January 2010

Judging Discretion: Contexts for Understanding the Role of Judgment

Sarah M. R. Cravens
University of Akron School of Law, cravens@uakron.edu

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Abstract

This article approaches from a new angle the problem of understanding the meaning and scope of discretion in the judicial role and how an appellate court can or should judge the use or abuse of a lower court's freedom of judgment. This article considers the meaning and practical application of the appellate standard of review of "abuse of discretion" across three different areas of law: federal sentencing, injunctive relief, and civil case management. The purpose behind this approach is to attempt to find commonalities that can be drawn across subject matter lines on a topic that is currently rife with imprecision in its implementation. Looking at the broad brush picture of what abuse of discretion means and how it is judged as a practical matter in different contexts, this article brings into relief certain essential characteristics of cases in which abuse of discretion can be meaningfully assessed by an appellate court. Where it also brings into relief certain types of cases in which judicial freedom to choose cannot be meaningfully or consistently judged for abuse by an appellate court, the article suggests alternative terminology and alternative mechanisms for oversight.

I. Introduction

The more one thinks about the role of the judge, especially the judge in a common law system, the more one must wrestle with issues of character, personality, politics and personal convictions in that role. That all of these matter in some way to judicial decisionmaking is inescapable. One cannot ignore the reality that judges are human.[1]

[*] Associate Professor of Law, University of Akron School of Law. A.B. Princeton University; M.Phil. Cambridge University; J.D. Washington & Lee University. Parts of this article were originally delivered as the inaugural Hon. Stephanie K. Seymour Lecture at the University of Tulsa College of Law under the titled "Judging Discretion." My thanks to those present at the lecture, whose questions and comments spurred the further development of the ideas presented there. My thanks also to all those who participated in workshops at the University of Tulsa College of Law and the University of Akron School of Law, and Capital University School of Law.

[1] Jerome Frank famously posed the question whether judges are human in a series of law review articles in the 1930s. *See* Jerome Frank, *Are Judges Human? Part 1: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17 (1931-32); Jerome Frank, *Are Judges Human? Part 2: As Through a Class Darkly*, 80 U. PA. L. REV. 233 (1931-1932). I take it as settled that judges *are* of course human, that machines could not achieve the same results, and thus the question is the

The difficulty is in determining *how* individuality, character, or personality matter, how judicial character might legitimately and usefully play a role in the exercise of judgment from the bench. One of the core aspects of the judicial role, one necessary to the fulfillment of the broad institutional goals of the judiciary,[2] and one that necessarily calls for individuality of judgment is the exercise of discretion. Discretion is a powerful tool. It can be a slippery and nebulous concept, but it is of great importance to actual outcomes. Discretion, the flexibility to reach an equitable result, allows justice to be accomplished.[3]

All of this calls for a solid understanding of the meaning of discretion, and how, if at all, we can meaningfully judge its use or abuse. We need to understand how discretion fits into the judicial role, what it permits and what it doesn't, and how those bounds can be identified. This article tackles these issues as the necessary background to future work on a more specific understanding of the role of certain individual personality traits or personal values or commitments that might enter into decisionmaking where judgment, or discretion, is exercised.

If only there were a satisfactory straightforward definition of the judicial role. It is easy enough to suggest that, for example, it is the job of the judge to decide cases according to the law. Or in the words of the now-Chief Justice of the Supreme Court, in

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extent to which a judge's humanity appropriately comes into the fulfillment of the obligations of the judicial role.

[2] Frederic William Maitland, EQUITY AND THE FORMS OF ACTION 17 (Chaytor ed. 1909) (Equity was designed "not to destroy the law but to fulfill it.") "Equity then, in its true and genuine meaning, is the soul and spirit of the law: positive law is construed, and rational law is made, by it." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Ch. 27.

[3] *See generally* Aristotle, NICOMACHEAN ETHICS, Bk 5 (Joe Sachs trans., Focus Publishing 2002). *See also, e.g.*, 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Ch. 27 ("Equity then, in its true and genuine meaning, is the soul and spirit of the law: positive law is construed, and rational law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretations of the rule."); William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 LAW & CONTEMP. PROBS. 29 (1993) (demonstrating the use of equity power to establish new substantive rights).

his confirmation hearings, judges are like umpires, calling balls and strikes.[4] Definitions like these keep the public, along with the lawyers and judges, happy and confident in the judiciary, allaying fears that judges might be usurping more power to make law than is properly accorded them. However, to anyone who considers them more closely, they are also troubling descriptions, because they mask the realities of what we actually call upon judges to do, and thus restrain us from honest exploration of extraordinarily important jurisprudential questions.[5]

It has long been taken for granted that in order to achieve justice in particular cases, the law must provide consistency and equity must allow judges the flexibility to do justice in the cases to which the general rule does not seem to apply for one reason or another.[6] We may talk about this flexibility in decisionmaking in terms of 'justice,' 'equity,' 'judgment,' and so on, but in terms of a legal standard for the review of these flexible aspects of the judicial power, we tend to focus on the word "discretion." More specifically, appellate courts look to see whether a lower court judgment needs to be

[4] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2005) (statement of John Roberts, Nominee for Chief Justice of U.S. Supreme Court), available at http:// www.gpoaccess.gov/congress/ senate/judiciary/sh109-158/browse.html.

[5] In the first meeting of a seminar on the judicial role, I asked my students to define the role of the judge – to explain what a judge was supposed to do. (This is what Benjamin Cardozo famously undertook to do in the early twentieth century. Benjamin N. Cardozo, THE NATURE OF THE JUDICAL PROCESS (1921). Nearly a century later, the question remains a tricky one. In his conclusion, Cardozo called on future generations to continue the work of answering it. *Id.* at 179-180.) My students offered some confident answers, we discussed them, and at the end of that first class session, I took away their written responses. In the final meeting of the class, after some three months of reading about and discussing various aspects of the judicial role in detail, I asked them to respond to the same question and only then handed back their original responses so that they could compare the two. To my great satisfaction, they were far less able to write a definitive answer at the end of the class than they had been at the beginning. The more one reads and thinks hard about the judicial role, the more problematic it inevitably appears.

[6] *See, e.g.*, Benjamin N. Cardozo, THE NATURE OF THE JUDICAL PROCESS (1921); Brian Bix, JURISPRUDENCE: THEORY AND CONTEXT 103 (4th ed. 2006); Karl N. Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS 217-218 (1960).

reversed due to an "abuse" of discretion.[7] But there is really very little consistent understanding of exactly what constitutes an abuse of discretion or whether there is or should be consistency in the meaning of the term across contexts and substantive areas of law.[8] As one judge has put it, "Unfortunately, this phrase ["abuse of discretion"] covers a family of review standards rather than a single standard, and a family whose members differ greatly in the actual stringency of review."[9]

Over time the Supreme Court has made some general pronouncements about the idea of flexibility in legal judgment, including, for example:

> The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[10]

[7] *See, e.g.*, 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Ch. 27 ("Equity then, in its true and genuine meaning, is the soul and spirit of the law: positive law is construed, and rational law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretations of the rule."); Frederic William Maitland, EQUITY AND THE FORMS OF ACTION 17 (Chaytor ed. 1909) (Equity was designed "not to destroy the law but to fulfill it.").

[8] In a speech to federal appellate judges, Professor Rosenberg once elaborated: "The term 'abuse of discretion' . . . is the noise made by an appellate court while delivering a figurative blow to the trial court's solar plexus. . . . The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff." Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978). For a variety of approaches to the abstract question of what discretion is, *see, e.g.*, Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L. J. 231 (1990) (approaching question of whether there are right and wrong answers from perspectives of judging by skill or expediency or creativity); Ronald Dworkin, LAW'S EMPIRE (1986) (effectively arguing anything beyond the weakest understanding of discretion out of the picture); Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L. J. 747 (1982) (advocating a look to whether the discretion was meant to be committed to the trial judge or to judges throughout the system as a whole); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975) (endorsing discretion, finding bounds discernible and effective); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971) (categorizing discretion into primary and secondary types).

[9] American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 594 (7th Cir. 1986).

[10] Hecht Co. v. Bowles, 64 S. Ct. 587 (1944).

Discretion, the Court has further explained, is hardly "unfettered by meaningful standards or shielded from thorough appellate review."[11] And, from a very early date indeed, we have Chief Justice Marshall's statement that "Discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[12] These are interesting statements, but hardly definitive as a practical matter.

It is only since the late 1960s that discretion has received significant scholarly attention,[13] but in that time, much ground has been trodden in various efforts to achieve a deeper and more nuanced practical understanding of discretion. This article will not of course attempt to retread all of that ground. For instance, it does not attempt to determine in any abstract way whether discretion is a good[14] or a bad thing.[15] Nor does it take a position on whether discretion should be expanded or contracted, either in particular areas or in abstract conception. It does not engage in further exploration of the "primary" and "secondary" types of discretion which some scholars have found to be a helpful distinction,[16] but which does not particularly advance the discussion in a way relevant to

[11] Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975).
[12] United States v. Burr, 25 F.Cas. No.14,692d at 30, 35 (CC Va.1807) (Marshall, C.J.).
[13] In 1969, Professor Davis published the first significant analysis of discretion in the administrative context. *See* Kenneth Culp Davis, DISCRETIONARY JUSTICE (1969). In 1971, Professor Rosenberg published the first significant analysis of discretion in the judicial context. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971).
[14] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 495 (2003) (asserting the importance of equity's flexibility in procedural rules: "The moderating force of equity ensures just results in each application of the strict law and also fulfills an essential role in the dialectic evolution of the law.")
[15] *See, e.g.*, Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B. U. L. REV. 1 (2004) (bemoaning movement away from law in many areas, arguing that appellate abuse of discretion standard keeps courts from engaging and thus from developing and clarifying the law); Hon. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas The Fairchild Lecture*, 1994 WIS. L. REV. 9 (1994) (arguing that appellate courts rely too much on standards of review to duck actual decisionmaking, and that this is particularly apparent in the uptick in reliance on the "abuse of discretion" standard which doesn't have any consistently understood content).
[16] *See, e.g.*, Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (providing typology of primary and secondary discretion, substantive and procedural discretion, etc.); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971).

the point I wish to make here. Furthermore, this article does not undertake to determine whether discretion is, as an empirical matter, significantly abused, or how the use and abuse of discretion in the United States compares with its use and abuse in civil law systems,[17] or what the optimal substantive and procedural bounds on discretion may be in particular substantive areas of the law.[18]

Instead, this article will examine the possibility of determining or establishing a more consistently clear understanding of a workable meaning of *abuse of discretion*, to the end of better understanding the meaning, scope, and role of discretion in judicial decisionmaking both in the first instance and in the review of that decisionmaking on appeal. To this end, the article proposes that where such a consistent workable meaning does not fit the current practice with regard to review for abuse of discretion, there should be some adjustment of the terms invoked, particularly in standards of appellate review, to reflect the different understandings of the proper scope of decisionmaking authority. This may help to avoid muddling of concepts, both in the judicial mind and in the mind of the observer. Furthermore, in light of additional difficulties presented by review of the kinds of practical judgments required in areas in which the current model of appellate review for abuse of discretion is less workable, this article contemplates both adjustments that might be made in order either to make appellate review a better fit or else to move oversight to a more appropriate mechanism than appellate review, such as regulation of judicial conduct in the disciplinary process or judicial performance evaluation.

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[17] Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules – And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191 (2007) (cataloguing major changes in case management discretion in recent years and comparing discretion in American system with civil-law systems).

[18] *See* Jay Tidmarsh, *Pound's Century, And Ours*, 81 NOTRE DAME L. REV. 513, 559 (2006) (discussing the counterproductivity and ineffectiveness of case management discretion).

Again, discretion typically shows up in the law as a standard of review. A higher court may look to see whether a lower court has "abused its discretion." To know whether that discretion has been abused, it is essential to have an understanding of what discretion *is*. There is at least one useful way in which discretion has been negatively defined as a general matter. There seems to be a strong general consensus that discretion hasn't been abused when the appellate court would simply have decided the matter differently had it been charged with the decision in the first instance.[19] That is, a simple difference of opinion does not constitute an abuse of discretion. Viewing the same point from a positive angle, we tend to think of discretion as authority to choose within a range of possible legitimate outcomes. This is, of course, complicated by the fact that in some contexts it is not the outcomes alone, but the reasoning behind them that determines their legitimacy, whether they are inside or outside the range of legitimate outcomes. Essentially, the question of abuse of discretion becomes one of defining the bounds on that range of legitimate substantive outcomes. Within the bounds of discretion, any outcome may be considered "legal" insofar as it has the imprimatur of legitimate authority as a permissible outcome. In the review of discretion, one must thus contemplate a *range* of equally "right" outcomes, rather than a *single* right outcome.

Discretion comes up in countless ways and contexts. Some decisions are explicitly couched as discretionary by the use of the very word; others are implicitly discretionary due to the vagueness of a rule – in the use of the word 'may,' for example. In addition, there are some aspects of discretion that simply pervade the judicial role – everything from daily scheduling to the organization of a written opinion – things that

[19] *See, e.g.*, Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971).

that require flexibility and yet can be of great practical, even dispositive, importance to the parties affected – could be classed in a broad understanding of judgment or discretion. Because discretion comes up in varied substantive law contexts, the efforts to define it have often gone down very specific paths of defining discretion just for particular contexts, often with the goal of determining discretion's specific bounds in those contexts and assessing whether they are optimal or even effective.[20] By contrast, this article examines discretion *across* contexts, looking for meaningful generalities or commonalities that can be drawn together to better understand the significance of this crucial aspect of the role of individual and individualized judgment by those on the bench.

Discretion may be practically limited by a list of factors guiding judgment, or by the announcement of two ends of a range of possible outcomes, but even more simply, it can be limited by the very fact of the imposition of appellate review. One might argue that "discretion" is in fact no such thing if the decision is reviewable at all – that is, if it is reversible for error at all. This in itself is a limitation on the use of judgment. Of course, if that were our common understanding of the meaning of discretion, there would be no meaning in a standard of review of "abuse of discretion." By setting up the standard of review, we acknowledge that there *are* limits as a matter of law, and that we still consider

[20] For examples of discussions of discretion within a particular substantive or procedural area, see, e.g., Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63 (2007); Peter Sankoff, *The Search for a Better Understanding of Discretionary Power in Evidence Law*, 32 QUEEN'S L. J. 487 (2007); Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMPLE L. REV. 1075 (2006) (on discretion in conditional orders); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003); Edward L. Rubin, Discretion and its Discontents, 72 Chicago-Kent L. Rev. 1299 (1997) (focusing on discretion in administrative law); Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 S.M.U. L. REV. 493 (1997) (exploring the definition and bounds on discretion in the particular context of the application of Fed. R. Civ. Proc. 11); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Jon R. Waltz, Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence, 79 Nw. U. L. Rev. 1097 (1984); Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

the judge to have something called "discretion" within those limits. The limits or bounds on discretion may be procedural, substantive, or both (and this article will tackle the potential and limitations of each), and it is necessarily context-dependent as to which the law is best able to provide.

