

5. *Sixth Amendment — Federal Sentencing Guidelines — Deviation Based on Policy Disagreements.* — In *United States v. Booker*,¹ the Supreme Court remedied a Sixth Amendment violation by making advisory the Sentencing Guidelines that had shaped federal sentences since 1987.² The Court, however, instructed judges to continue calculating the appropriate Guidelines range and also to consider “other statutory concerns.”³ The Court subsequently held that sentences within the recommended Guidelines range were to be accorded a “presumption of reasonableness” on appeal.⁴ Last Term, in *Kimbrough v. United States*,⁵ the Supreme Court addressed for the first time how appellate courts should review sentences that vary from the Guidelines recommendations based solely on policy disagreements.⁶ The Court upheld a below-Guidelines sentence that a district court judge imposed based on his disagreement with the fact that much harsher sentences were imposed on crack cocaine dealers than on powder cocaine dealers, in the famous 100-to-1 ratio.⁷ Some of the *Kimbrough* language suggested that the case was merely a natural outcome of *Booker* and

inexperienced, to insist upon conducting his own defense to criminal charges.”); *id.* at 849 (Blackmun, J., dissenting) (“I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical — albeit voluntary — caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification.”); *see also* *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161 (2000) (“No one, including Martinez and the *Faretta* majority, attempts to argue that as a rule pro se representation is wise, desirable, or efficient.”); Decker, *supra* note 81; Sabelli & Leyton, *supra* note 83. The Indiana Court of Appeals specifically acknowledged the existence of such criticism in reaching its decision. *Edwards*, 854 N.E.2d at 48 (“We . . . acknowledge the authority cited by the State — including more recent separate opinions of a number of Justices on the United States Supreme Court — that criticizes the holdings of *Faretta* and *Godinez*.”).

¹ 543 U.S. 220 (2005).

² The Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.), established the Sentencing Commission, which promulgated guidelines in part to achieve uniformity in federal sentencing. *See, e.g.*, U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2 (2007), available at www.ussc.gov/general/USSC_Overview_Deco7.pdf.

³ *Booker*, 543 U.S. at 246.

⁴ *Rita v. United States*, 127 S. Ct. 2456, 2459 (2007).

⁵ 128 S. Ct. 558 (2007).

⁶ Decided the same day as *Kimbrough*, *Gall v. United States*, 128 S. Ct. 586 (2007), held that an appellate court could not require that sentences outside the applicable Guidelines range be justified by “‘extraordinary’ circumstances.” *Id.* at 595. All sentences, regardless of their relationship to the Guidelines, are to be subject to “a deferential abuse-of-discretion standard.” *Id.* at 591.

⁷ At the time Derrick Kimbrough was sentenced, a defendant who dealt one gram of crack cocaine was subject to the same period of incarceration as one who dealt 100 grams of powder cocaine. *Cf. Kimbrough*, 128 S. Ct. at 575 (discussing the sentencing judge’s concern about the disparity resulting from the 100-to-1 ratio). Although the disparity between crack and powder cocaine sentencing has been decreased by a recent amendment to the Sentencing Guidelines, the 100-to-1 ratio still exists in statutory minimums. *Id.* at 569 & n.10.

will likely lead to deferential review for certain types of sentencing variations based on policy disagreements. Other portions of *Kimbrough*, however, illustrated and arguably increased the post-*Booker* tension between mandatory and indeterminate sentencing.

Congress established statutory minimums for crack and powder cocaine sentences but left to the Sentencing Commission the task of designing sentences for cocaine offense levels beyond the minimum standards.⁸ The statutory minimums employed a 100-to-1 ratio.⁹ The Sentencing Commission applied this ratio throughout cocaine offense levels without compiling empirical evidence to support the crack/powder ratio.¹⁰ Against this backdrop, Derrick Kimbrough pled guilty to three drug offenses: “distributing fifty or more grams of crack cocaine, distributing cocaine, [and] conspiring to distribute fifty grams or more of crack cocaine.”¹¹ The Sentencing Guidelines recommended 168 to 210 months of imprisonment for the drug counts.¹² Contrasting the Guidelines range for crack cocaine with the much lower one that would have applied for like offenses involving powder cocaine, the judge sentenced Kimbrough to 120 months on each of the three drug offenses, to be served concurrently.¹³

The Fourth Circuit vacated and remanded.¹⁴ In a brief per curiam opinion, the court stated that “a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.”¹⁵

The Supreme Court reversed. Justice Ginsburg,¹⁶ writing for the Court, held that the cocaine Guidelines, like the rest of the Guidelines, are advisory rather than mandatory.¹⁷ Although federal sentencing judges must include the Guidelines range in their consideration of relevant factors, judges may then consider the statutory criteria of 18 U.S.C. § 3553(a), including whether a sentence within the range is

⁸ See *id.* at 567 (describing statutory minimums for crack and powder cocaine).

