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

by

Marla Schwaller Carew\*

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\*Attorney, Varnum LLP; Adjunct Professor, Thomas M. Cooley Law School; University of Michigan, B.A. 1990; M.A. 1994; J.D. 2000; Wayne State University Law School, LLM 2009. The author gratefully acknowledges Professor Peter Henning, Wayne State University Law School, Eric M. Nemeth, Tax Attorney, Varnum LLP, and Professor Marjorie Gell, Thomas M. Cooley Law School.

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## I. INTRODUCTION

In 2007, the 3rd Circuit, on appeal, vacated and remanded the non-incarceration sentence of criminal tax defendant William Tomko Jr. in an opinion notable for its outrage and disgust at the sentencing court's order of probation and home confinement (in a luxurious home built with the proceeds of Tomko's criminal tax evasion).<sup>1</sup> In 2008, the District of Columbia Circuit, on appeal, affirmed a non-incarceration sentence for criminal tax defendant Gus Gardellini, in an opinion that permitted Gardellini to serve his term of probation at his then-current home in Belgium, and noted that he had already "suffered substantially" due to his prosecution.<sup>2</sup> The *Tomko* court was convinced that deterrence of similar tax crimes required incarceration<sup>3</sup> and the *Gardellini* court noted with approval the sentencing court's belief that publicity was a sufficient deterrent to potential criminal tax offenders, and maintained that a focus on deterrence above all other sentencing factors was a mistake.<sup>4</sup>

Aside from the individual characteristics of the offenders and judges, and the passage of one year, what accounted for the dramatic turn-about in federal appellate sentencing review (and the growing number of sentencing, and sentencing appeal, opinions in 2008 sharing *Gardellini's* flexibility)? The answer resides in the Supreme Court's 2007 and 2008 sentencing guidance that enhanced judicial discretion and allowed for this dramatic change in sentences upheld on appeal.

In 1984, Congress gave the nation the Sentencing Reform Act and United States Sentencing Commission, and in 1987 the Commission gave the legal community the Federal Sentencing Guidelines, directions for sentencing criminal defendants with uniformity, justification and an eye towards deterrence of other crimes and criminal intents. The Guidelines took much discretion away from judges in the name of uniformity in all sentencing and increased punishment, and deterrence, of white collar crime. In 2006 the Supreme Court, in *United States v. Booker*,<sup>5</sup> began to restore discretion to sentencing judges by making the Guidelines advisory, and the floodgates opened wider in 2007 and 2008 with Supreme Court opinions in *Rita*,<sup>6</sup> *Gall*<sup>7</sup> and *Kimbrough*,<sup>8</sup> each of which permitted increasing degrees of

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

2. *United States v. Gardellini*, 545 F.3d 1089 (DC Cir. 2008).

3. *Tomko*, 498 F.3d at 166-167.

4. *Gardellini*, 545 F.3d at 1091, 1095.

5. 543 U.S. 220 (2006).

6. 127 S. Ct. 2456 (2007).

7. 128 S. Ct. 586 (2007).

8. 128 S. Ct. 558 (2007).

judicial discretion and use of less- or non-incarceration sentences to punish criminal defendants.

These grants of increasing judicial discretion, like possession of human free will in any circumstance, were not without drama and dissent. By 2007 the tax community found itself faced with a sentencing landscape purporting to embrace discretion and departure in the absence of mandatory Guidelines, but proceeding in cases like the sentencing of William Tomko Jr., on pre-*Booker*, Guidelines-adherent grounds. This battle between sentencing discretion, often favoring hefty fees, restitution and alternative sentences such as probation and home confinement, and traditional Guidelines sentences reliant on prison time for all (with a double helping for the white collar offender), continues to unfold in the federal tax community. As this much of this Article was being written, tax practitioners awaited the opinion of the 3rd Circuit *Tomko* en banc rehearing with a growing body of individualized, below-Guidelines federal criminal tax sentences at their disposal. As the oral arguments in the *Tomko* en banc rehearing were reminiscent of *Gardellini* and other, flexible or downward-departing sentences from 2008, an equally flexible (or alternative) rehearing opinion was expected (and duly delivered).

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

Much has been written about the effects of *Booker* and its progeny, *Rita*, *Gall* and *Kimbrough*, on the current and future direction of criminal sentencing under the United States Sentencing Guidelines and the availability of flexible and alternative sentences, such as probation, home confinement and restitution. Many publications have viewed these cases and predicted trends with regard to white collar criminal sentencing. However, little to none of the plentiful academic and practitioner studies of the USSG after *Booker*, *Rita*, *Gall* and *Kimbrough* have focused on the impact of these changes in law on sentencing of tax crimes. Review of United States Sentencing Commission publications on trends after *Booker* make few or any references to treatment of tax defendants<sup>9</sup> and some otherwise

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

comprehensive publications by the Commission fail to break tax crimes out of the category of “other white collar” at all.<sup>10</sup>

The Internal Revenue Service, passionate though it may be in pursuit of tax scofflaws<sup>11</sup> and closure of the “tax gap” recently estimated to total \$345 billion,<sup>12</sup> participates in sentencing of tax criminals only as an interested party<sup>13</sup> and focuses its efforts on tax compliance and enforcement<sup>14</sup> rather than tracking criminal sentencing trends or advocating for changes in sentencing law. Its publications do not address the opportunities and concerns for adequate deterrence under *Rita*, *Gall* and *Kimbrough*, and the Department of Justice is charged with too many other, non-tax litigation duties to focus solely on tax sentencing matters. Tax controversy defense

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

11. See Examples of General Tax Fraud Investigations - Fiscal Year 2009, at <http://www.irs.gov/compliance/enforcement/article/0,,Id=187277,00.html>. See also Internal Revenue Service Fiscal Year 2008 Enforcement Results, available at [http://www.irs.gov/pub/irs-news/2008\\_enforcement.pdf](http://www.irs.gov/pub/irs-news/2008_enforcement.pdf), showing upward trend of Collections and Enforcement revenues from 1999-2008; U.S. Government Sues Jackson Hewitt Tax Preparation Franchises in Four States, Alleging Pervasive Fraud, Apr. 30, 2007 at <http://www.irs.gov/newsroom/article/0,,Id=169251,00.html> and Fraudulent Telephone Tax Refunds, Abusive Roth IRAs Top Off 2007 “Dirty Dozen” Tax Scams Notice IR-2007-37, Feb. 20, 2007.

12. IRS Updates Tax Gap Analysis, Notice IR-2006-28, Feb. 14, 2006. “As with prior estimates, the updated estimate of the tax gap shows that the largest component of this gap, more than 80%, comes from underreported taxes. Underreported income tax is the largest component of this (see attached Tax Gap Map for Tax Year 2001). Nonfiling and underpayment of tax comprise the rest of the tax gap.”

13. As set forth in 28 CFR 0.70, the Department of Justice, Tax Division, under the direction of an Assistant Attorney General appointed specifically to that division, conducts civil and criminal litigation arising under the Internal Revenue Code. Detailed information on the specific functions and subgroups within the Tax Division is available at <http://www.usdoj.gov/tax/index.html>. An example of Tax Division prosecution of criminal tax offenders first investigated by the IRS Criminal Investigation Division, which established the foundation of the case prior to the Tax Division’s involvement, may be found at Department of Justice Press Release dated Jan. 29, 2009, Former NFL Player, Ex-Casino Owner and Nevada Businessman Indicted in Massive Tax Fraud Scheme.

14. See IRS publications describing the role of its law enforcement arm, Criminal Investigations, such as Criminal Investigation (CI) At-a-Glance, <http://www.irs.gov/irs/article/0,,Id=98398,00.html> and Internal Revenue Manual Part 9, Criminal Investigation.

counsel, a group of stakeholders nearly as vitally concerned in criminal tax sentencing trends as their clients, appear to be consumed with other practice matters and most are not publishing on this topic beyond speculations that *Gall* and *Kimbrough* could offer certain white collar defendants the possibility of more lenient or otherwise “alternative” sentences.<sup>15</sup>

In Part II of this Article I will describe the prehistory and creation of the United States Sentencing Commission and Federal Sentencing Guidelines, the roots of the concept of “white collar” crime and its treatment under the Guidelines, and the goals specific to white collar criminal sentencing that motivated Congress, in part, to take these steps to formalize criminal sentencing. I will briefly revisit the Supreme Court’s first holdings regarding the limits of the Guidelines and the Sixth Amendment in *Koon v. United States*,<sup>16</sup> *Apprendi v. New Jersey*,<sup>17</sup> *Blakely v. Washington*<sup>18</sup> and *United States v. Booker*,<sup>19</sup> which made the Guidelines effectively advisory, and the Supreme Court’s subsequent rulings in *Rita*, *Gall* and *Kimbrough*, all of which collectively set the stage for the current opportunities for departure in criminal tax sentencing. In Part III of this Article, I will discuss the current state of flexibility and availability of alternative sentences in criminal tax sentencing after *Rita*, *Gall* and *Kimbrough*. Finally, in Part IV, I will present public outrage against high profile criminal tax violators, troubling trends, and a modest proposal for future tax sentencing flexibility that could balance salient legal and public policy concerns. Part V is a brief conclusion.

## II. THE FOUNDATIONS OF *RITA*, *GALL* AND *KIMBROUGH* AND THE HISTORY OF TAX SENTENCING

### *A. Prehistory and Creation of the Federal Sentencing Guidelines*

Prior to the creation of the Federal Sentencing Guidelines, federal judges had broad discretion to sentence defendants within the ranges created by statutory minimums and maximums, and so long as a sentence was within these statutory limits it was nearly unreviewable by a court of appeals.<sup>20</sup> In 1975, Senator Ted Kennedy introduced S. 2966, 94th Cong., 2nd Sess., a

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15. See, e.g., The Promise of Booker: Probationary Tax Sentences, New York Law Journal, Vol. 240 No. 99, Nov. 20, 2008.

16. 518 U.S. 81 (1996).

17. 530 U.S. 466 (2000).

18. 542 U.S. 296 (2004).

19. 543 U.S. 220 (2006).

20. *Id.* See also *Koon v. U.S.*, 518 U.S. 81, 96 (1996).

sentencing reform measure created by liberal reformers to serve as an anti-imprisonment and anti-discrimination bill.<sup>21</sup>

“Sentencing Reform I” in 1978 and 1980, S.1437, 95th Cong., 2nd Sess., introduced by Senators Kennedy and McClellan, featured strong encouragement of alternative, non-imprisonment sentences and judicial discretion to depart from guidelines and flexibly meet the challenge of defendants’ aggravating and mitigating personal characteristics.<sup>22</sup> The alternatives to imprisonment encouraged by these bills featured a presumption against imprisonment for rehabilitative purposes, the goal of not exceeding the capacities of the nation’s federal prisons, and the desire to reduce society’s reliance on imprisonment as “the archetypical criminal punishment.”<sup>23</sup> In addition to the Senate Judiciary Committee additions to these bills, Senator Gary Hart sponsored an amendment to limit sentences under the new legislation and allay fears that “the results could be longer terms of incarceration than we have under current law.”<sup>24</sup> Another provision provided that a newly created sentencing commission would be guided by actual and current sentences, and another directed the commission to draft guidelines reflecting “the general appropriateness of imposing a sentence other than imprisonment” for a first time offender not convicted of a violent or otherwise serious offense (by contrast, habitual offenders and those engaged in racketeering were to be sentenced more harshly).<sup>25</sup>

By “Sentencing Reform II” in 1982 and 1984, all of the prior intent to create non-incarceration, more liberal guidelines that would deal with rehabilitation of the nonviolent, first time offender by alternative means were gone.<sup>26</sup> This legislation was pro-incarceration and not clearly concerned with retention of discretion to sentencing judges.