Many of the most important and interesting bits of judicial ethics are not those addressed in the codifications of behavioral rules. They are not about bribery[21] or family connections[22] or misuse of letterhead.[23] They are instead far more deeply buried in the process of reasoning and the substance of reason-giving.[24] The exercise or the abuse of discretion is just such a buried (but pervasive) issue. Conduct regulations may identify important virtues of the judicial role, but they are, in the main, not difficult to agree upon or understand.[25] Debates over regulation of judicial conduct do sometimes get into the issue of what a judge can *say* with reference to her judgment or her judicial ideology or anything else, but this article explores what a judge can *do* (legitimately) on the bench with reference to those unspoken philosophies when there is flexibility in the law. Therefore this article will not focus on the terms of the canons or rules formally imposed as a matter of judicial conduct regulation. There will always be some clear cases in which those behavioral constraints would fully dispose of the questions posed here, but for the most part, the regulation of judicial conduct does not answer the broader ethical questions this article poses about the role of the judge.

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[21] *See, e.g.*, American Bar Association Model Code of Judicial Conduct, Rule 3.13(a).
[22] *See, e.g.*, American Bar Association Model Code of Judicial Conduct, Rule Rule 2.11(a)(2).
[23] *See, e.g.*, American Bar Association Model Code of Judicial Conduct, Rule 1.3 cmt [1].
[24] This is a view I have explored elsewhere in, e.g., Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007); Sarah M. R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637 (2005); and Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2004).
[25] A notable exception here might be the rule prohibiting judicial conduct that results in the appearance of impropriety, which was hotly debated at the time of the most recent revisions to the ABA Model Code of Judicial Conduct.

Clearly the judicial system as it currently exists countenances the possibility that a judge will (legitimately) bring her own ideology into play. There would otherwise be little reason to put potential federal judges through an exhaustive confirmation process, insofar as that process is currently used to elicit and examine every facet of those personal ideological beliefs and interests. Similarly, in the state systems, there would be little reason for great debates about whether and how much to allow candidates for judicial election to say about their political party affiliations and other ideological commitments or whether to allow them to raise money for campaigning or when to recuse themselves in relation to campaign circumstances. At least in part because judges are entrusted with discretion, we are careful about selecting judges. We want them to decide the "easy" cases correctly, following the law where it is clear, and to decide the "hard" cases correctly, where serious and active contemplation is required to find the right answer; and because we want to know just how they are going to go about deciding "very hard" cases.[26] In the selection of judges, we look at their ideas about the direction in which they think the law should move in the gray areas. It is implicit in the idea of the common law that it will adapt and improve as time goes by – to that extent the idea of the chain novel is a very helpful one – so we want to have an idea of what potential "authors" have in mind, or to return to my own analogy, we need to know how potential trustees will improve the corpus under their care.[27]

There are opportunities as well as dangers here. Opportunities to improve the law, obviously, are a good thing, but they come with very real dangers. At a threshold

[26] For paradigm of easy, hard, and very hard cases, see Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1983-84).
[27] *See* Ronald Dworkin, LAW'S EMPIRE 228-32 (1986).

level, there is an easy objection: we can't all agree on what it means to "improve the law." Various aspects of ideology may shape a judge's whole approach to any case. For now it is sufficient to say that discretion, if it is discretion that can be abused, must have consistent known bounds, within which judges can exercise practical judgment. It will be for a later article to tackle further questions about exactly how those bounds can or should be constructed in order to address the problems of personal as opposed to public reasons, hidden 'real' reasons, and so on.

We want judges to judge well and "ethically." At one level, that must mean that we want them to comport themselves in accordance with specific rules of conduct with honesty and integrity and so on. Where there are clear rules to apply, where there are no gaps in the law, such a proposition is unlikely to provoke disagreement. In the vast majority of cases, after all, the rule of law is straightforward. The judge can find it relatively easily and apply it relatively easily. In such situations, the idea of the judge acting ethically means little more than following the most basic rules of conduct, avoiding conflicts of interest, following the clear guidance of the law, and putting aside any *ad hominem* concerns. In such cases, the judge will not have to worry about the introduction of normative values that might shape a legal outcome.

However, the idea of judging ethically may have another, more internally-focused aspect. Where there is any amount of flexibility in the situation before the judge, the situation will be somewhat different. This flexibility need not amount to what might ordinarily be referred to as a "gap" in the law, although that is certainly a part of it.[28] I refer here rather more to a situation in which the law appears to be (or is) settled and straightforward, but the application of the law leaves room for considerable manipulation.

[28] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921).

Where such flexibility for judgment coincides with areas of social policy that may be of great importance, a judge's discretion that might otherwise be of relatively little importance may suddenly take on entirely new dimensions.[29] In such contexts, it is essential to have a clear understanding of the bounds on legitimate discretionary decisionmaking.

In any given context, discretion may first of all have substantive bounds. These would be bounds on the actual potential outcomes. They would thus be stricter and clearer, but harder to establish so that they really work. Second, discretion may have procedural bounds. These are bounds on methodology to use, factors to consider, explicit normative priorities to acknowledge, and so on. These are more flexible bounds, in that they do not constrain the actual outcomes but rather the decisionmaking process, where there is more flexibility in interpretation and judgment and so on. This flexibility is (presumably) there to permit judges to reach just outcomes. Discretion, particularly insofar as it is bounded by procedures, necessarily allows for the propriety of a range of outcomes, so as long as the judge is clearly within any relevant substantive (outcome-oriented) bounds and gives a sufficient account of having followed the prescribed procedures, any outcome is legitimate. If that is all true, then discretion is a really robust aspect of the judicial role and one court really should not try to second-guess another. If that is all true, then the exercise and explanation of discretion also provides an opportunity for us to grow and improve and better understand the common law, because what we should do is insist and focus on the careful reason-giving for the discretionary judgment exercised. The judge ought to feel free to be candid, without fear of being

[29] *See, e.g.*, Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003); William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 LAW & CONTEMP. PROBS. 29 (1993) (demonstrating use of equity power to establish new substantive rights).

second-guessed, but in the knowledge that the reasons are given to demonstrate compliance with stated bounds and appellate courts will review at that analysis with deference. A virtuous judge has nothing to fear and everything to gain in terms of understanding the obligations and limitations of the substantive law and of the judicial role.

Much of the content of these reasoned explanations will be fairly mundane, but some of it might well expand our understanding of what goes into the practical judgment of particular kinds of questions. Those explanations that further our understanding might even be later incorporated as procedural bounds to indicate whether certain common considerations or approaches that are within or outside the bounds. One often hears the objection that judges may not always be candid about their 'real' reasons and that the malleability of the bounds of discretion is such that judges will almost always be capable of articulating some explanation that fits within procedural bounds even if it is not an accurate portrayal of the judge's actual decisionmaking process and reasoning. However, to the extent that that might be true, there are two responses.

First, those with the authority to establish the flexibility in the decisionmaking (the drafters of a rule of civil procedure, or the drafters of a statute laying out the appropriate considerations in sentencing decisions, for example) made the choice to leave such flexibility. It could always be tightened by those same authorities if their goals were not being accomplished. Second, and more important for the legitimacy of the outcomes, if the judge has in fact supported the outcome with legitimate reasons and proper methodology, hidden reasons are irrelevant to the substantive justice of the outcome, because it has in fact been shown to be a legitimate conclusion that any other judge

(again regardless of any hidden agenda) might have reached as well. Speaking more generally, it is arguably irrelevant in any context whether a judge "agrees" at some substantive level with the justification relied upon, whether the judge is convinced by that justification, as long as the justification is one that is supported in the law. In the end, if the reason given is on its own terms a legitimate one, and there is no factual error in the application of that reason to the reach the conclusion the judge has reached, then there is no objection to be made about the substantive justice of the outcome.

To the extent that this last point has shifted to terms of 'doing justice,' it is worth pointing out the relationships between terms here. Discretion is that flexibility of judgment that allows a judge legitimate choice from among multiple equally 'legal' outcomes to achieve the most equitable result – the one that best achieves overarching goals of fairness and justice. This is, again, necessarily individualized decisionmaking. We might question whether at that stage there is a meaningful distinction between 'doing equity' or 'doing justice' and importing some kind of individual ethic of the judge's into the judicial process. Structural bounds taken seriously on appeal make that individuality less troublesome, but there will still be questions to ask about whether there are certain types of personal values or commitments that are more or less legitimate in this process.

This article takes on the basic background question necessary to build a foundation on the basis of which it will be possible to explore later the more nuanced questions about the legitimacy of personal as opposed to public reasons that might be used where discretion exists. The basic background question is one simply about a common and consistent basic understanding of discretion and abuse of discretion, and the consistency of such meaning across contexts. Some of the foremost areas of the law in

which the standard of discretion (or abuse of discretion) and the idea of 'doing equity' or 'doing justice' come into play, and the areas in which the effects of that flexibility may be most pronounced, are those of injunctive relief (and even more specifically, that of preliminary injunctive relief), federal criminal sentencing, and in aspects of case management in civil litigation ranging from day-to-day scheduling and decisions about discovery to promotion of settlement or encouragement of alternative methods of dispute resolution.[30] A consistent understanding of the meaning of 'abuse of discretion' across different substantive areas of law, if it is possible to attain, will help both as a matter of consistent decisionmaking and as a matter of the judiciary better understanding, better exercising, and better explaining the role of judgment in its work.[31] Normative values will always come into judicial decisionmaking in some fashion where judgment is exercised, and a clearer basic understanding of the meaning of discretion will help us in the process of understanding the extent to which those normative values must be cabined or openly explained, and so on.

It is important to acknowledge that if we give judges discretion (as I think we must in certain circumstances to permit justice to be done), then within the bounds of discretion determined by the context of the decision to be made, the idea should be to allow judges freedom to exercise reasoned judgment. For discretion to have real meaning, lower court judges must not be subject, in their exercise of judgment, to

[30] Obviously discretion comes up in many other contexts as well. Another useful context for which there is no room in this article – administrative law – has been usefully illustrated as an analogy for thinking about discretion in Constitutional law in Daniel A. Farber & Suzanna Sherry, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 40-42 (2009).

[31] On some occasions judges do look across fields of substantive law to see how standards are defined in other contexts, but typically they do so without discussion. *See, e.g.*, United States v. Ruff, 535 F.3d 999, 1005 (9th Cir. 2008) (Gould, J., dissenting) (quoting SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001)) (borrowing proposed standard for abuse of discretion in sentencing case from sanctions cases relating to Rule 60 and Rule 37 motions).

reversal based on mere second-guessing or differences of opinion by the appellate court. Indeed, that would change what the law is. To accept the exercise of discretion requires the acceptance of individuality of judgment, which can seem troubling. However, that is simply a manifestation of a lack of total agreement in all circumstances as to the meaning of justice, which is a basic reality of the current state of our system, and not necessarily a bad reality. Part of what this article attempts to do is to show how context may matter in determining the substantive or procedural bounds of decisionmaking authority, but that over all, if we are asking judges to accomplish the same goal of achieving just outcomes in particular cases within the bounds of the law, it will be best if there is a clear understanding of the broader role of judgment.

The article concludes that it is important that there be consistency in the understanding of discretion across substantive areas of law (in which the specific bounds on discretion may well be different). That consistency is to be found in procedural bounds on decisionmaking, in which there is a balance between flexibility and structure and a premium is put on the explanation of the reasoning provided in support of the discretionary decision when it comes to appellate review. The article further concludes that any understanding of discretion that would permit a free-form second-guessing review on appeal simply guts the concept, and thus is unworkable. Finally, the article concludes that in areas in which there are no established procedural bounds to guide both the exercise of judgment by the district court and the review of that exercise of judgment by the appellate court, would be best dealt with first by changing the terminology (not using the term ‘discretion’ or talking about its ‘abuse’), and second by moving the review from an appellate review mechanism to a conduct regulation or performance review

mechanism. Discretion must be exercised, and to determine whether there has been an abuse in that process, there must be standards that apply to guide the court's judgment at each stage.

II. Context #1: Federal Sentencing

Federal sentencing law and policy has in recent years provided an increasingly rich body of judicial decisionmaking and explanation of that decisionmaking, at both the district and the appellate court levels, through which we can observe and test the idea of discretion in profitable ways. The focus here is thus not on the substance of sentencing law and policy -- on whether it is currently structured well or poorly for its purposes, and so on. Rather, it is a lens through which we may examine the problem of discretion and the particular manifestation of that problem in the guise of "reasonableness review."[32] Others have written far more extensively than I will here about the nuances of discretion in the federal sentencing context.[33] This will necessarily be a more general account to serve the purposes of comparison with the implementation and review of discretion in other areas of law.

