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Righting the Historical Record: A Case for Appellate Jurisdiction over Appeals of Sentences for Reasonableness Under 28 U.S.C. § 1291

BRIANA LYNN ROSENBAUM*

This Article is the first to analyze critically the jurisdictional basis for the Supreme Court's mandate in United States v. Booker that all courts of appeals review the length of criminal sentences for "reasonableness." The availability of appellate review has expanded greatly since the Booker opinion, and, indeed, recent research shows that the number of sentence appeals has risen. Unfortunately, the Court did not explain the jurisdictional basis for its expanded "reasonableness review." The omission is not trivial. For decades, federal courts have held that courts of appeals do not have jurisdiction to review the length of criminal sentences. This view has been especially entrenched since 1984, when Congress created the Federal Sentencing Guidelines and a corresponding "limited" right to appeal sentences. The Supreme Court may not increase the jurisdiction of these courts; the Constitution gives this power to Congress alone. This Article revives the scholarship on the historical and legislative underpinnings of appellate review of criminal sentences in an attempt to find a justification, if any, for Booker's expanded appellate review. The Author concludes, as have other scholars, that the courts of appeals have had jurisdiction under 28 U.S.C. § 1291 to review the length of sentences since at least 1891, and additionally argues that this jurisdiction survived the Federal Sentencing Guidelines. The Supreme Court in Booker created an entirely new type of sentencing decision, a purely discretionary decision, that lies outside the federal Guidelines system and, thus, outside that system's limited appellate review. Accordingly, at least for these types of purely discretionary sentencing decisions, § 1291 remains the basis for jurisdiction over Booker reasonableness appeals.

* Law Fellow and Instructor, Stanford Law School. I would like to express my deep gratitude to Norman Spaulding, Professor of Law at Stanford Law School, whose advice (both professional and scholarly) greatly affected the tenor of this piece. Many thanks also to George Fisher, Professor of Law at Stanford Law School, and Richard Marcus, Horace O. Coil ('57) Chair in Litigation at U.C. Hastings College of the Law, for donating their time and energy to helping better this piece, and to Jeannie Merino, Deepa Varadarajan, Andrea Roth, Shirin Sinnar, and Elizabeth Pollman for their support throughout. Finally, a huge thank you to the amazing team of editors at the *Hastings Law Journal*.

TABLE OF CONTENTS

INTRODUCTION.....	866
I. THE <i>BOOKER</i> DECISION.....	872
II. PRE-SRA REVIEW OF SENTENCES IN THE FEDERAL COURTS: THE ORIGIN OF THE RULE OF NONREVIEW.....	875
A. DEVELOPMENT OF THE “RIGHT” TO A CRIMINAL APPEAL.....	878
B. THE SCOPE OF JURISDICTION OVER SENTENCE APPEALS PRIOR TO THE SRA.....	884
1. <i>Freeman and the Power to Modify Sentences</i>	885
2. <i>Dorszynski and Discretionary Limits on Appeals of Sentencing Decisions</i>	888
III. REVIEW OF CRIMINAL SENTENCES AFTER THE SRA: THE IMPACT OF § 3742 ON APPELLATE JURISDICTION.....	899
A. DECONSTRUCTING THE MAJORITY VIEW: “UNREASONABLE” SENTENCES ARE NOT “IN VIOLATION OF LAW” UNDER § 3742(A)(1).....	900
B. TWO POSSIBLE BASES FOR JURISDICTION OVER “REASONABLENESS REVIEW”.....	909
1. <i>Section 3742(a)(4) as a Basis for Jurisdiction over Reasonableness Review</i>	909
2. <i>Section 1291 as a Basis for Jurisdiction over Reasonableness Review</i>	911
CONCLUSION.....	920

INTRODUCTION

From the creation of the Federal Sentencing Guidelines in 1984 (“Guidelines”) until January 2005 when the Supreme Court issued its opinion in *United States v. Booker*,¹ courts unanimously agreed that courts of appeals in the federal system had only a limited power to hear appeals of criminal sentences.² Under 18 U.S.C. § 3742(a) and (b)—the appellate provisions of the Sentencing Reform Act of 1984 (SRA) that created the Guidelines³—defendants and the government could file

1. 543 U.S. 220 (2005).

2. *See, e.g.*, *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993) (“In the post-guidelines era, then, only sentences that meet the criteria [listed] in section 3742 are amenable to appellate review.”); *see also* authorities cited *infra* note 235.

3. *See* 18 U.S.C. § 3742(a), (b) (2006); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

appeals challenging only four categories of sentences: (1) sentences “imposed in violation of law,” (2) sentences “imposed as a result of an incorrect application of the sentencing guidelines,” (3) sentences that are outside the applicable guidelines range, and (4) sentences that are “imposed for an offense for which there is no sentencing guideline and [are] plainly unreasonable.”⁴ Before *Booker*, the Supreme Court and most courts of appeals agreed that Congress’s decision to provide appellate review of these four specific categories of sentences meant that Congress intended to foreclose review of all other types of sentences.⁵ Following this logic, courts of appeals routinely rejected for lack of jurisdiction appeals of sentences that fell within the applicable guidelines range.⁶

Despite this seemingly well-entrenched limit on appellate jurisdiction over sentencing decisions, the Supreme Court in *United States v. Booker* directed appellate courts to take jurisdiction over appeals of the substantive reasonableness of *all* sentences.⁷ This directive to review the length of all sentences for reasonableness unquestionably results in a substantial expansion of appellate jurisdiction. After *Booker*, defendants (and presumably the government as well) are now able to appeal an entire subset of sentences that were previously unassailable: within-guidelines sentences where the appellant challenges only the length of the sentence and does not claim some specific legal error.⁸

The SRA

creat[ed] a sentencing commission to develop binding rules—inaptly named guidelines—that limited available sentences in particular cases. The Federal Sentencing Guidelines assigned narrow sentencing ranges within the broader statutory sentencing limits. These Guideline ranges were based on a number of variables, including the circumstances surrounding the offense and the defendant’s prior criminal convictions.

Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 5 (2008). Once the sentencing judge found (either through her own fact finding or based on the jury’s verdict) the specific combination of variables that triggered a specific guidelines range, the judge (with limited exceptions) was bound to sentence within that range. *Id.*

4. 18 U.S.C. § 3742(a), (b).

5. The Supreme Court affirmed this theory in *United States v. Ruiz*, when it held that 18 U.S.C. § 3742(a) did not “authorize” an appeal of an otherwise lawful within-guidelines sentence “where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart.” 536 U.S. 622, 627 (2002) (listing cases). *But see* *United States v. Hahn*, 359 F.3d 1315, 1321–22 (10th Cir. 2004) (holding that § 1291 continues to provide subject matter jurisdiction over sentencing appeals despite waiver of the right to appeal).

6. *See, e.g., United States v. Morales*, 898 F.2d 99, 101 (9th Cir. 1990) (citing cases).

7. 543 U.S. 220, 260 (2005) (“[T]he [Sentencing Reform] Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a).”); *see also id.* at 311 (Scalia, J., dissenting in part) (“[T]he Court would now have [the reasonableness standard] apply across the board to all sentencing appeals, even to sentences within ‘the applicable guideline range,’ where there is no legal error or misapplication of the Guidelines.” (quoting § 3742(f)(2)(A), (B))).

8. *Compare* *United States v. Pelayo-Bautista*, 907 F.2d 99, 101 (9th Cir. 1990) (“Appellate review of a sentence that is within the correctly applied guideline range and was not imposed in

It now also appears that this reasonableness review has caused a substantial increase in the actual caseload of the courts of appeals. A survey of cases conducted by the New York Council of Defense Lawyers suggests that the overwhelming majority (76%) of sentences appealed to the federal courts of appeals on “reasonableness” in the year following *Booker* were within-guidelines sentences.⁹ Moreover, data from the U.S. Sentencing Commission show that the actual number of sentence appeals has risen significantly since *Booker*.¹⁰ The Commission reported that, from 2000 to 2004, federal courts of appeals heard, per year, an average of 2966 appeals challenging the sentence only (as opposed to the conviction), whereas from 2005 to 2009, the courts heard a yearly average of 4895 sentence-only appeals—an increase of 65%.¹¹ Appeals of both the sentence and the conviction have risen as well, from an average of 1327 a year to 1899 a year, while appeals of the conviction only have remained at just around 2000 per year since 2000.¹² This increase in sentence appeals since *Booker* cannot simply be attributed to a rise in criminal cases in the federal system.¹³ Indeed, the percentage of total sentences appealed has also increased. For example, in the year before *Booker*, defendants appealed their sentences in 6.6% of cases,¹⁴ while in the year after, they appealed them 11.4% of the time.¹⁵ After 2006, the percentage of sentences appealed decreased to around 8–9%.¹⁶ This is perhaps because federal defendants caught on quickly that courts of

violation of law is not expressly authorized by section 3742(a). Accordingly, we have no jurisdiction over this appeal.”), with *United States v. Plouffe*, 445 F.3d 1126, 1128 (9th Cir. 2006) (overruling *Pelayo-Bautista* as “clearly irreconcilable” with the *Booker* mandate to “review the reasonableness of all sentences”).

9. See Brief for the New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner at 2a–3a, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754) (asserting that of the 1515 sentences that parties appealed for “unreasonableness” in 2006, 1152 were appeals of within-guidelines sentences).

10. See U.S. SENTENCING COMM’N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2001–2009), available at http://www.ussc.gov/Data_and_Statistics/index.cfm.

11. *Id.*

12. *Id.*

13. See OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 7 (2006) (reporting a “new record” in the number courts of appeals filings in 2006, which the office attributed largely to criminal appeals filed as a result of *Booker* and *Blakely v. Washington*, 542 U.S. 296 (2004)).

14. See U.S. SENTENCING COMM’N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2004), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2004/SBTOC04.htm. The Author calculated these percentages using information provided in the studies regarding how many cases were tracked in any given year and the number of each type of appeal reported in table 55 of each study. See *id.*

15. See U.S. SENTENCING COMM’N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2006), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/SBTOC06.htm.

16. See U.S. SENTENCING COMM’N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2007–2009), available at http://www.ussc.gov/Data_and_Statistics/index.cfm.

appeals rarely reversed sentences on reasonableness grounds.¹⁷ Nevertheless, according to the U.S. Sentencing Commission data, the number of sentence appeals is still above pre-*Booker* levels by at least 2–3%.¹⁸ A thorough analysis of the possible explanations for these numbers is beyond the scope of this Article, but it is reasonable to assume that the newfound ability after *Booker* to appeal within-guidelines sentences for reasonableness has affected appeal rates.

Despite the clear magnitude of the expansion of appellate review the Court caused in *Booker*, there has been no scholarship analyzing the appropriateness of that decision. This is not to say that the *Booker* decision has gone unnoticed. The Court in *Booker* upended the federal guidelines system, provoking massive debates over how to implement that opinion without undermining the Guidelines' purpose. Scholars have particularly focused on the constitutional implications of the Court's Sixth Amendment holding and problems with the actual implementation of the advisory Guidelines scheme the Court mandated in that case.¹⁹ But this preoccupation has left unnoticed a very serious question regarding the propriety, whether legal or practical, of expanding the jurisdictional scope of the courts of appeals.

How did *Booker*, a Sixth Amendment case about the right to a jury trial of the facts that increase sentences, result in such a massive expansion of appellate jurisdiction? As the Third Circuit has recognized, "The Supreme Court did not explain the jurisdictional basis for the reasonableness review it mandated in *Booker*."²⁰ The omission is not trivial. While the Supreme Court may set a standard of review (namely,

17. See Brief for the New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner at 5–6, 1a, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754) (reporting that of the 1152 within-guidelines sentences appealed by defendants in an almost eleven-month period in 2006, only one sentence was reversed for being substantively unreasonable).

18. Compare U.S. SENTENCING COMM'N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2004), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2004/SBTOCo4.htm, with U.S. SENTENCING COMM'N, SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS intro. & tbl.55 (2007–2009), available at http://www.ussc.gov/Data_and_Statistics/index.cfm. Similarly, the Administrative Office of the U.S. Courts reported that the number of criminal appeals in 2008 was 4% higher than in 2004, although the report also noted a steady decline in *Booker*-related appeals from 2006 to 2008. OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 7 (2008).

19. See, e.g., Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005) (arguing *Booker* represents a possible retreat from the blunder that the *Apprendi* line of cases made of the relationship between the Constitution and substantive criminal law); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137 (2006) (criticizing the post-*Booker* trend to treat the Guidelines as mandatory despite the *Booker* holding); Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625 (2007) (reviewing federal sentencing jurisprudence and arguing that the post-*Booker* sentencing regime, especially in the Fourth Circuit, is unconstitutional as an essentially mandatory guidelines scheme).

20. *United States v. Cooper*, 437 F.3d 324, 327 (3d Cir. 2006).

reasonableness) for the courts of appeals, it may not increase the jurisdiction of these courts.²¹ Indeed, “[n]o court, including the United States Supreme Court, has the power to promulgate a declaration of *jurisdiction*. That remains the exclusive province of Congress within the boundaries set forth by the Constitution.”²² And because there is no constitutional right to appeal a criminal sentence, the jurisdiction of the courts of appeals is “limited to those subjects encompassed within a statutory grant of jurisdiction.”²³

Hence, if the courts of appeals did not have jurisdiction to review within-guidelines sentences before *Booker*, how can they miraculously have that jurisdiction after *Booker*?²⁴ After *Booker*, prosecutors across the country argued that they did not.²⁵ These arguments always lost; indeed, only one federal judge, Judge Ruggero Aldisert, in his dissent in the Third Circuit case *United States v. Cooper*, agreed that courts of appeals do not have jurisdiction to hear appeals of within-guidelines sentences for reasonableness.²⁶ This open jurisdictional question casts doubt on the viability of the ever-increasing number of criminal sentence appeals since *Booker*. Furthermore, without a clear answer to this question, one is left with the impression that the Supreme Court took upon itself the power to expand the jurisdiction of the federal courts, a power the Constitution clearly gives to Congress alone.²⁷ Most of the

21. See *id.* at 339 (Aldisert, J., concurring and dissenting).

22. *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

23. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); see also *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.”); *United States v. Arishi*, 54 F.3d 596, 596–97 (9th Cir. 1995) (“The right to appeal is statutory, not constitutional. A party ‘must come within the terms of [an] applicable statute’ in order to appeal.” (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977))).

24. Despite earlier opinions forbidding review of within-guidelines sentences, all courts of appeals now review within-guidelines sentences for reasonableness after *Booker*. Initially, most did not discuss the statutory basis for doing so. See, e.g., *United States v. Jiménez-Beltre*, 440 F.3d 514, 517 (1st Cir. 2006); *United States v. Marcussen*, 403 F.3d 982, 985 (8th Cir. 2005) (conducting a reasonableness review of sentences within the guidelines range without reaching the question of jurisdiction); *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005) (same). The First Circuit has simply explained, “A majority of Justices said explicitly in *Booker* that sentences would be reviewable for reasonableness whether they fell within or without the guidelines, and for us that is the end of the matter.” *Jiménez-Beltre*, 440 F.3d at 517 (footnote omitted). Under the longstanding rule that the Supreme Court cannot create jurisdiction, this position is untenable.