⁹ See, e.g., 21 U.S.C. § 841(b)(1)(A) (2006) (specifying that the penalty for possessing 5 kilograms of cocaine is equal to the penalty for possessing 50 grams of cocaine base, or crack cocaine).

¹⁰ *Kimbrough*, 128 S. Ct. at 567.

¹¹ *United States v. Kimbrough*, 174 F. App’x 798, 798 (4th Cir. 2006) (per curiam). Kimbrough also pled guilty to “possessing a firearm in connection with a drug trafficking crime.” *Id.*

¹² *Kimbrough*, 128 S. Ct. at 565.

¹³ *Id.* at 565 & n.3. The sentence for the firearms offense was 60 months, to be served consecutively, so Kimbrough would ultimately serve 180 months under this sentence. *Id.*

¹⁴ *Kimbrough*, 174 F. App’x at 799.

¹⁵ *Id.* (citing *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006)).

¹⁶ Justice Ginsburg was joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, and Breyer.

¹⁷ *Kimbrough*, 128 S. Ct. at 564.

“greater than necessary” to achieve sentencing objectives.¹⁸ The oft-criticized crack/powder cocaine disparity was a permissible factor for a judge to consider under the “greater than necessary” statutory umbrella.¹⁹

Justice Ginsburg began by noting that crack and cocaine, while “chemically similar, . . . are handled very differently for sentencing purposes.”²⁰ Justice Ginsburg emphasized that the Sentencing Commission, throughout the years, had criticized the 100-to-1 ratio, finding that the disparity initially was based on unfounded assumptions about crack cocaine’s impact and that it causes low-level offenders to be punished more severely than high-level drug dealers.²¹ Furthermore, the ratio “fosters disrespect for and lack of confidence in the criminal justice system,” largely because the lengthier crack cocaine sentences are often imposed on black offenders.²² Justice Ginsburg also emphasized that the Sentencing Commission had departed from its usual empirical approach when it formulated drug sentences.²³ Rather than reflecting data gathered by the Commission, cocaine sentences were established solely based on the 100-to-1 ratio Congress had used in statutory minimum crack and powder cocaine sentences.²⁴ She noted that the Sentencing Commission itself had repeatedly recommended reducing the disparity between crack and powder cocaine sentences.²⁵

The Court rejected the government’s argument that the 100-to-1 ratio represented a congressionally endorsed policy that judges are obliged to follow. While the government argued that Congress’s decision to use a 100-to-1 ratio in statutory minimums implied that the ratio should extend to other sentencing levels, the Court refused to “[d]raw[] meaning from [congressional] silence.”²⁶ The Court also found that congressional rejection of a Commission-proposed 1-to-1 ratio did not imply approval of a 100-to-1 ratio.²⁷ Congress’s “tacit

¹⁸ *Id.* (quoting 18 U.S.C. § 3553(a) (2006)) (internal quotation marks omitted). These policy goals include “just punishment,” deterrence, protecting the public, and rehabilitating the defendant. *See* 18 U.S.C. § 3553(a)(2).

¹⁹ *Kimbrough*, 128 S. Ct. at 564.

²⁰ *Id.* at 566.

²¹ *Id.* at 568.

²² *Id.* (quoting U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 103 (2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf) (internal quotation marks omitted). Although the Court only briefly touched on the racial impact of drug sentencing, the issue is one of great concern to many people. *See generally*, e.g., Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381 (2002).

²³ *Kimrough*, 128 S. Ct. at 567.

²⁴ *Id.* at 567, 575.

²⁵ *Id.* at 569.

²⁶ *Id.* at 571.