Discretion in sentencing is constrained on the one hand by clear substantive or ultimate-outcome-related bounds (i.e. statutory minimums and maximums),[34] and on the

[32] United States v. Booker, 125 S. Ct. 738 (2005).
[33] *See, e.g.*, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008); Sherod Thaxton, *Determining "Reasonableness" without a Reason? Federal Appellate Review Post-Rita v. United States*, 75 U. CHI. L. REV. 1885 (2008); Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006). As many of these articles point out, there are many further layers or aspects of discretion in the sentencing context – discretion of police officers in investigations, prosecutors in charging and offering plea bargains, for example – none of which are a part of the discussion here. *Id*.
[34] *See, e.g.*, 18 U.S.C. § 3581(b) and 28 U.S.C. § 994.

other hand by procedural bounds (mandated methodology and reasoning requirements).[35] The former are more straightforward, and thus in some sense constrain more closely, but in order to achieve general justice, are necessarily set far enough apart that they do not do the bulk of the constraining or guiding work. The latter are more flexible to allow for more individualized justice, but provide more practical guidance and thus constrain discretion in more practical terms. While the Supreme Court continues to announce that there are two forms or components of reasonableness review (procedural and substantive), the Court has, as yet, provided no definition of substantive reasonableness.[36] (Here, "substantive" does not mean compliance with the substantive (i.e. outcome-oriented) bounds on discretion, but rather something like a "totality of the circumstances" approach to the appropriateness of the sentence that has been arrived at by procedurally compliant means.)[37] The bulk of appellate review for abuse of discretion in sentencing focuses on procedural reasonableness. While deferential, the review of whether the judge considered all the right factors and reasonably supported the sentence chosen with factually accurate assessments of those factors is a genuinely searching one.[38] The few recent cases that have attempted to grapple directly with substantive reasonableness issues independent of procedural issues have either given that concept content that properly belongs to procedural reasonableness or that have simply turned it into exactly what they say it is not: a substitution of the appellate court's own opinion of the appropriate sentence.[39] At the end of the day, an examination of current trends in sentencing law demonstrates that procedural bounds work. They achieve the best balance

[35] *See*, *e.g.*, 18 U.S.C. §3553(a) and Rita v. United States, 127 S. Ct. 2456 (2007).
[36] *Rita*, 127 S. Ct. at 2466-67.
[37] *Gall*, 128 S. Ct. at 597.
[38] Gall v. United States, 128 S. Ct. 586 (2007).
[39] *See* discussion *infra*, text accompanying notes _____.

of consistency, flexibility, and the capacity for meaningful appellate review. An open-ended 'substantive reasonableness' mechanism for review, by contrast, effectively renders discretion meaningless.

Background on Sentencing Law

In order to understand the changing role and understanding of discretion in this area, a brief history of relevant federal sentencing law is in order. Before the 1980s, almost any law review article about discretion would hold up federal sentencing as the paradigmatic example of an area in which judges had "true" discretion.[40] Judges were to use their judgment and the sentences they imposed were not meaningfully subject to appellate review.[41] Bounded only by statutory maximums and minimums, judges truly had choice within those bounds.[42] This was true discretion. District court judges believed themselves to be skilled at sentencing, and as a general rule, consistently resisted the imposition of appellate review.[43]

This, as it turned out, resulted in inconsistent decisionmaking.[44] Congress stepped in and addressed the problem by establishing the United States Sentencing Commission to create guidelines for federal sentencing.[45] District court judges implemented those guidelines in mandatory form and some even began to make a show of distancing themselves from any responsibility for the wisdom of those sentences where they

[40] *See, e.g.*, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).
[41] *See, e.g.*, Douglas Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO. ST. J. CRIM. L. 37, 61 (2006); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 572-73 (2005).
[42] *Id.*
[43] *See, e.g.*, Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524-525 (2007).
[44] *See, e.g.*, Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).
[45] *See* Sentencing Reform Act, 28 U.S.C. §991-998; 18 U.S.C. §3551-3626.

disagreed with the Commission's work.[46] In this era, the review of sentencing decisions was more or less limited to checking the math. The work of sentencing judges, who were acting without much discretion in the first place, was simply reviewed for compliance with the terms of the guidelines. It was, for the most part, a straightforward matter of calculation.

In 2005, however, in *United States v. Booker*,[47] the Supreme Court decided that the guidelines could not in compliance with the Sixth Amendment be considered mandatory, but only advisory. Appellate review changed at that point from a deferential review of calculus to a new creature labeled "reasonableness review."[48] The *Booker* majority equated this reasonableness review to review for abuse of discretion.[49] Reasonableness is a pliable and elusive concept that contemplates a range of possible correct answers – just like discretion. Regardless of the term used, the idea here is one of flexibility that affords room for practical judgment.

In June 2007, the Supreme Court issued its opinion in *Rita v. United States*.[50] The holding of the majority opinion in *Rita* was that appellate courts *may* (but need not) apply a presumption of reasonableness on review of any sentence that falls within the advisory guidelines. Reasonableness review was clarified in *Rita* as having two components: procedural reasonableness and substantive reasonableness. Appellate courts are thus supposed, as a threshold matter, to review the sentencing record to assure themselves that the lower court first correctly calculated the advisory guidelines range, then considered

[46] *See, e.g.*, Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 537(2007) (citing remarks by various judges in opinions and other media); Douglas Berman, A Common Law for the Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking, 11 Stan. L. & Pol'y Rev. 93 (1999).
[47] United States v. Booker, 125 S. Ct. 738 (2005).
[48] *Id.*
[49] Id.; Rita v. United States, 127 S. Ct. 2456, at 2465, and 2471 n.2 (June 21, 2007).
[50] *Id.*

the factors in 18 USC § 3553, which lays out the appropriate considerations and purposes that go into formulating an appropriate sentence, as well as the arguments of the parties, and that they then provided an adequate explanation of their reasoning as to why the chosen sentence, in compliance with the statutory directives and advisory guidelines, constitutes a term sufficient but not greater than necessary to achieve the goals of criminal sentencing.

There is a small complication here worth noting: while appellate courts conduct their review for "reasonable" decisionmaking by the district courts, the district courts are actually forbidden to use "reasonableness" as their own goal in the process.[51] To do so constitutes reversible procedural error. Sentencing judges must instead comply with the directive of the so-called "parsimony provision" in aiming for a *point* (sufficient but not greater), and then the appellate court can later determine on review whether the point actually selected was within the *range* of reasonable sentences that might legitimately have been chosen.

Along similar lines, the majority in *Rita* made clear that rebuttable presumptions about the reasonableness of sentences imposed within the bounds of the advisory guidelines range were *only* appropriately applied by *appellate* courts.[52] A sentencing judge would thus not be permitted to assume, according to *Rita*, that a within-guidelines sentence is reasonable and require the defendant to overcome that presumption.[53] (Of course, this is a directive that might easily be overcome in practice with mere semantics.) Instead of applying such a presumption of reasonableness to the guidelines range, a

[51] *Rita*, 127 S. Ct. at 2462.
[52] *Rita*, 127 S.Ct. at 2465.
[53] Nelson v. United States, 129 S. Ct. 890 (2009) (prohibiting sentencing court presumption that guidelines range is reasonable).

sentencing judge would have to arrive at her own conclusion as a result of consideration of all of the §3553(a) factors (which include the guidelines), as well as any non-frivolous arguments from the parties. If the sentencing judge's conclusion should happen to place the sentence within the advisory guidelines range, according to *Rita*, the appellate court might *then* presume the reasonableness of the sentence based on the "double-determination" or the "coincidence" of the judgments of these two experienced and knowledgeable entities: the United States Sentencing Commission and the sentencing judge herself.[54] The problem with this concept (or at least one problem) is that if the judge was supposed to start with the guidelines and then consider the §3553(a) factors, there is tremendous potential for a cognitive anchoring bias.[55] Furthermore, it has not been the consistent reality of the implementation of the rules of *Booker* and *Rita* that judges consider themselves so free from the guidelines that they come up with the sentence independently of the influence, or what has been called the "gravitational pull," of the guidelines.[56]

In the period following *Rita*, appellate courts ran the gamut from being rightly critical or rightly approving of sentencing court decisions, to failing to conduct any meaningful review at all, to simply replacing the judgment of the sentencing court with the appellate court's own view. Then, late in 2007, the Supreme Court decided two more major cases. In *Gall v. United States*,[57] the Court held that all sentences, whether inside or outside the guidelines (and by whatever margin), are subject to a deferential abuse-of-discretion review that focuses on the sentencing judge's methodology and

[54] *Rita*, 127 S. Ct. at 2463.
[55] *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777, 787-794 (2001) (explaining anchoring bias).
[56] *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting) and at 2473-2474 (Stevens, J., concurring).
[57] Gall v. United States, 128 S. Ct. 586 (2007).

reasoning supporting the sentence.[58] In doing so, it dismissed the possibility of "proportionality" review that had been developing in the jurisprudence of the circuit courts after *Rita*.[59] On the same day, in *Kimbrough v. United States*,[60] the Court held that while sentencing judges are required to consider the guidelines, they have discretion to disagree with the Sentencing Commission's policy determinations and find that the guidelines do not achieve the overarching sentencing goals of 18 U.S.C. §3553.[61] These were noteworthy steps forward in the practical understanding of the bounds on discretion for both district and appellate court judges, but the opinions also left a glaring hole unfilled. In neither case did the Court make any effort to define the legitimate content of "substantive reasonableness" review.

In order to understand the current state of abuse of discretion analysis in the federal sentencing context, it is necessary to divide the analysis into the two major components of reasonableness identified by the Court in *Rita*: procedural reasonableness and substantive reasonableness.

Procedural Reasonableness Review

Procedural reasonableness in sentencing requires compliance with a set of seemingly straightforward steps: (1) calculate the appropriate advisory Guidelines sentencing range; (2) consider all of the factors enumerated in 18 U.S.C. §3553(a) (which include that advisory guidelines range and relevant policy statements, along with the nature and circumstances of the offense, history and characteristics of the offender, seriousness of the offense, promotion of respect for the law, providing just punishment,

[58] *Gall*, 128 S. Ct. at 591.
[59] *Id.*
[60] 128 S. Ct. 558 (2007).
[61] *Kimbrough*, 128 S. Ct. at 564.

affording adequate deterrence, protecting the public, providing appropriate training or treatment, the kinds of sentences available, the need to avoid unwarranted sentencing disparities, and the need to provide restitution), as well as any non-frivolous arguments of the parties; (3) determine the sentence that will be sufficient but not greater than necessary to achieve the goals of §3553(a); and (4) provide an explanation of reasoning adequate to allow the reviewing court to determine that you followed the process here correctly.[62] In implementing this procedure, district courts must not presume the guidelines are reasonable or impose burdens on defendants to overcome such presumptions.

Appellate courts accordingly undertake basic review of the record for appropriate indications that these steps were actually taken. If any steps or considerations were obviously entirely omitted, that is a very straightforward way to determine procedural unreasonableness and avoid the need to dig any deeper. The *Rita* opinion was quite generous to sentencing judges in allowing them room for flexibility and judgment about how much explanation is necessary to support the imposition of a sentence that falls within the advisory guidelines.[63] Appellate courts following *Rita* might for example interpret this as a requirement that they "ensure only that the district judge imposed the sentence for reasons that are logical and consistent with the factors set forth in 3553(a)."[64] Appellate courts consistently agree that there is no need to provide any "ritualistic incantation" of all of the §3553(a) factors.[65]

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[62] *Rita*, 127 S. Ct. at 2465.
[63] This is clear especially in the analysis of the facts of *Rita*. *Rita*, 127 S. Ct. at 2468-69.
[64] *See, e.g.*, United States v. Olfano, 503 F.3d 240, 244 (3d Cir. 2007) (quoting United States v. Williams, 425 F.3d 478-481 (7th Cir. 2005)) (describing level of deference owed to district court decision).
[65] *See, e.g.*, United States v. Benally, 541 F.3d 990, 996-97 (10th Cir. 2008); United States v. Mayberry, 540 F.3d 506, 518 (6th Cir. 2008).

That said, many appellate courts afford a degree of deference, a degree of presumption that the sentencing court did what it was supposed to do, that goes too far for this author's comfort.[66] Too far, that is, to be quite in keeping with the idea of meaningful review for abuse of discretion. There are some striking differences of approach to this aspect of reasonableness review that can be seen by taking a somewhat oblique angle on the problem – that is, by looking at the appellate perspective on when appeals of procedural reasonableness might be deemed "frivolous." Within a few months after *Rita*, Seventh Circuit had declared in one case that an *Anders*[67] brief should have been submitted instead of a procedural reasonableness appeal in a within-guidelines case,[68] and granted an *Anders* brief in a case involving the imposition of a sentence at the statutory maximum.[69] By contrast, in the same period, the Second Circuit denied two *Anders* briefs on within-guidelines sentences for failure to exhaust the possibilities of bringing reasonableness challenges, even when there was an indication that the lawyers filing those briefs had thought of the sentencing issues and understood them, but considered them less than viable.[70]

Aside from looking at the *Anders* angle on this problem, we can simply see some courts affording deference to the sentencing court that goes too far – saying things like: "The sentencing judge in this case said that he [balanced the factors] in this case and we

[66] *See, e.g.*, U.S. v. Tisdale, 239 Fed. Appx. 962 (6th Cir. 2007) (Clay, J., dissenting) (finding majority too lenient in its approach to procedural reasonableness review).
[67] *Anders* briefs (so-called in reference to the opinion in *Anders v. California*, 386 U.S. 738 (1967)) are written by attorneys seeking to be excused by the appellate court from the obligation to represent their clients on appeal, on the ground that there is no non-frivolous basis for appeal. They are odd pieces of advocacy, in that attorneys must first suggest and then knock down any arguments that might conceivably be made on appeal.
[68] U.S. v. Gammicchia, No. 06-3325 (7th Cir. Aug. 9, 2007) (slip op. at 1).
[69] U.S. v. Gilbert, 2007 WL 2728531 (7th Cir. Sep. 18, 2007).
[70] U.S. v. Whitley and U.S. v. Artis, 05-3359-cr, 06-4444-cr (2d Cir. Sep. 17, 2007).

have no reason to doubt that he did."[71] For reasons that will become yet clearer as we turn to the analysis of substantive reasonableness, in order that discretion may be given robust and reliable meaning for appellate, I would urge less presumption that procedures were followed, and more stringency in the appellate enforcement of the requirement of providing reasoning to support the determination of the sentence, to put more consistent force into procedural reasonableness review. Generally, I must underscore, both district and circuit courts usually get it right in practice, whether their language about what they are doing gets it right or not. The reasoning is generally sufficiently supported in the district court record, either on the transcript or in written reasoning of the sentencing court, so that it is apparent that all the requisite hoops were jumped through - that the judge considered the pre-sentence report, heard arguments from parties, and gave reasons for the sentence based on legitimate considerations under the statute. And appellate courts, in the main, do a solid job of identifying procedural errors while keeping themselves from substituting their judgment on substance. That is the model to follow, though: the model of actually looking at the considerations, rather than saying "we trust that the judge did it right." If anything, I would urge a strengthening of the review of sentences for an assurance of procedural reasonableness, because in order to establish a meaningful understanding of discretion, I am about to suggest the total elimination of substantive reasonableness review.

Substantive Reasonableness Review

After *Rita*, federal courts at all levels appeared to be in a state of some confusion about what to make of substantive reasonableness. There was really no useful guidance from the Supreme Court about what it means. During the oral argument for *Gall v.*

[71] See *Gammicchia* (slip op. at 5).