25. See, e.g., *Cooper*, 437 F.3d at 328 n.5 (majority opinion).

26. *Id.* at 333–34 (Aldisert, J., concurring and dissenting); see also *Jiménez-Beltre*, 440 F.3d at 523–24 (Howard, J., concurring in part and concurring in the judgment) (“Although I think the government has the better of the jurisdictional argument, and although I would hold that there still is no right to appeal discretionary decisions to sentence within the properly calculated guidelines sentencing range, the issue is better left to the Supreme Court.” (citing *Cooper*, 437 F.3d at 333–40 (Aldisert, J., concurring and dissenting))).

27. There is a longstanding debate among federal courts scholars about whether Congress’s power to make exceptions to the jurisdiction of the Supreme Court and to establish and control the

legal world appears to be totally unfazed by the Court's apparent power-grabbing. But the issue is one of extreme importance. Jurisdictional limitations are a key ingredient in the American system of separation and equalization of powers and, thus, "go[] to the very foundation of our constitutional scheme."²⁸

In this Article, I offer an analysis of appellate jurisdiction over sentencing decisions that serves to legitimize the current practice of reviewing criminal sentences for reasonableness. After briefly discussing the *Booker* decision in Part I, I trace in Part II the development of the right to appeal sentencing decisions from the beginning of our nation to today. After demonstrating the statutory availability of appellate review of sentences, I then revive the scholarship on the historical scope of that review, discussing both the limitations of the types of appeals historically allowed in the courts and the articulated reasons for those limitations. Through this analysis, I confirm that, contrary to popular opinion, the courts of appeals definitively had jurisdiction to review criminal sentences under 28 U.S.C. § 1291, the "final decision" statute, at least until Congress enacted the SRA in 1984. Although courts routinely rejected appeals of the length of sentences for lack of jurisdiction before the SRA, they did so erroneously, relying on older case law without fully analyzing the basis for those decisions. In fact, this "rule of nonreview" was based not on jurisdiction, but on a policy of deference to the sentencing judge—a policy that can be changed at any point, by either Congress or the Supreme Court. Despite this, federal courts have long cited decades-old cases for the proposition that courts of appeals do not have jurisdiction to hear appeals of sentences within statutory limits.²⁹ This is simply wrong. The jurisdictional basis of the rule of nonreview is firmly entrenched in sentencing jurisprudence due to a combination of judicial inertia and stare decisis. One must go back decades to discover its original articulation.

jurisdiction of lower federal courts means that it has plenary control over everything but the Supreme Court's original jurisdiction, or something more limited. I do not, through this Article, intend to imply a position in that debate. The purpose of this Article is to assume, as federal courts routinely do, see authorities cited *supra* notes 21–23, that Congress alone has the power to expand and limit the jurisdiction of the Article III courts and, considering that assumption, to determine whether the Supreme Court has usurped some of that power in *Booker*.

28. *United States v. Hahn*, 359 F.3d 1315, 1333 (10th Cir. 2004) (Murphy, J., dissenting) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)).

29. See Allan L. Schwartz, Annotation, *Direct Review by United States Court of Appeals of Duration of Sentence Imposed by District Court in Federal Criminal Prosecution, Where Duration Does Not Exceed Statutorily Authorized Maximum*, 21 A.L.R. Fed. 655, § 3[a] (1974) (citing cases supporting "the general rule" that courts of appeals ordinarily cannot directly review the length of sentences imposed in federal criminal cases "where the duration of the sentences does not exceed the statutorily authorized maximum"); see also *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir. 1952) (holding that, unless the court were to "over-rule sixty years of undeviating federal precedents, [it] must hold that an appellate court has no power to modify a sentence" on appeal).

Having established an independent basis of jurisdiction in § 1291, I then present, in Part III, the first scholarly analysis of whether 18 U.S.C. § 3742(a) and (b) limit that jurisdiction so as to preclude review of sentences for reasonableness. First, I review and reject the majority position that jurisdiction over review for reasonableness can be found in § 3742(a)(1) and (b)(1), which authorize appeals of sentences “imposed in violation of law.”³⁰ I go on to suggest two alternative bases for finding appellate jurisdiction over “reasonableness review” of within-guidelines sentences: jurisdiction under § 3742(a)(4) and (b)(4), the “catchall” provisions of the SRA, and jurisdiction under 28 U.S.C. § 1291, the “final decision statute.”³¹

Through an analysis of the SRA, the legislative history surrounding the SRA, and the pre-SRA review landscape, I ultimately argue that 18 U.S.C. § 3742 and 28 U.S.C. § 1291 work in tandem, limiting judicial review of only those sentencing decisions that are part of Congress’s Sentencing Guidelines scheme, but leaving intact the general grant of jurisdiction over sentence appeals under § 1291. Accordingly, § 1291 remains the justification for appeals of the ultimate discretionary sentencing decisions that the Supreme Court created in *Booker*.

I. THE *BOOKER* DECISION

Before delving into the historical appellate jurisdiction of the courts of appeals, it will help to first have a basic understanding of the *Booker* decision. In *United States v. Booker*, a five-member majority of the Court held that the Guidelines were unconstitutional under the Sixth Amendment because under those Guidelines, the judge—not the jury—found facts that determined the appropriate guidelines range and thus “determined the upper limits of sentencing.”³² This type of judicial fact-finding ran afoul of the Court’s previous holdings in *Blakely v. Washington* and *Apprendi v. New Jersey* that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”³³

Although few in the legal world were surprised by the Court’s decision to reaffirm *Apprendi* and *Blakely* in the context of the Guidelines, many were surprised by the Court’s take on the appropriate remedy for the constitutional violation. In what is often called *Booker*’s “remedial opinion,” a different majority of five Justices decided that the

30. See *infra* Part III.A.1.

31. See *infra* Part III.B.

32. 543 U.S. 220, 236, 243–44 (2005).

33. *Id.* at 244 (discussing *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

best way to cure the Sixth Amendment flaw in the Guidelines was to make them advisory.³⁴ The theory goes that, if sentencing judges are not required to impose a sentence within a certain guidelines range after finding specific facts, then there is no statutory maximum driven by the Guidelines, the *Blakely* and *Apprendi* rules do not apply, and thus the jury need not find the facts supporting the sentence beyond a reasonable doubt. According to the remedial majority, so long as federal sentencing judges only “consult [the] Guidelines and take them into account when sentencing,” the constitutional error is cured.³⁵

In order to free sentencing judges from the “mandatory” nature of the Guidelines, the Supreme Court also had to revamp appellate court review of sentencing decisions. To do that, a bit of statutory housecleaning was required. As the remedial majority explained, one provision of the SRA, 18 U.S.C. § 3742(e), was incompatible with the advisory Guidelines scheme the Court created.³⁶ Section 3742(e) set forth various standards of review on appeal of specific sentencing decisions, including de novo review of departures from the applicable guidelines range.³⁷ Under § 3742(e), a court of appeals reviewing a sentence outside the range had to determine whether the sentencing judge correctly followed both the Guidelines and their corresponding policy provisions.³⁸ But because sentencing judges could no longer be forced to follow the Guidelines, such rigid review would no longer be appropriate. Therefore, the Supreme Court struck down § 3742(e).³⁹

The Court did not eliminate appeals of criminal sentences altogether. The Court explicitly left intact 18 U.S.C. § 3742(a) and (b), which set forth the specific types of sentences from which a defendant and the government can appeal.⁴⁰ Under § 3742(a) and (b), federal appellate courts can still hear (as they had before *Booker*) the four enumerated types of sentencing appeals.⁴¹ But, since the Supreme Court struck down the standards of review for these appeals located in

34. *Id.* at 258–65. To make the Guidelines “advisory,” the Court “severed and excised” 18 U.S.C. § 3553(b)(1), the provision of the federal sentencing statute that makes the Guidelines mandatory. *Id.* at 245.

35. *Id.* at 264. As one article has explained, “In other words, *Booker* and *Blakely* do not hold that the Constitution forbids a judge from increasing a maximum available sentence; rather, their holding is that judicial factfinding cannot be the only way to increase the maximum available sentence.” Hessick & Hessick, *supra* note 3, at 7 n.23.

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

37. *See* 18 U.S.C. § 3742(e) (2000).

38. *See id.* (requiring, among other things, reversal of a sentence that departs from the applicable guideline range based on a factor that “is not authorized under section 3553(b)”).

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

40. *See id.* at 260.

41. *See id.* at 224 (“[D]espite § 3553(b)(1)’s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range)” (citing § 3742(a) and (b))).

§ 3742(e), courts of appeals had no direction as to how they should review sentences on appeal. What to do? Not to worry, the Court declared. Federal courts had been reviewing sentences outside the applicable guidelines ranges for “reasonableness” for many years and are perfectly capable of applying that same standard *to all sentences in* the context of the newly advisory guidelines.⁴² Accordingly, the Court held, the courts of appeals must from then on apply a “reasonableness” standard of review to sentencing decisions “irrespective of whether the trial judge sentences within or outside the Guidelines range.”⁴³ This reasonableness review, the Court explained, would “continue to move sentencing in Congress’s preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”⁴⁴

The Court has had several opportunities since *Booker* to clarify its remedial holding. Two of these cases, *Rita v. United States*⁴⁵ and *Gall v. United States*,⁴⁶ are particularly pertinent here. In *Rita*, the Court held that a court of appeals may treat sentences within the properly calculated guidelines range as presumptively reasonable.⁴⁷ However, the Court also cautioned that “the presumption applies only on appellate review.”⁴⁸ As the Court explained in *Gall*, the Guidelines are merely “the starting point and the initial benchmark” of the sentencing decision at the district court level.⁴⁹ The district judge must also consider “all of the § 3553(a) factors to determine whether they support the sentence requested by a party” and only then, after making “an individualized assessment based on the facts presented,” can the judge decide whether an outside-guidelines or inside-guidelines sentence is warranted.⁵⁰ Finally, the Court

42. *Id.* at 260–63. Until 2003, § 3742(e) directed appellate courts to review sentences that fell “outside the applicable guideline range” for reasonableness. See 18 U.S.C. § 3742(e)(3) (1994); see also *Booker*, 543 U.S. at 261.

43. *Booker*, 543 U.S. at 260 (citing 18 U.S.C. § 3742(a)–(b)). After excising § 3742(e), the standard of review section of the SRA, the Court reviewed both the remaining portions of the SRA and “appellate sentencing practice during the last two decades,” and held that review for “unreasonableness” was implicitly set forth in the SRA. *Id.* at 261–62. Justice Scalia, in his dissent, strongly disagreed, calling the Court’s remedy a “redrafting” of the statute. *Id.* at 310 (Scalia, J., dissenting in part). “Only in Wonderland,” Justice Scalia notes, can the Court “use[] the power of implication to fill a gap created by the Court’s own removal of an explicit standard.” *Id.* at 309–10. Regardless of the allure of Justice Scalia’s argument, the majority prevailed, and reasonableness review remains.

44. *Id.* at 264–65 (majority opinion).

45. 551 U.S. 338 (2007).

46. 552 U.S. 38 (2007).

47. *Rita*, 551 U.S. at 347.

48. *Id.* at 351.

49. *Gall*, 552 U.S. at 49.

50. *Id.* at 49–50. Section 3553(a) lists seven factors that a court must consider in imposing a sentence, including, for example, “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need to provide restitution to any victims of the offense.”

further clarified that “reasonableness review” equated to “a deferential abuse-of-discretion standard,” and that “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range” under this standard.⁵¹

Although the Court in *Gall* specifically affirmed the requirement that the courts of appeals review *all* federal sentences for reasonableness, the Court has yet to explain the jurisdictional basis for the courts of appeals to do so. This is a significant omission, especially considering the expanded role of the courts of appeals after *Booker*.

Two statutes currently provide possible bases for jurisdiction to review within-guidelines sentences for reasonableness after *Booker*: (1) 18 U.S.C. § 3742, the jurisdictional statute enacted in 1984 as part of the SRA; and, (2) 28 U.S.C. § 1291, the more general, “final decision” statute. The next two Parts explore the history and scope of both statutes in order to discern their impact on appellate jurisdiction over sentencing decisions today.

II. PRE-SRA REVIEW OF SENTENCES IN THE FEDERAL COURTS: THE ORIGIN OF THE RULE OF NONREVIEW

28 U.S.C. § 1291 provides: “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”⁵² As the historical analysis below shows, this “final decision” statute has existed in various forms since about 1891.⁵³ A “final decision” is a decision by a district court that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁵⁴ There is no question that sentences are “final decisions” within the meaning of § 1291: According to the Supreme Court, “Final judgment in a criminal case means sentence. The sentence is the judgment.”⁵⁵ Prior to the SRA, courts of appeals routinely heard

18 U.S.C. § 3553(a) (2006). Section 3553(a)(4), which the Court left intact in *Booker*, 543 U.S. 220, 264 (2005), requires that the sentencing court consider the sentencing range provided by the Guidelines. § 3553(a)(4).

51. *Gall*, 552 U.S. at 41.

52. 28 U.S.C. § 1291 (2006).

53. See *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (reviewing the evolution of § 1291); *Arizona v. Manypenny*, 451 U.S. 232, 245 n.19 (1981) (same); *United States v. Hahn*, 359 F.3d 1315, 1322 n.7 (10th Cir. 2004) (same).

54. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

55. *Berman v. United States*, 302 U.S. 211, 212 (1937). The question presented in *Berman* was whether a judgment in a criminal case is final for the purpose of appeal as a temporal matter. See *id.* That is, whether the fact that a sentence was suspended made the sentence not “final” according to the terms of § 1291. See *id.* It was not a case about the appealability of a sentence. Nevertheless, many courts have used this language as support for the fact that a sentence is reviewable under § 1291. See, e.g., *Hahn*, 359 F.3d at 1320 (“It is beyond dispute that a conviction and imposition of a sentence constitute a final judgment for § 1291 purposes.”); *United States v. McAndrews*, 12 F.3d 273, 276–77 (1st Cir. 1993) (citing *Berman*). Regardless of the logic (or lack thereof) of this tactic, the fact remains

sentencing appeals under § 1291 where a defendant challenged the sentence alone.⁵⁶ Accordingly, at least until Congress passed the SRA in 1984, § 1291 should have provided courts of appeals with subject matter jurisdiction to review criminal sentences.⁵⁷

Despite this, and since about the 1920s, many courts of appeals have declined to review sentences within the statutory range based on a longstanding rule that courts of appeals have no jurisdiction to review the duration of sentences.⁵⁸ As the Supreme Court has explained in *Dorszynski v. United States*: “[i]f there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute.”⁵⁹ This rule, often called the “rule of nonreviewability” or “rule of nonreview,” has been subject to overwhelming criticism in the past.⁶⁰ The criticism centers on two main points. First, scholars generally agree that the early federal courts that created the rule of nonreview, most prominently in the 1917 case *Freeman v. United States*,⁶¹ misinterpreted the then-existing statutory language on the appellate powers of the federal courts.⁶²

The second criticism of the rule of nonreview has broader implications for the scope of appellate powers to review sentences for reasonableness. Under this criticism, to the extent that appellate courts have declined to review sentences within statutory limits, they have done so because of a limited standard of review, not based on an inability to accept jurisdiction over those appeals.⁶³ In fact, courts of appeals have had jurisdiction to review sentences under § 1291 and its predecessor

that courts have been reviewing sentences under § 1291 for decades. See authorities cited *infra* note 56.