²⁷ *Id.* at 572.

acceptance” of a 2007 amendment to the Guidelines that reduced the ratio suggested that Congress did not categorically reject lower ratios at above-minimum offense levels.²⁸ Finally, while uniformity is still “an important goal of sentencing,”²⁹ it is not overriding; “some departures from uniformity were a necessary cost of the [*Booker*] remedy.”³⁰

During her discussion, Justice Ginsburg reiterated that the Sentencing Guidelines still provide a “starting point” for sentencing.³¹ However, while “closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range ‘fails properly to reflect § 3553(a) considerations[,]’”³² closer review was not required in this case because here the Sentencing Commission had deviated from its “characteristic institutional role.”³³ The district court judge had proceeded properly by starting with the Sentencing Guidelines, then considering § 3553(a) factors and Commission reports critical of the crack/powder sentencing disparity.³⁴ Therefore, the district court’s sentence was reasonable.³⁵

Justice Scalia concurred in the judgment, noting that the majority was in accord with precedent, including the *Booker* requirement that a judge “must consult [the] Guidelines and take them into account when sentencing.”³⁶ While the Guidelines should be treated with respect, a judge cannot be required to follow them when a “reasonable application of the § 3553(a) factors” suggests a different sentencing outcome.³⁷ There should be no “thumb on the scales” favoring the Guidelines.³⁸

Justice Thomas dissented because the remedial steps taken in *Booker* and continued in *Kimbrough* “are necessarily grounded in policy considerations rather than law.”³⁹ Instead of adopting a “sweeping remedy,”⁴⁰ the *Booker* Court merely should have required additional facts that would increase sentences to be submitted to a jury.⁴¹ Because there was no law to guide the Court in addressing the issues of

²⁸ *Id.* at 573.

²⁹ *Id.*

³⁰ *Id.* at 574.

³¹ *Id.* (quoting *Gall v. United States*, 128 S. Ct. 586, 596 (2007)) (internal quotation mark omitted).

³² *Id.* at 575 (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)).

³³ *Id.* Notably, the Commission initially had relied solely on statutory minimums and given no weight to “empirical data and national experience.” *Id.* (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)) (internal quotation marks omitted).

³⁴ *Id.*

³⁵ *Id.* at 576.

³⁶ *Id.* (Scalia, J., concurring) (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005) (Breyer, J., delivering the opinion of the Court in part)) (internal quotation mark omitted).

³⁷ *Id.* at 577.

³⁸ *Id.*

³⁹ *Id.* (Thomas, J., dissenting).

⁴⁰ *Id.* at 578.

⁴¹ *Id.* at 577.

the current sentencing regime, it was “forced . . . to assume the legislative role of devising a new sentencing scheme.”⁴² Justice Thomas noted that the reasonableness standard itself was mandated by the *Booker* majority rather than by Congress.⁴³ Since “there is no principled way to apply the *Booker* remedy,” he argued for a return to a mandatory Guidelines regime, as originally intended by Congress.⁴⁴

Justice Alito also dissented. He would have held that “a district judge is still required to give significant weight to the policy decisions embodied in the Guidelines.”⁴⁵ As the *Booker* remedy “does not permit a court of appeals to treat the Guidelines’ policy decisions as binding,” however, Justice Alito argued that no distinction should be made between cocaine Guidelines and other Guidelines.⁴⁶

In some respects, *Kimbrough* was simply a logical result of the *Booker* holding that rendered the Sentencing Guidelines advisory and, as such, will have minimal impact. However, some of the language in *Kimbrough* continued to illustrate the tension between mandatory and advisory sentencing created by the *Booker* remedy.

In *Booker*, the Court confronted the fact that the Sentencing Reform Act of 1984⁴⁷ (SRA) required a judge who found certain facts post-conviction to increase sentences in accordance with the Guidelines.⁴⁸ The Court held that this violated the Sixth Amendment, as it punished a defendant based on facts not proven to a jury beyond a reasonable doubt.⁴⁹ The Court addressed this shortcoming by excising a portion of the SRA, rendering the Guidelines “effectively advisory.”⁵⁰ At the same time, it instituted a reasonableness review for sentences.⁵¹

Kimbrough and *Gall v. United States*,⁵² decided on the same day, provided the Court’s first directions on how sentences outside the Guidelines should be treated in a post-*Booker* regime. As the Court described it, the government in *Kimbrough* argued for an exception to the advisory nature of the Guidelines based on its understanding of the laws that had created statutory minimums,⁵³ an argument lower courts

⁴² *Id.* at 578.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 578–79 (Alito, J., dissenting).

⁴⁶ *Id.* at 579.

⁴⁷ Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

⁴⁸ See *United States v. Booker*, 543 U.S. 220, 226 (2005) (Stevens, J., delivering the opinion of the Court in part).