United States, Justice Scalia said if he were sitting on a court of appeals, he would have no idea what he is allowed to do in terms of substantive reasonableness review.[72] Neither the *Gall* nor the *Kimbrough* opinion provided a definition, so in the time since the *Rita* majority's confirmation that such a thing as substantive reasonableness did exist, most circuit courts have responded by simply paying the concept empty lip service. Others that have actually purported to engage in analysis of substantive reasonableness have in fact confused it with what are properly understood as procedural issues. Finally, a smaller and far more problematic group, in trying to find a meaning for substantive reasonableness, has misused it entirely by simply replacing the district court's procedurally reasonable view with the circuit court's own, and in doing so, has undermined any comprehensible meaning of discretion. The absence of any consistent or workable definition of substantive unreasonableness from either the Supreme Court or the circuit courts that have attempted definitions of their own brings this problem into relief.

If discretion is to have any robust meaning, any *integrity* of meaning, in the sentencing context, there can be no such thing as substantive unreasonableness. If the procedural requirements are met (and review there ought to be very demanding and thorough), then for discretion to have any real meaning or integrity, there should be no further review, because the choice, the individualized judgment, of the sentencing judge is within its proper bounds and there is no error.[73] Within the procedural bounds on

[72] *See* Transcript of October 2, 2007 Oral Argument before the Supreme Court of the United States in *Gall v. United States* at 43, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-7949.pdf

[73] It is worth noting here that the argument against substantive reasonableness analysis can be made on wholly other grounds as well. Justice Scalia's concurrence in *Rita* said as much quite plainly. "Reasonableness review cannot contain a substantive component at all[, but] appellate courts can nevertheless secure some amount of sentencing uniformity through the procedural reasonableness review

discretion, the sentencing court *exercises judgment*. That judgment requires practical wisdom, and is of necessity individual, calling upon the insight and experience of the district court judge. If discretion is to mean anything, it must mean that within defined procedural bounds, any determination is legitimate. If appellate courts or Congress or other observers are dissatisfied with the way the sentences come out under such a system, then by all means, they should work to change the bounds or the terms within which those sentencing judges exercise reasoned choice. But they must do so through a device that provides a measure of consistency greater than what we currently see in the jurisprudence of substantive reasonableness review.

In the first category of treatments of substantive reasonableness mentioned above – by far the largest – circuit courts pay lip service to the concept.[74] There is not much to say about this category except to note its dominance, and to emphasize the fact that most courts, even those that appear to perceive (without explaining) some legitimate content in substantive reasonableness review, and who find it to be an issue properly before them for decision, as a practical matter do not engage with it when they have reached a conclusion of procedural reasonableness.[75] Instead, having engaged in a rigorous

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made possible by the *Booker* remedial opinon." *Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring). However, Justice Scalia take this position out of concern about judicial fact-finding under the Sixth Amendment, whereas I am concerned about the meaning of discretion. *Id.* at 2476-2479.

[74] *See, e.g.*, United States v. Pfeiffer, 2009 WL 291367 at *1 (8th Cir. Feb. 9, 2009) (example of no real content to substantive reasonableness analysis: "Upon reviewing the totality of the circumstances, we hold that the sentence is substantively reasonable.").

[75] It is well accepted that if the court finds the sentence to be procedurally unreasonable, the court should not engage in substantive reasonableness analysis, but rather should remand to the district court to cure the procedural errors before engaging in any consideration of substantive reasonableness analysis. *See, e.g.*, United States v. Kane, 552 F.3d 748 (8th Cir. 2009) (finding procedural unreasonableness, concluding therefore no need to consider substantive reasonableness); United States v. Richardson, 521 F.3d 149, 158 (2d Cir. 2008) (remanding for procedural unreasonableness based on failure to provide explanation; unable to assess whether substantively unreasonable due to lack of procedural reasonableness). Less than helpful, on the other hand, are those cases that do not take care to distinguish between procedural and substantive reasonableness. *See, e.g.*, United States v. Ortega-Rogel, 281 Fed. Appx. 471, 474 (6th Cir. 2008) (agreeing with defendant's contention that sentence was both procedurally and substantively unreasonable without

analysis of procedural reasonableness, they simply conclude, *without* any analysis, that the sentence is *also* substantively reasonable (or at any rate that it is not substantively *un*reasonable.[76] It looks very much as though those courts are nodding to the concept because the Supreme Court has said it exists, but they (quite correctly in my view) have no idea what it is. And, in practical terms, those courts were choosing the best option available to them, but that option ought to be afforded greater integrity through the clear elimination of substantive reasonableness analysis. In fact, an increasing number of these opinions prompt concurring opinions that note some bewilderment at the lack of guidance as to the proper content of substantive reasonableness analysis.[77]

Some circuit courts that have actually engaged directly with substantive reasonableness analysis are in fact giving that analysis content that properly belongs to the field of procedural reasonableness review. Some of the open attempts to explain the difference between the two have betrayed as much. So much so, in fact, that several cases in this category have been vacated and remanded to the circuits in light of *Gall* and/or *Kimbrough*. An inapposite attempt at a cooking analogy by a panel of the Third Circuit in *United States v. Tomko*[78] provides a useful example. The *Tomko* majority wrote in a footnote, to explain the content of substantive unreasonableness:

> To put it figuratively, there is a recipe for reasonableness that in many, if not most cases, will lead to a palatable result, and we are not in a position to protest if the result is a little too sweet or bitter for our taste. However, when a number of key ingredients prescribed by that recipe are

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distinguishing between the two; reasoning appears to be based on procedural error, so substantive should never be reached in such a case).

[76] *See, e.g.*, United States v. Olfano, 503 F.3d 240 (3d Cir. 2007); United States v. Salas-Argueta, 249 Fed Appx. 770 (11th Cir. 2007); United States v. Grant, 247 Fed. Appx. 749 (6th Cir. 2007).

[77] United States v. Wittig, 528 F.3d 1280, 1289-1290 (10th Cir. 2008) (Hartz, J., concurring) (writing, joined by whole panel, to comment on problematic nature of current state of jurisprudence of substantive reasonableness).

[78] United States v. Tomko, 498 F.3d 157 (3d Cir. 2007) (opinion vacated for rehearing en banc, United States v. Tomko, 513 F.3d 360 (3d Cir. 2008)).

> obviously missing from the mix, we cannot ignore the omission and feign satisfaction – we are obliged to point out there is no proof in the pudding.[79]

This was a failure both of logic and of over-cuteness. What it actually provided was a clear example of procedural error.[80] The omission of a factor is a basic matter of procedural error, so it is unsurprising that *Tomko* has since been reheard en banc, that the opinion of the en banc court was deeply divided (8-5), and that the cooking analogy did not reappear.[81]

Some courts in this middle ground of confusion do not try to explain the difference explicitly, but simply treat certain arguments as substantive reasonableness arguments that are in fact procedural arguments. For example, a recent Tenth Circuit opinion called "substantively unreasonable" to district court's failure to consider §3553(a) factors (1), (2), (4), and (6).[82] Again, the failure to consider relevant factors is clearly procedural error. There is no need for any additional layer of substantive reasonableness analysis to reach the conclusion the appellate court reached in that instance. In another case, the Sixth Circuit found substantive unreasonableness where the district court based a sentence on facts not founded on record evidence and failed to

[79] *Tomko*, 498 F.3d at 164 n.7.

[80] Justice Stevens' concurrence in *Rita*, for example, attempts to explain the difference between procedural and substantive reasonableness review by saying that if the procedure had been impeccable, but a sentencing judge always sentenced Yankees fans more harshly than Red Sox fans, the decision would be substantively unreasonable. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring). This fails as an example: to have considered baseball allegiances in determining a sentence would constitute consideration of an improper factor. That is clear procedural error, and thus undermines the hypothetical setup that the procedure had been "impeccable" in the first place. This is the objection presented by Justice Scalia in his concurrence. *Rita*, 127 S. Ct. at 2483 n.6 (Scalia, J., concurring).

[81] United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (holding district court did *not* abuse its discretion, i.e., that sentence was not substantively unreasonable). The eight-judge majority seems to have as clear an understanding as is possible of substantive reasonableness review under an abuse of discretion standard, but the mere fact of the substantial number of dissenters, as well as the rhetoric and approach of the dissent demonstrates there is still no strong and consistent understanding of what the appellate courts are meant to do with substantive reasonableness review. Even the majority acknowledged just how rare any finding of abuse of discretion on substantive reasonableness would be. *Id*. at 573.

[82] United States v. Friedman, 554 F.3d 1301, 1308 (10th Cir. 2009).

provide adequate explanation for the sentence imposed.[83] These are clearly procedural errors. One of the more common elements suggested in the various circuit court attempts to define substantive unreasonableness is the use of an impermissible factor. As the dissent to one such case in the Sixth Circuit argues, this is simply a mischaracterization of a procedural element.[84] Given the open-ended and vague outlines of the § 3553(a) factors, the requirement of considering any arguments raised by the parties, and the requirement of providing an adequate explanation for decision, the use of impermissible considerations falls effortlessly into the procedural review category.[85] The attempt to pack these issues into the substantively reasonableness category is merely a desperate effort to provide content for that otherwise empty category.

Confusion on the mandate of substantive reasonableness review is evident both from the dissents in the cases in which a panel majority's finding of substantive unreasonableness is founded on disagreement founded in consideration of procedural elements[86] and from the number of cases GVR'd by the Supreme Court for reconsideration by the circuit courts.[87] The confusion no doubt results from the lack of guidance about what constitutes substantive unreasonableness in the first place, which might lead a court to borrow from the well of procedure to fill the analysis of substance.

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[83] United States v. Hughes, 283 Fed. Appx. 345, 349 (6th Cir. 2008) (defining substantive unreasonableness as occurring where "the district court selects the sentence arbitrarily, bases the sentence on impermissible factors [or] fails to consider pertinent section 3553(a) factors, or gives an unreasonable amount of weight to any pertinent factor," looked at in the totality of the circumstances (quoting United States v. Jones, 489 F.3d 243, 252 (6th Cir. 2007), but failing to match the deficiencies found to the terms of that definition).
[84] United States v. Hunt, 521 F.3d 636, 650-51 (6th Cir. 2008) (Martin, J., dissenting). *See also*, *e.g.*, United States v. Davis, 537 F.3d 611 (6th Cir. 2008) (substantive unreasonableness for consideration of an impermissible factor (gap between crimes and second sentencing hearing)); United States v. Puche, 282 Fed. Appx. 795, 2008 WL 2496845 (11th Cir. June 24, 2008) (finding variance was based on legally erroneous factor (district court disagreement with constitutionality of guidelines enhancement)).
[85] *See*, *e.g.*, United States v. Gardellini, 545 F.3d 1089, 1093 (D.C. Cir. 2008).
[86] *See*, *e.g.*, U.S. v. Poynter, 495 F.3d 349 (6th Cir. 2007) (Siler, J., dissenting).
[87] *See*, *e.g.*, U.S. v. Garcia-Lara, 499 F.3d 1133 (10th Cir. 2007) (GVR'd in light of *Gall*, by Garcia-Lara v. United States, 128 S. Ct. 2089 (2008) (no decision yet by Tenth Circuit on remand).

Such failed attempts to demonstrate the difference between the two types of reasonableness only underscore the lack of legitimate content to substantive reasonableness analysis.

It is the existence of the next category of substantive reasonableness analyses, though, that prompts me to argue that it really matters that the confusion about substantive reasonableness be sorted out, because it is in this category that a solid and meaningful understanding of discretion suffers. In this category, when judges try to find content for substantive reasonableness analysis, they simply replace the sentencing court's judgment with their own. They take different approaches in doing so. And they all say they are not doing this, but a closer look betrays that they are. In these cases, discretion has lost all its robust meaning, and that practical wisdom exercised so carefully by the sentencing courts is improperly cast aside.

For another example, take again the original Third Circuit panel opinion in *Tomko*.[88] The majority showed concern with the weight put on particular factors, but did so with the kind of conclusory language that would exercise the red pen of any grader of first-year law school exams – using phrases like "simply does not justify" and "it was unreasonable and an abuse of discretion." The dissenting judge on the panel wrote in response: "I do not believe it presumptuous to state that each member of this panel, if sitting as a district judge, would have sentenced William Tomko to time in prison. However, this Court does not review sentences de novo."[89] Writing for the majority in the en banc opinion, he reiterates this position and explains further that, having reviewed the procedure and the logical reasoning of the district court and having found no

[88] United States v. Tomko, 498 F.3d 157, 172 (3d Cir. 2007) (opinion vacated for rehearing en banc, United States v. Tomko, 513 F.3d 360 (3d Cir. 2008)).
[89] *Tomko*, 498 F.3d at 173 (Smith, J., dissenting).

deficiency: "The risk of affirming an unwarranted sentencing disparity in this case is one we must accept while following the 'pellucidly clear' command that we apply the abuse-of-discretion standard of review."[90]

Another rather indefinite attempt at a definition for substantive reasonableness offers that it "relates to the length of the resulting sentence."[91] That is the extent of the explanation. Surely this does not look to anything more than a disagreement with whether the sentence is, all things considered, the proper length. To allow a finding of abuse of discretion on such an open-ended basis undermines the whole concept of procedural bounds and meaningful procedural review and guts the meaning of discretion entirely.