After years of discussion, debate, haggling and changes of priority beginning in the mid-1970s,<sup>27</sup> Chapter II of The Comprehensive Crime Control Act of 1984, The Sentencing Reform Act of 1984 (popularly referred to as the “SRA”), established the United States Sentencing Commission, which was charged with promulgating Sentencing Guidelines.<sup>28</sup> The SRA directed the Commission to provide certainty and fairness in meeting the

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21. Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 *Wake Forest L. Rev.* 223, 224 (1993).

22. *Id.* at 237-238.

23. *Id.* at 242.

24. *Id.*

25. *Id.* at 243.

26. *Id.* at 266-268.

27. *Id.* at 237-238.

28. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(A), 98 STAT. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)).

purposes of sentencing, avoid unwarranted sentencing disparities while maintaining sufficient flexibility to permit individualized sentences and develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.<sup>29</sup> This subsection (a)(2) contained, in relevant part for this discussion, direction that a court consider the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense<sup>30</sup> and afford adequate deterrence to criminal conduct.<sup>31</sup>

Subsections (b) and (c) of Section 3553 directed courts to impose sentences "of the kind, and within the range" established by the Sentencing Commission for the applicable offense unless the court found that an aggravating or mitigating circumstance existed that was not adequately taken into consideration by the Sentencing Commission and that should result in a sentence different from that described.<sup>32</sup> The sentencing court was required to state in open court the reasons for its imposition of the sentence and specific reasons for any departure from the sentence required in subsection (b).<sup>33</sup>

By November 1987, the Commission created and Congress approved the Federal Sentencing Guidelines,<sup>34</sup> which embodied Congress' primary purposes of promoting honesty in sentencing (e.g., ending the practice of a judge sentencing a defendant to 12 years in prison, only to have the Parole Commission release the prisoner after 4 years)<sup>35</sup> and reducing sentencing disparities.<sup>36</sup> It is interesting to note that while Congress used statistical studies to analyze sentencing disparity trends and prove the existence on

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29. 28 U.S.C. § 991(b).

30. 18 U.S.C. § 3553(a)(2)(A) as enacted by Pub. L. No. 98-473, § 227, 98 Stat 1987, 1989-1990.

31. 18 U.S.C. § 3553(a)(2)(B) as enacted by Pub. L. No. 98-473, § 227, 98 Stat 1987, 1989-1990.

32. 18 U.S.C. § 3553(b) as enacted by Pub. L. No. 98-473, § 227, 98 Stat 1987, 1989-1990.

33. 18 U.S.C. § 3553(c) as enacted by Pub. L. No. 98-473, § 227, 98 Stat 1987, 1989-1990.

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

35. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4-5 (Fall 1988)

36. *Id.*



unpalatable variances,<sup>37</sup> the newly created Commission used analysis of 10,000 prior cases to attempt to follow “typical past practice,”<sup>38</sup> as it created categories of offenses and set lengths of sentences. The past sentencing patterns of unconstrained judges thus proved simultaneously too wide-ranging and individualized for lawmakers’ tastes but also served as the building blocks of the new rules designed to rein in judges. The Commission’s depth of empirical and statistical analysis brought significant discrepancies in pre-Guidelines sentences of white collar criminals to its attention,<sup>39</sup> and the Commission decided to remedy this apparent inequity by requiring “short but certain terms of confinement” for many of the kinds of white collar offenders, specifically tax, antitrust and insider trading offenders, who would previously have likely received a sentence of probation.<sup>40</sup>

Once the Sentencing Guidelines were in place, district court judges were directed to follow a set procedure when sentencing defendants, consisting of determining the applicable offense Guideline section, base offense level and specific offense characteristics, making certain adjustments and referring to policy statements or commentary that might warrant consideration in imposing a sentence.<sup>41</sup> They were also to consider the purposes of sentencing set forth in 18 U.S.C. section 3553(a)(2),<sup>42</sup> namely the competing goals of imposing a sentence “sufficient, but not greater than necessary” that “reflects the seriousness of the offense, to promote respect for the law” and “afford[ing] adequate deterrence.”<sup>43</sup>

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37. *Id.* For example, 2nd Circuit sentences ranging from three to 20 years of imprisonment for identical crimes.

38. *Id.* at 7-8.

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

40. *Id.* at 20-21. See also Paul J. Hofer and Mark H. Allbaugh, Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing: Article: The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 29; See also Frank O. Bowman, III, Symposium: Panel Four: The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1321-1323 (May 2005); Frank O. Bowman, III, Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed, 1 Ohio St. J. Crim. L. 373 (Spring 2004).

41. USSG § 1B1.1.

42. USSG § 1B1.10 comment (backg'd).

43. 18 U.S.C. § 3553(a), (a)(2)(A) and (B). Included in the 2008 version of § 3553(a), though not in its original SRA incarnation, is a new subsection (7), requiring courts to consider the need to provide restitution to victims.

The 2008 version of USSG section 2T1.1 clearly retains the marks of this goal, with the base offense level for tax loss of \$2,000 or less set to 6 (0-6 months of imprisonment for a Class I Criminal History defendant, 2-8 years for a Class II defendant, etc.) and rapidly climbing to Offense Levels of 16 and 18 for tax loss over \$80,000 or \$200,000, respectively (both numbers that are possible and realistic amounts of tax loss for seemingly “ordinary” offenders accused of underreporting income from a small business for a limited number of years).<sup>44</sup> For a Class I defendant, these Offense Levels of 16 and 18 equate on the 2008 Sentencing Table to 21-27 or 27-33 months imprisonment, respectively. These are hefty terms of imprisonment for white collar offenders who might be able to make restitution and pay fines to the IRS from their earnings or small business cash flow, but unable to make the United States Treasury whole if imprisoned for a year or more.

*B. Sociological Roots of “White Collar” Crime and the Guidelines’  
Focus on Offense, Rather Than Offender*

The term “white collar” crime was first used in 1939 in a speech by sociologist Edwin Sutherland to the American Sociological Society.<sup>45</sup> Sutherland used the term in the course of discussing crime committed by individuals in positions of power, and in the course of his larger work of disproving that crime was due to “poverty and its related pathologies.”<sup>46</sup> He defined white collar crime as “crime committed by a person of respectability and high social status in the course of his occupation.”<sup>47</sup> Sutherland intended to end the treatment of such offenses as civil wrongs and obtain criminal prosecution of them, and ultimately succeeded.

While Sutherland’s early studies of white collar crime focused on the “high social status” and other characteristics of the offender, the Guidelines and other federal criminal statutes focus instead on the offense committed.<sup>48</sup> While this focus on offense rather than offender (at least until Chapter 5, Part H - Specific Offender Characteristics, of the Guidelines comes into play for potential sentencing departures) would seem to reduce the kind of disparity that Congress and the Commission found offensive when it produced

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44. USSG § 2T4.1.

45. Ellen S. Podgor, *Criminal Law: The Challenge of White Collar Sentencing*, 97 *J. Crim. L. & Criminology* 731, 734-735 (Spring 2007).

46. *Id.* at 734-735 (quoting Edward H. Sutherland, *White Collar Crime* 9 (1949)).

47. *Id.* (quoting Edward H. Sutherland, *White Collar Crime* 9, 10 (1949)).

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

lenience in pre-Guidelines white collar sentencing, this focus actually ignores the greater media scrutiny, shame and difficulty reintegrating into society after incarceration experienced by white collar defendants.<sup>49</sup> The offense-focus also masks one very real offender-focus under the Guidelines, the sentence enhancements under 3B1.1 and 3B1.3 for defendants in a leader or management role, or those acting in a position of trust or using a special skill (defined as skills not possessed by the general public and usually requiring substantial education, training or licensing, e.g., skills possessed by lawyers, pilots, doctors, and accountants).

The 3B1.1 and 3B1.3 sentence enhancements most commonly applied to white collar criminals, on top of the heightened Guidelines applicable to defendants sentenced under 2B1.1 (larceny, embezzlement, fraud, etc.) and 2T1.1 (tax offenses), can produce sentences for white collar first-time offenders substantially more severe than those received for violent “street crimes” such as murder and rape.<sup>50</sup> While, as we will see in Section III.B. of this Article, there appears to be greater flexibility in granting low-incarceration and otherwise “alternative” sentences to criminal tax offenders after the Supreme Court’s 2008 opinions in *Gall* and *Kimbrough*, as recently as 2007 sentencing data indicated that, after the Supreme Court’s 2005 opinion in *Booker*, the majority of federal criminal sentences imposed remained in conformity with the Guidelines<sup>51</sup> and did not address issues such as the disproportionate harshness of some white collar sentences.

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49. Podgor *supra* note 45 at 740, discussing the long-lasting post-sentencing life disruptions of disbarment for lawyers, exclusion from federal medical programs for doctors, “bad boy” restrictions in federal securities work for stockbrokers and - contra the street cred found by some non-white collar defendants in “catching a case” – the shaming and social ostracism of white collar defendants and their families. *See also* Dan M. Kahan and Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. Law & Econ. 365 (April 1999).

50. Podgor *supra* note 45 at 732-733, quoting in n 10 *United States v. Ebbers*, 458 F.3d 110, 129 (2nd Cir. 2006) and the 2nd Circuit’s statement that “twenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation.”

51. U.S. Sentencing Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at vi (2006). *See also* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>.

C. *Seeds of Uncertainty: Koon, Apprendi/Blakely and Booker*

Once the Guidelines were in place and held to be constitutional<sup>52</sup> district sentencing courts applied them with strictly constrained discretion<sup>53</sup> until *United States v. Koon* in 1996,<sup>54</sup> when the Supreme Court ruled that the decision of a district court to grant a departure from the Guidelines would be due, in most cases, “substantial deference” upon review by a court of appeals, because the district court’s decision “embodies the traditional exercise of discretion by a sentencing court.”<sup>55</sup> Much of this discretion was due to the fact that the *Koon* court saw district courts in the position of being best able to make a “refined assessment” of the facts bearing on a sentence outcome and whether the sentence should fall within or without the “heartland” of cases in the Guidelines.<sup>56</sup> As the district courts had “an institutional advantage over appellate courts in making these sorts of determinations” deference was owed to the “judicial actor . . . better positioned than another to decide the issue in question.”<sup>57</sup> “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”<sup>58</sup>

This restoration of at least limited discretion to sentencing judges did not last long, though. In 2001 the Commission promulgated more stringent Guidelines for tax criminals, which increased the chances of time in prison for offenders, and in 2003, the PROTECT Act<sup>59</sup> reversed the portion of *Koon*

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

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

54. *Koon v. United States*, 519 U.S. 81 (1996).

55. *Id.* at 98.

56. *Id.* at 98.

57. *Id.* at 98-99.

58. *Id.* at 113.