⁴⁹ *Id.* at 226–27.

⁵⁰ *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

⁵¹ *Id.* at 261–62.

⁵² 128 S. Ct. 586 (2007).

⁵³ *Kimbrough*, 128 S. Ct. at 570.

had found persuasive.⁵⁴ Instead of the government's stance, the Court chose the interpretation that read the statutory minimums as minimums and nothing more.⁵⁵ The Guidelines related to crack cocaine are no more mandatory than the other Guidelines, end of story.

Under this reading, *Kimbrough*'s impact will be limited. *Booker* will continue to shape federal sentencing; *Kimbrough* merely reiterated the idea that the Guidelines no longer strictly bind sentencing decisions. *Kimbrough* will provide clear support for sentence reductions based on policy disagreements with the crack cocaine Guidelines, as long as those reductions honor the mandatory minimums established by Congress. From this view, *Kimbrough* will be most useful for addressing other offenses for which Congress established mandatory minimums but gave limited or no guidance on how the Sentencing Commission should establish sentences beyond those minimums.⁵⁶

Had the Court limited its discussion to the express *Booker* framework, *Kimbrough* would have been a straightforward decision. Because the Court not only discussed the advisory nature of the Guidelines, but also discussed justifications for and possible limitations on policy-based variations, *Kimbrough* illustrated the tensions operating when sentencing is neither fully indeterminate nor fully mandatory. Because the Court did not explain how its intermediate approach should function, *Kimbrough* left judges with little guidance on how to incorporate or review policy disagreements and related factors.

Some parts of *Kimbrough* leaned toward a more indeterminate intermediate zone, indicating that judges may reduce sentences based on factors that the Court had not specifically addressed post-*Booker*. It seems that the history of specific Guidelines,⁵⁷ Commission statements,⁵⁸ discussion from Congress (regardless of whether Congress

⁵⁴ See, e.g., *United States v. Williams*, 456 F.3d 1353, 1366 (11th Cir. 2006) ("[Taking] into account [a] personal disagreement with Congress's judgment as to how much harsher the penalties for crack offenders should be . . . [is] an impermissible factor in fashioning [a] sentence."), *abrogated by Kimbrough*, 128 S. Ct. 558; *United States v. Pho*, 433 F.3d 53, 63 (1st Cir. 2006) ("[C]ategorical rejection of the 100:1 ratio impermissibly usurps Congress's judgment about the proper sentencing policy for cocaine offenses."), *abrogated by Kimbrough*, 128 S. Ct. 558.

⁵⁵ *Kimbrough*, 128 S. Ct. at 571–72 (rejecting the argument that the existence of a 100-to-1 ratio in statutory minimums meant this ratio was mandatory for other offense levels).

⁵⁶ The only Sentencing Commission report on the topic of mandatory minimums indicated that, as of 1991, there were 100 federal minimum penalty provisions. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (1991), *available at* http://www.ussc.gov/r_congress/manmin.pdf. Of these, four drug- and violent crime-related statutes were responsible for 94% of the sentences shaped by mandatory minimums. *Id.*

⁵⁷ Cf. *Kimbrough*, 128 S. Ct. at 566–69 (discussing the history of the cocaine Guidelines).

⁵⁸ Cf. *id.* at 568–69 (discussing various Commission reports). While Commission policy statements "in effect on the date the defendant is sentenced" have always been an express consideration, 18 U.S.C. § 3553(a)(5) (2006), *Kimbrough* suggested that even those policy statements that contradict sentencing policy as expressed in actual Guidelines may be considered.

acted on it),⁵⁹ or even post-sentencing actions that the Court deems relevant⁶⁰ are fair game in ensuring that sentence reductions based on policy disagreements receive deferential review. By including a variety of previously unconsidered categories in its discussion, the *Kimbrough* Court in some regards seemed to indicate that *Booker* means that just about everything is fair game in a sentencing judge's estimation.

Of course, there are inherent risks in unfettered policy-based sentencing variations. Foremost is that the pendulum will sway too far toward judicial discretion — and too much judicial discretion was one of the primary catalysts of sentencing reform.⁶¹ Judges are unable to create nationwide uniformity by conducting studies and hearings, as the Sentencing Commission ideally could.⁶² To the extent that uniformity is still a desirable goal of sentencing, allowing policy-based variations could defeat that goal.⁶³ Taking the *Booker* remedial opinion to its logical extreme, *Kimbrough* could suggest that judges may pick and choose among § 3553(a) factors, disregarding select portions, and among policies, finding language to support their approaches even if that language is flatly contradicted by the Guidelines themselves.