Judges are less than satisfied without a clear definition of substantive reasonableness analysis to apply. In a recent case from the Tenth Circuit, Judge Hartz wrote a separate concurrence in which both of the other panelists joined, simply to comment on his distress at the state of the circuit's jurisprudence on substantive reasonableness.[92] He referred to current substantive reasonableness review as "going through the motions" and as "an empty gesture." However, the definition he suggests using for substantive unreasonableness is problematic as well.[93] In an Eleventh Circuit case, the majority concluded that the sentence imposed was not substantively

[90] United States v. Tomko, 562 F.3d 558, 574 (3d Cir. 2009) (internal citation omitted).
[91] United States v. Smart, 518 F.3d 800, 803 (10th Cir. 2008).
[92] United States v. Wittig, 528 F.3d 1280, 1289-90 (10th Cir. 2008)
[93] *Wittig*, 528 F.3d at 1289-90 (Hartz, J., concurring). Judge Hartz suggested defining as sentence as substantively unreasonable "if the only reason that the length is outside the range of what judges ordinarily impose for 'defendants with similar records who have been found guilty of similar conduct' is that the sentencing judge has an idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal-justice system." *Id*. at 1289. He acknowledges the difficulty of determining what is idiosyncratic, but falls back on the guidelines as reflective of common practice. *Id*. This ends up looking very much like either presuming the guidelines to be reasonable or requiring serious consideration and explanation of the applicability of the guidelines even in light of the permissibility of disagreement with those guidelines, either of which would fall more neatly under procedural reasonableness.

unreasonable, but the dissenting judge complained that the majority's understanding of substantive reasonableness analysis insulates district court judges from meaningful review.[94] The dissenting judge acknowledged the absence of a definition in *Gall*, but promoted the idea of consistency across fields in the adoption of the standard of "a definite and firm conviction that the district court committed a clear error of judgment."[95]

Of course, the existence of procedural reasonableness review reflects that there *will* always be meaningful review of district court decisions on sentencing, and furthermore, what the specific complaints raised in the dissenting opinion seem to demand is a more adequate explanation of reasoning by the district court judge, which certainly falls within the ambit of such procedural review. Furthermore, as the D.C. Circuit has suggested, if a court were to adopt a definition along the lines proposed in the *Autery* dissent (and elsewhere)[96] there is little indication of what reference point might be used for determining such open-ended error.[97] The dissenter on the D.C. Circuit panel called the district court decision in that case a "textbook" abuse of discretion, but failed to provide a clear basis or reference point for that conclusion that would set it apart from procedural error.[98]

A recent Eighth Circuit case provides an interesting counterpoint, illustrating the ability of procedural reasonableness review to comprehend a wide array of aspects of the district court's approach.[99] In *Kane*, a case with genuinely horrific facts, the court does a

[94] United States v. Autery, 555 F.3d 864, 877-78 (9th Cir. 2009) (using a methodology and analysis that looks strikingly like procedural reasonableness review); *see also id*. at 878-882 (Tashima, J., dissenting).
[95] *Autery*, 555 F.3d at 879 (Tashima, J., dissenting).
[96] The Eleventh Circuit has invoked this standard as well. See United States v. Pugh, 515 F.3d 1179, 1191 (2008).
[97] United States v. Gardellini, 545 F.3d 1089, 1093 (D.C. Cir. 2008); United States v. Pugh, 515 F.3d 1179, 1191 (2008); United States v. Autery, 555 F.3d 864, 879-880 (2009) (Tashima, J., dissenting).
[98] *Gardellini*, 545 F.3d at 1100 (D.C. Cir. 2008) (Williams, J., dissenting).
[99] United States v. Kane, 552 F.3d 748 (8th Cir. 2009).

searching point-by-point review of procedural compliance and comes to the conclusion that the explanation provided does not hold up to scrutiny in various respects.[100] Incidentally, this process requires the appellate court to explain clearly how and why the explanation does not hold up to scrutiny, an advantage not provided by an open-ended inquiry into whether under the totality of the circumstances the sentence is substantively reasonable in the minds of an appellate panel.[101] The conclusion in *Kane* is that the district court judge abused his discretion by failing to comply with the procedural bounds on his decisionmaking authority. This provides transparency as well as accountability on both sides, both of which are lacking in the current state of substantive reasonableness review.

The fact that many of the 2007 cases have by now been granted certiorari, vacated, and remanded to the circuit courts in light of *Gall*[102] indicates that the circuit courts have indeed gotten things wrong on reasonableness review. However, without either a firm definition of substantive unreasonableness from the Supreme Court or (better) the elimination by the Supreme Court of substantive reasonableness review, confusion and overstepping in the judgment of lower court exercise of discretion within procedural bounds will continue.

If there were a pattern to the cases in which circuit courts are finding sentencing decisions procedurally reasonable but substantively unreasonable – if there were

[100] *Kane*, 552 F.3d at 756.
[101] *Kane*, 552 F.3d at 753-756. (The opinion in *Kane* never reaches the substantive reasonableness question, but provides a general "totality of circumstances" definition for that term. *Id.* at 753, 757.)
[102] *See, e.g.*, United States v. D'Amico, 496 F.3d 95 (1st Cir. 2007). (vacated and remanded in light of *Gall*, D'Amico v. United States, 128 S. Ct. 1239 (2008) (no decision yet by First Circuit on remand); United States v. Garcia-Lara, 499 F.3d 1133 (10th Cir. 2007) (vacated and remanded in light of *Gall*, Garcia-Lara v. United States, 128 S. Ct. 2089 (2008) (no decision yet by Tenth Circuit on remand); *see also* United States v. Tomko, 498 F.3d 157 (3d Cir. 2007) (opinion vacated for rehearing en banc, United States v. Tomko, 513 F.3d 360 (3d Cir. 2008)).

particular characteristics of defendants or crimes or judges or other factors the decisions had in common – perhaps that would be useful as a way of defining further procedural bounds. Factors might be added to or taken off of the list of permissible considerations. Further requirements might be grafted onto those already there. However, there is no obvious pattern. These opinions look very much like plain disagreements with the ultimate outcomes reached by the district courts below. To put this another way: there doesn't seem to be any reliable substance to substantive reasonableness review. Many of these cases are still on remand in light of *Gall*, but without any clearer understanding of what

Discretion is an area of bounded choice, of judgment within certain fetters. In the sentencing context, discretion is bounded in two major ways. First and most obviously, it is bounded on two ends by statutory maximums and minimums particular to each case. Second, between those ends, the discretion is bounded by procedures that require particular considerations to be made and to be made properly. The right considerations must be taken into account, and this without mistake of law or fact, and the sentencing judge must provide adequate explanation for the reasoning to be determined to be within those procedural parameters. This is a crucial point about the sentencing context, that the adequacy of the explanation is a *part* of *procedural* reasonableness.

And how could it rationally, or with integrity, be otherwise? What if we were to say that even within this space of choice bounded by procedural requirements, a higher court could review for something more? What would that something more be? What can be the content of that rule, or the standard to be applied? What could it mean other than "unless the appellate court would have decided otherwise"? I cannot make sense of, or

find the integrity in, such a standardless rule. As Justice Scalia put it to the petitioner in the oral argument of *Gall*: "We're trying to [develop] a rule here that can be applied sensibly by all the courts of appeals when they are reviewing the innumerable sentences of federal district judges."[103] The *procedural* fetters, taken seriously on review by the circuit courts, are the sole sensible bounds on the discretion of the district judges in the sentencing context.

In the oral argument in *Gall*, Chief Justice Roberts asked the attorney for the petitioner if there is any legitimate review left at this point other than procedural reasonableness review.[104] Even more clearly than the petitioner there, I would answer a resounding "No." If we mean discretion and reasonableness to have any meaningful content, the answer ought to be no. Sadly, the majority opinion in *Gall* did not attempt to answer the Chief Justice's excellent question.

District court judges routinely report that sentencing is the hardest part of their job, and the part that keeps them awake at night. They have been given discretion to do that part of their job within certain bounds. If they stay within procedural bounds, we should value their virtue of Aristotelian "phronesis" or practical wisdom, a quality for which we ought to have selected them in the first place, and a quality which should only grow with their greater practical experience. We should value that judicial virtue by protecting it, rather than asking circuit courts to engage in undirected Monday-morning quarterbacking through the device of a standardless substantive reasonableness review.

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[103] *See* Transcript of October 2, 2007 Oral Argument before the Supreme Court of the United States in *Gall v. United States* at 43, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-7949.pdf

[104] *See* Transcript of October 2, 2007 Oral Argument before the Supreme Court of the United States in *Gall v. United States* at 9, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-7949.pdf

Gall demonstrated that discretion really does mean there is room for different views, for emphasis on a particular factor, and so on. *Kimbrough* underscores the freedom for judges to disagree. Both look to the adequacy of the explanation for the decision made. And the bulk of the appellate courts seem content to stick to that much analysis. Until the Supreme Court provides some explanation of the meaning and content of substantive reasonableness, appellate courts should continue to do both that. To give "substantive reasonableness" the content that a handful of judges are giving it – to allow second-guessing of procedurally reasonable sentencing decisions – would be to gut the idea of discretion entirely. The constraints that turn out to be workable in the attempt to achieve the right balance between consistency and flexibility for individualized justice are those that focus on methodology and reason-giving. These constraints ensure that *discretion* was in fact *exercised* (rather than arbitrariness) in a deliberate and thoughtful manner within an appropriate framework of considerations.

III. Context #2: Injunctive Relief

As was the case with federal criminal sentencing in Part II above, decisions to grant or deny injunctive relief are primarily made by trial court judges, and then reviewed by appellate courts for abuse of discretion. Just as was the case with sentencing decisions, these are decisions that are of great practical import for the parties involved as well as for certain third parties, and they are decisions with a wide range of potential practical outcomes.[105] Injunctions granted or denied[106] can, for example, permit or arrest

[105] *See* James T. Carney, *Rule 65 and Judicial Abuse of Power: A Modest Proposal for Reform*, 19 AM. J. TRIAL ADV. 87 (1995) (demonstrating potential power and importance of injunctive relief).
[106] Because the characterization of injunctive relief can be either in 'positive' or 'negative' terms, either a grant or a denial of an injunction can effect such a change on the situation.

pollution, protect or endanger a species, bankrupt or permit a business venture to go forward, force or preclude a settlement,[107] and so on. Once again similar to the federal sentencing context, the judge who must make a decision whether to grant or deny an injunction is given guidelines and factors to apply, but those factors afford every opportunity for subjective characterization and easy manipulation.[108]

The framework within which judges are supposed to make decisions about injunctive relief provides at least nominal structure and boundaries. The traditional factors to be considered for a preliminary injunction – (1) likelihood of success on the merits, (2) balance of harm to the parties, (3) adequacy of a remedy at law, and (4) public interest – styled as such, may give an appearance of legal certainty, may provide the judge with a context in which to suggest balls and strikes could be called. However, the reality is that on the one hand, there is a lack of consistency in the understanding of the factors (where they can even be agreed upon in principle), and on the other hand, each of the factors is too internally subjective to provide much in the way of hard and fast limits on the judge's exercise of authority. Ultimately, the framework for decisionmaking in this context is a loose (albeit roughly consistent) one, and one that requires a judge to do a certain amount of normative decisionmaking about competing values. It thus provides a useful body of case law in which to explore the meaning of equitable discretion.

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[107] One of the factors to be considered in analyzing whether to grant a preliminary injunction is the judge's assessment of the likelihood of success on the merits. This is obviously a subjective assessment, but more importantly, it is one that simply forecasts how the judge expects that the case will come out. Such a forecast, when it figures into a decision on whether to grant or deny injunctive relief may have a direct and immediate impact on the possibility of settlement of a case. If a judge's ideology values or promotes settlement as a goal preferable to judgment by a court, that ideology may affect the judge's analysis of whether to grant or deny the injunction. The judge may see the potential of injunctive relief for one side as a tool to force the other side to capitulate. It may dramatically change the bargaining postures of the parties.

[108] See discussion *infra* text accompanying notes _____.

The history of injunctions jurisprudence has been one marked more by typical incremental evolution in the common law process, rather than by the kind of abrupt changes and interpretations that have marked the history of sentencing jurisprudence. Coming out of the mists of Equity as a regime separate from Law, the availability of injunctive relief has long been associated with just the kind of flexibility we expect to encounter when we talk about discretion.[109] Injunctive relief is necessarily tied to specific circumstances, so individualized approaches to some extent naturally predominated over an emphasis on consistent legal principles. While the parties to a given case may be quite invested in the particular outcome of that case, the reality that injunctions decisions are so fact-driven may result in a greater general comfort level with the flexibility, not just for the achievement of individualized justice but also because there is less setting of precedents when cases are so circumstantially unique.

In re Debs[110] is a useful example of the potential flexibility of the injunctions analysis and the way in which discretion may be buried in the very approach to the analysis and thus may remain unrecognized as such, even while having a tremendous effect on how the analysis goes. The case arose out of the famous Pullman strike in Chicago at the end of the nineteenth century.[111] It is a useful example of how judicial characterization of facts and issues is a key factor behind the exercise of discretion, especially where reasoning matters. Courts can shape the facts and the elements in an opinion to give the appearance of reaching an inescapable conclusion, when with some slight changes to various characterizations along the way, one might just as easily reach the opposite conclusion. This is not just about making an ultimate choice about whether

[109] Doug Rendleman, CASES AND MATERIALS ON REMEDIES at 229 (1999, 6th ed.) .
[110] In re Debs, 15 S. Ct. 900 (1895).
[111] *Debs*, 15 S. Ct. at 903.

it would be equitable to grant an injunction. The discretion is perhaps even more significant in setting up the characterization of what the choice is that the judge will be making, in the first place. All of this use of characterization need not be subversive or intentionally misleading, but there is a layer of discretion to be recognized here that is not typically thought of as such, or thought of at all. Finally, *Debs* is also an example of just how practically powerful a tool the injunction can be – here the court shows it can effectively *govern* by means of an injunction.[112]

In its analysis of *Debs*, the Court looks early on in the analysis to the maxim of equity that says equity will protect property rights as a primary consideration, and then points out that the government has a property interest in the mail.[113] (At a minimum we might say that that much is not an incontrovertible principle of law.) The Court doesn't rest on that idea alone, but rather uses it to set the analysis running in a particular direction.[114] There were many directions the Court could have taken, or focuses it could have selected in deciding the appeal. The government had sought and obtained an injunction in the court below, but of course it had had the power to call in troops to effect the same end,[115] if it chose to, and the Court could have required as much, given the requirement that an injunction will not issue unless there is no other adequate remedy.[116] The Court could alternatively have characterized the situation primarily as a public

[112] *Debs*, 15 S. Ct. at 904 (enforcing the power of the United States to keep the peace). In a more recent case, the same power to govern (and particularly to maintain public order) by injunction still shows up. *See* People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997), cert. denied, 117 S. Ct. 2513. On the advantages of governing through the use of injunctions, *see*, for example, Owen M. Fiss, *The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1, 10 (1997).
[113] *Debs*, 15 S. Ct. at 906.
[114] *Debs*, 15 S. Ct. at 906.
[115] *Debs*, 15 S. Ct. at 905-906.
[116] *Debs*, 15 S. Ct. at 905-906. For a more recent example of a case in which the Court considered the significance of the availability of other means than injunctive relief for enforcing compliance with the law, *see* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

nuisance,[117] or could have focused on the criminal process in order to preserve the protection of rights implicit in a jury trial,[118] as Clarence Darrow (one of the attorneys in the case) argued.[119] It could have dealt with the aspect of the case that was premised on a Sherman Act issue,[120] or could have turned it into a damages action.[121] All that said, the Court chose to set the stage by stating a loose maxim of equity, even though that is not necessarily the most convincing approach, and dispensed with each of the other potential more specific and more obviously "legal" approaches. Thus the Court ultimately made this case about a broader notion of the role of the courts as supporters and enforcers of the general welfare at the request of the government.