59. Prosecutorial Remedies and Tools Against Exploitation of Children Today Act of 2003, Pub. L. No. 108-21. 117 Stat. 650.

that directed appellate courts to give due deference to sentencing judges' decisions.<sup>60</sup>

The Supreme Court opinions in *Apprendi* and *Blakely* sowed the seeds of *Booker* by, in cases regarding the interplay of the 6th Amendment with state sentencing guidelines, overruling guidelines-compliant sentences that allowed judges to usurp the constitutional role of the jury in finding facts necessary to support increased criminal sentences.<sup>61</sup> *Apprendi* and *Blakely* taken together appeared to curtail judicial discretion by limiting the sentences that a judge may impose based on judicially found facts, but these opinions also (as the Supreme Court was about to elucidate in *Booker*) struck at the viability of sentencing guidelines in general.<sup>62</sup>

By the time the Supreme Court was presented with review of Freddie Booker's and Duncan Fanfan's sentences on cocaine charges, the implications of *Blakely*'s reservation of rights to juries and away from guidelines had caused chaos in the federal criminal justice system and raised issues regarding proper ongoing administration of justice.<sup>63</sup> *Booker* presented a case of two defendants convicted of cocaine offenses, for whom trial judges had made additional factual findings.<sup>64</sup>

The *Booker* Court held that *Apprendi* and *Blakely* applied to the Federal Sentencing Guidelines,<sup>65</sup> that any fact necessary to support a Guidelines sentence exceeding the maximum authorized by jury-found facts must be admitted by the defendant or proved to a jury beyond a reasonable doubt,<sup>66</sup> that the Guidelines (in the so-called "remedy opinion") offer the possibility of imposing sentences beyond those supported by jury-found facts and thus are no longer constitutional but instead "effectively advisory."<sup>67</sup> Finally, the *Booker* court held that courts must now "consider" the advisory

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60. Steven Toscher, Sentencing Discretion in Criminal Tax Cases – Where We Have Been and Where We Are, CCH Journal of Tax Practice and Procedure, December 2007-January 2008, Vol. 9, No 6.

61. 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); 542 U.S. at 313 ("As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

62. 542 U.S. at 305-306. "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."

63. Steven Toscher, Sentencing Discretion in Criminal Tax Cases – Where We Have Been and Where We Are, CCH Journal of Tax Practice and Procedure, December 2007-January 2008, Vol 9, No 6.

64. 543 U.S. at 227-228.

65. *Id.* at 235.

66. *Id.* at 244.

67. *Id.* at 245.

Guideline ranges and also tailor sentences in light of other concerns set forth in 18 U.S.C. section 3553(a).<sup>68</sup> The *Booker* “remedy” court adopted this approach to maintain a “strong connection between the sentence imposed and the offender’s real conduct – a connection important to the increased uniformity of sentencing that Congress intended...”<sup>69</sup> The “remedy” court also directed appellate courts to review sentences for reasonability.<sup>70</sup> *Booker* spawned numerous law review and practitioner articles as well as marked uncertainty over the future of federal sentencing - would life with “effectively advisory” Guidelines be a sentencing free-for-all or more of the same?<sup>71</sup>

*D. Sea Change or Free For All? Booker’s Aftermath in Rita, Gall, and Kimbrough*

Any excitement generated by *Booker*’s de-fanging of the Guidelines had barely abated when the Supreme Court took on its next groundbreaking federal sentencing case, *Rita v. United States*.<sup>72</sup> The defendant in *Rita* appealed post-*Booker*, using the *Booker* remedy court’s holding that district court sentences should be reviewed for reasonability to argue that his within-Guidelines sentence was improperly subjected to the presumption of reasonability on appellate review.<sup>73</sup> The Court held that a court of appeals may apply a presumption of reasonableness to a within-Guidelines sentence<sup>74</sup> because the presumption is not binding and also reflects the fact that by the time a within-Guidelines sentence has reached an appellate court for review, both the sentencing judge and Commission will have reached the same conclusion as to the proper sentence for the defendant.<sup>75</sup>

The Court also revisited the basic sentencing objectives set forth in 18 U.S.C. section 3553(a) and noted the Guidelines’ commentary statement that Congress’s aims of seeking uniformity (narrowing the disparity of sentences imposed by different courts for similar conduct) and proportionality (imposing appropriately different sentences for criminal conduct of different severity) of sentencing often conflict.<sup>76</sup> The Court acknowledged that difficulty in conceding that a presumption of

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68. *Id.* at 245-246 and 264.

69. *Id.* at 246.

70. *Id.* at 261.

71. Lee D. Heckman, Note: The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-*Booker* World, 69 Ohio St. L. J. 149, 171 (2008).

72. 127 S. Ct. 2456 (2007).

73. 127 S. Ct. at 2462.

74. *Id.*

75. *Id.* at 2463.

76. *Id.* at 2464.

reasonability could encourage sentencing judges to impose within-Guidelines sentences.<sup>77</sup>

The subsequent cases of *Gall* and *Kimbrough*, each of which raised tantalizing issues for the future of federal criminal tax sentencing and lay the groundwork for the last part of this Article, were heard and decided on the same days in late 2007. *Gall* followed *Rita*'s discussion of within-Guideline sentences by addressing the case of a defendant charged for his past participation in a drug ring, who after substantial rehabilitation and cooperation with law enforcement, received a sentence far below the applicable Guideline.<sup>78</sup>

While defendant *Gall*'s presentence report recommended a term of incarceration of 30 to 37 months, the district court sentenced *Gall* to 36 months' probation, stating that probation reflected the seriousness of his offence and imprisonment was unnecessary because of *Gall*'s voluntary withdrawal from the criminal activity years before his charge and the upstanding character of his post-offense conduct.<sup>79</sup> The 8th Circuit reversed and remanded for sentencing<sup>80</sup> and the Supreme Court took the case to address the reasonability of *Gall*'s sentence and the 8th Circuit's practice of requiring proportionality (or "extraordinary" circumstances) to justify a substantial departure from a Guidelines range. It held that *Gall*'s dramatically lowered sentence was reasonable, for reasons set forth below.<sup>81</sup> The Supreme Court first addressed the applicable standard of review. *Gall* addressed a downward departure so substantial that it was sentence wholly outside of the applicable Guidelines.<sup>82</sup> The Court briefly revisited its holdings in *Booker*,<sup>83</sup> directed sentencing judges to give serious consideration to any departure from the Guidelines and explain their conclusions that unusually lenient or harsh departure sentences were appropriate and sufficiently justified.<sup>84</sup> The Court left sentencing courts with sufficient discretion to vary from the Guidelines without requiring rules that demand "extraordinary" circumstances to justify substantial departures outside of Guidelines ranges.<sup>85</sup>

The *Gall* Court, in the context of upholding the district court's non-incarceration sentence, dispelled any suggestion that a sentence of probation with no incarceration was overly lenient. This language subsequently played

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77. *Id.* at 2467.

78. 128 S. Ct. 586 (2007).

79. *Id.* at 600-601.

80. *Id.* at 594.

81. *Id.* at 591.

82. *Id.* at 594 (the Court of Appeals characterized the sentence as "a 100% downward variation").

83. *Id.* at 594.

84. *Id.*

85. *Id.*

a starring role in opinions and oral arguments granting, or advocating, for non-incarceration sentences for white collar offenders. The Court stated:

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. [Citations omitted] Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking.<sup>86</sup>

Furthermore, the conditions of a sentence of probation “can have a significant impact on both that person and society. . . . Often these conditions comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist.”<sup>87</sup>

The Court then introduced two concepts that have produced much of the opportunity for increased judicial discretion and use of alternative sentences discussed in section III.B of this Article. These concepts of procedural and substantive reasonableness may be explained as follows. First, at the district court level, a sentencing court should begin all sentencing proceedings by correctly calculating the Guidelines range applicable to the defendant and offense, and then consider all of the section 3553(a) factors to see whether they support the sentences advocated by the parties.<sup>88</sup> In this review of section 3553(a) against potential sentences, the sentencing court must make “an individualized assessment based on the facts presented.”<sup>89</sup> As a penultimate step, the sentencing court must consider the extent of deviation from the Guidelines, if it believes that an outside-Guidelines sentence is warranted, and weigh the justification to ensure that it is “sufficiently

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86. *Id.* at 595-596.

87. *Id.* at 595, fn 4, quoting 1 N. Cohen, *The Law of Probation and Parole* 7:9 (2d ed. 1999).

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

89. 596-597.



compelling to support the degree of variance”<sup>90</sup> Finally, the sentencing judge must “adequately explain” the sentence to promote the perception of fair sentencing and allow for meaningful appellate review.<sup>91</sup>

Procedural error may occur when a sentencing court treats the Guidelines as mandatory, fails to consider section 3553(a) factors or fails to explain a sentence.<sup>92</sup> Substantive error may occur if, taking into account the totality of the circumstances, the sentence imposed is substantively unreasonable (a nebulous standard at best).<sup>93</sup> The *Gall* Court directed appellate courts to review for both levels of reasonableness under the “familiar” abuse of discretion standard.<sup>94</sup> Once a sentencing court’s actions successfully pass both procedural and substantive review, the appellate court may apply a presumption of reasonableness to a within-Guidelines sentence, but may not apply a presumption of unreasonableness to an outside-Guidelines sentence.<sup>95</sup> It must instead consider the extent of the deviation and give “due deference” to the sentencing court’s decision that “the section 3553(a) factors, on the whole, justify the extent of the variance.”<sup>96</sup> The fact that the appellate court might have ruled otherwise is insufficient to reverse the district court’s sentence.<sup>97</sup> The *Gall* Court supported this explication of procedural and substantive reasonableness review by acknowledging that sentencing judges are in superior positions to find facts with full knowledge of the facts and insights not on the record, and reiterated *Rita*’s and *Koon*’s

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90. *Id.* at 597, though note that “sufficiently compelling” falls short of the mathematical proportionality and “exceptional” circumstances embraced by the 8th Circuit and rejected by the Supreme Court, though all of the terms of “sufficiently compelling,” “proportional” and “exceptional” are sufficiently amorphous and susceptible to construction and manipulation, and the Stevens Opinion does not define, parse and differentiate these terms in a meaningful way.

91. *Id.* See also *United States v. Peters*, 512 F.3d 787 ((6th Cir. 2008) for an example of a failure of procedural reasonableness, when the sentencing court failed to adequately address defendant’s non-frivolous (time served) reasons for imposing a different sentence or adequately explain his reasons for rejecting the arguments); *United States v. Funk*, 534 F.3d 522 ((6th Cir. 2008) “Procedural error, then, is abuse of discretion per se, inasmuch as the court applied the law improperly. But substantive error is far more ambiguous – it is an error so serious that the decision is not entitled to deference, just as if the court had relied on a clearly erroneous finding of fact, clearly misapplied the law, or applied the wrong law.” Internal citation omitted).