However, the Court, in a roundabout fashion, also suggested that *Kimbrough* should not lead to unfettered discretion. In doing so, a portion of the Court's discussion indicated that, at least when it comes to policy disagreements, *Booker* may not mean that all Sentencing Guidelines are equally advisory. Most importantly, the Court indicated that it might endorse a close review with regard to at least some sentence variances grounded solely in policy disagreements.⁶⁴ Also, the majority focused on factors that could be used to limit *Kimbrough*'s applicability, and the resulting deferential review, to other factual situations. For example, the Court noted that the Commission did not play its "characteristic institutional role"⁶⁵ with regard

⁵⁹ Cf. *Kimbrough*, 128 S. Ct. at 569, 572 (discussing congressional reactions to Commission recommendations).

⁶⁰ Although *Kimbrough* was sentenced in April 2005, *id.* at 565 n.2, the Court relied in part on information not publicized by the Sentencing Commission until 2007, *id.* at 568 (citing U.S. SENTENCING COMM'N, *supra* note 22, at 8); *id.* at 569 (describing 2007 changes to Sentencing Guidelines); *id.* at 574 n.15.

⁶¹ See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 26–27 (2000) (noting that the troubling disparities resulting from unfettered judicial discretion sparked the movement toward sentencing reform).

⁶² Cf. *Kimbrough*, 128 S. Ct. at 567 (noting the typical Commission approach of using empirical evidence and adjusting sentences to meet sentencing goals); *id.* at 574 (acknowledging inevitable variation among district court sentences).

⁶³ See, e.g., Patrick M. Hamilton, *Are the U.S. Sentencing Guidelines Dead?*, BOSTON B.J., May–June 2008, at 6, 6 (noting concern that *Gall* and *Kimbrough* granted so much discretion that they "turned the Guidelines into a shell hollowed out from within").

⁶⁴ See *Kimbrough*, 128 S. Ct. at 575.

⁶⁵ *Id.*

to drug sentencing and that crack cocaine sentencing has had a particularly troublesome history.⁶⁶

While discussing varying levels of review, the Court indicated that the Guidelines may be less advisory under certain circumstances. In its brief discussion contrasting the treatment of unusual and mine-run cases, the Court stated that “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case ‘outside the “heartland”’”⁶⁷ Less respect, and closer review, may be appropriate when the variance stems solely from the Guidelines range’s failure “to reflect § 3553(a) considerations.”⁶⁸ This distinction, in one regard, emphasizes judicial discretion: whether a case is “outside the heartland” is an issue for the judge to decide.⁶⁹ In another regard, however, a hint of mandatoriness still seems to cling to the Guidelines. Anything less than deferential review seems antithetical to the concept of Guidelines as merely advisory, yet deferential review does not apply in all circumstances. In contrast to the clear statements of *Booker* and *Kimbrough* that no Guidelines are mandatory, the varying review could indicate that some Guidelines, in some circumstances, have more binding effect than others.

With the contrast between its holding and its dicta, *Kimbrough* adds one more layer to the tension between the Guidelines as advisory and the Guidelines as weighted. The now-advisory Guidelines were given some weight by the *Booker* requirement that judges consider the applicable Guidelines in sentencing.⁷⁰ They were given additional weight in *Rita v. United States*,⁷¹ which held that sentences within the Guidelines should be accorded a presumption of reasonableness.⁷² Yet, in contrast, two recent cases appear to loosen the hold of the Guidelines. *Kimbrough*, of course, is one such case. *Gall v. United States* also appeared to tilt the balance toward more judicial discretion, holding that appellate courts cannot require extraordinary circumstances to justify lengthy sentence reductions.⁷³ By stating that sentences outside the Guidelines could not be accorded a “presumption of unreasonableness,”⁷⁴ *Gall* expressly supported judicial discretion beyond Guidelines

⁶⁶ *Id.* at 566–69.

⁶⁷ *Id.* at 574–75 (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)).

⁶⁸ *Id.* at 575 (quoting *Rita*, 127 S. Ct. at 2465) (internal quotation mark omitted).