56. See, e.g., *Hahn*, 359 F.3d at 1320–21 & nn.3–4 (citing several cases); see also *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996) (“Prior to the passage of the Sentencing Reform Act . . . criminal appeals were taken pursuant to 28 U.S.C. § 1291.”).

57. It should be mentioned that § 1291 also covers appeals of final decisions in civil cases. However, only the scope of the statute as it relates to appeals in criminal cases is relevant to this discussion.

58. See, e.g., *Gurera v. United States*, 40 F.2d 338, 340–41 (8th Cir. 1930) (declining to review the severity of a two-year sentence for transportation of a half gallon of whisky due to lack of “control” over the sentence); Schwartz, *supra* note 29, § 3[a] (collecting cases supporting the common law rule of nonreviewability).

59. 418 U.S. 424, 440–41 (1974) (quoting *Gurera*, 40 F.2d at 340–41).

60. See *United States v. Rosenberg*, 195 F.2d 583, 605 & n.26 (2d Cir. 1952); Robert J. Kutak & J. Michael Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463, 464–71 (1974); Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379, 388–89 (1964) (analyzing the rule of nonreviewability); see also *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962).

61. 243 F. 353, 357 (9th Cir. 1917).

62. See Kutak & Gottschalk, *supra* note 60, at 465–71.

63. *United States v. Cooper*, 437 F.3d 324, 327 n.4 (3d Cir. 2006).

statutes since as early as 1891.⁶⁴

While this distinction between standard of review and jurisdiction may seem pedantic at first glance, it is anything but. If the courts of appeals do not have jurisdiction to review criminal sentences within statutory limits, then the *Booker* Court did not have the power to simply construct this jurisdiction. On the other hand, if the appellate courts declined to review sentences within statutory limits for policy reasons, the Supreme Court did not overstep its boundaries in *Booker*. The Supreme Court's ability to regulate the functions of the district courts gives it wider latitude to establish, and change, standards of review on appeal.⁶⁵

Several scholars, including most notably Robert Kutak and Michael Gottschalk, have historically agreed that the rule of nonreviewability is fundamentally flawed.⁶⁶ Despite this fact, appellate courts in guidelines cases cite the rule as preventing appellate review of within-guidelines

64. See *infra* Part II.A.

65. In *Booker*, the Court did not rely on its supervisory powers to create the reasonableness standard of review; instead, the Court claimed it was interpreting the statute authorizing criminal sentence appeals, the SRA. *United States v. Booker*, 543 U.S. 220, 260–62 (2005). However, if, as this Author argues, jurisdiction over sentence appeals of within-guidelines sentences is derived not from the SRA but from § 1291, then any standard of review implied from the SRA seems irrelevant in that context. The natural next question is whether the Court could imply a reasonableness review standard from § 1291, or from § 1291 and § 3742 combined. However, it is not necessary to answer this question for the purposes of this Article; the Court's ability to regulate the functions of the appellate courts provides more than enough authority, even if the statutes do not. As the Supreme Court recently explained in *Dickerson v. United States*, "The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." 530 U.S. 428, 437 (2000). Presumably this also includes the authority to regulate and prescribe standards of review. See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (recognizing that deferential review of a district court's decision regarding attorney's fees was not "compelled" by the underlying statute, but nevertheless mandating deferential review based, in part, on policies of "sound judicial administration").

Although the Court does not appear to question its inherent ability to supervise the procedures of the inferior courts, see *Dickerson*, 530 U.S. at 437; Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 371–84 (2006) (examining Supreme Court cases relying on supervisory powers to prescribe rules of procedure), scholars continue to debate this seemingly well-entrenched rule. See Barrett, *supra*, at 387 (questioning whether the Supreme Court possesses inherent supervisory authority to impose procedures upon inferior federal courts); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 868–37 (1994) (arguing that Article III's distinction between supreme and inferior courts requires inferior courts to follow Supreme Court precedents); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1500–12 (2000) (questioning Congress's ability to strip the Supreme Court of its ability to supervise the lower federal courts). The Supreme Court's authority to regulate and change the standards of review applied by the courts of appeals is the subject of my current research.

66. See Kutak & Gottschalk, *supra* note 60, 510–13; see also 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 533, at 336 & n.20 (3d ed. 2004) (providing a brief history of sentence appeals and citing "extensive literature" written on the subject of the rule of nonreviewability, "most of it favorable to appellate review of sentencing").

sentences.⁶⁷ This includes Judge Aldisert in his dissent from the Third Circuit decision *United States v. Cooper*.⁶⁸ In *Cooper*, Judge Aldisert disagreed with the majority that the Supreme Court in *Booker* authorized reasonableness review over within-guideline sentences. Citing to *Dorszynski* and other rule-of-nonreviewability cases, Judge Aldisert argued that jurisdiction over sentence appeals has always been extremely limited, both before and after the SRA, and does not include a power to review sentences within statutory limits for reasonableness.⁶⁹ Since “[n]o court, including the United States Supreme Court, has the power to promulgate a declaration of *jurisdiction*,” Judge Aldisert argued, the Court in *Booker* could not have required review of within-guideline sentences for reasonableness.⁷⁰

In order to determine whether the Supreme Court overstepped its bounds by, in effect, telling the courts of appeals to ignore precedent and review within-guidelines sentences for reasonableness, it is necessary to take a fresh look at the history and criticisms of the rule of nonreviewability.

A. DEVELOPMENT OF THE “RIGHT” TO A CRIMINAL APPEAL

Considering the modern proliferation of appeals in the criminal system, it is perhaps surprising to learn that Congress did not grant criminal defendants the right to appeal in this country until 1889, over a hundred years after the adoption of the United States Constitution.⁷¹ Indeed, the first Congress, when it established the federal court system through the First Judiciary Act of 1789, explicitly provided only for appeals from certain types of judgments in civil actions, suits of equity, and admiralty and maritime cases.⁷² Many theories have been advanced

67. See Schwartz, *supra* note 29, § 3[a] (collecting cases supporting the common law rule of nonreviewability).

68. *Cooper*, 437 F.3d at 336–37 (Aldisert, J., concurring and dissenting).

69. *Id.*

70. *Id.* at 339 (emphasis in original).

71. ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 215, 219 (1987).

72. Ch. 20, §§ 11, 21–22, 1 Stat. 73, 79, 83–84 (describing the appellate jurisdiction of the circuit courts); see also *id.* §§ 13, 22 (describing the appellate jurisdiction of the Supreme Court). The First Judiciary Act of 1789 established separate circuit and district courts. *Id.* § 4. Although the composition of the circuit courts would go through many changes, see SURRENCY, *supra* note 71, at 27–41, the Act originally provided that the circuit courts would be composed of one district judge and two Supreme Court Justices. § 4. To fulfill their “circuit duty,” the Justices of the Supreme Court traveled each year to “hold circuit” in various locations across the country. SURRENCY, *supra* note 71, at 27. Intending that the circuit courts would preside over the more important civil and criminal trials, see *id.* at 35, Congress gave these courts original jurisdiction to try all diversity of citizenship suits involving over \$500 and original jurisdiction over most criminal trials. § 11. Congress reserved for the district courts jurisdiction over civil cases involving less than \$500 and criminal cases “where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.” *Id.* § 9. Congress also provided that the circuit courts would play an appellate role, granting them jurisdiction over appeals from “final decrees

for the lack of criminal appeals in the early years of our nation. Erwin Surrency proposes one theory in this book, *History of the Federal Courts*. He explains that “the issue in the Nineteenth Century was whether the defendant was guilty of the crime charged rather than the [modern-day] emphasis on observing the proper procedure”⁷³ Accordingly, the practice of appellate review, along with other procedures designed to ensure fairness in the procedural system (as opposed to its substantive “correctness”), played only a limited role. Surrency also attributes the scarcity of criminal appeals to the lack of federal substantive criminal law in the early years of our nation: “Until the Civil War, the power of Congress to punish individuals for criminal conduct was limited to crimes against the laws of the United States and those committed in the areas which were controlled by the federal government.”⁷⁴ Thus, there were very few federal offenses, and states had jurisdiction over most common law and statutory crimes.⁷⁵ Because most criminal trials in the eighteenth and nineteenth centuries occurred in state court, there were few federal criminal convictions to review.⁷⁶

The Supreme Court affirmed the finality of criminal convictions for purposes of appeal in an 1805 decision, *United States v. More*.⁷⁷ In *More*, the defendant sought review in the Supreme Court of his conviction for taking unlawful fees as a Justice of the Peace.⁷⁸ On his own initiative, Chief Justice Marshall “suggested a doubt whether the appellate jurisdiction of [the Supreme Court] extends to *criminal cases*.”⁷⁹ The defendant argued it did, citing section 2 of Article III of the Constitution, which provides, “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.”⁸⁰ The defendant argued that since Congress did not specifically take criminal appellate jurisdiction

in a district court in causes of admiralty and maritime jurisdiction” where the matter in dispute exceeded \$300 and from “final decrees and judgments in civil actions” where the matter in dispute exceeded \$50. *Id.* §§ 11, 21, 22. The Supreme Court also served an appellate function over “civil actions, and suits in equity” from a circuit court, where the matter in dispute exceeded \$2000. *Id.* §§ 13, 22. Over the next century, Congress would eventually merge the trial functions of the circuit and district courts, making the circuit courts almost exclusively appellate bodies. In 1842, Congress gave the district courts concurrent jurisdiction with the circuit courts over all noncapital criminal trials. SURRENCY, *supra* note 71, at 112–13 (citing Act of Aug. 23, 1842, ch. 188, § 3, 5 Stat 516, 517). For a more detailed description of the early American federal court system, see SURRENCY, *supra* note 71.

73. SURRENCY, *supra* note 71, at 220.

74. *Id.* at 120.

75. *See id.* at 113–20; *see also* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 528 (1992).

76. Arkin, *supra* note 75, at 528.

77. 7 U.S. (7 Dall.) 159, 173–74 (1805).

78. *Id.* at 159.

79. *More*, 7 U.S. at 169.

80. U.S. CONST. art. III, § 2.

away from the Supreme Court, Congress did not make an “exception” to the Supreme Court’s jurisdiction as required by the Constitution.⁸¹ The *More* majority disagreed. It noted that section 22 of the First Judiciary Act explicitly limited the appellate jurisdiction of the Supreme Court to “civil cases” involving matters in dispute over \$2000.⁸² This “affirmative description of [the Court’s] powers,” the Court held, “must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.”⁸³ Thus, the judgments of the trial courts in criminal cases were final.⁸⁴ Following *More*, the Supreme Court routinely rejected requests by defendants to review criminal judgments—both as to convictions and to sentences—on jurisdictional grounds.⁸⁵

In fact, Congress had established the first mechanism for review in a criminal case three years earlier, with the Act of April 29, 1802 (“Act of 1802”).⁸⁶ Section 6 of that Act provided judges of the circuit courts—the trial courts responsible for the most important civil and criminal trials—with the power to certify questions to the Supreme Court when the judges of the circuit court could not agree on “any question.”⁸⁷ The impetus for this statute lay in the makeup of the federal courts at the time.⁸⁸ The circuit courts consisted of one district judge and two Justices of the Supreme Court; however, only two judges—including at least one Justice—constituted a quorum.⁸⁹ When the two present judges could not agree on a conviction or sentence, some arbiter was required; section 6 placed the Supreme Court in this role.⁹⁰ However, while the Act of 1802 made review of circuit decisions possible, the Supreme Court later

81. *More*, 7 U.S. at 169–70.

82. *Id.* at 173. For a discussion of the appellate jurisdiction of the Supreme Court under the First Judiciary Act, see *supra* notes 72 & 78.

83. *More*, 7 U.S. at 173.

84. *Id.* at 174 & * (“[I]n criminal cases the judgment of the [district court] is final.” (citing *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 299 (1796))).

85. See, e.g., *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833) (“But this court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence.”); see also *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[F]or a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.”); *United States v. Sanges*, 144 U.S. 310, 319 (1892) (“For a long time after the adoption of the Constitution, Congress made no provision for bringing any criminal case from a Circuit Court of the United States to this court by writ of error.”).

86. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

87. *Id.* § 6 (“[W]henver any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall . . . be stated under the direction of the judges, and certified under the seal of the court . . .”).

88. *SURRENCY*, *supra* note 71, at 215–16; see also *United States v. Rider*, 163 U.S. 132, 135–36 (1896) (reviewing the background of the certificate of division of opinion in section 6 of the Act of 1802).

89. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

90. § 6, 2 Stat. at 159–61.

clarified that defendants “had no right to ask for” certificate to the Supreme Court on a division of opinion.⁹¹ Not surprisingly, this “tie-breaker” statute “was of limited use, and only a few criminal cases came to the court under this procedure.”⁹²

The Act of 1802 certification mechanism remained the only review procedure for criminal law until 1879. Through section 1 of the Act of March 3, 1879 (“Act of 1879”), Congress gave the circuit courts their first appellate powers over criminal cases, granting them “jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars.”⁹³ Although the Act of 1879 significantly broadened review of criminal cases, it too had its limits. First, Congress did not grant corresponding appellate jurisdiction to the Supreme Court. Thus, the decisions of the circuit courts remained final.⁹⁴ Second, section 2 of the Act provided that the circuit judges or justices “may allow such writ of error” after having considered “the importance and difficulty of the questions presented.”⁹⁵ Accordingly, the availability of appeal was discretionary, at the whim of the circuit court.⁹⁶

Despite the limited nature of review offered in the Act of 1879, one section of the Act is worth further discussion. Section 3 provided, “in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon.”⁹⁷ Courts seeking to implement the Act began to interpret this language as providing the circuit courts with the power not only to

91. *Ex parte Gordon*, 66 U.S. 503, 504–05 (1861) (declining to hear an appeal of a piracy conviction carrying a death sentence because the circuit judges were not “opposed in opinion”).

92. SURRENCY, *supra* note 71, at 216. *But see* BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 83 (Little, Brown, & Co. 1880) (claiming that the division of opinion procedure was “very often used,” although not specifying whether specifically used in criminal cases).

