding a probation sentence when the Guidelines recommended at least twelve months because the district court explained that the defendant was "'a law abiding citizen, who [did] an incredibly dumb thing'" (alteration in original)); United States v. Christenson, 403 F.3d 1006, 1007, 1009 (8th Cir. 2005) (holding that a 75% downward departure was not unreasonable), *aff'd en banc*, 424 F.3d 852 (8th Cir. 2005); United States v. Pizano, 403 F.3d 991, 992, 996 (8th Cir. 2005) (upholding departure from seventy months to eighteen months as reasonable when the court "seriously considered the government's recommendation before arriving at its own evaluation of the significance and usefulness of Pizano's assistance" and "stated its reasons for departing . . . were based on its examination of the facts and were related to the nature, extent and significance of Pizano's assistance").

58. *See, e.g.*, United States v. Doe, 128 F. App'x 179, 180 (2d Cir. 2005) (remanding an upward departure to the statutory maximum of twelve years as unreasonable for a defendant who refused to reveal his name when the Presentence Report recommended six to twelve months).

59. *See, e.g.*, United States v. Saenz, 428 F.3d 1159, 1160 (8th Cir. 2005) (reversing sentence of 20 months for cooperation when the statutory minimum was 60 months); United States v. Castillo, 430 F.3d 230, 244 (5th Cir. 2005) (holding the lower court's downward departure was an abuse of discretion); United States v. Smith, 128 F. App'x 89, 91 (11th Cir. 2005) (vacating as unreasonable a sentence of supervised release and time served rather than the guidelines range of 78 to 98 months); United States v. Dalton, 404 F.3d 1029, 1030, 1033 (8th Cir. 2005) (holding that a departure from the mandatory minimum sentence of 240 months to 60 months was unreasonable and stating that "[a]n extraordinary reduction must be supported by extraordinary circumstances"); United States v. Rogers, 400 F.3d 640, 642 (8th Cir. 2005) (concluding that a departure from the

unreasonableness from defendants.[60] This may have a lot to do with the careful screening that the government gives all cases that it appeals. Nevertheless, the courts of appeals seem much less comfortable overturning upward departures than they do overturning downward departures.

The Commission's diligent work on post-*Booker* sentencing data has provided an excellent picture of what trial judges are doing with their newly granted discretion under *Booker*. But we need to know much more about the rates of reversal for unreasonableness and the types of sentences considered unreasonable. Post-*Booker* sentencings are just now reaching the appellate courts. Until there is sufficient experience with the

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suggested range of 51 to 63 months to probation is unreasonable).

60. *See* United States v. Saldana, 427 F.3d 298, 312–13 (5th Cir. 2005) ("The sentence does overstate the degree of harm, does not appear to advance the goal of uniformity, and does over-compensate for the number of counts, but each of these was a permissible reason for the district court to depart . . . and, taken together, would likely justify a sentence at least within striking distance of that imposed by the district court. Given the deference we owe to the district court . . . , we decline to hold the degree of the departure unreasonable."); United States v. Winters, 416 F.3d 856, 857–58, 860–61 (8th Cir. 2005) (upholding the statutory maximum sentence of 20 years, above the top guidelines sentence of 191 months, for a first offender convicted of voluntary manslaughter because of the defendant's "execution style slaying of an unarmed person"); United States v. Smith, 417 F.3d 483, 484–85, 491 (5th Cir. 2005) (upholding a statutory maximum sentence of 120 months, instead of the suggested 41 months, for taking a stolen car across state lines because the judge found that the sentence did not reflect the defendant's criminal history); United States v. Shannon, 414 F.3d 921, 922–24 (8th Cir. 2005) (upholding a sentence of nearly five years, rather than one year, for making false statements to the police in light of the defendant's "extensive criminal history and incorrigibility," and noting that even if the departure was excessive, it was reasonable given the factors in § 3553(a)); United States v. Meeker, 411 F.3d 736, 747–48 (6th Cir. 2005) (recommending that on remand the district court should consider imposing a six-level upward departure because the defendant's actions caused "financial devastation accompanied by severe emotional trauma"); United States v. Cunningham, 405 F.3d 497, 500, 505–06 (7th Cir. 2005) (upholding a four-level increase (from 135 month maximum to 210 months) for a child pornographer who had engaged in illegal sexual activity with his victim); United States v. Johnson, 403 F.3d 813, 814 (6th Cir. 2005) (affirming sentence of eighteen months when the guidelines range was four to ten months because judge explained that he wanted to give the defendant the maximum benefit of a drug treatment program); United States v. Fleming, 397 F.3d 95, 99–101 (2d Cir. 2005) (holding that a sentence of two years rather than eleven months for the last of several violations was not unreasonable); United States v. Yahnke, 395 F.3d 823, 825–26 (8th Cir. 2005) (upholding a two-level departure for a particularly bad criminal history and parole violations); *see also* United States v. Cotton, 399 F.3d 913, 915, 917 (8th Cir. 2005) (affirming sentence of forty-six months, when range capped at thirteen months, in part because "[the defendant] could best receive drug treatment within prison"). Not included in this list is the horrendous case of the child pornographer who cut off genitals and ate them, where the upward departure to thirty years was upheld as reasonable. United States v. Rogers, 423 F.3d 823, 826, 829 (8th Cir. 2005). For additional cases, showing the same skewed pattern (far fewer reversals of above-guideline sentences than of below-guideline sentences), see U.S. SENTENCING COMM'N, *supra* note 54, at 30, exhibit 2. *See also id.*, at 35 (stating that "courts generally appear to [be] reversing below-ranges sentences more often than above-range sentences").

actual operation of sentencing as controlled by the courts of appeals applying reasonableness review, sentencing practices in the district courts alone may very well present a distorted picture of how the federal sentencing system is functioning after *Booker*.