92. *Id.* at 597.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

statements that the sentencing judge has greatest access to and familiarity with the individual defendant and case.<sup>98</sup>

The Court's opinion in *Kimbrough*, issued on the same day, takes *Gall*'s focus on the role of section 3553(a) in a procedurally reasonable sentence even further to make section 3553(a) the foundation of judicial freedom to vary from the Guidelines based on policy disagreements. Defendant Derrick Kimbrough pled guilty to four crack cocaine offenses, which under statutory sentencing minimum carry dramatically higher applicable Guidelines ranges (i.e., *Kimbrough*'s crack offenses led to a range of 19-22.5 *years* of incarceration, versus 97 to 106 *months* for similar powder cocaine charges).<sup>99</sup> While the Court stated that it granted certiorari to determine whether the crack/powder Guidelines disparity had been rendered advisory by *Booker*,<sup>100</sup> its subsequent discussion of the district court's below-Guidelines sentence focused on the fundamental role of the 18 U.S.C. section 3553(a) goals of sentencing and a sentencing court's responsibility to consider those varying, often contradictory goals (e.g., sufficient but not greater than necessary versus sufficient to afford deterrence).<sup>101</sup>

After a discussion of the policy reasons for the 100:1 crack/powder sentence ratio,<sup>102</sup> the Court revisited its holding in *Booker* and the new status of the Guidelines as advisory.<sup>103</sup> It characterized the post-*Booker* Guidelines as containing an overarching provision, codified in 18 U.S.C. section 3553(a), instructing district sentencing courts to impose sentences "sufficient, but not greater than necessary" to accomplish sentencing goals, including reflecting "the seriousness of the offense," promoting respect for law, providing just punishment and affording "adequate deterrence to criminal conduct."<sup>104</sup> In short, "*Booker* permits the court to tailor the sentence" in light of statutory concerns other than the Guidelines.<sup>105</sup>

The Court reviewed the district court's dramatically below-Guidelines sentence and statements that a within-Guidelines sentence would have been "greater than necessary" to accomplish the purposes set forth in 18 U.S.C. section 3553(a), especially in light of the "disproportionate and unjust effect" of the 100:1 sentence disparity<sup>106</sup> and upheld the district court's sentence, because the district court properly fulfilled its procedural

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

99. 128 S. Ct. at 565-566.

100. *Id.* at 565-566.

101. *Id.* at 570.

102. *Id.* at 568-569.

103. *Id.* at 570.

104. *Id.*

105. *Id.*

106. *Id.* at 565.

prerequisites (calculating a Guidelines range, addressing 18 U.S.C. section 3553(a) factors, considering the nature and circumstances of the offense and history and characteristics of the defendant, and explaining its sentence and its disagreement with the “unwarranted disparity” caused by the crack/powder sentences).<sup>107</sup> Finally, the district court “appropriately,” in the view of the Court, framed its final sentence determination in terms of the overarching instruction of 18 U.S.C. section 3553(a) to “impose a sentence sufficient, but not greater than necessary” to accomplish the sentencing goals of 18 U.S.C. section 3553(a)(2).<sup>108</sup>

The district court sentence met the second test, that of substantive reasonableness, as well by weighing the goals of 18 U.S.C. section 3553(a) with the “particular circumstances” of the defendant’s case and the policy argument that a 100:1 sentence disparity was at odds with section 3553(a) and the goal of preventing unwarranted sentence disparities.<sup>109</sup> The *Kimbrough* Court looked back to *Gall* and *Rita* to acknowledge the sentencing court’s superior position for fact finding and section 3553(a) evaluation<sup>110</sup> and the need for closer review when the sentencing court varies “based solely on the judge’s view that the Guidelines range ‘fails properly to reflect section 3553(a) conditions.’”<sup>111</sup>

Subsequent commenters have raised the possibility that the *Kimbrough* holding properly affects only crack cocaine sentences,<sup>112</sup> though the Supreme Court’s January 2009 per curiam opinion in *Spears v. United States*<sup>113</sup> suggests that a new door for judicial discretion based on policy disagreements opened with Justice Ginsburg’s opinion in this case.<sup>114</sup>

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107. *Id.* at 575.

108. *Id.* at 575-576.

109. *Id.* at 576.

110. *Id.* at 574.

111. *Id.* 575, quoting *Rita*, 551 U.S. at 2563.

112. Lynn Adelman & Jon Deitrich, *Gall, Kimbrough and Crack Retroactivity: Positive but Incomplete Steps in the Evolution of Federal Sentencing*, OSJCL Amici: Views From the Field (January 2008), at <http://osjcl.blogspot.com>, stating that the *Kimbrough* justices refused “to fully accept the government’s concession that district courts may disagree with other policies embedded in the guidelines.”

113. 129 S. Ct. 840 (2009).

114. *Id.* at 843-844. “*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect.” While this immediately appears to apply only to crack sentences, the Court goes on to state that its permission of policy disagreement-based variances follows in the tradition of *Booker*’s permission of individualized determinations of Guideline applicability to particular cases. *Id.* (“and not simply based on an individualized determination that they yield an excessive sentence in a particular case. The latter proposition was already established pre-*Kimbrough*, see *United States v. Booker*. . .”). This language, and the absence of any statement by

### III. CASES AND TRENDS: SENTENCING TAX CRIMES AND DEBATES OVER DETERRENCE

White collar criminal scholars<sup>115</sup> and defense practitioners<sup>116</sup> eagerly wondered at the wider impact of *Kimbrough* on sentences for which section 3553(a) arguments for leniency might be made. They did not have to wait long for a series of cases addressing combinations of *Rita*, *Gall* and *Kimbrough*, notably with regard to varying amounts of judicial severity and leniency on appellate review of downward departures in criminal tax sentences. The first illustrative tax case issued after *Rita*, and in expectancy of the Supreme Court's yet-undelivered opinions in *Gall* and *Kimbrough*, was the 3rd Circuit's 2007 opinion in *Tomko v. United States*.<sup>117</sup>

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

*Tomko* featured the case of a contractor who pled guilty to tax evasion, pursuant 26 U.S.C. section 7201, after causing numerous subcontractors to falsify invoices and create the appearance that work done on his luxurious new home was actually done for his company.<sup>118</sup> The estimated tax loss was more than \$225,000.<sup>119</sup> He was sentenced by the district court to community service, probation and a fine, rather than the applicable Guidelines sentence of 12-18 months of incarceration, after extensive district court explication of Tomko's charitable generosity,

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the Court in *Spears* that its permission of policy disagreements in crack cocaine cases is inapplicable to any non-crack cocaine case, leaves the white collar criminal bar with the appearance of retained flexibility and hope for future policy-motivated judicial discretion.

115. Nancy Gertner, *Gall, Kimbrough and Me*, OSJCL Amici: Views From the Field (January 2008), at <http://osjcl.blogspot.com>.

116. See, Steven Toscher, *Sentencing Discretion in Criminal Tax Cases – Where We Have Been and Where We Are*, CCH Journal of Tax Practice and Procedure, December 2007-January 2008, Vol 9, No 6; *The Promise of Booker: Probationary Tax Sentence*, New York Law Journal, Vol. 240 No. 99, November 20, 2008.

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

118. 498 F.3d at 159.

119. *Id.* at 159.

acceptance of responsibility and the effect that his incarceration would have on his 300 innocent employees.<sup>120</sup>

Following guidance provided in *Rita*, the 3rd Circuit Court of Appeals reviewed the sentence for reasonableness under a deferential abuse of discretion standard, and to make sure that the sentencing court gave meaningful consideration to the 18 U.S.C. section 3553(a) factors and applied them to the circumstances of the case.<sup>121</sup> The court noted that “review for reasonableness, though deferential [does] not equate to a rubber stamp”<sup>122</sup> and there is a “difference between deference and abdication.”<sup>123</sup> These disclaimers should rob the eventual result that the court found Tomko’s non-incarceration sentence lacking of no suspense.<sup>124</sup>

The 3rd Circuit began its review of Tomko’s probationary sentence by acknowledging that reasonability review must begin with procedural review of the district court’s weighing and balancing of the 18 U.S.C. section 3553(a) factors, and substantive review of the sentence itself, to ferret out sentences illogical and inconsistent with 18 U.S.C. section 3553(a).<sup>125</sup> Such sentences are substantively unreasonable, stated the court in a notably vague piece of guidance, when illogical and inconsistent with the section 3553(a) factors (even if procedurally reasonable). In a notably vague piece of guidance, the *Tomko* court went on to explain identification of illogical and inconsistent sentences by conceding that there is a “recipe for reasonableness,” though appellate courts may not complain of overly bitter or sweet results, but if key ingredients are missing they must draw attention to sentences for which “there is no proof in the pudding.”<sup>126</sup> This statement leaves one wondering how an appellate court is to find proof, or lack thereof, in a recipe that may be acceptable when either bitter or sweet.

The 3rd Circuit went on to find no proof in *Tomko*’s pudding on the grounds that the Guidelines: were drafted by a respected public body with access to the best studies of penology (and thus sentences that departed from the Guidelines to impose no imprisonment required “careful, impartial” weighing of sentencing factors<sup>127</sup>); contained policy statements emphasizing the seriousness of tax evasion;<sup>128</sup> and underscored in policy statements the

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120. *Id.* at 161.

121. *Id.* at 163.

122. *Id.* at 164, quoting *United States v. Rattoballi*, 452 F.3d 127, 132 (2nd Cir. 2006).

123. *Id.*, quoting *United States v. Crisp*, 454 F.3d 1285, 1290 (11th Cir. 2006).

124. *Id.* at 172.

125. *Id.* at 165, fn 7.

126. *Id.*

127. *Id.* at 165.

128. *Id.* at 165-166, quoting USSG Manual ch 1, pt A, intro cmt 4(d) re the Commission’s goal to replace pre-Guidelines probationary sentences for economic criminals with “at least a short period of imprisonment.”

need for tax prosecutions to provide just punishment, promote respect for the law and provide for deterrence.<sup>129</sup> Specifically, the Guidelines state that “criminal tax prosecutions serve to punish the violator and promote respect for the tax laws,”<sup>130</sup> that deterrence from violating the tax laws is a primary consideration in light of the low proportion of tax violations actually prosecuted, and that sentences for tax crimes should be “commensurate with the gravity of the offense” to act as successful deterrents.<sup>131</sup>

The *Tomko* appellate court found his probationary sentence lacking in deterrent value due to the component of home confinement in a “gilded cage” bought through tax evasion,<sup>132</sup> and stated that the luxury and comfort of Tomko’s 8,000 square-foot house (complete with home theatre, pool, sauna and bar) did not reflect the seriousness of his offence or provide adequate deterrence pursuant to 18 U.S.C. section 3553(a)(2)(A) and (B). In light of its belief that 18 U.S.C. section 3553(a) requires a sentence “minimally sufficient” to satisfy concerns of general and specific deterrence,<sup>133</sup> and discussion of the greater value of jail time as a general deterrent (citing the Guideline’s statement that willful tax evaders go undetected so often that those who are caught must be given some term of imprisonment),<sup>134</sup> the court agreed with the Government’s argument that “real deterrence is jail”<sup>135</sup> and concluded that Tomko’s probationary sentence was inconsistent with the deterrence goals of 18 U.S.C. section 3553(a)(2)(A)-(B).<sup>136</sup>

Ultimately, when faced with *Booker*’s goals of increasing deference to sentencing courts, the *Tomko* court elected instead to closely and conservatively hew to the 20 year old “basic statutory goals” Congress embraced when it created the Commission and charged it with diminishing unwarranted sentence disparity.<sup>137</sup> As the taxpayer’s counsel relied on arguments supporting Tomko’s bid for downward departure based on charitable works and negligible prior criminal history, the chance to engage

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129. *Id.* at 166, citing 18 U.S.C. § 3553(a)(2)(A) and (B).

130. *Id.*, quoting USSG Manual ch. 2, pt. T, intro. cmt. (1997).

131. *Id.*

132. *Id.*

133. *Id.* note 9 at 166.

134. *Id.* at 167.

135. *Id.* at 166-167.

136. *Id.* at 167.