93. Act of Mar. 3, 1879, ch. 176, § 1, 20 Stat. 354, 354. The “writ of error,” as described in the Act of 1879, was the major method of appeal throughout the eighteenth and much of the nineteenth centuries. *See* SURRENCY, *supra* note 71, at 201. The “writ of appeal” (the method now used exclusively in the American system) and the writ of error differ in many respects. *Id.* Most importantly, however, the writ of error was commonly known “as confining the examination of the reviewing court to the rulings and hence to the law involved in the case.” *Id.* at 202. By contrast, on a writ of appeal, “all evidence before the trial court” was presented to the appellate court, “and the review was much wider ranging, for . . . the reviewing court reviewed both the facts and the law.” *Id.* The writ of error was abolished in all cases in 1928. *Id.* at 209–10. For more on the subject of the writs of error and appeal, see *id.* at 201–09.

94. Arkin, *supra* note 75, at 523 n.83 (blaming the limited reach of the Act of Mar. 3, 1879 on the “the shortage of judicial personnel and the fact that there was no appellate jurisdiction in the Supreme Court” (citing SURRENCY, *supra* note 71, at 218)).

95. § 2.

96. Arkin, *supra* note 75, at 522–23.

97. § 3.

review the lawfulness of criminal sentences, but also to reduce sentences they thought excessive without having to remand the case to the district court.⁹⁸ As Judge Drummond explained in the 1881 decision *United States v. Bates*, “one object of the statute was to give to the circuit court authority, not only over the rulings of the district court during trial, but also over the degree of punishment imposed upon the party.”⁹⁹ Circuit courts, such as in *Bates*, thus declared that they would “award execution in conformity with [their] own opinion as to the degree of punishment which should be imposed,” if the circuit court disagreed with the district court.¹⁰⁰ According to Judge Drummond, a circuit court need only adopt the precise terms of conviction and sentence of the district court “where the judgment of that court is affirmed, not only as to the rulings made during the trial of the cause, but also as to the sentence.”¹⁰¹ Otherwise, the statute allowed a circuit court to substitute its judgment for that of the district court. As an example, the circuit court in *United States v. Wynn* relied on its appellate powers under section 3 of the Act of 1879 to reduce the defendant’s one-year sentence for stealing a letter from the mail, imposed by the district court, to eight months.¹⁰² The court held that the time already served, eight months imprisonment at hard labor, was a “sufficient sentence,” considering “all the circumstances, and in view of the possible doubt of the constitutionality of the question that is involved.”¹⁰³ Though courts later questioned whether the power in section 3 to modify sentences survived subsequent legislation, for the next twelve years at least, the circuit courts could exercise their appellate function to determine appropriate criminal sentences.

Congress finally provided criminal defendants with an explicit right to appeal (as opposed to the former avenues of review that were subject to judicial discretion) in the Act of February 6, 1889 (“Act of 1889”).¹⁰⁴ Congress initially limited that right to only direct appeals to the Supreme

98. SURRENCY, *supra* note 71, at 217 (citing *Bates v. United States*, 10 F. 92 (Cir. Ct. N.D. Ill. 1881); *United States v. Wynn*, 11 F. 57 (Cir. Ct. E.D. Mo. 1882)); Arkin, *supra* note 75, at 523 n.83 (“The circuit courts held themselves empowered to review both the rulings of the district court during trial and the nature of the penalty imposed.”); *see also* *United States v. Ruiz-Garcia*, 886 F.2d 474, 476 n.4 (1st Cir. 1989) (“Prior to 1891, federal appellate courts had, and occasionally exercised, the power to revise harsh sentences on appeal.” (citing Irving R. Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 257, 259 & nn.5–6 (1962); *United States v. Rosenberg*, 195 F.2d 583, 604–07 & nn.24–30 (2d Cir. 1952))).

99. *Bates v. United States*, 10 F. 92, 96 (Cir. Ct. N.D. Ill. 1881).

100. *Id.*

101. *Id.*

102. 11 F. 57, 57–58 (Cir. Ct. E.D. Mo. 1882).

103. *Id.* at 58. Because the defendant in *Wynn* had already served eight months of his one-year sentence at the time the court issued its decision, the court’s decision effectively released the defendant from prison. *Id.* at 57–58. The court declined to reach the legal issues raised in the appeal, *id.* at 57, most likely because they became moot upon the defendant’s release.

104. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

Court from “final judgments” in death penalty cases.¹⁰⁵ However, Congress expanded the right to appeal to all criminal cases only two years later through the Judiciary Act of 1891.¹⁰⁶ The Judiciary Act of 1891 represented a major overhaul of the entire federal criminal court system. As part of this Act, Congress formally organized the appellate functions of the circuit courts into the “circuit courts of appeals.”¹⁰⁷ The Circuit Courts of Appeals functioned much as they do today, exercising only an appellate function over the trial courts.

Through section 6 of the Judiciary Act of 1891, Congress provided the Circuit Courts of Appeals with “appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those” over which the Supreme Court had jurisdiction.¹⁰⁸ Accordingly, the new Circuit Courts of Appeals and the Supreme Court together had appellate jurisdiction over all criminal cases in the federal courts.¹⁰⁹ The Judiciary Act of 1891 was the first federal statute to include the “final decision” language now located in 28 U.S.C. § 1291; it is widely considered to be the predecessor of the modern statute.¹¹⁰

105. *Id.* (“[I]n all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court . . . Every such writ of error shall be allowed as of right . . .”); see *Abney v. United States*, 431 U.S. 651, 656 n.3 (1977) (“Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals ‘in all cases of conviction of crime the punishment of which provided by law is death.’” (quoting Act of Feb. 6, 1889, § 6)); *United States v. Dickinson*, 213 U.S. 92, 98 (1909); *United States v. Sanges*, 144 U.S. 310, 321 (1892) (“The first act of Congress which authorized a criminal case to be brought from a Circuit Court of the United States to this court, except upon a certificate of division of opinion, was the act of Feb. 6, 1889. . .”).

106. Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828. This act is also called the “Circuit Court of Appeals Act” or the “Evarts Act.”

107. *Id.* § 2.

108. *Id.* § 6. In section 5 of the Act, Congress provided that appeals would be taken directly from the district and circuit courts to the Supreme Court (bypassing the new courts of appeal) “[i]n cases of conviction of a capital or otherwise infamous crime.” *Id.* § 5 (emphasis added); see also *Ballew v. United States*, 160 U.S. 187, 201 (1895) (citing the Act of Mar. 3, 1891 as conferring appellate jurisdiction on the circuit courts of appeals in criminal cases not given to the Supreme Court). Although Congress intended only a limited direct appeal to the Supreme Court, a legislative “goof” thwarted this intent. As Surrency explains, the Supreme Court had previously defined the term “infamous crimes” to include any crime that is punishable by imprisonment in the state prison. SURRENCY, *supra* note 71, at 220–21 (citing *In re Claasen*, 140 U.S. 200 (1891)). Section 5 of the Act thus effectively gave the Supreme Court appellate jurisdiction over all criminal cases. *Id.* at 221; Arkin, *supra* note 75, at 523 n.86; see also *In re Claasen*, 140 U.S. 200, 204–05 (1891) (applying the Supreme Court’s earlier holding in *Ex parte Wilson*, 114 U.S. 417, 418 (1885)—where the Court held that “a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the provision of the Fifth Amendment”—to the definition of “infamous crime” in section 5 of the Judiciary Act of 1891).

109. Act of Mar. 3, 1891 §§ 5–6; see also *Ballew*, 160 U.S. at 201.

110. See *Arizona v. Manypenny*, 451 U.S. 232, 245 n.19 (1981) (“Through a succession of re-codifications and technical amendments, § 6 of the 1891 Act has been carried forward as 28 U.S.C.

Over the next twenty years, Congress gradually transferred direct review of all criminal cases (capital and noncapital), to the courts of appeals, all the while defining the appellate powers as the power to review "final decisions" of the lower courts.¹¹¹ Finally, in the Act of March 3, 1911, Congress settled on the language which, for the most part, remains today: "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts."¹¹² Congress first codified this language in the Judicial Code at 28 U.S.C. § 225 and again, with minor changes, in the revised Judicial Code at 28 U.S.C. § 1291.¹¹³

B. THE SCOPE OF JURISDICTION OVER SENTENCE APPEALS PRIOR TO THE SRA

As the above history shows, 28 U.S.C. § 1291 and its predecessor statutes have provided for appellate jurisdiction in criminal cases since at least the Judiciary Act of 1891. But while the power to take a criminal appeal is firmly established, the scope of appellate jurisdiction in criminal cases is less clear. Exactly what could appellate courts do on appeal in a criminal case?

Courts frequently cite two lines of cases for the proposition that the appellate "powers" of the courts of appeals do not extend to reviewing the length of a criminal sentence. In one line of cases, starting with *Freeman v. United States*, courts held that Congress affirmatively withdrew such jurisdiction from the appellate courts through the Judiciary Act of 1891.¹¹⁴ In the other, exemplified by cases such as *Dorszynski v. United States*, courts do not rely on a specific jurisdictional statute, but instead describe a policy of deference to sentencing courts that precludes review.¹¹⁵ Each is analyzed in turn.

§ 1291."); *United States v. Hahn*, 359 F.3d 1315, 1322 n.7 (10th Cir. 2004) ("Congress created intermediate courts of appeals in 1891. The very act that created the courts of appeals conferred on them the power to review final judgments in almost all civil and criminal cases. Recodified and technically amended, § 6 of the 1891 Act exists essentially unchanged today as 28 U.S.C. § 1291." (internal citations omitted)).

111. See Act of Jan. 20, 1897, ch. 68, 29 Stat. 492 (deleting "or otherwise infamous" from § 5 of the Judiciary Act of 1891, effectively transferring appellate jurisdiction of all but capital cases to the circuit courts of appeals); see also Act of Mar. 3, 1911 §§ 128, 236, 238 (withdrawing from the Supreme Court and transferring to the courts of appeals appellate jurisdiction over capital cases).

112. § 128.

113. See *Cobbledick v. United States*, 309 U.S. 323, 324 & n.1, 325-26 & n.4 (1940) (reviewing history of the final decision statute); *Dugan & McNamara v. Clark*, 170 F.2d 118, 119 (3d Cir. 1948) ("[28 U.S.C. § 1291] conforms to the former Section 128(a) of the Judicial Code, as amended, 28 U.S.C.A. § 225(a)").

114. 243 F. 353, 357 (9th Cir. 1917).

115. 418 U.S. 424, 440-42 (1974).

I. Freeman and the Power to Modify Sentences

As I explained above, the Act of 1879 enabled the circuit courts both to question the legality of convictions and to modify sentences on appeal. But Congress, in defining the jurisdiction of the Circuit Courts of Appeals in 1891, failed to include the language from the Act of 1879 that gave the circuit courts the power to “pronounce final sentence.” Courts split in interpreting how this omission affected the appellate jurisdiction of the Circuit Courts of Appeals.

Some courts thought Congress’s decision to omit this language meant that Congress had repealed the power to modify sentences on appeal by implication.¹¹⁶ In *Freeman v. United States*, the leading case espousing this limited view, the defendant asked the Ninth Circuit Court of Appeals to “modify [his] sentence and judgment” and release him from prison.¹¹⁷ The defendant argued that, “in consideration of the nature of the testimony” presented at trial, the court should modify his one-year sentence for mail fraud.¹¹⁸ The *Freeman* court declined, holding that under the Judiciary Act of 1891, Congress only gave the court the power to “review” final decisions, not to “pronounce final sentence.”¹¹⁹ According to the *Freeman* court, Congress’s decision to delete the language “pronounce final sentence” from the Judiciary Act of 1891 meant that appellate courts no longer had the power to revise sentences on appeal.¹²⁰ Accordingly, the court stated broadly, the question of “the nature of the sentence” was entirely in the discretion of the trial court, and the appellate court “will not [review]” the sentence as long as it is within statutory limits.¹²¹

116. See *United States v. Rosenberg*, 195 F.2d 583, 604 n.25 (2d Cir. 1952) (discussing the impact of the Judiciary Act of 1891 on the appellate power to modify sentences).

117. 243 F. at 357.

118. *Id.*

119. *Id.* (quoting Act of Mar. 3, 1879, ch. 176, 20 Stat. 354).

120. See *id.*

121. *Id.* Prior to the Judiciary Act of 1891, a district judge could sit on the circuit court appellate panel that heard the appeal of his own decision. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 6 (6th ed. 2002). In light of this, it is possible that Congress only allowed modification of sentences prior to 1891 under the theory that the circuit court would be just as knowledgeable about the intricacies of the case as the district judge—indeed, they could be the same person. Later, in section 3 of the Judiciary Act of 1891, Congress changed this, providing that “no . . . judge before whom a cause or question may have been tried or heard . . . shall sit on the trial or hearing of such cause or question in the circuit court of appeals.” Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826, 827. One could deduce that Congress eliminated the appellate power to modify sentences in the same Act as a corollary to the decision to eliminate the same judges at trial and on appeal. However, I think this unlikely for two reasons. First, according to at least one scholar, Erwin Surrency, judges did not usually hear appeals of their own cases, despite their theoretical ability to do so. As he explains, circuit court judges could be called upon to fill in for such appeals. SURRENCY, *supra* note 71, at 218. It is unlikely that Congress would give *all* circuit courts the ability to modify sentences on appeal if it was intending to target only a certain type of appeal that rarely happened. Furthermore, in prohibiting district judges from hearing appeals of their own decisions, Congress sought to ensure a fair and

Other courts took the opposite view, arguing that the appellate courts' power to modify sentences on appeal survived the Judiciary Act of 1891. Section 11 provided, "All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals."¹²² If the writ of error encompassed the same powers after the Judiciary Act of 1891 as before, then the power to modify sentences, incorporated into the writ by the Act of 1879, should also have survived the Judiciary Act of 1891. The leading case supporting this view is *Hanley v. United States*,¹²³ a 1903 Second Circuit Court of Appeals decision. In that case, the court ordered a reduction of the defendant's sentence for mail fraud, asserting that section 11 of the Judiciary Act of 1891 encompasses the power granted by the Act of 1879 to "pronounce final sentence."¹²⁴

This latter view, espoused by the *Hanley* court, has found strong support in the literature. As several scholars have pointed out, the *Hanley* court's expansive view of section 11 of the Judiciary Act of 1891 is supported by legislative history.¹²⁵ In its report to Congress accompanying the Judiciary Act of 1891, the House Committee on the Judiciary advised Congress that the Act "provides that the circuit courts of the United States shall exercise such jurisdiction . . . as they have and exercise under existing laws."¹²⁶ The Committee further stated that the Judiciary Act of 1891

destroys the "judicial despotism" of the present system by creating an intermediate appellate court, with power to revise the final judgments

uninfluenced look at the judgment below. 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3545 (3d ed. 2008). In light of this, it is highly unlikely that Congress meant to eliminate review of the substance of the sentencing decision altogether, which could decrease fairness in sentencing, even if Congress intended to remove the ability to modify sentences.

122. § 11.

123. 123 F. 849, 854-55 (2d Cir. 1903).