⁶⁹ While the *Kimbrough* majority provided no guidance on how reviewing judges are to consider a sentencing judge’s determination that a case is “outside the heartland,” the Court indicated in *Gall* that such decisions were to be accorded great deference. See *Gall v. United States*, 128 S. Ct. 586, 600 (2007) (finding no error in the district judge’s using the defendant’s unusual “voluntary withdrawal as a reasonable basis for giving him a less severe sentence” than co-conspirators).

⁷⁰ *United States v. Booker*, 543 U.S. 220, 259 (2005).

⁷¹ 127 S. Ct. 2456 (2007).

⁷² *Id.* at 2462.

⁷³ *Gall*, 128 S. Ct. at 595.

⁷⁴ *Id.*

restraints. However, *Gall* also indicated that judges' explanations must be more extensive as their sentences vary farther from the Guidelines,⁷⁵ creating a tension that is echoed in *Kimbrough*.

The Court's attempt to combine the structure of mandatory sentencing regimes with the flexibility of indeterminate ones left sentencing and reviewing judges with many hints but little certainty on how to approach policy disagreements. If *Booker* truly means what *Booker* says, and if *Kimbrough* merely reiterates that the Guidelines are advisory for all sentences not expressly prescribed by statute, then all the factors mentioned in *Kimbrough* (as well as any others a sentencing judge deems relevant) should lead to the same result: deferential reasonableness review. However, that may not automatically be the case.

Additionally, it is not clear whether all, some, or none of the elements discussed in *Kimbrough* must be present to trigger deferential review. Should the Court ultimately opt for a more "mandatory" regime, it will be able to constrain *Kimbrough* to its factual twins. Should the Court prefer a more indeterminate sentencing structure, it could find that cases evidencing only one of the *Kimbrough* elements, or an analogous factor, should receive the same deferential review.

While *Kimbrough* permits judges to reduce sentences for policy reasons, sentencing judges are left to grapple with the question of to what extent policy disagreements, absent a finding of unusual circumstances, may shape sentencing. Part of *Kimbrough*'s impact is fairly predictable: *Kimbrough* will almost certainly result in deferential review for sentences based on disagreements with the disparity between crack and powder cocaine sentencing. Also, *Kimbrough* will likely result in deferential review for judges who decrease sentences based on disagreements with the policies underlying lengthy drug sentences. The Supreme Court recognized that all drug-trafficking offenses, not just offenses involving cocaine, were formulated based on statutory boundaries rather than on empirical evidence.⁷⁶ And it found persuasive the fact that the Commission had used this non-empirical approach in establishing crack cocaine sentences.⁷⁷ Based on the Commission's general non-empirical approach to drug sentencing, judges who express a policy disagreement with harsh drug sentences in non-crack cocaine cases may be accorded the more deferential review.

Beyond that, it is unclear what level of review policy considerations will receive in purportedly advisory sentencing.⁷⁸ *Gall* hinted that at

⁷⁵ *Id.* at 597.

⁷⁶ *Kimbrough*, 128 S. Ct. at 567.

⁷⁷ *Id.* at 575.

⁷⁸ This is true for both sentence reductions and sentence increases. Upward variances are possible but rare, accounting for 1.6% of post-*Booker* federal sentences. U.S. SENTENCING

least some policy disagreements beyond drug sentence length may be accorded substantial deference. In *Gall*, a sentencing judge gave probation instead of a lengthy sentence to a man who had dealt drugs as a college student, had voluntarily withdrawn from the conspiracy, and then had started his own business.⁷⁹ While the sentencing court had focused on Gall's unusual circumstances,⁸⁰ *Gall* was still in part based on a disagreement with Sentencing Commission policy. Although the Commission had explicitly considered and rejected age as an appropriate factor in most sentences,⁸¹ the sentencing judge had considered age in reducing the defendant's sentence, as the *Gall* majority noted with approval.⁸² How much *Gall* can contribute to the policy disagreement debate is unclear, however, as *Gall* in some regards exemplified the "outside the heartland" case meriting deferential review.

As Justice Scalia noted in his caustic *Booker* dissent, "[t]he worst feature of the [*Booker*] scheme is that no one knows — and perhaps no one is meant to know — how advisory Guidelines and 'unreasonableness' review will function in practice."⁸³ Because the Court moved beyond its *Booker* rationale in dicta on varying review and the lengthy discussion of the crack/powder history, the *Kimbrough* opinion could justifiably be accused of evidencing inscrutability with regard to sentencing review for policy disagreements. Justice Thomas's dissent was perhaps too quick to dismiss the *Booker* remedy a mere two years after it was established. Yet, it is true that the Court has yet to articulate a means by which judges may reliably apply its remedial option, especially to sentences that fall outside the Guidelines.