137. *Id.* at 169.

in any meaningful debate regarding alternative sentences (such as home confinement and other probation) as paths to deterrence was lost.<sup>138</sup>

In its own brief dismissal of alternative sentences as inadequate to provide deterrence, the *Tomko* court summarizes its rejection of the sentencing court's departure based on good works and employment history, noting the sentencing court's alleged errors with the brief statements "a sentence of mere probation . . . is unreasonable"<sup>139</sup> and "we disagree with the dissent that the hefty fine imposed on Tomko mitigates the unreasonableness of the sentence in this case."<sup>140</sup> The court found the fine imposed on Tomko a "justification for leniency" that would reinforce the perception that "wealthy defendants can buy their way out of a prison sentence" contra Congress's clear intent as shown in the SRA and section 3553(a), and condemned restitution imposed in "lenient" sentences as encouraging disparate sentencing, which is violative of the Guidelines and possibly unconstitutional.<sup>141</sup>

The *Tomko* dissent acknowledged the opportunity for greater judicial discretion, and looked forward to the Supreme Court's pending ruling in *Gall*, with its exploration of whether a deviation required exceptional circumstances<sup>142</sup> and prohibition of applying the presumption of unreasonableness of outside-Guidelines sentences.<sup>143</sup>

The *Tomko* dissent found that the sentencing court gave ample and meaningful consideration to section 3553(a) factors.<sup>144</sup> The district court did, in fact, examine subsections (a)(1) [nature and circumstances of the offense and defendant characteristics], (a)(2)(A)-(D) [the need to reflect the seriousness of the offense, promote respect for the law and provide just punishment, to afford adequate deterrence, and to protect the public from further crimes of the defendant], (a)(3) [kinds of sentences available], (a)(4) [sentences and Guidelines range for the offense] and (a)(6) [the need to avoid unwarranted sentence disparities] of section 3553 and discuss its considerations at length.<sup>145</sup> In summary, it explained its sentence departure for Tomko through its recognition of the need for consistent sentencing, but given Tomko's specific characteristics, its finding that a sentence mitigated by section 3553(a) factors was more appropriate. It also increased Tomko's fee above that in the applicable Guidelines range (to \$250,000, *over eight times more* than the upper end of the applicable Guideline range at the

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138. *Id.* at 169-172.

139. *Id.* at 172.

140. *Id.* at 173.

141. *Id.* at 173.

142. *Id.* at 174.

143. *Id.* at 175.

144. *Id.* at 176.

145. *Id.*

time<sup>146</sup>) and ordered restitution as permitted under section 3553(a)(7), stating that, for a wealthy defendant, the within-Guidelines fee was insufficient, but the combination of probation, a substantial fine and payment to the IRS of Tomko's tax obligation "will address the sentencing goals of punishment, deterrence and rehabilitation."<sup>147</sup>

The dissent opined that both it and the appellate court majority would have applied the section 3553(a) factors differently had they been the sentencing court, but conceded that the district court's evaluation of section 3553(a) factors was thorough, supported by the record, logical and consistent with the factors and thus ultimately deserved to be upheld under a deferential reasonableness standard.<sup>148</sup> Finally, the dissent addressed its disagreement with the *Tomko* majority's emphasis on Guidelines policy statements and the majority's view that the sentencing court improperly ignored the pertinent policy statements.<sup>149</sup> The dissent countered with criticism that the *Tomko* majority was impermissibly reviewing the sentencing court's judgment on a *de novo* standard, and most crucially, justifying its reversal of the district court's sentence based on overreliance on one section 3553(a) factor ((a)(5) direction to look to Guidelines policy statements) and devaluation of all other section 3553(a) factors.<sup>150</sup>

The *Tomko* dissent is correct that the majority's skewed application of section 3553(a) factors is not supported elsewhere in case law. However, the dissent could have, and did not, use the discussion as an opportunity to revisit the purely advisory nature of the Guidelines (and their policy statements) per *Booker* as well as *Gall* direction that a reasonable sentence upheld on review need not be the same sentence that the appellate court would have issued itself, had it been in the position of the sentencing court.<sup>151</sup>

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146. *Id.* at 181.

147. *Id.* at 176-177.

148. *Id.* at 177-179. *See also Gall*, 128 S. Ct. at 597 regarding the fact that the appellate court may not reverse a district court solely because it would have imposed a different sentence.

149. USSG Manual ch 2, pt T introductory cmt. [stating that because of the limited number of criminal tax prosecutions relative to incidence of such violations, deterrence is a primary consideration of the Part T tax Guidelines] and Section 2T1.1, cmt. background [discussing the pre-Guidelines history of more probationary sentences for white collar offenders, the Commission's belief that increased costs of incarceration are inconsequential in relation to potential revenue from tax compliance and the Commission's intent that Guideline 2T1.1 will reduce sentence disparity and "somewhat increase average sentence length"].

150. *Id.* at 181.

151. *Gall*, 128 S. Ct at 597 "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."



Taken together, the *Tomko* majority and dissent present an interesting discussion of the politics and policy of probationary sentences and deterrence of criminal tax defendants. The majority focused on the need for deterrence (one factor among many) and its perceived inadequacy of arguments for departure based on Tomko's charitable works, employment record and ability to pay restitution.<sup>152</sup> In response, the dissent noted that the policy statement in USSG section 2T1.1 used in the majority opinion as a weapon against non-incarceration sentences *actually* stated that its intention of disparity reduction will result in a "reduced," not "eliminated," number of purely probationary sentences.<sup>153</sup> The dissent saw the plain language of the background comment to 2T1.1 mirroring section 3553(a)(6) to acknowledge the need to avoid unwarranted sentence disparities, though neither mandates elimination of non-incarceration sentences, and also noted that overreliance on section 3553(a)(6) encourages automatic application of the Guidelines and violation of the Supreme Court's holding in *Booker*.<sup>154</sup> On this topic, and with its fuller acknowledgment of the messy and often contradictory goals of the Guidelines and section 3553(a) post *Booker*, the *Tomko* dissent appears to have the superior recipe for pudding (leaving the *Tomko* majority with no "proof" in the same).

The *Tomko* majority and dissent also plumbed the depths of the then-recent *Rita* opinion for Supreme Court direction on procedural and substantive reasonableness. The majority, as discussed above, focused on a mythical "recipe for reasonableness" and Tomko's probationary sentence substantively having "no proof in [its] pudding." The dissent saw the majority's review and application of *Rita* as improperly drawing a hard line between procedural and substantive review that the *Rita* court, with its emphasis on the interconnectedness of procedure and substance, did not intend.<sup>155</sup> The dissent argued convincingly that the majority impermissibly focused on pure substance, ignoring the sentencing court's thorough procedural review, in its "repeated references to the need for Tomko to spend time in jail"<sup>156</sup> and makes the prescient statement that "[I]n order for the Guidelines regime to be truly advisory, a District Court must be able to

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152. *Tomko* 498 F.3d at 166, 170-73.

153. *Id.* at 182.

154. *Id.*

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

156. *Id.* at 183-84.

potentially, when the proper situation arises, sentence a defendant outside of the Guidelines range but within the statutory range. Any other conclusion would alter the statutory sentencing scheme as passed by Congress and interpreted by *Booker*.<sup>157</sup> The *Tomko* dissent's call for proper departure under *Booker* was answered within months by the Supreme Court's holdings in *Gall* and *Kimbrough*.<sup>158</sup>

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

In contrast to the “business as usual” approach of the 3rd Circuit in *Tomko*,<sup>159</sup> a growing number of tax cases decided after *Gall* and *Kimbrough* embrace the opportunity for more flexible sentencing. For example, the 3rd Circuit tax sentencing appeal *Levinson* is more welcoming of the opportunities for alternative sentencing presented in *Gall* and *Kimbrough*, though the district court in question undermined its attempt at authorizing a probationary sentence by entirely failing to explain the grounds for its

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157. *Id.* at 184.

158. *Gall* and *Kimbrough* were released shortly after the 3rd Circuit's *Tomko* opinion, reversing and remanding a non-incarceration sentence on grounds of providing inadequate deterrence and (although said, it was strongly implied) offending the sensibilities of the court by allowing Tomko to serve out his home confinement sentence in a luxurious home complete with a home theatre, pool and bar. *See id.* at 172. The effect of *Gall*, *Kimbrough* and the increased discussion of deterrence – an overarching goal or merely one of many § 3553(a) factors – can be seen in the Nov. 19, 2008 oral argument transcript of the 3rd Circuit's en banc rehearing. Transcript of Oral Argument, United States v. Tomko, 498 F.3d 151 (No. 05-4997) (3rd Cir. argued Nov. 19, 2008). The oral argument is lively reading, with the court hazing Assistant Attorney General, Tax Division, Nathan Hochman over his unwavering interest in deterrence as “the” § 3553(a) goal to be met, and its good-natured teasing of Tomko's defense counsel (who doubts that he will argue before the panel again). Given the tone of the court's insistence with Hochman that deterrence is only one of many § 3553(a) factors, and that his laser-like focus on it, and only it, is unduly narrow, it was no surprise to find that the en banc court upheld Tomko's sentence in an opinion filed on Apr. 17, 2009. The majority opinion upheld the Tomko non-incarceration sentence as procedurally and substantively reasonable, though it admitted that many of its judges would not have imposed the same sentences had they been in the district court – but that is not the test of a sound and reasonable sentence.

159. Explaining that many courts have yet to see a Guidelines sentence they do not like or a variance they can support, see, Nancy Gertner, *Gall, Kimbrough and Me*, OSJCL Amici: Views From the Field (Jan. 2008), at <http://osjcl.blogspot.com>.

variation.<sup>160</sup> This embrace of downward departures is seen outside of tax in “other” white collar criminal sentencing as well.<sup>161</sup>

### 1. *United States v. Taylor*

Talmus Taylor was convicted of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. section 7206(2), and sentenced to one year in a halfway house and a fine.<sup>162</sup> The Guidelines sentence for his offence would have been 30 to 37 months in prison, a supervised release, and a fine.<sup>163</sup> After an appeal by the Government, the 1st Circuit vacated the sentence as substantively unreasonable and remanded the case. The case returned to the 1st Circuit again after the Supreme Court remanded it for further consideration in light of *Gall* and *Kimbrough*, which were released after Taylor’s initial sentencing.<sup>164</sup> The 1st Circuit acknowledged that *Rita*, *Gall* and *Kimbrough* made clear that “in the post-*Booker* world, district judges are empowered with considerable discretion in sentencing, as long as the sentence is generally reasonable and the court has followed the proper procedures,” and that it would, per *Gall*, review Taylor’s sentence under a deferential abuse of discretion standard, requiring procedural and substantive inquiries.<sup>165</sup>

While the 1st Circuit, in its first 2007 review of Taylor’s sentence,<sup>166</sup> found the sentence substantively unreasonable on grounds that the district court failed to take all section 3553(a) factors into account, failed to adequately explain its justifications for a probationary sentence,<sup>167</sup> and ultimately issued a sentence that did not afford adequate deterrence.<sup>168</sup> This appellate opinion is very much like the 3rd Circuit’s opinion in *Tomko*, both

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160. *United States v. Levinson*, 543 F.3d 190, 194 (3rd Cir. 2008).

161. See, e.g., *United States v. Adelson*, Nos. 06-2738-cr(L), 2008 U.S. App. LEXIS 24864, at 3 (2d Cir. Dec. 9, 2008) (affirming a below-Guidelines sentence, coupled with substantial restitution, on the grounds that the sentencing court properly considered the § 3553(a) factors, and did not fail to recognize the Guidelines or give proper weight to them.).

162. *United States v. Taylor*, 532 F.3d 68, 69 (1st Cir. 2008).

163. *United States v. Taylor*, 499 F.3d 94, 96 (1st Cir. 2007), vacated, 532 F.3d (2008).