124. *Id.* (quoting Act of Mar. 3, 1879 § 3). In *Hanley*, the Second Circuit reversed the defendant's sentence due to legal error, not based on a general claim of excessiveness. *Id.* However, the point remains that the court considered section 11 of the Act of 1891 to encompass the former powers to "pronounce final sentence." *Id.*

125. See Kutak & Gottschalk, *supra* note 60, at 467-68; see also *Ballew v. United States*, 160 U.S. 187, 201-02 (1895) (interpreting section 11 of the Judiciary Act of 1891 to incorporate the Supreme Court's former statutory power to direct the district courts, on remand, to resentence the defendant in conformity with the Court's decision); *United States v. Rosenberg*, 195 F.2d 583, 604 n.25 (2d Cir. 1952) (noting that *Ballew* and *Hanley* "strongly suggest that the statutory powers given in the 1879 law to circuit courts had been incorporated by reference in the 1891 statute setting up the circuit courts of appeal," but continuing to abide by the *Freeman* rule in recognition of its firm entrenchment in sentencing jurisprudence); *Recent Cases: Criminal Procedure—Federal Court of Appeals Vacates Sentence on Grounds of Severity and Remands to District Court for Resentencing*, 109 U. PA. L. REV. 422, 423 n.13 (1961); cf. *United States ex rel. John Davis Co. v. Ill. Sur. Co.*, 226 F. 653, 664 (7th Cir. 1915) (holding, in a civil case, that it had the power "the power to modify, as well as to affirm or reverse, any judgment of the District Court").

126. H.R. REP. NO. 51-1295, at 1 (1890).

of the district courts in all cases, civil and criminal, except . . . where the fine is not over \$300 and does not involve imprisonment.¹²⁷

Despite strong support for its view, the *Hanley* court's position did not carry the day. Courts and scholars have cited *Freeman* and the like for the proposition that, at least until the SRA in 1984, the federal appellate courts did not have jurisdiction to review the length of sentences as long as those sentences lay within the limitations provided by statute.¹²⁸

But *Freeman* does not stand for such a broad proposition. Even if, as the *Freeman* court held, appellate courts no longer have jurisdiction to modify a sentence on appeal, there is nothing in the *Freeman* case or other early cases that restricts appellate courts' power to scrutinize sentences for error and to remand for resentencing under the final decision statute. Although the *Freeman* court, relying on the Judiciary Act of 1891, held that it could not review the severity of an otherwise legal sentence on appeal,¹²⁹ it did so in the context of the defendant's argument that "in consideration of the nature of the testimony," the court "should modify the sentence and judgment, so as to omit [his] imprisonment."¹³⁰ The opinion does not indicate that the defendant in *Freeman* would have been satisfied with a consolation prize—a decision vacating the sentence and remanding for resentencing. It is easy to conceive of possible reasons why a defendant might want the appellate court to issue a sentence rather than the trial court—the most obvious being if the district court judge was known to impose harsh sentences. Regardless of the defendant's reasons, however, the issue in *Freeman* was whether the Circuit Courts of Appeals retained the power to modify sentences on their own, and not whether the Circuit Courts of Appeals could review a sentence for some kind of error (including excessiveness) and remand for resentencing. As such, modern courts should be wary of citing *Freeman* and other early cases interpreting the Judiciary Act of 1891 for the proposition that the courts of appeals have no jurisdiction to review sentences within statutory limits. So long as an "unreasonable sentence" constitutes an "error" as the Supreme Court now says it does,

127. *Id.* at 3.

128. See Brief for the Hon. Orrin G. Hatch et al. as Amici Curiae Supporting Petitioner at 8–9, *United States v. Booker*, 543 U.S. 220 (2005) (Nos. 04-104, 04-105) (citing *Freeman* for the proposition that the Judiciary Act of 1891 "impliedly repealed appellate jurisdiction over sentencing"); see also *United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1971) ("The statutory authority to review sentences, exercised on appeal from 1789 to 1891, is thought to have been removed by implication . . ." (citing *Freeman v. United States*, 243 F. 353, 357 (9th Cir. 1917)); *Witt v. United States*, 287 F.2d 389, 393 (9th Cir. 1961) ("The sentence being within the limits allowed by the statute, this court has no authority to lessen or in any way change the sentence." (citing *Brown v. United States*, 222 F.2d 293 (9th Cir. 1955); *Freeman*, 243 F. at 357)).

129. See *Freeman v. United States*, 243 F. 353, 357 (1917) (holding that court would not "review" the sentence "where the punishment assessed is within the statutory limits").

130. *Id.*

neither *Freeman* nor the Judiciary Act of 1891 bars review of that sentence.

2. *Dorszynski and Discretionary Limits on Appeals of Sentencing Decisions*

As the above statutory history shows, the courts of appeals have had the power, under statute, to review criminal sentences since at least the Judiciary Act of 1891. Nevertheless, many courts still deny such a power existed prior to the SRA, citing the longstanding rule—most famously quoted in the 1974 Supreme Court case, *Dorszynski v. United States*—that courts of appeals will not disturb the decisions of lower courts regarding the length of sentences that fall within statutory limits.¹³¹ So long as a district court sentences a defendant below the statutory maximum, the rule goes, an appellate court cannot question the suitability of the sentence.¹³²

Despite this seemingly strict limitation on the “powers” of the appellate courts, a review of the cases in this area shows that the rule of nonreview referred to in *Dorszynski* and like cases is not jurisdictional, but policy-based. As Chief Judge Anthony Scirica articulated in the majority opinion in *United States v. Cooper*, the rule of nonreview “was based not on a lack of jurisdiction, but on the wide discretion of sentencing courts which made reversal nearly impossible.”¹³³ This distinction makes all the difference: while the Supreme Court may not expand the jurisdiction of the federal courts, it may, through its ability to regulate the functions of the lower courts, change the level of deference the appellate courts give to district court decisions—including sentencing decisions.¹³⁴

131. 418 U.S. 424, 440–41 (1974); *see also* *United States v. Cooper*, 437 F.3d 324, 336 (3d Cir. 2006) (Aldisert, J., concurring and dissenting) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.” (quoting *Dorszynski*, 418 U.S. at 431)); *United States v. Simmons*, 92 F.3d 1169, 1169 (1st Cir. 1996) (unpublished opinion) (“[W]e have no jurisdiction to consider an appeal from sentence that was within the applicable guideline range and was correctly determined.”).

132. *Dorszynski*, 418 U.S. at 440–41; *see also* *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (“The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court’s denial of habeas corpus.”); *United States v. Ruiz-Garcia*, 886 F.2d 474, 476–77 (1st Cir. 1989) (“For almost a century, conventional wisdom taught that: ‘If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.’” (quoting *Gurera v. United States*, 40 F.2d 338, 340–41 (8th Cir. 1930))).

133. 437 F.3d at 327 n.4 (majority opinion) (citing *Koon v. United States*, 518 U.S. 81, 96 (1996); *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996); *United States v. McAndrews*, 12 F.3d 273, 276–77 (1st Cir. 1993); S. REP. NO. 98-225, at 150 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333.))

134. *See* *Williams v. United States*, 503 U.S. 193, 219 n.17 (1992) (White, J., dissenting) (noting that the Court must expand the scope of appellate review of sentences because Congress, through the SRA, withdrew some of the previous “near-absolute discretion” of the district courts); *Yates v. United States*, 356 U.S. 363, 366–67 (1958) (*per curiam*) (recognizing that reduction of a sentence normally

First, a word about the confusion between deference and jurisdiction. Appellate courts usually “defer” to a lower court’s decisions when, due to some judicial or statutory policy, the judgments of the lower court are valued over that of the appellate court. For example, appellate courts defer to the trial courts’ decisions as to the impartiality or credibility of jurors on voir dire because trial courts are in a better position to evaluate demeanor evidence and responses to questions.¹³⁵ How much deference is given is reflected in the scope of review, also called the “standard of review.” The standard of review is the level of scrutiny with which an appellate court will evaluate a lower court’s decision. Thus, the broader the standard of review, the more expansive in scope the appellate court’s examination will be.¹³⁶ Appellate jurisdiction, on the other hand, is the power of a particular appellate court to review the lower court’s decision in the first place. As noted earlier, “No court, including the United States Supreme Court, has the power to promulgate a declaration of *jurisdiction*. That remains the exclusive province of Congress within the boundaries set forth by the Constitution.”¹³⁷ A standard of review, by contrast, may be defined either by Congress or by the courts.

The confusion between jurisdiction and standard of review is greatest when the standard of review is a narrow one. It is easy to mistake deference to a lower court’s decision for a lack of power to overturn that decision.¹³⁸ This is especially the case when the Supreme Court itself sends mixed messages on the issue. On the one hand, the Court has routinely made it clear that appellate courts have jurisdiction to review sentences under 28 U.S.C. § 1291. In *Arizona v. Manypenny*, the Court explained, “it is settled that . . . an appeal by the defendant in a criminal case, may be taken from any final decision of a District Court”

ought not to be made by a reviewing court, but nevertheless exercising its “supervisory power over the administration of justice in the lower federal courts” by setting aside a sentence of the district court); see also *Kontrick v. Ryan*, 540 U.S. 443, 454–56 (2004) (suggesting that because time constraints are “claim-processing rules” and are not “jurisdictional,” they can be altered; so, unlike when parties raise jurisdictional issues, assertions of untimeliness can be waived “if the party asserting the rule waits too long to raise the point”); authorities cited *supra* note 65.

135. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

136. For a thorough discussion of standards of review, scope of review, and examples of the varying levels of deference to trial court decisions, see 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (4th ed. 2010); J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, *LAW & CONTEMP. PROBS.*, Spring 1984, at 1; Maurice Rosenberg, *Standards of Review, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 30 (Arthur D. Hellman ed. 1991).

137. *Cooper*, 437 F.3d at 339 (Aldisert, J., concurring and dissenting) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

138. See *United States v. Minutoli*, 374 F.3d 236, 240 (3d Cir. 2004) (recognizing that the lack of “power” to review discretionary decisions not to depart had been described by the courts as both “jurisdictional” and as deferential to the sentencing courts’ “unfettered discretion”).

under § 1291.¹³⁹ And over forty years earlier, in *Berman v. United States*, the Court defined the term “final judgment” in the context of a criminal case: “Final judgment in a criminal case means sentence. The sentence is the judgment.”¹⁴⁰

Furthermore, the Supreme Court has, on a number of occasions, reviewed sentences for illegality or abuse of discretion, strongly implying the Court’s view that jurisdiction over these appeals exists.¹⁴¹ As an example, in the 1958 case *United States v. Yates*, the defendant appealed her one-year sentence for criminal contempt, which was based on her refusal to answer questions about the Communist membership of other persons.¹⁴² Contempt is an offense for which there is no statutory sentencing limit; thus, any sentence, no matter how harsh, falls within “statutory limits.”¹⁴³ The Court conceded that, “normally,” a reduction in sentence should be left to the discretion of the trial court.¹⁴⁴ However, the Court went on to explain:

when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.¹⁴⁵

The Court determined that the seven months the defendant had already spent in jail was “an adequate punishment,” and ordered the district court to reduce the sentence to time served.¹⁴⁶

139. 451 U.S. 232, 245 (1981) (holding that § 1291 authorizes a state to appeal from a federal district court’s judgment of acquittal).

140. 302 U.S. 211, 212 (1937). Admittedly, Supreme Court cases such as *Berman*, which use the “sentence is the judgment” language, are usually cases questioning whether a decision is sufficiently “final” so as to trigger appellate review under § 1291. *See id.* at 213 (holding that defendant’s conviction was “final” and appealable under § 1291 despite the fact that the district court suspended the sentence). The Court has not specifically stated that sentences themselves (as opposed to the conviction) are final decisions reviewable under § 1291. But actions can speak louder than words. The Supreme Court has reviewed sentencing decisions on a number of occasions, strongly implying the Court’s view that jurisdiction over these appeals exists, presumably under § 1291 authority. *See United States v. McAndrews*, 12 F.3d 273, 276–77 (1st Cir. 1993) (explaining that before the sentencing guidelines were enacted, courts of appeals had jurisdiction over sentencing appeals under § 1291, though the wide discretion afforded to sentencing judges narrowed the scope of the appellate review).

141. *See, e.g., United States v. Tucker*, 404 U.S. 433, 447 (1972) (remanding for resentencing when the sentence was based in part on three prior convictions, two of which were unconstitutional); *Yates v. United States*, 356 U.S. 363, 366–67 (1958) (per curiam) (remanding to the district court with instructions to reduce the sentence to time served based on the district court’s refusal to exercise judgment); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing the defendant’s convictions for burglary and robbery based on the illegality of the sentencing procedure).

142. 356 U.S. at 364–66.

143. *See id.* (deciding the case without referring to any statutory minimum or maximum).

144. *Id.* at 366.

145. *Id.* at 366–67.

146. *Id.* at 367. Interestingly, the *Yates* decision came twenty-six years after the Court, in

Following similar logic, the courts of appeals routinely reviewed sentencing decisions of the district courts up until the passage of the SRA. Generally, “sentences that were imposed above statutory limits, that were the result of material misinformation, or that were based on a constitutionally impermissible factor” were reviewable on appeal.¹⁴⁷ Courts of appeals also reviewed and reversed sentences if the trial court failed to exercise its discretion, for example by refusing to consider certain information during sentencing.¹⁴⁸ Furthermore, at least one court followed the Supreme Court’s example in *Yates* and imposed its own sentence upon reversal. In that case, *United States v. Daniels*, the Sixth Circuit reversed a five-year sentence imposed on a defendant whose religious beliefs precluded him from obeying an order of a local selective service board.¹⁴⁹ The court held that the district court did not properly exercise its discretion when it sentenced the defendant to the maximum sentence.¹⁵⁰ The district court did not consider mitigating evidence, but instead imposed the same sentence that it had for all other “cases of this kind.”¹⁵¹ The Sixth Circuit held that this defendant, who was “of ‘good character’ and of ‘apparent model behavior,’” deserved a much lighter sentence.¹⁵² Accordingly, the court reversed the sentence with directions that the district court instead impose twenty-five months of probation and “civilian work contributing to the maintenance of the national health, safety or interest.”¹⁵³

Despite this clear record of appellate jurisdiction to review sentences, the Supreme Court has seemed to deny appellate jurisdiction to review a district court’s sentencing decision on several occasions—most prominently in *Townsend v. Burke*,¹⁵⁴ *United States v. Tucker*,¹⁵⁵

Blockburger v. United States, announced that the Supreme Court has no power to revise sentences within statutory limits. 284 U.S. 299, 305 (1932) (“[I]t is true that the imposition of the full penalty . . . seems unduly severe; but . . . the matter was one for [the trial] court, with whose judgment there is no warrant for interference on our part.”). In light of the Court’s holding in *Yates*, the deference the Court afforded to sentencing judges in *Blockburger* should not be taken as synonymous with lack of jurisdiction.

147. *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)); see 3 WRIGHT ET AL., *supra* note 66, § 533, at 330–31 nn. 9–11 (citing cases).