The issue initially raised on appeal was a contempt holding for violation of the injunction granted below,[122] but Justice Brewer was fairly open about changing that focus – saying that this situation constitutes a "special exigency" demanding that courts do all they can possibly do.[123] (Then again, Justice Brewer also seems to suggest there could never be true legal warrant for a strike, so it could also be that he is simply making up a

[117] *Debs*, 15 S. Ct. at 908-910. The Court does deal extensively with the nuisance conception in the opinion, but does not set it up as the primary direction, theme, or basis for its decision.
[118] *Debs*, 15 S. Ct. at 910-911.
[119] *Debs*, 15 S. Ct. at 911. The opinion suggests that Justice Brewer may have worried as a practical matter that juries would not convict on these facts. *Id*. at 905. This raises an interesting question about whether enforceability is a legitimate consideration in the injunctions analysis.
[120] *Debs*, 15 S. Ct. at 912.
[121] *Debs*, 15 S. Ct. at 905.
[122] In re Debs, 64 F. 724 (1894). The questions actually taken on by the Court, however, were stated as follows, without dealing with the contempt issue, but rather the legitimacy of the underlying injunction: (1) Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible destruction thereof? And (2) If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

[123] *Debs*, 15 S. Ct. at 909. *See also id*. at 912 ("We enter into no examination of the act . . .,upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

justification to fit the outcome he wants to see).[124] This raises broader ethical concerns about how equity should be done and when and why it is appropriate to try to do equity. *Debs* was a unanimous opinion, but it is surely relevant at some level that its author's judicial philosophy was a very actively involved one. Justice Brewer did not think judges should be shrinking violets, but instead should use their platform to require the masses to live up to certain ideals.[125] It will be for another day to argue about exactly where to draw the line on incorporation of or explanation of personal views in discretionary decisionmaking, but the fact that they can play a role surely has significance for even the baseline analysis of what discretion means and how it can, more generally, be exercised properly or abused.

Debs has been styled by one commentator as the Court's "darkest day" (as a matter of overreaching power in face of civil disobedience).[126] Even if that might be a bit of an exaggeration, it does show what equitable discretion can open the door to if it is only fuzzily understood, and how important it is that we have a clear understanding of how to determine when discretion has been 'abused.' In the period of the common law development of injunctions analysis in which the *Debs* opinion was written, there were, of course, many maxims of equity that might apply to a case, but those were notoriously flexible and obscure.[127] A parody list of "Lost Maxims of Equity" illustrates these

[124] *Debs*, 15 S. Ct. at 912. *Cf.* Owen Fiss, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME VII: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 at 55-56 (1993).
[125] *See*, *e.g.*, Owen Fiss, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME VII: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 at 56-57 (1993) (citing Brewer's 1893 speech titled "The Nation's Safeguard").
[126] Owen M. Fiss & Doug Rendleman, INJUNCTIONS at 16 (2d ed. 1984) (citing Prof. Ernest Brown).
[127] *See*, *e.g.*, Roger Young and Stephen Spitz, *SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S. C. L. REV. 175, 177 (2003) (providing list of established maxims of equity).

qualities with the suggestion that, for example, "Equity is not for the squeamish."[128] This is, notably, equally true of "discretion" as it is presented in this article. And of course, for the heritage of the unbounded use of conscience and personal values in equitable decisionmaking we have the (in)famous device of the Chancellor's foot.[129]

Over time, particularly with the merger of law and equity, the desire for justice by consistency gained strength, and certain general factors emerged as the central considerations that have been relevant to decisionmaking about injunctions. These factors come to provide a more consistent, if still malleable, framework for the exercise of individualized justice through discretion. Once again, the factors typically taken into consideration in the preliminary injunctions analysis were the plaintiff's ability to show that

> (1) they have no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm they would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) they have some likelihood of success on the merits; and (4) the injunction would not disserve the 'public interest'.[130]

This is the version of the factors[131] cited in the opinion issued by the district court judge ruling on the injunction requested in *American Hospital Supply Corp. v. Hospital*

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[128] Eugene Volokh, *Lost Maxims of Equity*, 52 J. LEGAL ED. 619 (2002).

[129] "Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience." John Selden, *Table Talk* (quoted in John Bartlett, FAMILIAR QUOTATIONS).

[130] Amer. Hosp. Supply Corp. v. Hospital Products, Ltd., 1985 WL 1913 at *1 (N.D. Ill. Jul. 8, 1985). This is the version of the four factors as it appears in the district court opinion, distilling the basic concepts identified by Prof. Leubsdorf in a seminal article on the jurisprudence of injunctions. *See* John Leubsdorf, *The Standard of Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

[131] The factors are sometimes listed in different orders and articulated in different ways, but conventionally deal with balancing the same basic concepts. Another formulation, for example, states the test as requiring the moving party to show "(1) irreparable harm *and* (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping in movant's favor." Williams v. State Univ., 635 F.Supp. 1243, 1250 (E.D.N.Y. 1986). *See also, e.g.*, Linda J. Silberman,

Products, Ltd., a case that would not have been noteworthy except for its handling on appeal to the Seventh Circuit.

Judge Posner, writing for the majority on the panel that reviewed the grant of the injunction in *American Hospital Supply*, tried to take the consistency of the basic framework one step further.[132] He attempted to reduce the framework of factors to an algebraic formula.[133] Using this formula, the judge should grant the injunction if, but only if $PxH_p > (1-P)xH_d$.[134] Translated out of Algebra into English, that is: the judge should grant the injunction if, but only if, the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial of the injunction would win at trial would be an error (in other words that the plaintiff will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.[135] In an effort to minimize judicial error in decisions where the stakes can be very high, without actually changing the law, he tried to move injunctions jurisprudence away from equity towards math, away from judgment towards calculus.[136] This approach was an effort to formalize, or regularize, the balancing and

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Injunctions by the Numbers: Less Than the Sum of its Parts, 63 CHICAGO-KENT L. REV. 279, 279-280 (1987).

[132] Amer. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589 (7th Cir. 1986).
[133] *Id*. In light of the panel's affirmance of the district court's grant of the injunction, it seems an odd occasion on which to introduce a new mode of analysis. *Cf.* Judge Swygert's remark: "The majority claims that its formula is merely a distillation of the traditional four-prong test. But if nothing is added to the substantive law, why bother? *Amer. Hosp. Supply*, 780 F.2d at 609 (Swygert, J., dissenting). Judge Posner's new version of the standard is a development of a suggestion made earlier by Prof. Leubsdorf as a formula of words, rather than a specifically algebraic formula. *See* John Leubsdorf, *The Standard of Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978). Prof. Leubsdorf specifically noted in his article the impracticality of attempting to attach numbers to the elements of the formula, and offered it rather as an alternative to the free-form gut decisions that might be made without sufficient structure for the analysis. *Id*.
[134] *Amer. Hosp. Supply*, 780 F.2d at 593.
[135] *Amer. Hosp. Supply*, 780 F.2d at 593.
[136] *Amer. Hosp. Supply*, 780 F.2d at 593. For further reflections on this and other efforts to pin down analyses susceptible to "fuzzy logic," see Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 436-439, passim (2002).

"sliding scale" analyses already in use, and which had in fact been used by the district court below.[137]

This new approach was not, as it turned out, received as a tremendous step forward. Judge Swygert, dissenting from the panel opinion, criticized the attempt at formulaic precision as "antithetical to the underlying principles of injunctive relief," and suggested that the "traditional element of discretion residing in the decision of a trial court to grant a preliminary injunction has been all but eliminated by [the majority's] decision."[138] He concluded:

> Like a Homeric Siren the majority's formula offers a seductive but deceptive security. Moreover, the majority's formula invites members of the Bar to dust off their calculators and dress their arguments in quantitative clothing. The result spectacle will perhaps be entertaining, but I do not envy the district courts of this circuit and I am not proud of the task we have given them.[139]

Even those judges who were favorably impressed with the idea of the formula ended up doing the same basic equitable, qualitative-rather-than-quantitative analysis they had done before.[140] There were negative scholarly reactions as well.[141]

On the whole, the attempt to further formulize preliminary injunction analysis gave a false sense of certainty and covered up the reality of flexible judgment in an area where there is much practical power to be wielded and full and frank explanation of individualized judgment in light of real uncertainty is of great importance to the

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[137] *Amer. Hosp. Supply*, 780 F.2d at 613 (appendix containing district court memorandum).
[138] *Amer. Hosp. Supply*, 780 F.2d at 609 (Swygert, J., dissenting).
[139] *Amer. Hosp. Supply*, 780 F.2d at 610 (Swygert, J., dissenting).
[140] Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 553-556 (1987). *See also* Cleveland Hair Clinic, Inc. v. Puig, 986 F. Supp. 1227 (N.D. Ill. 1996) (example of preliminary injunction case from within seventh circuit using traditional factors and analysis rather than Judge Posner's formula).
[141] *See, e.g.*, Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of its Parts*, 63 CHICAGO-KENT L. REV. 279, 279-280 (1987).

legitimacy of outcomes.[142] This is a matter of actual integrity in the decisionmaking process as well as a matter of judicial candor and the concern for public confidence in the judiciary. A false image of objectivity and certainty can only support a very condescending view of those values.[143] Indeed, squeezing the facts and the analysis (in spite of ambiguities, contradictions and uncertainties) to fit into the confines of "objective" mathematical analysis will only muck up the common law. Judges would do better to be candid and straightforward about the process, the inputs, and the challenges in their decisionmaking.

At any rate, the idea of calculus did not catch on, and instead, there was a solidifying of the standard(-ish)[144] four factors. These factors were most recently presented by the Supreme Court as: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm in the absence of preliminary relief; (3) balance of equities tips in his favor; (4) whether injunction is in public interest.[145] These factors provide basic consistent structure, within which there remains a fair amount of freedom both as to the decision whether or not to grant the injunction and as to the shape the relief will

[142] Writing about the flexibility and the discretionary nature of the modern injunction, Prof. Rendleman has called the combination "an irresistible attraction to judicial activists-social engineers and an anathema to those who think that the function of judges is to decide discrete disputes. Doug Rendleman, CASES AND MATERIALS ON REMEDIES at 229 (1999, 6th ed.)

[143] See further discussion of concerns relating to actualities and realities in the judicial process in Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007)

[144] As discussed *supra* at note ___, the articulation of the factors can vary, but the content of the factors remains consistent. That said, `there remains some difference opinion among circuits as to issues such as the standard of proof on those factors in relation to arguments about maintenance of the status quo. *See* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001). Another factor that can come into play in the preliminary injunction analysis considers whether the movant is seeking an injunction that would change the status quo, in which case the burden on the movant is heightened. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) (en banc).

[145] Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374 (2008).

take.[146] Each of these factors is not a matter of calculus, but a matter of perspective and characterization. There is a lot of flexibility, but requiring the judge to keep within the framework, and requiring explicit reasoning on each factor is an effective constraint on individual judgment in decisionmaking.[147] The Supreme Court has recently reinforced some of the boundaries here, emphasizing for example that the analysis must look to *likelihood*, not *possibility*, when it comes to likelihood of success and of irreparable harm.[148] The Court emphasized as well that lower courts must genuinely consider and address in their reasoning *all* of the factors, noting that the district court in *Winter* failed to give serious attention to the balance of the equities and the public interest.[149] In both the majority opinion and the concurring section of Justice Breyer's opinion, there is an emphasis on the need to consider and adequately explain the reasoning on each factor in order to properly exercise discretion in this context which is neatly parallel to the current jurisprudence of procedural reasonableness review in sentencing.[150]

In a relatively recent intellectual property case about discretion, albeit one about granting a permanent (rather than preliminary) injunction,[151] the Supreme Court

[146] In his discussion of the proper role of equitable discretion in decisionmaking about injunctive relief, Prof. Schoenbrod underscores the importance of strong, clearly articulated transsubstantive principles in restraining judicial decisionmaking. *See* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988).
[147] Of course, legislatures have demonstrated their capacity to cabin discretion in subject-matter-specific contexts where they consider it wise to do so. They may establish, for example, substantive priorities in a particular context, like protecting the species under the Endangered Species Act. Some commentators call such an action the elimination of discretion, but there is still judgment to be exercised in these cases, so I would argue it is only a narrowing and not an elimination of discretion.
[148] *Winter*, 129 S. Ct. at 375.
[149] *Winter*, 129 S. Ct. at 378.
[150] *Id.* at 386 (Breyer, J., concurring in part and dissenting in part). Justice Ginsburg in her dissenting opinion emphasizes the flexibility of equitable decisionmaking and expresses satisfaction with the expanded explanation provided by the District Court when it modified the injunction. *Id*. at 391 n.2 (Ginsburg, J., dissenting).
[151] The standard for preliminary and permanent injunctions differs only insofar as the former requires a showing of likelihood of success on the merits, where the latter requires actual success on the merits. *See* Amoco Production Co. v. Gambell, 480 U.S. 531, 546 n.12 (1987).

underscored the need for the exercise of true judgment. In *Ebay v. MercExchange*,[152] the Court declined to endorse a test that would effectively make the grant of an injunction automatic upon finding that a patent is valid and the defendant has infringed it.[153] Instead, the Court reiterated the importance of the word 'may' in the remedial statute and directed that the traditional four-part test must be worked through in each case in order to properly exercise discretion.[154] As Chief Justice Roberts quoted in his concurring opinion in *Ebay*, emphasizing the need to exercise equitable discretion within the structured framework of legal analysis: "Discretion is not whim."[155]

This discussion has focused on the discretionary decision whether to grant or deny a permanent injunction. However, there may well be additional concerns related to discretion in the injunctions context when, for example, there is a structural injunction at issue. There the discretion will go not just to whether to grant or deny, but how to shape the injunctive relief.[156] These can be highly contentious issues indeed, in light of the judge's broad powers, and the more specific and guiding structure the judge can rely upon in the framework of the law of injunctions, the better.