164. *Taylor*, 532 F.3d at 71.

165. See *id.* at 69-70, (noting that in the 1st Circuit, after procedural and substantive review, “[R]eversal will result if - and only if - the sentencing court’s ultimate determination falls outside the expansive boundaries of that universe [of reasonableness].”)

166. *Taylor*, 499 F.3d at 95.

167. See *id.* at 102 (finding the statement that a non-incarceration sentence was appropriate because of the “fantastic contribution he [Taylor] has made to the community” was insufficient).

168. *Id.* at 103-4.

in disagreement with the sentencing court's weight given to charitable work and the ultimate holdings that probationary sentences lacked deterrence, though it tempers the appellate *Tomko* court's harshness with the open-minded approach of requesting adequate explanation of the sentence on remand and leaving open the possibility that the non-incarceration sentence might be upheld so long as it is procedurally sound and adequately explained per *Gall*.<sup>169</sup>

## 2. *United States v. Coughlin*

Like *Taylor*, this case presents a pre-*Gall*/*Kimbrough* sentence remanded for resentencing after *Gall*'s holding. Thomas Coughlin, a prominent corporate executive, pled guilty to five counts of wire fraud and one count of filing a false tax return in violation of section 7206(1).<sup>170</sup> His applicable Guidelines sentence would have been 27 to 33 months, but the district court sentenced him to no imprisonment, five years of probation, a \$50,000 fine and \$411,218 in restitution due to Coughlin's poor health,<sup>171</sup> family circumstances, and charitable works.<sup>172</sup> Tantalizingly, the district court mentioned Coughlin's "fall from grace" in its reasoning for a non-incarceration sentence.<sup>173</sup> Was this a poorly articulated opinion on the punitive and deterrent effect of probation, fines and restitution or merely an off-hand acknowledgment of the shame suffered by any criminal offender? A more thorough statement could have been useful, given *Gall*'s acknowledgement of the loss of liberty and real effect of non-incarceration sentences. The 8th Circuit reversed and remanded this sentence on the grounds that the district court did not appropriately weigh the section 3553(a) factors and state with specificity the reasons for its below-Guidelines sentence.<sup>174</sup>

On remand,<sup>175</sup> the district court restored its sentence of no incarceration and five years of probation, including 27 months of home detention with electronic monitoring (and credit given for time served), with a memorandum explaining its reasoning at length.<sup>176</sup> Not surprisingly, the district court in this February 2008 resentencing first addressed the impact of *Gall*, released after the initial sentence and before the remand hearing, and the procedure *Gall* established for calculating Guidelines, reviewing section

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169. *Taylor*, 532 F.3d at 69.

170. *United States v. Coughlin*, 500 F.3d 813, 815 (8th Cir. 2007).

171. *Id.* at 816-17.

172. *Id.* at 819.

173. *Id.* at 819.

174. *Id.*

175. *United States v. Coughlin*, No. 06-20005, 2008 U.S. Dist. LEXIS 11263, at 3 (W.D. Ark. Feb. 1, 2008).

176. *Id.* at 2-3.

3553(a) factors and adequately explaining the given sentence.<sup>177</sup> The district court then revisited its below-Guidelines sentence in light of section 3553(a) to impose a sentence “sufficient, but not greater than necessary” to achieve the diverse statutory sentencing goals.<sup>178</sup> Among the section 3553(a) factors discussed at length is the factor of greatest interest for the purposes of this Article, the need for deterrence.

The district court defended its non-incarceration sentence for Coughlin on the grounds that his offense was “gravely serious,” arguing that probation and home detention accomplished the goals of punishment and deterrence “more effectively than imprisonment. Not all defendants must be sentenced to be duly punished.”<sup>179</sup> Stating that probation can accomplish the goals of punishment, the court revisited *Gall*’s discussion of the substantial restriction of liberty inherent in non-incarceration punishment,<sup>180</sup> concluding that Coughlin’s sentence “is far from an act of leniency, and its characterization as such deprives sentencing courts of a valuable and effective form of punishment.”<sup>181</sup> The district court, in addition, revisited portions of the SRA, enacted in part to address prison overcrowding, and Congress’ statutory direction to the Commission “to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons.”<sup>182</sup> The court concluded with the observation that, after the fines, restitution and loss of liberty “Coughlin has suffered greatly, for he had it all and squandered his success. For that he is paying the price and will be punished for the rest of his life.”<sup>183</sup>

### 3. *United States v. Levinson*

Levinson pled guilty to counts of wire fraud and filing a false tax return under 26 U.S.C. section 7206(1).<sup>184</sup> The district court found that the tax loss from Levinson’s actions exceeded \$44,000, and thus the applicable Guidelines sentence would be 24 to 30 months.<sup>185</sup> The district court instead imposed a sentence of two concurrent 24 months of probation<sup>186</sup> and

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177. *Id.* at 9-10.

178. *Id.* at 17-18.

179. *Id.* at 20-21.

180. *Gall v. United States*, 552 U.S. 38, 48 (2007).

181. *Coughlin*, 2008 U.S. Dist LEXIS 11263 at 26.

182. *Id.* at 32-33.

183. *Id.* at 38. In light of *Gall*, the United States filed a Motion to Dismiss Appeal with the 8th Circuit on Mar. 28, 2008 (entered as a Mandate of that court on Mar. 31, 2008), dismissing its own appeal of the sentencing court’s 2008 sentence on remand.

184. *United States v. Levinson*, 543 F.3d 190, 191 (3rd Cir. 2008).

185. *Id.* at 192.

186. *Id.* at 194

restitution<sup>187</sup> on the grounds that Levinson did not harm the public through his conduct (considering harm to a privately held company already compensated through a civil suit to be a purely private harm).<sup>188</sup> The 3rd Circuit found that the Delaware sentencing court failed to offer sufficient explanation for its downward departure to a wholly non-incarceration sentence, and failed to adequately explain its policy disagreement with the Guidelines.<sup>189</sup> Levinson's sentence was reversed and remanded, and any subsequent opinion has not yet been released.

While it might appear from this brief summary that the *Levinson* court was acting as the *Tomko* court did in hewing closely to the Guidelines, closer reading of the case shows the profound effect of *Gall* and *Kimbrough* (and the passage of 10 months from the date of filing the *Tomko* opinion) on the 3rd Circuit. The *Levinson* court acknowledged that the sentencing court properly determined the applicable Guidelines sentence and reviewed the section 3553(a) factors<sup>190</sup> before it made its controversial determination that Levinson was unlike other white collar tax offenders because his harm to a privately held company was a private harm.<sup>191</sup> The district court sentenced Levinson to probation and restitution after a few short statements regarding its view that after it reviewed the costs of incarcerating Levinson, a non-violent offender "whose crimes had little impact beyond his business partners and family," it concluded that "I just can't see that it makes much sense. I just do not."<sup>192</sup>

The 3rd Circuit did not agree with the Government that the sentencing court committed procedural and substantive error in imposing Levinson's sentence, but did take the view, reasonable in the circumstances, that the district court must "provide us with enough analysis on the record to permit meaningful appellate review, which it so far has not."<sup>193</sup> It also looked to *Gall* for the proposition that a failure to adequately explain a sentence deviation may be addressed "by giving the sentencing judge an opportunity to better explain the reasoning behind the decision"<sup>194</sup> and to *Kimbrough* for the proposition that district courts have institutional advantages in access to and consideration of evidence, and appellate courts would be foolish to try to second guess them.<sup>195</sup> The *Levinson* court further stated that in the post-*Booker* era of advisory Guidelines, per *Gall* it did not need "extraordinary

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187. *Id.*

188. *Id.*

189. *Id.* at 199.

190. *Id.* at 192-193, also 197-198.

191. *Id.* at 194.

192. *Id.* at 194.

193. *Id.*

194. *Id.* at 195.

195. *Id.* at 196.

circumstances” to justify a downward departure.<sup>196</sup> It took issue only with the district court’s sparse explanation of its analysis for downward departure<sup>197</sup> and the spectre of an unexplained policy disagreement with the Guidelines raised by that court’s comments on public and private harm and the cost of incarcerating criminal tax violators.<sup>198</sup> “Policy considerations are not off-limits in sentencing, see *Kimbrough*” though they require care in forming the basis of a wholly probationary sentence.<sup>199</sup> The *Levinson* court concluded with its acknowledgment that, given the sentencing possibilities offered by *Gall* and *Kimbrough*, “We do not say that a sentence of probation would be, on the record, plainly outside of the boundaries of permissible discretion. We only hold that the justifications given for the sentence are inadequate for us to recognize them as reflecting a proper exercise of discretion.”<sup>200</sup> Compare this acceptance of the possibility of departures to probationary sentences, departures based on policy disagreements, and sentences deemed procedurally and substantively reasonable though they might not be to the tastes of all jurists with the *Tomko* court’s disregard of procedural reasonableness and apparent obsession with the cost of Tomko’s residence.<sup>201</sup> This shift from wholesale dismissal of non-incarceration sentences, on the grounds of failure to afford adequate deterrence, to open acknowledgment that a below-Guidelines sentence (one that would not be the appellate court’s first choice) may still be lawful and appropriate continues in subsequent criminal tax sentence precedent.

#### 4. *United States v. Gardellini*

Gus Gardellini pled guilty to filing a false income tax return in violation of 26 U.S.C. section 7206(1), an offense that, given Gardellini’s offender characteristics, resulted in a Guidelines sentence of 10 to 16 months of imprisonment.<sup>202</sup> The district court took into account Gardellini’s payment of restitution and section 3553(a) factors, principally his cooperation, minimal risk of recidivism and that he had “suffered substantially” due to his prosecution.<sup>203</sup> The district court concluded with a statement that “what

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196. *Id.* at 199.

197. *Id.* at 199.

198. *Id.* at 200.

199. *Id.*

200. *Id.* at 202.

201. 498 F.3d at 159.

202. *United States v. Gardellini*, 545 F.3d 1089, 1090 (DC App 2008).

203. *Id.* at 1091.

really deters” potential tax evaders is “the efforts of prosecutors . . . in vigorously enforcing the laws.”<sup>204</sup> In consideration of its review of the section 3553(a) factors and the preceding considerations, the district court found a sentence of probation and a fine to be adequate.<sup>205</sup>

The Government appealed Gardellini’s probationary sentence as substantively unreasonable under *Booker* and *Gall*. The Court of Appeals for the DC Circuit reviewed the district court’s sentence in light of *Rita*, *Gall* and *Kimbrough*, using a deferential abuse of discretion standard, reviewing for procedural and substantive reasonableness, looking for policy disagreements with the Guidelines or Commission, and mindful that *Gall* does not require “extraordinary circumstances” to support a below-Guideline sentence.<sup>206</sup> The *Gardellini* court next raised an interesting point – when an appellate court, in substantive reasonableness inquiry, asks whether a sentence is unreasonably high or low, “analytical difficulty” arises because this question begs the response “Compared to what?”<sup>207</sup> The Guidelines are advisory, the section 3553(a) factors are “vague, open-ended, and conflicting” and each sentence decision involves a unique combination of offender and offense characteristics.<sup>208</sup> When the foregoing are combined with the deferential abuse-of-discretion standard of review, “It will be an unusual case when an appeals court can plausibly say that a sentence is so unreasonably high or low as to constitute an abuse of discretion by the district court.”<sup>209</sup>

The DC Circuit upheld Gardellini’s non-incarceration sentence as procedurally and substantially reasonable, noting that the Government’s objection to it held one section 3553(a) factor – deterrence – above all others<sup>210</sup> and in light of the discretion given to sentencing courts by the Supreme Court’s holdings in *Booker*, *Rita*, *Gall* and *Kimbrough*, “only a fool would think that he or she necessarily would receive the same sentence as Gardellini for a similar tax offense.”<sup>211</sup> To the extent that *Booker* and its progeny causes the federal sentencing system to become “unwise or inequitable,” Congress and the President are empowered to produce new legislation and should address sentencing concerns.<sup>212</sup>

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204. *Id.*

205. *Id.* The opinion notes that Gardellini would spend his probation in Belgium, where he lived with his family (his wife’s job took them to an overseas post), but did not state that Gardellini’s residence was a factor in his sentencing.