148. *Dorszynski v. United States*, 418 U.S. 424, 443 (1974) (“Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all.”); see *Woosley v. United States*, 478 F.2d 139, 147 (8th Cir. 1973) (remanding for resentencing a maximum sentence for draft violation by a defendant who refused to serve as a matter of conscience, holding that the severity of the five-year sentence “shocks the judicial conscience”); see also 3 WRIGHT ET AL., *supra* note 66, § 533, at 332 n.12, 336 n.19 (citing cases).

149. 446 F.2d 967, 972–73 (6th Cir. 1971).

150. *Id.* at 972.

151. *Id.* at 969, 973.

152. *Id.* at 972.

153. *Id.*

154. See 334 U.S. 736, 741 (1948).

155. See 404 U.S. 443, 447 (1972).

Gore v. United States,¹⁵⁶ *Yates v. United States*,¹⁵⁷ *Blockburger v. United States*,¹⁵⁸ and *Dorszynski v. United States*.¹⁵⁹ So which is it?

At first glance, the language in cases such as *Townsend*, *Tucker*, *Gore*, *Yates*, *Blockburger*, and *Dorszynski* appears to suggest that the Court's policy of nonreview of the length of sentences is based on a lack of jurisdiction. Each case has a tantalizing "sound bite" that purports to absolutely bar review. One case that is often cited is *Dorszynski*, where the Court, quoting the Eighth Circuit Court of Appeals, stated, "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has *no control* over a sentence which is within the limits allowed by a statute."¹⁶⁰ The Court's *Blockburger* decision is also routinely cited to support the rule of nonreview. There, the Court refused to reduce a sentence it considered "unduly severe" because "the matter was one for [the trial] court, with whose judgment there is *no warrant for interference* on our part."¹⁶¹ *Tucker*, *Gore*, *Yates*, and *Townsend* include similar language purporting to limit appellate power to review sentences.¹⁶² To this day, these sound bites are used to justify holdings that appellate courts do not have "jurisdiction" to review sentences within statutory limits.

However, as the research of Kutak, Gottschalk, and other authors makes plain,¹⁶³ "The Supreme Court support for the rule that federal appellate courts generally may not review a sentence is pure dicta."¹⁶⁴ Each of these cases—*Townsend*, *Tucker*, *Gore*, *Yates*, *Blockburger*, and *Dorszynski*—merely reflects a judicial policy of deference to district courts regarding the severity of sentences, not a holding regarding the jurisdiction of the appellate courts. Because much of this field has been thoroughly covered, only a brief review of these cases follows.

The Supreme Court first articulated the rule of nonreview in

156. See 357 U.S. 386, 393 (1958).

157. See 356 U.S. 363, 366-67 (1958) (per curiam).

158. See 284 U.S. 299, 305 (1932).

159. See 418 U.S. 424, 440-41 (1974).

160. *Id.* (quoting *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1930)) (emphasis added).

161. 284 U.S. at 305 (emphasis added).

162. *United States v. Tucker*, 404 U.S. 443, 447 (1972) ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."); *Gore v. United States*, 357 U.S. 386, 393 (1958) (noting the Court had no "power" to revise sentences on appeal); *Yates*, 356 U.S. at 366 ("[R]eduction of the sentence . . . normally ought not be made by this Court."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) ("The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction . . .").

163. See Kutak & Gottschalk, *supra* note 60, at 471-76 (analyzing Supreme Court precedent on the reviewability of sentences); *Appellate Review of Sentencing Procedure*, *supra* note 60, at 380-83 (same); see also 3 WRIGHT ET AL., *supra* note 66, § 533, at 336 n.20 (citing "extensive literature" written on the subject of the rule of nonreviewability).

164. *Woosley v. United States*, 478 F.2d 139, 142 (8th Cir. 1973) (citing 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 533, at 451-52 (1969)).

Blockburger, decided in 1932.¹⁶⁵ In that case, the petitioner challenged a statute that allowed him to receive multiple punishments for the commission of a single act.¹⁶⁶ Because that act, a single sale of morphine hydrochloride, violated two separate criminal statutes, the district court sentenced Blockburger to two consecutive terms of five years' imprisonment.¹⁶⁷ The Court upheld the sentence, refusing to question Congress's judgment on the severity of the punishments it chose.¹⁶⁸ Congress's intent was clear, the Court held: "[E]ach offense is subject to the penalty prescribed."¹⁶⁹ Furthermore, "if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction."¹⁷⁰ The Court went on to address the trial court's decision to impose "the full penalty of fine and imprisonment upon each count," and admitted that the district court's decision "seem[ed] unduly severe."¹⁷¹ However, the Supreme Court refused to question the sentencing court's decision, stating "the matter was one for that court, with whose judgment there is no warrant for interference on our part."¹⁷² But, in refusing to interfere with that judgment, the Court did not rely on some lack of power to do so—indeed, the Court did not mention jurisdiction at all. Instead, the Court acknowledged that "there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment."¹⁷³ In essence, the Court deferred to the more knowledgeable judgment of the district court; it did not make a jurisdictional ruling.

Twelve years later, the Court reviewed another multiple count conviction and sentence in *Gore v. United States*.¹⁷⁴ In that case, the defendant was arrested for selling narcotics on two separate occasions.¹⁷⁵ For each sale, the petitioner received three sentences of one-to-five years' imprisonment for violating three separate statutes making it illegal to sell, repackage, and conceal narcotics.¹⁷⁶ The defendant argued that

165. See 284 U.S. 299, 305 (1932).

166. *Id.* at 304.

167. *Id.* at 301.

168. *Id.* at 305.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. 357 U.S. 386 (1958).

175. *Id.* at 387.

176. *Id.* at 387–88. In conjunction with each sale of narcotics, the defendant in *Gore* was charged with, found guilty of, and separately punished for: (1) the unlawful sale of drugs except in the original stamped package; (2) the unlawful sale of drugs except in furtherance of a designated writing; and (3) the fraudulent concealment of unlawfully imported drugs. *Id.* at 387. The trial court ordered that the sentences imposed for the two sales—one to five years—run concurrently. Thus, the total sentence was three-to-fifteen years. *Id.* at 388.

the statute allowing multiple convictions and sentences based on a single act violated the constitutional prohibition against double jeopardy.¹⁷⁷ The Court disagreed, stating that the defendant, in essence, asked the Court to “enter the domain of penology.”¹⁷⁸ It declined to do so. As the Court explained, although the English and Scottish courts of appeal “were given power to revise sentences,” the Supreme Court “has no such power.”¹⁷⁹

As with *Blockburger*'s “no warrant for interference” language, *Gore*'s “penology” language has been routinely cited as support for the proposition that there is no appellate jurisdiction to review the length of sentences.¹⁸⁰ But, as Kutak and Gottschalk point out, the *Gore* opinion was not about appellate courts' jurisdiction to review sentences.¹⁸¹ The question before the Court was whether Congress intended to allow for multiple punishments and, if so, whether that intent would violate the Double Jeopardy Clause.¹⁸² Under this analysis, so long as the sentencing court was allowed, both under statute and the Constitution, to sentence the defendant under three separate statutes, the dispute was at an end.¹⁸³ In addition, the “penology” discussion, almost an afterthought in the majority opinion, references the power to “revise” sentences on appeal not the jurisdiction to review sentences generally.¹⁸⁴ Accordingly, like *Blockburger*, *Gore* can only be read to reflect two propositions that are important here: (1) a reaffirmance of the *Freeman* rule that appellate courts cannot modify sentences on appeal, and (2) the Court's significant deference to congressional decisions regarding the severity of punishment.

Four other Supreme Court cases are routinely cited to support a lack of jurisdiction to review sentences on appeal: *Townsend v. Burke*,¹⁸⁵ *Yates v. United States*,¹⁸⁶ *United States v. Tucker*,¹⁸⁷ and *Dorszynski v. United States*.¹⁸⁸ However, none of these cases supports the proposition that sentencing decisions within statutory limits are completely insulated from appellate scrutiny.

177. *Id.* at 392.

178. *Id.* at 393.

179. *Id.*

180. See, e.g., *United States v. Pruitt*, 341 F.2d 700, 703-04 (4th Cir. 1965) (citing *Gore* in support of its holding that the court was “powerless to review” an otherwise legal sentence within statutory limits); *Smith v. United States*, 273 F.2d 462, 468 (10th Cir. 1959) (same).

181. See Kutak & Gottschalk, *supra* note 60, at 472-73.

182. *Gore*, 357 U.S. at 390, 392.

183. *Id.* at 392-93.

184. *Id.* at 393. Indeed, the Court admits that the power to review sentences continued to be a “much mooted” point. *Id.*

185. 334 U.S. 736 (1948).

186. 356 U.S. 363 (1958) (per curiam).

187. 404 U.S. 443 (1972).

188. 418 U.S. 424 (1974).

In three of these cases—*Townsend*, *Yates*, and *Tucker*—the Supreme Court actually reversed the sentence based on some kind of sentencing error.¹⁸⁹ This fact is often overlooked, but it is important for our analysis as it shows that sentencing decisions are not, in fact, unassailable on review. In *Townsend*, a habeas case decided in 1948, the Court reversed the defendant's state convictions for burglary and robbery.¹⁹⁰ There, the sentencing court based the defendant's sentence in part on various prior "convictions," which were really counts of which he was acquitted.¹⁹¹ The Court first noted in dicta that "[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus."¹⁹² Nevertheless, the Court ordered the reversal of the sentence, holding that "the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide . . . renders the proceedings lacking in due process."¹⁹³ This is a far cry from the theory that sentences within statutory limits are untouchable.

Similarly, in *Tucker*, a 1972 case, the Court reversed the defendant's twenty-five-year sentence for armed bank robbery, a sentence the Court held was "founded at least in part upon misinformation of constitutional magnitude."¹⁹⁴ Once again, the district court had sentenced the defendant based in part on invalid prior convictions; this time two of the respondent's previous convictions had been unconstitutionally obtained.¹⁹⁵ Despite the fact that the defendant had been validly convicted in the instant case and had received a sentence within the statutory limits, the Court remanded to the trial court for resentencing.¹⁹⁶ Importantly, the Court's decision was a constitutional one—that is, that a

189. See *Tucker*, 404 U.S. at 447 (remanding for resentencing when sentence was based in part on three prior convictions, two of which were unconstitutional); *Yates*, 356 U.S. at 366 (remanding to the district court with instructions to reduce the sentence to time served based on the district court's refusal to exercise judgment); *Gore*, 357 U.S. at 393 (noting the Court had no "power" to revise sentences on appeal); *Townsend*, 334 U.S. at 741 (reversing the defendant's convictions for burglary and robbery based on the illegality of the sentencing procedure).

190. 334 U.S. at 741. Because *Townsend* was a habeas case, the Court's holding reversing the sentence may not specifically reflect the Court's opinion as to its powers on direct review. But this only supports the fact that *Townsend* cannot be used as a tool to deny appellate jurisdiction to review federal criminal sentences directly: The Court's discussion on the severity of sentences is dicta. Furthermore, the Court in *Townsend* made it clear that the sentence involved would be unconstitutional regardless of whether it was on direct review or habeas. See *id.* Again, this is a far cry from the prevailing opinion that sentences are unreviewable on appeal.

191. *Id.*

192. *Id.* (emphasis omitted).

193. *Id.*

194. *Tucker*, 404 U.S. at 447.

195. *Id.* at 448.

196. See *id.* at 449.

sentence based on misinformation violated the Constitution—not one of jurisdiction.

Even more telling is *Yates*, the Supreme Court case discussed above where the Supreme Court reversed a contempt sentence.¹⁹⁷ Scholars and judges often cite the following language from *Yates* as proof that the sentencing decisions of trial courts are unreviewable: “reduction of the sentence . . . normally ought not be made by this Court. It should be left, on remand, to the sentencing court.”¹⁹⁸ However, the most important part of this case is not this dictum but the result: The Court reviewed the trial court’s sentencing decision, set it aside, and imposed its own sentence.¹⁹⁹ Far from demonstrating that there is no appellate review of sentences, then, *Yates*, proves that the Court could, and did, revise a sentence when necessary.

The most recent, and perhaps the strongest, pronouncement of the rule of nonreview came in *Dorszynski v. United States*.²⁰⁰ In that case, the Court held that the district court’s decision to sentence a youth offender under the Federal Youth Corrections Act²⁰¹ as an adult, rather than opting for alternative treatment under the Act, was a final one, unreviewable on appeal.²⁰² Citing *Gore, Townsend*, and *Blockburger*, the Court explained that Congress, in providing for alternatives to incarceration when the youth offender would “benefit” from treatment, did not mean to abrogate the longstanding rule of deference to the trial court’s sentencing decision.²⁰³ Quoting *Blockburger*, the Court noted that, if the failure to sentence the youth offender to alternative treatment “appears ‘too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction.’”²⁰⁴ However, even in the face of this broad judicial-deference stance, the Court still acknowledged that the sentencing decision is not unassailable. As the Court explained, “Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all.”²⁰⁵ Accordingly, although the Court declined to question the “harshness” of the sentence imposed by the district court, it did review the sentencing decision to ensure that the sentencing judge properly exercised his discretion.²⁰⁶

Of course, it is hard to ignore the fact that the Court uses the “bars

197. See *supra* notes 142–46 and accompanying text.

198. 356 U.S. 363, 366 (1958) (per curiam).

199. *Id.* at 367.

200. 418 U.S. 424 (1974).

201. Ch. 1115, 64 Stat. 1085 (1950) (codified at 18 U.S.C. §§ 5005–5056 (1976)) (repealed 1984).

202. *Dorszynski*, 418 U.S. at 425–26, 443.

203. *Id.* at 440–42.

204. *Id.* at 442 (quoting *Blockburger v. United States*, 284 U.S. 299, 305 (1932)).

205. *Id.* at 443.

206. See *id.* at 444.

review” language in *Dorszynski*, seeming to imply that appellate jurisdiction ends as soon as it can be determined that the district court in fact exercised its discretion. But several factors counsel against such a broad reading of *Dorszynski*. First, the cases the Court relied on, namely *Gore*, *Townsend*, and *Blockburger*, do not stand for the proposition that other parts of the sentencing decision, including the lengths of sentences, are unassailable. In fact, as I have shown, these cases support the proposition that some judicial, legislative, and/or constitutional principles may trump judicial deference. Such would not be the case if judicial deference is grounded in jurisdictional roots, rather than simple policy. In addition, and perhaps more importantly, *Dorszynski* was not a jurisdiction case. The Court did not mention or analyze a single jurisdictional statute. The Court’s only concern was whether Congress meant to abrogate the “traditional” deference to sentencing decisions by requiring a “no benefit” finding for sentencing a youth offender as an adult.²⁰⁷ The Court said no. It canvassed the legislative history of the Federal Youth Corrections Act and found that “the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts.”²⁰⁸ Appellate review of the “no benefit” decision, which would necessarily restrict these options, was, therefore, not warranted.²⁰⁹ Assuming, then, that in future cases, some principle, be it legislative, constitutional, or judicial, does warrant appellate review, there should be no jurisdictional bar to expanding the review of sentences.