As may perhaps be obvious, there is no way (at least none I can imagine) to put any equivalent substantive (or ultimate-outcome-related) constraints into the law to parallel the statutory maximums and minimums provided in the sentencing context. Perhaps we may conclude from what we have seen thus far that procedural bounds are

[152] 126 S. Ct. 1837 (2006).
[153] *Ebay*, 126 S. Ct. at 1839-40.
[154] *Ebay*, 126 S. Ct. at 1839-41.
[155] *Ebay*, 126 S. Ct. at 1841-42 (Roberts, C.J., concurring) (quoting Martin v. Franklin Capital Corp., 126 S. Ct. 704, 710 (2005).
[156] The long-lasting and highly contentious structural injunction case regarding the Department of the Interior's Indian Trust is instructive here, as to the potential stakes in these cases, the wide-ranging structural possibilities for the injunction, the significant hands-on participation by the district court judge in identifying the need for and shaping the relief, and the potential for the personal views and antagonisms to enter into the analysis if legal frameworks are not strictly observed as far as practicable.

the most practically useful for constraining both the original discretionary determinations and the appellate review of those determinations, and perhaps we might suggest further that procedural bounds are *sufficient* constraints. In the next context we will have to examine whether they are also *necessary* constraints. Within the procedural bounds, there really is freedom to judge; there really can be different legitimate outcomes. (It will require another article entirely to tackle the complex questions about the legitimacy of personal perspectives, and any concerns about 'hidden' 'real' reasons.) For now: in the injunctions context, just as in sentencing, there is a range of reasonableness, and the fact that a particular party might do better or worse before a different judge because of the individual personalities and perspectives of those different judges should not be a cause for alarm. The flexibility that allows these differences is the very characteristic of judgment that facilitates the implementation of practical wisdom from the bench. The most important thing to worry about is that discretion was actually exercised, so the best thing to do is look for proper methodology plausibly explained and allow judges the freedom within the resulting range to do justice as best they can.

IV. Context #3: Civil Case Management

With the two previous contexts of federal sentencing law and injunction analysis, there were relatively clear and consistent (even if malleable) explicit bounds on the discretion to be exercised. It was even somewhat clearer when and where discretion could be exercised so that it was clearer when and how to impose bounds on its exercise. With sentencing, there were both specific outcome-related bounds and procedural bounds on the decisionmaking. With injunctions, there were only the procedural bounds on the

decisionmaking by the district court. In the civil case management context, by contrast, though there may be some procedural bounds articulated either in a relevant rule of civil procedure[157] or in the case law interpreting those Rules,[158] in practice there is simply much more freedom of decisionmaking authority to be exercised in the day-to-day management of a docket[159] with far less practical availability of review than in either of the contexts discussed above. It is a long established principle of the law that a court has the inherent power "to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants."[160] As Professor Bone aptly put it: "…it is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the judge's creation, subject to minimal appellate review."[161] The trend of the past few decades has been to expand this kind of procedural discretion.[162] Many of the decisions in everyday case management may seem quite mundane by comparison with the liberty concerns in the sentencing context, for example, but the decisions here can have just as significant a practical effect on the quality of justice, certainly as those

[157] *See*, *e.g.*, FED. R. CIV. PROC. 23 (including appropriate factors to consider in exercising discretion in the text of the Rule itself).
[158] *See*, *e.g.*, Nieves v. City of New York, 208 F.R.D. 521, 535 (S.D.N.Y. 2002) (citing Bambu Sales, Inc. v. Ozak Trading Inc., 58 F.3d 849, 852-54 (2d Cir. 1995) (providing list of four considerations bounding exercise of discretion to dismiss under Fed. R. Civ. Proc. 37(b)(2)(v): "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of ... noncompliance.").
[159] *See*, *e.g.*, FED. R. CIV. PROC. 16.
[160] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).
[161] Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1962 (2007). One possible growing exception to the lack of appellate oversight may be that of class action cases. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003).
[162] *See*, *e.g.*, Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (noting increase in discretion); Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982).

made in the injunctions context, and thus it is every bit as important that we be careful about the role of judgment here as in sentencing and injunction decisions.[163]

Another important distinction to be drawn between the case management context and the previous two contexts has to do with provision of reasoning. In the appellate review of the exercise of discretion in sentencing and injunction decisions, the focus was on the reasoning given by the district court, which was looking for indications that discretion was exercised within certain parameters. Without a reasoned explanation of a decision, no such meaningful review would be possible. It is unrealistic, as a matter of both resources and pragmatism, to imagine that every day-to-day case management decision could be supported by a written and fully reasoned memorandum by the court. Nonetheless, the rare bit of appellate review that does happen in this area is typically judged under an abuse of discretion standard.

Case management is both challenging and important in terms of the practical effects it can have on the outcomes of cases. Still it is mostly protected at this point either by a lack of available review or a lack of applicable substantive content for that review.[164] Because discretionary decisions in this context tend not to be reduced to reasoned writings, there is no body of past decisions on similar questions to look to in order to develop any kind of consensus either on substantive or procedural bounds on the range of reasonableness. That is, there is no equivalent body of opinions on the basis of

[163] Jay Tidmarsh, *Pound's Century, And Ours*, 81 NOTRE DAME L. REV. 513, 559 (2006) (noting the inherent political power to be wielded in this arena).

[164] *See*, *e.g.*, Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (noting case management arena as one of most extreme discretion). *But see* Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 118-119 (2007) (suggesting it is unnecessary to worry so much about discretion in case management about things like scheduling and discovery and so on, especially when there isn't strong empirical evidence to suggest judges are actively subverting particular litigants; suggesting limiting discretion will not be easy and may do more harm in constricting flexibility than good in achieving consistency.

which one might craft anything equivalent to the sentencing guidelines to show the range of views of judges across the board in similar circumstances, or even shy of that, for anyone (lawyer of judge) to assess a range of reasonableness. Presumably, we want to retain flexibility for practical as well as theoretical reasons, but we must ask whether an 'abuse of discretion' standard here means the same thing or has the same effectiveness here as it has in other contexts, or if judgment in this context is understood sufficiently differently to benefit from a different articulation of the standard or even a wholly different mechanism of review. In comparing the idea of discretion and its abuse in this context with the previous contexts, we can see how an inconsistent understanding of the same term in different contexts may cause confusion both about decisionmaking authority in specific cases and about the overarching idea of the judicial role at both the district and appellate levels, and how the exercise of practical judgment plays into those roles.

How, then, should we understand the evaluation of judgment in the case management context insofar as they bear on our understanding of discretion, and abuse of discretion, more generally? The day-to-day, moment-to-moment case management decisions may be habit-forming in terms of the kind of judgment that will be exercised (and how its scope will be understood) when bigger and more difficult discretionary decisions have to be made, particularly if the same language of 'abuse of discretion' is used to articulate the scope or limits of the judge's decisionmaking power. Without more bounds (or at any rate clearer bounds) on the decisionmaking here, appellate review can hardly have more meaningful or consistent content than a rough smell-test or difference of opinion; appellate review could hardly look for anything other than a rough sense of

fairness or justice in the way that some appellate courts have attempted the substantive reasonableness review of sentencing decisions. Case law on case management matters ranges all over the map as to the range of authority, the appropriate substantive options for the judge, the remedies where abuses are found, and so on.[165]

Fewer substantive and procedural bounds and accordingly broader discretion may be a practical necessity in this context. We must consider whether 'discretion' is really the best word to use here, if it is difficult or even impossible to define how the 'abuse' of decisionmaking authority should be measured. We unhelpfully confuse issues here by muddling different uses of the same term. Perhaps where no real meaningful or consistent appellate review is to be had, it would be better in the first place not to set "abuse of discretion" as the standard of review, on the ground that it produces a false sense of the real situation. In such situations, this article proposes that the relevant decisionmaking authority should go by some name other than discretion ("inherent authority," for example) and should be evaluated for "abuse" by some mechanism other than appellate review.[166]

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[165] *See, e.g.*, Ex parte Monsanto Co., 794 So.2d 350 (Ala. 2001) (declaring trial court attempt to try over 2,700 toxic tort claims without a case management order an "abuse of discretion"); Sims v. ANR Freight System, Inc., 77 F.3d 846 (5th Cir. 1996) (finding abuse of discretion in cumulative effect of district court procedures for expediting jury trial, but finding harmless error); G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (1989) (en banc) (determining, over four dissents, district court had authority to sanction party for failure to appear at judicial settlement conference); Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987) (imposing sanctions for failure to comply with court order to bring party with settlement authority to pretrial conference); Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) (finding lower court abused its discretion in sanctioning appellant for failure to settle); Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980) (upholding (over circuit court's reversal) district court's inherent authority to assess attorney's fees in case dismissed for plaintiff's failure to comply with discovery); National Hockey League v. Metropolitan Hockey Club, Inc., 96 S. Ct. 2778 (1976) (upholding (over circuit court's reversal) district court's dismissal under Rule 37 for egregious failure to comply with discovery orders; underscoring perspective of district court on full record/history and need for full range of options to be supported as truly available to district courts) (Brennan and White dissented, but without opinions).

[166] Even where the term "inherent authority" is already used, appellate review is commonly said to be for "abuse of discretion." *See* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805 (1995) (exploring inherent authority, finding that it is indeed nebulous, defining it as subject to abuse of discretion review, but not providing any content as to what would be within or outside

Perhaps it seems more palatable to accept a looser understanding of the substance of abuse of discretion review where there are not any very clearly established procedural or outcome-related bounds to use. But it would certainly be better to have a clearer understanding of the scope for judgment than to tolerate a fuzzy understanding simply for lack of any other idea of how to handle the confusion. Perhaps what is needed here is simply a different term for the freedom of choice allocated to the judge.[167] When there are no clear procedural fetters as a matter of *law*, the judge has effectively free choice, so the introduction of the 'abuse of discretion' standard of review in such situations only invites confusion. And if 'discretion' is the term used to describe the lower court's authority, while it is perfectly accurate so long as it refers to *unfettered* discretion, the mere use of the term 'discretion' in the first place naturally invites the idea that appellate review will be for 'abuse' of that discretion, a concept that appellate courts will try to fill with some kind of content, as we have seen in the context of substantive reasonableness review of federal sentences. In the case management context, we are dealing with the inherent authority or power of the court. If a decision is either unreviewable, or is

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the scope of that discretion, generally concluding this breadth of authority is a positive thing for managing cases). *See also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (providing exhaustive account of sources of authority (or, where relevant, lack of authority) for inherent judicial authority; suggesting division of inherent powers into three categories of "pure," "implied indispensable," and "beneficial;" suggesting more restraint and more open explanation of use of such powers). *But see* Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1 (2003) (touting importance and breadth of inherent authority in case management and particularly in alternative dispute resolution). Judges themselves seem to want to keep broad powers of inherent authority in the case management and alternative dispute resolution contexts to manage their dockets. *See, e.g.*, John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 UNIV. OF SAN FRANCISCO L. REV. 551 (1999) (detailing judicial favoring of expanding discretionary management powers in examining history of CJRA pilot program).

[167] In the introduction to his article on discretion, Professor Rosenberg noted the indispensability of the concept of discretion. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYR. L. REV. 635, 636 (1971). To the extent that I take his statement to refer to the concept of some freedom of choice, I wholeheartedly agree. However, since the use of this term to cover many different versions of that freedom of choice has led to continued confusion, rather than the fulfillment of Professor's Rosenberg hope that judges will "get on thinking terms with the concept," I propose here that we may keep the concept but dispense with the term in certain of its current uses. *Id.*

reviewable but without any agreed-upon constraints for the decisionmaking process, we should minimize confusion by ceasing to refer to the authority of the decisionmaker by the term 'discretion.'

In addition to the problem of confusion of terms, there is a problem to be resolved as to the mechanism for oversight, even when discretion is, as a matter of law, unfettered. Areas in which there is, as a matter of law, free choice, may still create potential space for abuse of the judicial role. In these areas of free choice, judges would be better constrained in their conduct by the disciplinary process, as opposed to the appellate review mechanism. It is possible that it might require some modifications to the relevant codes of conduct to accommodate some of these issues in the judicial conduct regulation mechanism. For example, at this point, a conduct complaint might be dismissed if it were explicitly an objection to procedure,[168] but that would be simple enough to change the relevant code provisions. On the other hand, it is arguable that no modification would be required. Perhaps delay and bias prohibitions already present would be perfectly sufficient to capture those cases in which the judicial conduct with regard to case management is truly beyond the scope of the legitimate carrying out of the judicial role. In the disciplinary process, more cases could more easily be examined for case management issues because even settled cases would stay in the mix. Reviewing bodies could look at patterns across all judges of a particular court, or across a particular judge's own performance over time. With more cases and more data to look at in these ways, we might do better at building up understanding of ranges of reasonableness, and so on.

[168] *See*, *e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995).

A recent disciplinary case from Ohio provides a practical example. In *Disciplinary Counsel v. Sargeant*,[169] the Ohio Supreme Court reprimanded a judge for a pattern of delay that affected primarily contested divorces, well out of line from his peers with similar dockets.[170] While this is a tricky area (indeed a case of first impression for Ohio in dealing exclusively with docket control issues),[171] because it deals so much with assumptions and inferences from the case management data, the court resolved it as a matter falling under Canons 3 and 3(B)(8), which focus on judicial obligations of impartiality, diligence, and efficiency.[172] The court took judicial notice of case management statistics over a ten year period for both this judge and his peers to see trends and make comparisons. With the statistical data, however, norms became apparent that showed both that the judge was well outside the norms built up by the practices of his peers and that he was notably outside the norms with regard to cases in a particular subject matter area (contested divorce cases).[173] This was not a case likely to have met with any success as a matter of appeal for abuse of discretion in case management, though, partly because of a basic lack of access to appellate review due to settlement, and partly because the abuse would not have been so evident in isolation.

Thus the regulatory mechanism might provide more scope for review in the first place and allow that review on a broader field. Of course, it is not inconceivable that such patterns and statistical evidence could come into the consideration of an appeal for abuse of discretion, and there is still hesitancy on the part of lawyers to criticize judges in

[169] Disciplinary Counsel v. Sargeant, 889 N.E.2d 96 (2008) (finding unnecessary and unjustified delay).
[170] *Sargeant*, 889 N.E.2d at 100-101.
[171] *Sargeant*, 889 N.E.2d at 102.
[172] Ohio Code of Judicial Conduct, Canon 3 ("A judge shall perform the duties of judicial office impartially and diligently.") and Canon 3(B)(8) ("A judge shall dispose of all judicial matters promptly, efficiently, and fairly and comply with guidelines set forth in the Rules of Superintendence for the Courts of Ohio.")
[173] *Sargeant*, 889 N.E.2d at 98-99, 101.

the disciplinary as opposed to the appellate context,[174] but I would suggest that where there is a legitimate concern about abuse of judicial power, it is (however uncomfortable) better and more neatly dealt with as a matter of judicial conduct than as a matter of legal error when there is insufficient law to permit consistency in finding error. With the focus on the judge's conduct, rather than on the application of the law to the particular circumstances of a given case, it would be easier to look at case management statistics to see patterns that appear to be outside the norm (or even just to develop an idea of what the norm is), rather than trying to find abuses in single cases without any significant body of past decisions from which to reach a consistent understanding of what the norms are and therefore whether they have been violated.