206. *Id.* at 1092-1093.

207. *Id.* at 1093.

208. *Id.*

209. *Id.*

210. *Id.* at 1095.

211. *Id.*

212. *Id.* at 1096.



The *Gardellini* dissent disagreed, finding *Gardellini*'s sentence too low and inadequate to afford deterrence, in a thorough opinion supported by statistics on the low percentage of filed returns audited by the IRS and the interplay of courtroom publicity and deterrence.<sup>213</sup> In so doing, however, the dissent arguably fell into the Government's trap of placing excessive weight on only one section 3553(a) factor – deterrence – and denying reasonability to all other inquiries and considerations.

#### 5. *United States v. Weisberg*

This brief and unpublished 6th Circuit case offers an additional view of the increased discretion and liberalization in sentencing post *Gall* and *Kimbrough*. Joseph Weisberg pled guilty to felony tax evasion in violation of 26 U.S. 7201, which would carry a Guidelines sentence of 33 to 41 months, after enhancement in light of Weisberg's "special skills" gained in his practice of law and tax loss of \$321,654.<sup>214</sup> The district court sentenced Weisberg to five months imprisonment, five months home confinement, and a three-year term of supervised release after finding no "special skill" required to evade taxes and mitigating offender characteristics (age, health, no prior convictions, punishment in the loss of his law license).<sup>215</sup> On appeal, the 6th Circuit reviewed Weisberg's sentence for procedural and substantive reasonableness and upheld the sentence, noting that post *Rita* and *Gall*, the government failed to appreciate the amount of deference due an appellate court to the sentencing court, and, given the superior position of a sentencing judge in having access to and familiarity with the individual case before him, finding that the district court adequately explained its reasons for imposing a below-Guidelines sentence.<sup>216</sup>

#### 6. *United States v. Smith*

A Northern District of Ohio sentencing case provides an additional look at below-Guidelines sentences in the wake of *Rita*, *Gall* and *Kimbrough*. Joseph Smith pled guilty to conspiracy to defraud the IRS in violation of 18 U.S.C. 371, making false tax returns in violation of 26 U.S.C. section 7206(1) and corruptly endeavoring to obstruct and impede in violation of 26 U.S. section 7212(a).<sup>217</sup> Smith's Guidelines sentence was 27 to 33 months, though the district court sentenced him to imprisonment of 12 months and 1 day on one count, 3 months on the other counts (to be served

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213. *Id.* at 1098-1099.

214. *United States v. Weisberg*, 2008 U.S. App. LEXIS 22095 (6th Cir. 2008).

215. *Id.* at 6-7.

216. *Id.* at 14-15.

217. *United States v. Smith*, 2009 U.S. Dist LEXIS 7462 (N.D. Oh. 2009).

concurrently with the year-and-day sentence), 2 years of supervised release, community service, and restitution of \$39,154 to the IRS.<sup>218</sup>

The sentencing judge approached her below-Guidelines sentence by noting that the duty of every sentencing judge is to evaluate each person as a unique individual who may not fit within a formulaic sentencing table. The importance of this duty has only been enhanced by *Koon, Booker, Gall* and the like.<sup>219</sup> After consideration of section 3553(a) factors and the difficulty of reconciling the goals of specific and general deterrence<sup>220</sup> the court explained Smith's below-Guidelines sentence as adequate because of its success in specific deterrence (the stress, shame and financial burden on Smith since he was charged made it "most unlikely" that he will re-offend) and the punitive and deterrent effects of the hefty restitution Smith must make to the IRS.<sup>221</sup> The sentencing judge further dispelled any concerns of unwarranted sentence disparity by showing that Smith's year-and-a-day term of incarceration was the median sentence given for such offenses in the 6th Circuit, and only 3 months shorter than the median national sentence for such offenses.<sup>222</sup> In an example of the kind of adequate disclosure and explanation of a below-Guidelines sentence not seen in *Taylor* and *Levinson*, supra, the sentencing judge concluded with a summary of matters considered, each party's briefs, the Guidelines range and section 3553(a) factors, in arriving at a sentence "sufficient, but not greater than necessary, to comply with the purposes of section 3553(a)."<sup>223</sup>

#### IV. THE FUTURE AND A MODEST PROPOSAL

##### A. Troubling Trends

At the time that this article was written, high profile white collar and tax criminals such as Ponzi scheme promoters Bernard Madoff and R. Alan Stanford<sup>224</sup> and offshore tax shelter promoter UBS<sup>225</sup> dominate the business and financial news with stories of multimillion and multibillion dollar thefts

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218. *Id.* at 2-3.

219. *Id.*

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

221. *Id.* at 10-11.

222. *Id.* at 13.

223. *Id.* at 16-17.

224. Fraud is the "In" Crime Mar. 1, 2009, White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2009/03/fraud-is-the-in.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/03/fraud-is-the-in.html) ("The message is loud and clear - the DOJ has a growing number of alleged fraud cases dropping in its lap.")

225. Lynnley Browning, US Extends its Inquiry of Offshore Tax Fraud, [nytimes.com](http://nytimes.com) Mar. 18, 2009.

from clients and illegal sheltering of taxes from United States law. This author believes it reasonable to assume that these cases will further sour public sentiment against white collar offenders, especially those accused or convicted of high profile offenses with large dollar figures of loss. Such an understandable hardening of public opinion brings with it the danger of courts turning away from the judicial discretion to impose non-incarceration sentences embodied *Gall* and *Kimbrough* and revisiting sentencing pre-*Booker* to impose automatic within-Guidelines sentences (in other words, to follow the lead of the *Tomko* appellate court in 2007).

Federal judge Nancy Gertner of the District of Massachusetts raises a similar specter of conservative conformity in her study of discretion in *Gall* and *Kimbrough*, noting that *Booker* “did not unleash judges and herald a return to indeterminate sentencing” and that the vast majority of judges “in the vast majority of cases did essentially nothing new.”<sup>226</sup> Judge Gertner speculates that this is due in part to the fear of some judges that after nearly twenty years of Guidelines they were no longer competent to make sentencing judgments, and in part to those judges who “never saw a Guideline sentence they didn’t like” despite the disrespect for law promoted by harsh punishments that fail to take into account individual facts and circumstances.<sup>227</sup>

Judge Gertner’s concerns are well founded, as shown in her acknowledgement that *Koon*’s pro discretion language did not spur a revolution in sentencing (so much for “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”<sup>228</sup>), nor did *Booker*’s (see the *Tomko* 2007 majority appellate decision), and dicta in *Spears* notwithstanding,<sup>229</sup>

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226. Nancy Gertner, *Gall, Kimbrough and Me*, OSJCL Amici: Views From the Field (Jan. 2008), at <http://osjcl.blogspot.com>.

227. *Id.* p 4.

228. 519 U.S. at 113.

229. 129 S. Ct at 843-844. “*Kimrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect.” While this immediately appears to apply only to crack sentences, the Court goes on to state that its permission of policy disagreement-based variances follows in the tradition of *Booker*’s permission of individualized determinations of Guideline applicability to particular cases. *Id.* (“and not simply based on an individualized determination that they yield an excessive sentence in a particular case. The latter proposition was already established pre-*Kimrough*, see *United States v. Booker*....”). This language, and the absence of any statement by the Court in *Spears* that its permission of policy disagreements in crack cocaine cases is inapplicable to any non-crack cocaine case, leaves the white collar criminal bar with the appearance of retained flexibility and hope for future policy-motivated judicial discretion.

*Kimbrough* may only be applied to crack offenses<sup>230</sup> or may be limited to policy disagreements closer in magnitude to the 100:1 crack-powder dichotomy (while at lower loss levels tax crimes are dealt with somewhat more harshly than non-tax economic crimes, the disparity quickly evens out and is nowhere near 100:1 in magnitude).<sup>231</sup>

Also, in a caution and concern raised by Federal Judge Lynn Adelman of the Eastern District of Wisconsin and Professor Jon Deitrich, the defendant in *Gall* was “an extremely sympathetic figure” who withdrew from crime and began self-rehabilitation before he was contacted by the police.<sup>232</sup> Criminal tax defendants are rarely sympathetic figures (William Tomko, Jr., convicted of instructing subcontractors to falsify invoices and appear to be doing work for schools when they were building his new home instead,<sup>233</sup> was certainly not treated with sympathy, respect or affection upon his 3rd Circuit appeal) in the manner of defendant *Gall*, and in the wake of Stanford, Madoff, Wesley Snipes et al, actors with any stain of willfulness or defiance are very likely to be pilloried in the press and, eventually, in court.<sup>234</sup>

### B. Opportunities

However, troubling trends and gloom aside, if *Gall*, *Kimbrough* and the dicta in *Spears* bear out true restoration of judicial discretion in sentencing, and fulfillment of *Koon*'s promise of sentencing every defendant as an individual,<sup>235</sup> the Supreme Court has created great opportunities for sentencing judges to deal most effectively with criminal tax defendants. The Commission's and Guidelines' competing goals of affording adequate discretion and imposing sentences sufficient, but no greater than necessary to

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230. Nancy Gertner, *Gall*, *Kimbrough* and Me, OSJCL Amici: Views From the Field (Jan. 2008), at <http://osjcl.blogspot.com>.

231. In Lynn Adelman & Jon Deitrich, *Gall*, *Kimbrough* and Crack Retroactivity: Positive but Incomplete Steps in the Evolution of Federal Sentencing, OSJCL Amici: Views From the Field (Jan. 2008), at <http://osjcl.blogspot.com>, Page 4, Judge Adelman and Professor Deitrich also note that even after *Kimbrough* addressed the 100:1 crack/powder ratio and the Commission revised the Guidelines, the disparity remains significant (between 25:1 and 80:1).

232. *Id.* at 3.

233. 498 F.3d at 159.

234. As seen in contemporary coverage of sentencing on Professor Douglas Berman's Sentencing Law and Policy blog, pre-Booker precedents still appear in sentencing and defense victories and downward departures continue to remain strangely suppressed in legal news [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/03/the-persistence-of-prebooker-precedents-in-a-postbooker-world.html](http://sentencing.typepad.com/sentencing_law_and_policy/2009/03/the-persistence-of-prebooker-precedents-in-a-postbooker-world.html), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/02/why-do-defense-wins-in-sentencing-appeals-often-go-unpublished.html](http://sentencing.typepad.com/sentencing_law_and_policy/2009/02/why-do-defense-wins-in-sentencing-appeals-often-go-unpublished.html).