A review of the cases above provides several principles. First, traditionally, the mere fact that a sentence is “severe” was never a ground for overturning it—some other justification was required. Second, courts do not question policy decisions made by Congress on the proper punishment for particular offenses. And third, appellate courts usually cannot reduce or increase a sentence on their own—that is the province of the trial courts. But these cases do not stand for the broader proposition that appellate powers to review sentencing decisions are somehow limited jurisdictionally. In each of the above cases, the Court relied on policies of deference to congressional penological decisions and trial sentencing decisions—policies which can give way, and have given way, to superior principles.

There are many legitimate reasons for the appellate courts to be reluctant to interfere with the sentencing process, including respect for the expertise of the trial judge who is most familiar with the facts of the case, recognition of the difficulty of sentencing, and the availability of other alternatives for relief, such as the executive pardoning power.²¹⁰

207. *See id.* at 440.

208. *Id.* at 436.

209. *Id.* at 443.

210. *See Gall v. United States*, 522 U.S. 38, 51–52 (2007); *see also United States v. Rosenberg*,

However, there is little explanation of why the courts have, over time, mischaracterized this reluctance as a jurisdictional limitation, rather than what it is: a policy choice. This is doubly confusing, considering the great number of federal appellate courts that have reviewed criminal sentences, albeit under a deferential abuse of discretion standard.²¹¹ As Justice Alito recently noted, “Appellate review for abuse of discretion is not an empty formality. A decision calling for the exercise of judicial discretion ‘hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.’”²¹²

So why the confusion? Modern courts seem to cite the above cases for no better reason than some kind of common law inertia. Judicial opinions are considered well-founded if grounded in prior decisional law; accordingly, judges and law clerks can be tempted to look no further than the last case found with a convenient sound bite. Unfortunately, these sound bites can be taken out of context and may not actually support the decisions at hand.²¹³ A further complication is the hierarchy of case law in the federal common law system. Lower courts must follow the decisions of higher courts, regardless of errors found therein. Thus, judges often feel compelled to follow incorrect pronouncements of other courts, despite clear evidence of error. For example, in the 1952 case *United States v. Rosenberg*, Judge Frank felt he could not modify a death sentence imposed on Julius and Ethel Rosenberg for their part in providing information to the Soviet Union during wartime.²¹⁴ After reviewing the history of the final decision statute and determining that the statute did allow courts of appeals to modify sentences on appeal, Judge Frank went on to explain that “sixty years of undeviating federal precedents” required that he hold otherwise.²¹⁵ His proverbial hands were tied, and the death sentences had to stand.

These two forces—common law inertia and hierarchy of decisional law—have so firmly entrenched the jurisdictional basis of the rule of nonreview that one must go back decades, as I have, to find the original basis of the rule. Doing so shows that the rule of nonreview, while

195 F.2d 583, 607 n.30 (2d Cir. 1952). For a general discussion of the different levels of deference to trial court decisions and the reasons for such deference, see Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

211. See authorities cited *supra* notes 147–53.

212. *Gall*, 552 U.S. at 68 (Alito, J., dissenting) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)).

213. As an example, in his dissent in *Cooper*, Judge Aldisert cites *Dorszynski* to support the conclusion that the Supreme Court did not have the power in *Booker* to expand appellate jurisdiction beyond the limited “jurisdiction” available before the SRA. See *United States v. Cooper*, 437 F.3d 324, 336–37 (3d Cir. 2006) (Aldisert, J., concurring and dissenting). But, as explained above, see *supra* text accompanying notes 206–09, *Dorszynski* was not a case about jurisdiction, but about respect for sentencing discretion.

214. *Rosenberg*, 195 F.2d at 604.

215. *Id.*

certainly an important policy in federal common law, is based on a policy of deference to the sentencing judge, not on some statutory jurisdictional limit.

III. REVIEW OF CRIMINAL SENTENCES AFTER THE SRA: THE IMPACT OF § 3742 ON APPELLATE JURISDICTION

The above analysis shows that, at least up until 1984, 28 U.S.C. § 1291 provided appellate courts with the jurisdiction to review sentences within statutory limits. However, a narrow scope of review over sentencing decisions made reversal nearly impossible. With few exceptions, appellate courts before 1984 limited their review of sentencing appeals to three basic types of claims: (1) that a sentence was outside the statutory maximum, (2) that a sentence was based on impermissible considerations, and (3) that a sentence was the result of some other type of error.²¹⁶ As previously discussed, the limited nature of review stemmed from deference, not a lack of jurisdiction.

However, all this changed in 1984 with the SRA. Prior to the SRA's implementation, there was widespread concern among politicians and commentators that the almost limitless discretion given to sentencing courts led to inconsistent and unfair sentencing practices. Sentencing judges were imposing an "unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."²¹⁷ To remedy this, Congress created the Guidelines. The Guidelines, established by the SRA, required sentencing judges to impose specific lengths of sentences according to a mathematical formula.²¹⁸ Congress designed this formula to take into account all facts that could possibly arise in a particular case, including, for example, the conviction offense, the defendant's prior offenses, and whether the defendant used a gun in the commission of the conviction offense.²¹⁹ Once a sentencing judge plugged these factors into the

216. *United States v. Colon*, 884 F.2d 1550, 1553 (2d Cir. 1989); *see also* *United States v. Hack*, 782 F.2d 862, 870 (10th Cir. 1986) (citing *Yates v. United States*, 356 U.S. 363, 366–367 (1958); *United States v. Thompson*, 680 F.2d 1145, 1149 (7th Cir. 1982); *United States v. Prazak*, 623 F.2d 152, 155 (10th Cir. 1980)); *United States v. Brown*, 382 F.2d 52, 52–53 (3d Cir. 1967) (citing *Gore v. United States*, 357 U.S. 386 (1958); *United States v. Ginzburg*, 398 F.2d 52, 63–64 (3d Cir. 1968) (Van Dusen, J., dissenting); *United States v. Frank*, 245 F.2d 284, 288 (3d Cir. 1957)).

217. S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *id.* at 37–50 (discussing background of the SRA and disparate sentencing); *see also* *United States v. Jiménez-Beltre*, 440 F.3d 514, 522 (1st Cir. 2006) (Howard, J., concurring) (same); *United States v. Denardi*, 892 F.2d 269, 279–80 (3d Cir. 1989) (Becker, J., concurring and dissenting) (same).

218. *See* 18 U.S.C. § 3553(b)(1) (2000); *see also* discussion *supra* note 3.

219. *See generally* U.S. SENTENCING COMM'N, 2010 FEDERAL SENTENCING GUIDELINES MANUAL & SUPPLEMENT (2010). For a thorough review of the rationale, history, and outline of the U.S. Sentencing Guidelines, *see generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894–

calculus, the Guidelines generated a narrow sentence range that the judge—with limited exceptions—had to use.²²⁰

Each specific range reflected what Congress, through the Sentencing Commission, believed to be the proper punishment for each crime and the particular circumstances involved. If applied properly, every defendant in America convicted of the same crime, and under similar circumstances, would be sentenced to the same term of imprisonment, give or take a few months. The district courts had little power to deviate from these narrow sentencing ranges, as Congress made application of the Guidelines mandatory and provided for only a limited ability to depart.²²¹

To ensure that the SRA would be implemented as Congress planned, Congress also provided for a wider review of sentencing decisions. It did so through § 3742(a), which provides,

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence:

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range . . . ; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.²²²

Congress also provided a similar list of appealable sentences by the government in § 3742(b). That list mirrors the defendants' list in all respects except one: under § 3742(b)(3), Congress gave the government the right to appeal sentences imposed below the guidelines range, rather than sentences above the guidelines range.²²³

The scope of § 3742, which purports to list the kinds of sentences defendants and the government “may” appeal, is a much debated point. Most important to our analysis is how § 3742 affects the jurisdiction of appellate courts over appeals of criminal sentences, if at all. This question is the primary focus of the remainder of this Article.

A. DECONSTRUCTING THE MAJORITY VIEW: “UNREASONABLE” SENTENCES ARE NOT “IN VIOLATION OF LAW” UNDER § 3742(A)(1)

The language of the statute itself is a logical starting point for

99 (1990).

220. § 3553(b)(1) (prohibiting departure from the Guidelines unless the court finds aggravating or mitigating circumstances not adequately taken into account by the Sentencing Commission when formulating the Guidelines).

221. *Id.*

222. *Id.* § 3742(a).

223. *Id.* § 3742(b)(3).

determining its scope. The types of appeals listed in § 3742(a)(2)–(4) address sentencing appeals on issues related to the Guidelines themselves.²²⁴ Congress designed these provisions to ensure greater scrutiny over sentencing decisions that did not comply in some way with the sentencing scheme enacted by Congress.²²⁵ In addition, Congress included § 3742(a)(1) to address sentences involving some legal error.

Conspicuously missing from this list of appealable sentences is review of “lawful” sentences that fall within the properly applied guidelines range. That is, if the defendant cannot claim some legal error in the sentence—either in the implementation of the Guidelines or some other type of error, such as a constitutional error—§ 3742 does not appear to allow for an appeal. As an example, shortly after the implementation of the SRA, defendants began to request that sentencing judges impose sentences below the guidelines range for various reasons not considered by the Guidelines, including, for example, that the sentence suggested by the Guidelines does not adequately take into account mitigating circumstances, such as a defendant’s drug addiction.²²⁶ In deciding not to grant these requests, referred to as requests for “downward departures,”²²⁷ district courts often had to make subjective value judgments²²⁸ with which defendants could easily take issue. But, because a failure to depart downward necessarily results in a within-guidelines sentence, § 3742(a)(2)–(4) could not provide the justification for an appeal of the sentence.²²⁹

To solve this problem, defendants turned to § 3742(a): appeals of

224. *Id.* § 3742(a)(2)–(a)(4).

225. S. REP. NO. 98-225, at 151 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3334 (“Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines.”).

226. *See, e.g.,* *United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir. 1989) (finding no jurisdiction to review on appeal whether the district judge erred when he declined to depart downward from an eighteen-to-twenty-four month sentencing range in consideration of defendant’s drug addiction and the relatively small amount of drugs involved).

227. A decision to sentence outside the guidelines range is called a “departure.” A “downward departure” occurs when the district court sentences below the guidelines range, and an “upward departure” occurs when the court sentences above the guidelines range.

228. *See Koon v. United States*, 518 U.S. 81, 113 (1996) (“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”); *United States v. Williams*, 65 F.3d 301, 309–10 (2d Cir. 1995) (“[T]he Sentencing Guidelines do not displace the ‘traditional role of the district court in bringing compassion and common sense to the sentencing process.’ In areas where the Sentencing Commission has not spoken . . . district courts should not hesitate to use their discretion in devising sentences that provide individualized justice . . .” (citation omitted) (quoting *United States v. Rogers*, 972 F.2d 489, 492 (2d Cir. 1992))).

229. Section 3742(a) also fails to provide for appeals by defendants of downward departures—in other words, arguments that the sentencing court did not depart *enough* from the Guidelines. Similarly, the government could not complain about insufficient upward departures though § 3742(b).

sentences “in violation of law.”²³⁰ Defendants argued that when a sentencing judge incorrectly discounted certain mitigating circumstances, such as a defendant’s drug addiction, the resulting sentence was imposed “in violation of law” under § 3742(a)(1).²³¹ But this argument was fatally flawed. Congress could not have intended § 3742(a)(1) to cover “any arguable claim of error in sentencing, including a claim that a particular sentence is unreasonably high or low.”²³² Interpreting § 3742(a)(1) as such would render the rest of § 3742(a) superfluous.²³³ Why, indeed, would Congress need to spell out the specific sentencing decisions in § 3742(a)(2)–(4) if § 3742(a)(1) covered all arguable claims of error? It would not. Not surprisingly, the courts roundly rejected this argument, universally agreeing that Congress intended § 3742(a)(1) to cover only those types of appeals that were available before the SRA, including appeals of sentences outside the statutory maximum, sentences based on “impermissible considerations,” and sentences that were the result of some other type of legal error not covered by the Guidelines.²³⁴

The impact of this view on the circuit courts’ pre-SRA appellate jurisdiction is clear: If Congress intended § 3742(a)(1) to cover the pre-SRA avenues of appeal, it follows that 28 U.S.C. § 1291 could no longer be relied on to provide jurisdiction over appeals of sentencing decisions. For this reason, most courts agreed, and continue to agree, that § 3742 is “the exclusive avenue through which a party can appeal a sentence in a criminal case.”²³⁵

230. § 3742(a).

231. *E.g.*, *Colon*, 884 F.2d at 1554. In these appeals, defendants mainly argued that, in failing to depart under certain circumstances, sentencing courts violated 18 U.S.C. § 3553(a) or (b). *See* David N. Yellen, Commentary, *Appellate Review of Refusals to Depart*, 1 FED. SENT’G REP. 264, 264 (1988) (listing the possible bases by which refusals to depart could be appealable as violations of law under § 3742(a)(1)); *see also* *United States v. Denardi*, 892 F.2d 269, 275–85 (3d Cir. 1989) (Becker, J., concurring and dissenting) (arguing that a refusal to depart is appealable under § 3742(a)(1) as a violation of 18 U.S.C. § 3553(a)). Section 3553(a) states that a sentence shall be “sufficient, but no greater than necessary, to comply” with the statutory purposes of sentencing (including retribution, deterrence, incapacitation, and rehabilitation), and § 3553(b) required that the sentencing judge “impose a sentence” within the appropriate Guidelines range unless the judge “finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” 18 U.S.C. § 3553(a), (b) (2006). The courts of appeals rejected these arguments. *See, e.g.*, *Colon*, 884 F.2d at 1553–56; *United States v. Denardi*, 892 F.2d 269, 270–72 (3d Cir. 1989); *see also* *United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990); *United States v. Franz*, 886 F.2d 973, 979 n.7 (7th Cir. 1989) (rejecting argument made by commentators).

232. *Colon*, 884 F.2d at 1553; *see also* *Denardi*, 892 F.2d at 271–72 (majority opinion).

233. *Denardi*, 892 F.2d at 272; *see also* *United States v. Cooper*, 437 F.3d 324, 338–39 (3d Cir. 2006) (Aldisert, J., concurring and dissenting).

234. *Colon*, 884 F.2d at 1552.

235. *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993) (“In the post-guidelines era, then, only sentences that meet the criteria [listed] in section 3742 are amenable to appellate review.”); *see also* *United States v. Ruiz*, 536 U.S. 622, 627 (2002) (suggesting an agreement with the courts of appeals that § 3742 provides the exclusive avenue for appeals of criminal sentences when it considered

This position—that Congress meant courts of appeals to consult only § 3742 when determining their jurisdiction over sentencing appeals—is strongly supported both by the statutory language and in the legislative history. Sections 3742(a) and (b) provide: “A defendant [or the Government] *may* file a notice of appeal in the district court for review of an otherwise final sentence *if* the sentence [meets the listed criteria].”²³⁶ The use of the words “may” and “if” here suggests that notices of appeal cannot be filed in any unlisted circumstances. That is, unless one of the listed criteria is present, a defendant cannot appeal. This makes the listed criteria the exclusive avenues of appeal.