An additional potential mechanism for review as an alternative to appellate review of case management decisions for abuse of discretion might be through the use of judicial performance evaluations.[175] Attorneys, rather than appellate judges, would perhaps make the best monitors of reasonableness in these contexts.[176] Any fear of negative ramifications that might attach to the notion of pursuing disciplinary sanctions against a particular judge in a particular case would not pertain to these evaluations. Regular anonymous (and even random) review of judicial management of cases would

[174] This is the objection most commonly raised in response to any suggestion that the disciplinary mechanism be used to address problems. *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995). Having said that, while I believe judges deserving of great respect for the work that they do, I also do not think lawyers ought to be shy about bringing legitimate, non-frivolous complaints about judicial conduct into the disciplinary process. To say otherwise would be to give up on the idea of any effective mechanism for regulating judicial conduct, which cannot be a workable idea.

[175] *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995) (proposing judicial performance evaluations as one of a battery of reforms to check judicial power in the case management context).

[176] They are certainly better, as one appellate judge has remarked, than law clerks fresh out of law school. *See* Hon. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas The Fairchild Lecture*, 1994 WIS. L. REV. 9 (1994) (noting problem of appellate reliance on law clerks just out of school who have no frame of reference for whether a district court had abused its discretion).

provide some idea of a range of reasonable management options without any conceivable ground for fear of personal reprisals.[177] Such evaluations might even be gathered from a broader array of participants in the case management process: attorneys, litigants, peer judges, court staff, and so on. It is primarily the lawyers, as knowledgeable and concerned repeat players, who could provide the most useful data in establishing a range of reasonableness, though. Of course it is not entirely certain that lawyers would have the same idea of 'discretion' and 'abuse' thereof, but as long as there is already plenty of difference of opinion among district courts, circuit courts and the Supreme Court in the cases that have come up for decision on this standard, it is at least unlikely to add any *further* uncertainty to ask lawyers to contribute to the understanding of reasonableness, and as they are the repeat players most affected by the judicial decisionmaking in this area, it might well be a beneficial step.

Indeed, Professors Subrin & Main have identified an informal system that has built up for case management among lawyers, parallel to and consonant with that orchestrated by judges.[178] Perhaps the input of attorneys in judicial performance evaluations might be joined with greater input by those attorneys in the process of shaping case management. A recent proposal by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System calls for revisions to the civil discovery rules that would considerably tighten the flexibility built into the rules and procedures as they presently stand, and would in consequence limit the inherent

[177] This mechanism for review would address Prof. Bone's concern with regard to seeing broader trends that allow one judge to compare herself to others on the same court. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1986-90 (2007).

[178] Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004) (exploring a parallel informal procedural system among lawyers that enhances case management, perhaps to some extent more effectively than the current rules and the current involvement of judges is designed to, and suggesting potential 'recalibration' of formal procedural rules to comprehend these informal but systematic parallel advances).

authority of judges to adapt the rules and procedures to suit the management needs of the particular case.[179] So it is clear that practicing lawyers take an active interest in getting case management right, and that the discretion of the trial court does not seem to stand yet in a position of perfect balance between structure and free choice. Perhaps all of this suggests that there should be more structure, more law, built into the case management arena so that appellate courts *could* legitimately assess 'abuse of discretion' on review.

It is worth exploring this potential approach of further development or refinement of the rules, even if not to put specific substantive bounds on the options available to the judge, at least to provide methodology or considerations to guide the judge's exercise of discretion on a particular point.[180] One of the most contentious issues in the realm of civil case management is the role of judges in encouraging and participating actively in settlement conferences under Rule 16.[181] Several scholars have argued for written guidelines to govern judicial settlement conferences, for example, to guide and cabin the exercise of discretion.[182] In light of varying approaches and attitudes expressed in the case law on this topic, this does seem a worthwhile endeavor.[183] There are those who

[179] "Trial lawyer Group and Legal think Tank Call for Sweeping Overhaul of Civil Discovery Rules," The National Law Journal (Pamela A. MacLean) (March 12, 2009), *available at* http://www.law.com/jsp/article.jsp?id=1202429010018.

[180] *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2015-2016 (2007) (proposing Advisory Committee should consider channeling discretion by providing factors to balance and weights to assign to them); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578 (1985) (arguing that for exercise of 'principled discretion' in context of jurisdictional decisionmaking, the criteria that define and guide judgment are found in relevant statutory or constitutional grants of jurisdiction or from the tradition within which the grant arose, and those criteria must be "capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch.)

[181] *See, e.g.*, Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891 (2006); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27 (2003); Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L. J. 232 (2003); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

[182] *See, e.g.*, Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891 (2006).

[183] *See, e.g.*, Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987); G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (1989) (en banc).

would make these rules strict indeed, and who would quite simply narrow the range of options available as a practical matter to the judge, not just in the Rule 16 context, but across the field of case management decisionmaking more generally.[184] Ohio's Rules of Superintendence are a concrete example of a state court's attempt to set guidelines, rules, or benchmarks (as appropriate to the context) and to establish a means of monitoring judicial management of dockets.[185] In fact, it is the existence of these rules and monitoring mechanisms that made possible the kind of review undertaken in *Sargeant*.[186] Similar rules could presumably be adopted in the federal system. That said, there is also much debate about who should make such rules and what would be required to endow those rules with sufficient legitimacy and functionality.[187]

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[184] *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2003-2015 (2007); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27 (2003); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[185] RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO (amended Mar. 1, 2009).

[186] *Sargeant*, 889 N.E.2d at 100-101.

[187] *See, e.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008) (arguing that the Advisory Committee needs to develop more rigorous normative justifications for the rules it recommends (and do so more systematically) in order to sustain its legitimacy and fulfill its function of constructing an efficient and fair system of procedure in the federal courts); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990-2001 (2007) (arguing rulemakers have better perspective and access to information than judges making rules ad hoc for particular cases); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEORGETOWN L. J. 887 (1999); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229 (1998) (proposing that judges should not act as procedural rulemakers, arrogating to themselves vast swathes of discretionary authority, but rather that lawyers should come up with the rules and judges should merely approve or disapprove them); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997); Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker (1)*, 23 J. LEGAL STUD. 595 (1994) (arguing that a requirement of empirical evidence to support changes to procedural rules goes too far); Thomas D. Rowe, Jr., *Repealing the Law of Unintended Consequences?: Comment on Walker (2)*, 23 J. LEGAL STUD. 615 (1994) (supporting concept of bringing more information into civil rulemaking, but arguing requirements of empirical data collection would be too sweeping); Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569 (1994) (proposing that Advisory Committee establish criteria on the basis of research to reduce surprise); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464, 489 (1993) (proposing that Advisory Committee abandon incremental approach in favor of administrative approach of "comprehensive rationality" in rulemaking; advocating preservation of judicial expertise in civil rulemaking); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 L. & CONTEMP.

Local rules are not a silver bullet, of course.[188] Nor is the development of more structure in case law (though potentially helpful in theory) to be relied upon as the end-all-be-all solution.[189] Short of specific rules to limit substantive options or to mandate specific considerations or procedures in the decisionmaking process, one might preserve freedom of choice and maintain some guidance by way of indicating preferences or rebuttable presumptions.[190] When Professor Meltzer did an analysis Supreme Court cases on discretion in the wake of Professor Shapiro's article on jurisdiction and discretion, he found that some of the development of principles to constrain discretion had indeed occurred in the case law, but that many gaps remained unfilled because they were simply not suited to being rule-bound.[191] His conclusion was that judges ought to have some freedom there, which brings us back to the basic concept of the need to leave certain case management decisions to the free choice of the judge in the exercise of inherent authority and to the end of allowing sufficient flexibility to do justice in individual cases.

Some remain convinced that judges really do need to retain flexibility in the case management context.[192] Inherent authority provides that flexibility. But that does not

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PROBS. 67 (1988) (arguing need for overhaul of rulemaking process to incorporate systematic collection of empirical data to determine likely impact of rules before adoption).

[188] Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L. J. 1284, 1287 (1978) ("Taken as a whole, local rules can best be described as measurements of the chancellors' feet.").

[189] This would be particularly unworkable in a model that would simply look to the addition of more review of case management. One proposal to move case management to the magistrate judges, under the quasi-appellate review of the district courts, who would be required to write fully reasoned opinions, seems to me only move all of the work that cannot currently be handled by the system as it exists to another level of the system that will not have the capacity to handle it either. *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995).

[190] *See, e.g.*, David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995-96 (1989); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2016-2023 (2007).

[191] Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891 (2004).

[192] *See, e.g.*, Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003) (arguing for more equity than exists in the current version of the Rules); David L. Shapiro, *Federal*

have to mean the ceding of all oversight authority. It is important to try to achieve the best balance between giving judges enough rein to manage their dockets so as to do justice and achieve other institutional goals of the judiciary and allowing irrational loose cannon decisions by these judges in their case management roles.[193] As Roscoe Pound long urged, less definition and more freedom for judges have advantages that have been realized in the current structure of the rules of procedure,[194] and those advantages may be had without losing all oversight capability.

V. Conclusions

Judges encounter the idea of 'discretion' in all manner of contexts across the broad scope of the judicial role, not in hermetically sealed compartments of the law. The better they understand the meaning of 'discretion,' the better they can fulfill their obligations and stay within the bounds of their role. The better judges understand the idea of discretion, the better they can, in turn, convey that to a public that often seems

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Rule 16: A Look at the Theory and Practice of Rulemaking, 137 U. PA. L. REV. 1969, 1995 (1989) (arguing in favor of keeping substantial freedom of choice in the implementation of Rule 16). It is perhaps arguable that Rule 1 already provides just this flexibility in its general application to the rules of civil procedure. *See* FED. R. CIV. PROC. 1 (2007) ("[These Rules] should be construed and administered to secure the just speedy, and inexpensive determination of every action and proceeding.").

[193] Certainly the imposition of appellate review for abuse of discretion in instances of inherent authority indicates a lack of comfort with a total lack of oversight. The idea is most certainly that a panel of appellate opinions may be safer than a single infallible (because final) voice. *See, e.g.*, Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYR. L. REV. 635, 642 (1971). My suggestion is that we maintain the oversight function, and retain the safety in numbers, but move that oversight to a different group of people performing a somewhat different type of oversight and review.

[194] *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); but see Jay Tidmarsh, *Pound's Century, And Ours*, 81 NOTRE DAME L. REV. 513, 560-61 (2006) ("For Pound, the entire point of discretionary procedure was to shake off excessive legal formalism, to bring law and justice into accord, and . . . to decide cases on their merits. . . . [A]nyone who reads reported decisions [from the past few decades] should be struck by how modern judicial discretion, harnessed to reducing costs and delay, is remarkably un-Pound-like in spirit. Case management has taken on a life of its own, and dismissals for failure to abide by court-imposed scheduling deadlines, issue-narrowing requirements, and final pretrial orders fill the reporters. Many cases are determined on the criteria of efficiency and obedience to judicial will rather than on their merits.")

uneasy about the idea that not all judges might make the same decisions, but that many decisions (indeed decisions that might be shaped in some ways by a particular judge's own set of values and priorities and experience) are within the scope of discretion, and are so for good reason.[195] Looking at discretion across different contexts helps us to be as precise as possible, not just in our understanding of the proper scope and meaning of discretion, but also in the language we use to describe the exercise of judgment in different contexts.

Where there is appellate review for "abuse of discretion," in order for that term to have any useful meaning, it is imperative that there be some core of consistency about how discretion can be bounded, how its abuse can be reliably recognized as such without impinging on the judge's legitimate freedom of choice within the bounds of the law. Whether it is bounded as a matter of law or not, judges should use their freedom of choice consciously, openly, and sparingly. That is, they should *use*, as much as possible, the guidance of the law rather than their own personal judgment. They should be as transparent as possible when they are exercising discretion, both so that it is clear that the ultimate decision was in some respect a product of the judge's discretion, and thus tied to that particular case and that the law itself did not compel a particular conclusion, so that the law doesn't become murkier than it had been before, and so that we can see more clearly what judges are doing and how they may be bringing their own ideologies to bear, and thus potentially learn more about how our judges see their roles and about the extent to which their individual personalities may shape the substance of the law.

[195] *See*, *e.g.*, Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYR. L. REV. 635, 642 (1971) (referring to the history of discretion's place as a "four-letter word").

Discretion seems to be most workable as a reviewable grant of legal authority when there is a clearly defined framework, or set of guidelines, or procedure that governs its exercise in the first instance and in turn its review on appeal. Any time there is appellate review for abuse of discretion, two things are essential: first, there must be some form of legal authority that sets bounds on the decisionmaking process or on the range of legitimate outcomes, and second, there must be some form of written reasoned opinion that can be reviewed by an appellate court to determine compliance with the legal authority that sets the bounds on the lower court's discretion.[196] This would really be nothing new, if we could only keep clear and consistent sight of it. As the Supreme Court wrote in *United States v. Burr*: "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[197] Any time these conditions are lacking, there can be no legitimate appellate review for abuse of discretion, so it would be better both to change the terms and to move the oversight of the judicial role out of the appellate review mechanism and into either conduct regulation or some form of judicial performance evaluation. Otherwise, precisely in the context of appellate review, where there is an enhanced opportunity for achieving clarity, precision, and consistency, courts will continue to confuse the issues and muddy the law.

[196] Like Professor Shapiro, I believe that "[t]he discretion I urge is not an uncontrolled or whimsical power to decide like cases differently, but a power that carries with it an obligation of reasoned and articulated decision, and that can therefore exist within a regime of law." David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 579 (1985). *See also* Owen Fiss, THE LAW AS IT COULD BE 54 (2003) (" . . . it is not at all necessary . . . to ascribe to judges the wisdom of philosopher kings. The capacity of judges to give meaning to public values turns not on some personal moral expertise, of which they have none, but on the process that limits their exercise of power.")

[197] United States v. Burr, 25 F.Cas. No.14,692d, pp. 30, 35 (CC Va.1807) (Marshall, C.J.).