235. 116 S. Ct. at 2053.

punish, will remain, but increased judicial discretion will offer a larger toolkit for tackling these issues. The tensions between sufficient and deterrent sentences are frequently seen in most stark detail in white collar sentences, when the “piling on of points” for special skills, leadership roles, etc. can result in sentences for subordinate white collar offenders so severe that even the Government may advocate for departures at sentencing.<sup>236</sup>

The Commission, in its own publications, has begun to advocate for alternative sentences to mitigate the high cost of incarceration - a stunning change of position from its advocacy of more incarceration for more white collar offenders in the 1980s. With a cost to the nation of more than \$49 billion to incarcerate one in every 100 adults in 2007-2008, the Commission is now interested in uses of restitution and probation for nonviolent offenders.<sup>237</sup> In a recent publication on the uses of alternative sentences in the federal criminal justice system, the Commission stated “Increasingly, criminal justice professionals have argued that dwindling prison space should be reserved for the most serious and dangerous offenders, necessitating a reconsideration of alternative sanctions for first-time and nonviolent offenders.”<sup>238</sup> While the SRA required the Guidelines to reflect the general appropriateness of non-imprisonment sentences in certain cases for first-time or non-violent offenders, or those not convicted of an “otherwise serious offense,”<sup>239</sup> and tax crimes are considered serious offenses,<sup>240</sup> the Commission concedes that in the current fiscal climate “Aside from offense severity, financial offenses may be more suited to alternative sentences because of restitution... To the extent that these offenders are sentenced to prison alternatives, they may be better positioned to pay restitution.”<sup>241</sup>

Reasoned and intelligent discussions of the legitimate uses, and genuine punitive, life-inconveniencing character, of alternative sentences

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

237. *United States Sentencing Commission, Alternative Sentencing in the Federal Criminal Justice System* (Jan. 2009).

238. *Id.* at 1.

239. 28 U.S.C. § 994(j).

240. USSG § 2T1.1 comment (backg’d).

241. *Id.* at 19.

such as probation and home confinement (i.e., drug tests, unannounced home visits, inability to move or change jobs freely) are found in *Gall*<sup>242</sup> and the *Tomko* rehearing oral argument<sup>243</sup> as well as Professor Ellen S. Podgor's numerous and impassioned writing on the topic.<sup>244</sup> A Congressional policy preference for sentencing alternatives to strict incarceration is found, though often forgotten, in the 1970s and 1980s legislative histories of Senate Acts predating the SRA, in which promotion of alternative sentences was, for a short time, a widely discussed and viable goal of uniform sentencing.<sup>245</sup>

*Gall* and *Kimbrough* might also give criminal tax defendants room to argue about policy disagreements over differences in treatment of tax and other white collar offenders in section 2T1.1 and section 2B1.1 (though the disparities found here are minimal by crack/powder standards), high levels of incarceration available for use against white collar sentences in general, or the proportionately higher sentences meted out to first-time, non-violent white collar offenders than to certain violent criminal offenders.<sup>246</sup>

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242. 128 S. Ct. at 595-596; 128 S. Ct. at 595 fn 4.

243. Transcript of Oral Argument, *United States v. Tomko*, No. 05-4997 (3rd Cir. argued Nov. 19, 2008), at 49 (Tomko's counsel explains that one immediate penalty from Tomko's indictment was the sudden loss of his line of credit at his long-time bank and subsequent rejection by 39 banks before he could find one to lend him the funds needed for restitution).

244. See, John R. Lott, *Optimal Penalties Versus Minimizing the Level of Crime: Does it Matter Who is Correct?*, 17 B.U.L. Rev. 439 (1991); Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>.

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

246. See, e.g., Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines 2B1*, 18 Fed. Sent. R. 330 (2006) “the fact that the guidelines contemplate life imprisonment – and then a bunch more – for such crimes [white collar] reveals the degree to which emotion has overtaken logic in this area ... the overkill of the current economic crime guidelines is not limited to the most culpable offenders in the most exceptional cases.” “The combination of political pressure and some failures of foresight on the part of those involved in revising the economic crimes guidelines in recent years ... has produced Guidelines sentencing ranges for moderate-to-serious white collar offenders that simply cannot be rationally defended.” See also Ellen S. Podgor, *Criminal Law: The Challenge of White Collar Sentencing*, 97 *Crim. L. & Criminology* 731 (Spring 2007) for a discussion of the sociological roots of white collar crime and the irrationality of subjecting nonviolent first time white collar offenders to sentences higher than those imposed for violent

*Kimbrough*, with Justice Ginsburg's nod to the Commission's development of the Guidelines "using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports"<sup>247</sup> and subsequent allowance of sentence deviation based on policy disagreements (due to the Commission's formation of the crack cocaine guidelines without "tak[ing] account of 'empirical data and national experience'"<sup>248</sup>) may also provide an avenue to policy disagreement and departure from the tax and other white collar Guidelines due to their shared origin in the Commission's stated desire to increase sentences over those commonly given in past practice and corresponding lack of basis in "empirical data and national experience."

Although, to concede the obvious at this point in history, these arguments are lacking the moral force and urgency of the racially and economically charged crack/powder disparity and would be offered to the public and courts at a time when high profile white collar and tax offenders are objects of little to no sympathy and continue to merit and receive stiff sentences.<sup>249</sup> While commenters like Ellen Podgor are surely correct in predicting that white collar criminals like Bernie Ebbers will not backslide into repeated acts of crime, most likely because post-conviction they will never again have access to the high positions that facilitated their misdeeds,<sup>250</sup> even Professor Podgor concedes elsewhere that the social harms from single courses of white collar criminal activities may be larger, and tied

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crimes such as murder or rape and failing in general to take the white collar offender's clean slate (lack of prior convictions) into account; and Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 284 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>.

247. *Kimbrough*, 128 S. Ct at 567.

248. *Id.* at 575.

249. E.g., little public sympathy will (or should) arise for Adrian Dicker, whose guilty plea is memorialized in Mar. 17, 2009 Department of Justice Press Release 09-061 Former Accounting Firm Vice Chairman and Board Member Pleads Guilty to Tax Fraud Related to Tax Shelters Claiming Over One Billion Dollars of Fraudulent Tax Losses, <http://www.usdoj.gov/usao/nys/pressreleases/March09/dickeradrianpleapr.pdf> or Mariuz Debowski, co-conspirator in a fraudulent tax return scheme involving fraudulent check cashing, as described in Mar. 25, 2009 Department of Justice Press Release 09-269 "Connecticut Resident Pleads Guilty to Multi-Million Dollar Tax Fraud Conspiracy," [http://www.usdoj.gov/atr/pulic/press\\_releases/2009/244034.htm](http://www.usdoj.gov/atr/pulic/press_releases/2009/244034.htm). Justifiably harsh sentences are still given to white collar offenders post Gall and Kimbrough, as seen in Mar. 27, 2009 Department of Justice Press Release 09-282 Former National Century Financial Enterprises CEO Sentenced to 30 Years in Prison, Co-Owner Sentenced to 25 Years in Prison for Conspiracy, Fraud and Money Laundering (Defendants Order to Pay Restitution of \$2.3 Billion and Forfeit \$1.7 Billion). <http://www.usdoj.gov/opa/pr/2009/March/09-crm-282.html>.

250. Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (2007), <http://thepocketpart.org/2007/02/21/podgor.html> at 284.

to enormous economic loss to victims.<sup>251</sup> With loss of this magnitude, why would any defendant deserve a second bite at the apple?

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

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

The few years between this Article and the Supreme Court's opinion in *Booker* have held almost more change in sentencing laws than the courts and scholars can absorb. From a known process that reduced judicial discretion to an “advisory” system and standards of procedural and substantive reasonableness of sentences on appeal that allow (or force, as the case may be) appellate courts to admit that they must uphold sentences that they would never have handed down themselves, were they in the district court sentencing judge's shoes (e.g., the 3rd Circuit en banc panel in *Tomko*), the landscape for judges and advocates has changed and left many disoriented.

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

These arguments could be stereotyped as the watchdog Government versus wily defense counsel, if they did not occur in the context of a Guidelines system that, over time, became increasingly driven by political

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251. Ellen S. Podgor, Criminal Law: The Challenge of White Collar Sentencing, 97 *Crim. L. & Criminology* 731, 738-739 (Spring 2007).



agendas (two obvious examples being the enhanced white collar sentences post Sarbanes-Oxley or the crack-cocaine disparity) and motivated more by number-crunching and departure horse-trading than the goal of reaching individualized sentences that were only “sufficient but no greater than necessary” to further the purposes of section 3553(a) (only one of which is deterrence). With the Commission calling for flexibility in sentencing to hold down the ballooning price of the federal prison system, and the recognition post-*Gall* that a sentence may be procedurally and substantively reasonable though unpopular with certain appellate judges, this seems to be a poor time to wish for a renewal of the Guidelines through Congressional action. Instead, while occasionally unpopular and humanely flawed, district court sentencing judges, coupled with the availability of appellate review for reasonableness, appear post-*Rita* and *Gall* to be the federal criminal sentencing system’s best hope at crafting individualized sentences that take into account all of offense, offender and state of the system. Accordingly, this writer proposes renewed commitment to the development of federal criminal tax (as well as white collar) sentencing through case law, and looks forward to additional federal appellate application of *Gall* and *Kimbrough* to tax sentencing cases. One may bring order from chaos, just as the courts may bring enlightenment from the *Tomko* en banc opinion and others of its kind.

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

## V. CONCLUSION

In the aftermath of decades of Congressionally-directed sentencing legislation, and the recent burst of discretion, departures, returns to convention and dissent, the state of federal sentencing of criminal tax defendants in 2009 is murky. The future is difficult to forecast, with the presumption, on one hand, that the Democratic administration’s recent Supreme Court appointments from the left maybe more amenable to flexible sentencing and rehabilitation) and the suspicion, on the other, that public outrage over notable white collar crimes during the worst economic recession in memory will affect the near-term course of sentencing (towards stiffer penalties and fewer opportunities for judicial discretion to free high-living tax offenders like William Tomko, Jr.). Competing social and political

agendas of this kind could produce the kind of flip-flops in pre-Guidelines sentencing policy seen in the 1970s and 1980s and discussed in section II.A. above.

However, this writer maintains that buried in the murk remains the goal of individualized sentencing appropriate to the offense and offender and driven by the sentencing judge's greater familiarity with the defendant. Staying the course of post-*Booker*, advisory Guidelines sentencing, driven by Supreme Court holdings and influenced by the occasional federal circuit *en banc* opinion, will produce imperfect and occasionally unpalatably lenient sentences. But it will produce sentences that, in large part, honestly and accurately reflect all of the section 3553(a) factors – not limited to deterrence – and avoid the “barbarities” of the kind memorialized in *Adelson*.<sup>252</sup>

A popular legal maxim, or cliché, says that bad facts make bad law, but no more so than hardened positions and refusal to look at the big picture. Sentences under the Guidelines were intended to be “sufficient, but not greater than necessary” to comply with the diverse purposes and goals of section 3553(a), and while humans are imperfect, our imperfect district court judges stand a better chance of producing the most reasoned and rounded sentences than party-bound legislators. To borrow a metaphor from a recent former president, federal sentencing should “stay the course” of case law development unless or until it becomes untenable.

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252. *United States v. Adelson*, 441 F. Supp 2.d 506 at 510 (2006). “The [Sentencing] Commission has never explained the rationale underlying any of its identified specific offense characteristics . . . or the weights it has chosen to assign. . . Here, their combined effect – an added 20 points under the Guideline’s approach – ill-fits the situation of someone like *Adelson*. It represents, instead, the kind of “piling-on” of points for which the guidelines have frequently been criticized. “Even the Government blinked at this barbarity,” *id.* at 511.