There could be many explanations for the Court's approach to the structure/indeterminacy tension in *Kimbrough*. Perhaps the Court was reluctant to tread too definitely on the terrain of Congress, the body ultimately responsible for criminal sentencing. The Court may have intended its dicta on varying review as a caution, lest judges should read *Kimbrough* too sweepingly. The discordant dicta simply may have been designed to persuade other Justices to join the majority, especially in discussing the divisive *Booker* sentencing regime.⁸⁴

As this variety of plausible explanations for the Court's approach demonstrates, *Kimbrough* has done nothing to clarify — and arguably has increased — the tension between indeterminacy and structure in

COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 58 (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

⁷⁹ *Gall*, 128 S. Ct. at 592–93.

⁸⁰ *E.g.*, *id.* at 600 (discussing the defendant's voluntary withdrawal from the conspiracy).

⁸¹ *Id.* at 608 (Alito, J., dissenting).

⁸² *See id.* at 601 (majority opinion). The judge also considered family circumstances, another factor the Sentencing Commission had explicitly rejected. *Id.* at 608 (Alito, J., dissenting).

⁸³ *United States v. Booker*, 543 U.S. 220, 311 (2005) (Scalia, J., dissenting in part).

⁸⁴ *Booker* included two separate majority opinions and four dissents.

the new sentencing regime. While there may be numerous explanations for the Court's approach, the Court could also be accused of ducking its responsibilities with regard to sentencing. To suggest that, in an ethereal sense, some policy judgments may lead to greater scrutiny is to inject still more uncertainty into the sentencing and reviewing processes than had existed in previous post-*Booker* sentencing cases. If the issue of varying review was worth mentioning, surely it was also worth clarifying. While judges looking at *Kimbrough* can find various justifications for decreasing sentences based on policy disagreements, the Court may have ensured that it will have to address the issue of sentencing based on policy disagreements in the future.

6. *Sixth Amendment — Witness Confrontation — Forfeiture by Wrongdoing Doctrine.* — In 2004, the Supreme Court transformed the face of constitutional evidence law, holding that the Sixth Amendment's Confrontation Clause required that testimonial evidence from an unavailable witness could only be presented in court if the defendant had previously had an opportunity to confront that witness.¹ Yet *Crawford v. Washington*² provided precious little elaboration on what statements should be considered "testimonial"³ or whether there were any exceptions to the requirement of confrontation.⁴ As a result, since *Crawford*, courts and scholars have been struggling to define the bounds of this newly rediscovered right, largely unaided by the Supreme Court.⁵ One of many questions left unanswered after *Crawford* was whether, as in the context of hearsay,⁶ a defendant forfeited his right to confrontation by intentionally making the witness unavailable.⁷ Last Term, in *Giles v. California*,⁸ the Court answered this

¹ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

² *Id.*

³ The Court expressly declined to "spell out a comprehensive definition of 'testimonial.'" *Id.*

⁴ The only exception *Crawford* appeared to recognize was for "dying declarations," which it intimated could be accepted on "historical grounds." *See id.* at 56 n.6. *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1069 (2006) (noting that the "ultimate scope [of the Confrontation Clause after *Crawford*] remains unclear" and that "testimonial" is open to varying interpretations).

⁵ Since *Crawford*, the Court has decided only one other Confrontation Clause case, *Davis v. Washington*, 126 S. Ct. 2266 (2006), where it provided some further clarification on what constitutes a testimonial statement. *See id.* at 2274–79. The Court has also granted certiorari in *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008), in order to determine whether a forensic analyst's laboratory report is testimonial. *See* Commonwealth v. Melendez-Diaz, No. 05-P-1213, 870 N.E.2d 676, 2007 WL 2189152, at *1 (Mass. App. Ct. July 31, 2007) (unpublished table decision), *review denied*, 874 N.E.2d 407 (Mass. 2007).

⁶ *See* FED. R. EVID. 804(b)(6).

⁷ *See* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 450 (2006) ("The [*Crawford*] Court did not provide any discussion of forfeiture or provide guidance on the parameters of its 'acceptance' of the rule.").

⁸ 128 S. Ct. 2678 (2008).