This “exclusivity” reading is also supported by legislative history. In the report accompanying the Comprehensive Crime Control Act of 1983, which included the SRA, the Senate Committee on the Judiciary reported that:

[S]ection 3742 creates for the first time a *comprehensive system of review of sentences* that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.²³⁷

As the report further explains, these dual goals would be accomplished by providing “a *limited* practice of appellate review of sentences,” which would “provide a practical basis for distinguishing the cases where review is most needed from those where appeal would likely be frivolous.”²³⁸ Thus, review of sentences would be “confined” to those cases listed in § 3742.²³⁹

Further amendments made by Congress to various criminal statutes also reflect Congress’s intent to establish this comprehensive and exclusive scheme of sentencing appeals through § 3742. In other portions of the SRA—18 U.S.C. §§ 3562(b), 3572(c), and 3582(b)—Congress defined sentences to a fine, to a term of imprisonment, and to a term of probation as “final judgments.”²⁴⁰ And in §§ 3562(b), 3572(c), and 3582(b), Congress further provided that, notwithstanding their “final judgment” status, all three types of sentences could be corrected or

whether a limited reading of § 3742 “blocked” the Court’s consideration of defendant’s sentence appeal). *But see* United States v. Fossett, 881 F.2d 976, 978–79 (11th Cir. 1989) (holding that § 1291 still provided jurisdiction over appeals of refusals to downward-depart, and § 3742 merely “defines the claims that the court of appeals may hear in reviewing an appeal”).

236. 18 U.S.C. § 3742(a), (b) (2006) (emphasis added).

237. S. REP. No. 98-225, at 155 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3338 (emphasis added).

238. *Id.* at 149, 154 (emphasis added).

239. *Id.* at 150; *see* United States v. Franz, 886 F.2d 973, 978–80 (7th Cir. 1989) (analyzing the legislative history behind the SRA to support its holding that only those sentences listed in § 3742 are appealable).

240. 18 U.S.C. §§ 3562(b), 3572(c), 3582(b) (2006).

modified either (1) by the trial court, or (2) on appeal under § 3742.²⁴¹ These statutes do not mention appeals through other avenues, such as § 1291.

Furthermore, Congress's changes to Rule 35 of the Federal Rules of Criminal Procedure, as part of the SRA, also reflect an intent to make § 3742 the exclusive avenue for appeal of criminal sentences. Prior to the SRA, Rule 35 allowed a sentencing judge to "correct an illegal sentence at any time."²⁴² Congress amended Rule 35(a) to allow a district court to amend a sentence only by correcting the sentence on remand after "appeal under 18 U.S.C. [§] 3742."²⁴³ It did so "in order to accord with the provisions of proposed Section 3742."²⁴⁴ The fact that Congress took pains to articulate a single avenue for appeal in §§ 3562(b), 3572(c), and 3582(b), as well as Rule 35, provides further support for the fact that Congress intended that avenue—§ 3742—to be the exclusive jurisdictional statute governing sentence appeals.

If § 3742 provides the exclusive avenue for jurisdiction over appeals of sentencing decisions, it is only logical that Congress impliedly repealed any previous appellate jurisdiction the courts of appeals had over criminal sentences under § 1291. And, if that is the case, the only way jurisdiction can be expanded to include *Booker's* review for reasonableness is by interpreting § 3742. Most courts have done just that, finding appellate jurisdiction over such sentences in § 3742(a)(1).²⁴⁵ The logic is that, after *Booker*, if a sentence is "unreasonable," it was imposed "in violation of law."

I take issue with this position for two reasons. First, the premise that § 3742(a)(1) provides jurisdiction over reasonableness review is flawed. As I explain in the remainder of this Part, the courts of appeals have incorrectly asserted that a standard of review guiding the appellate courts—namely, reasonableness—somehow imposes a substantive legal

241. *Id.* §§ 3562(b)(2)–(3), 3572(c)(2)–(3), 3582(b)(2)–(3).

242. *See* FED. R. CRIM. P. 35 (1983).

243. Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, ch. II, § 215, 98 Stat 1987, 2015. In 2002, the Committee deleted the portion of Rule 35(a) implemented as part of the SRA on the ground that that provision was "no longer needed." FED. R. CRIM. P. 35 advisory committee's note (2002). As the Committee explained, § 3742 "clearly covers the subject matter" and "it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals." *Id.*

244. S. REP. No. 98-225, at 158 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3341.

245. *See* *United States v. Dorcelly*, 454 F.3d 366, 373 (D.C. Cir. 2006) (holding that an unreasonable sentence is imposed "in violation of law"); *United States v. Cooper*, 437 F.3d 324, 327–28 (3d Cir. 2006) (same); *United States v. Fernandez*, 443 F.3d 19, 25–26 (2d Cir. 2006) (same); *United States v. Martinez*, 434 F.3d 1318, 1321–22 (11th Cir. 2006) (same); *United States v. Mickelson*, 433 F.3d 1050, 1052–55 (8th Cir. 2006) (same); *United States v. Montes-Pineda*, 445 F.3d 375, 377 (4th Cir. 2006) (same); *United States v. Plouffe*, 445 F.3d 1126, 1128 (9th Cir. 2006) (same); *United States v. Boscarino*, 437 F.3d 634, 637 (7th Cir. 2006) (same); *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1113–14 (10th Cir. 2006) (same); *United States v. Frokjer*, 415 F.3d 865, 875 & n.3 (8th Cir. 2005) (same).

requirement on the district courts that, when violated, “violates the law.” Second, there are significant reasons to doubt the exclusivity principle—that is, that § 3742 provides the exclusive avenue for jurisdiction.²⁴⁶

Before getting to the flaws in the exclusivity principle and my arguments for alternative bases for review of reasonableness appeals, the majority position on § 3742(a)(1) must be tackled. There are two very convincing reasons to reject § 3742(a)(1) as a basis for jurisdiction over reasonableness appeals. Both were articulated for the first time in Judge Aldisert’s well-reasoned dissent in *United States v. Cooper*.²⁴⁷ First, as noted above, the prevailing view, endorsed by the Supreme Court in *United States v. Ruiz*, is that Congress intended § 3742(a)(1) to cover only the limited types of sentence appeals available before the SRA.²⁴⁸ No court prior to the SRA’s adoption reviewed a sentence based purely on a claim that the sentence was “unreasonable,” although, as explained above, courts presumably would have had the jurisdiction to do so. Just as with appeals of downward departures, “converting ‘any arguable claim of error in sentencing, including a claim that a particular sentence is unreasonably high or low,’ . . . into a violation of law for purposes of § 3742(a)(1)” renders the other sections of § 3742(a) superfluous.²⁴⁹ As Judge Aldisert pointed out,

Congress hardly needed to add subsections authorizing appeals that claim an incorrect application of the Guidelines, that challenge sentences outside the Guidelines, or that question the reasonableness of sentences for offenses not governed by the Guidelines, if Subsection (a)(1) authorizes appeals of all sentences based on any arguable claim of error.²⁵⁰

He went on say that his conclusion is supported by an important canon of statutory construction: “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”²⁵¹ Reading § 3742(a)(1) to include review for reasonableness does just that to the remainder of § 3742(a).

Second, even if a court were inclined to broaden the scope of § 3742(a)(1) to include previously unasserted claims of error, the language of the statute itself counsels strongly against including claims

246. As I argue in Part III.B.2, *infra*, several canons of statutory construction, as well as a review of Congress’s intent, strongly suggest that Congress could not have meant § 3742 to override appellate jurisdiction in § 1291, at least as far as it concerns appeals of sentences for reasonableness post-*Booker*.

247. 437 F.3d at 333–41 (Aldisert, J., concurring and dissenting).

248. See 536 U.S. 622, 627 (2002); see also *supra* text accompanying notes 230–35.

249. *Cooper*, 437 F.3d at 338–39 (quoting *United States v. Colon*, 884 F.2d 1550, 1553 (2d Cir. 1989)).

250. *Id.* at 338 (quoting *Colon*, 884 F.2d at 1553).

251. *Id.* at 337 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

that the sentence is “unreasonable.” It is simply illogical to assert that the meaning of “in violation of law” can be stretched to include review for reasonableness. The *Booker* Court did not create a new substantive law that could be “violated” when it held that courts of appeals should review sentences for reasonableness; it merely replaced the standards of review created by Congress (previously listed in § 3742(e), which the Court excised) with a universal “reasonableness” standard of review.²⁵² Indeed, “the Supreme Court has never held that an unreasonable sentence violates the Constitution or any statute.”²⁵³ For these reasons, Judge Aldisert argued that the courts of appeals did not have jurisdiction to review within-guidelines sentences, either for reasonableness or under any standard of review.²⁵⁴

Although I agree with Judge Aldisert on these points, there is one additional possibility that he did not consider. Contrary to Judge Aldisert’s opinion, the Supreme Court *did* create one new substantive law in *Booker*: an expanded ability for sentencing judges to depart from the Guidelines. Put another way, after *Booker*, sentencing judges now have more sentencing choices. However, for the reasons noted above, this increased discretion cannot justify an expanded definition of “in violation of law” under § 3742(a)(1).²⁵⁵ Regardless of the particular characterization of the new kind of sentencing decision—be it a substantive “reasonableness requirement” or increased sentencing discretion—expanding the meaning of “in violation of law” to include review of all sentences for reasonableness still renders several other parts of § 3742 superfluous. Again, including reasonableness review of all sentences in § 3742(a)(1) makes other subsections—such as § 3742(a)(4), which grants jurisdiction over “plainly unreasonable” sentencing decisions not covered by the Guidelines—redundant and unnecessary. Furthermore, and perhaps more importantly, to include increased sentencing discretion as a basis for violating the law under § 3742(a)(1), thus making all sentences reviewable, directly contradicts the clear language of the statute and Congress’s obvious intent that § 3742 should create a “limited” avenue of review. Congress never intended § 3742 to allow for review of within-guidelines sentences on a wholesale basis.²⁵⁶ Any responsible interpretation of § 3742(a)(1) must take this into account.

Judge Aldisert’s position has remained largely unnoticed, both by the courts and in academia. After *Booker*, the courts of appeals continue to take jurisdiction over “reasonableness” appeals of within-guidelines

252. *Id.* at 333–36.

253. *Id.* at 339 n.17.

254. *See id.*

255. *See supra* text accompanying notes 247–54.

256. *See supra* text accompanying notes 225–44.

sentences.²⁵⁷ Most courts assert jurisdiction over reasonableness review with little explanation. Some simply cite *Booker*, saying they must review sentences for reasonableness because the Supreme Court told them they must.²⁵⁸ But under the longstanding rule that the Supreme Court cannot manufacture jurisdiction,²⁵⁹ this position is untenable. Others state, without more, that “an unreasonable sentence is ‘imposed in violation of law.’”²⁶⁰ But, as just explained, this position is unsupported by the law.

Indeed, few courts have attempted a more thorough justification of jurisdiction. Those that have make two major arguments, both reflected in the Eighth Circuit’s decision, *United States v. Mickelson*.²⁶¹ First, reviewing the legislative history of the SRA and the *Booker* opinion, the *Mickelson* court concluded that appellate review of within-guidelines sentences is necessary to further Congress’s goal of decreasing sentencing disparity.²⁶² But, worthy as this goal is, it cannot justify expanding appellate jurisdiction under § 3742(a)(1). Regardless of Congress’s intent in enacting the SRA, Congress specifically provided appellate courts with only limited appellate jurisdiction to review sentences under § 3742(a)(1). While federal courts are empowered to interpret statutory provisions, they do not control, and cannot add to, their own jurisdiction.

Second, the Eighth Circuit in *Mickelson* suggested that an unreasonable sentence violates the law because it necessarily results from a failure to consider the § 3553(a) factors when imposing sentence.²⁶³ But this holding is at odds with the position of all courts of appeals before *Booker*, that defendants could not seek review of their sentences under § 3742(a)(1) “on the ground that the sentence imposed was in violation of the sentencing mandates of section 3553.”²⁶⁴ Just as in the context of downward departures, courts before *Booker* reasonably pointed out that allowing appeals based on any arguable § 3553 error

257. See authorities cited *supra* note 245.

258. See, e.g., *United States v. Jiménez-Beltre*, 440 F.3d 514, 517 (1st Cir. 2006) (“A majority of Justices said explicitly in *Booker* that sentences would be reviewable for reasonableness whether they fell within or without the guidelines, and for us that is the end of the matter.”).

259. See *supra* text accompanying notes 21–23.

260. *United States v. Dorcelly*, 454 F.3d 366, 373–75 (D.C. Cir. 2006); *United States v. Martinez*, 434 F.3d 1318, 1321–22 (11th Cir. 2006).

261. 433 F.3d 1050 (8th Cir. 2006).

262. *Id.* at 1053–55.

263. *Id.*; see *supra* notes 50 & 231 (discussing § 3553(a) factors); see also *United States v. Plouffe*, 445 F.3d 1126, 1128 (9th Cir. 2006) (also suggesting that an unreasonable sentence is “in violation of law” under § 3742(a)(1) based on a failed application of the § 3553(a)(1) factors); *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1114 (10th Cir. 2006) (same); *United States v. Montes-Pineda*, 445 F.3d 375, 378 (4th Cir. 2006) (“[A] contention that the district court imposed an unreasonable sentence is itself a contention that the court erred under § 3553(a).”).

264. *United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990) (holding that neither § 3553(a) nor § 3553(b) justified an exercise of jurisdiction under § 3742).

would render superfluous the rest of § 3742 and “would be contrary to Congress’ desire to provide for *limited* appellate review of sentences.”²⁶⁵ Perhaps anticipating such a rebuttal, the *Mickelson* court further noted that “there are now more sentencing variables” for a sentencing court to consider after *Booker*, suggesting that § 3553(a) takes on a different significance after *Booker* than before.²⁶⁶ But this point also fails to support the court’s jurisdictional position. Sentencing courts consider the *exact same* factors—namely, the § 3553(a) factors—after *Booker* as they did before.²⁶⁷ The only thing that has changed is that the sentencing judges have more choice at the end of the equation to sentence outside the guidelines ranges. As explained above, this increased “choice” cannot by itself justify expanding the definition of § 3742(a)(1).

The Supreme Court has done nothing to provide clarity on the jurisdictional questions left open by *Booker*. The Court in *Gall* recently reaffirmed its order that all courts of appeals must review all sentences for reasonableness, including within-guidelines sentences.²⁶⁸ And, despite the clear opportunity to do so (Judge Aldisert issued his dissent in *Cooper* a year before *Gall*), the Supreme Court declined to articulate a basis for claiming jurisdiction over this review.

But the fact that the Supreme Court says the courts of appeals must review certain types of sentences simply cannot be enough to resolve such a weighty issue. Even with the expanded jurisdiction after *Booker*, recent evidence shows that courts of appeals rarely reverse a sentence on reasonableness grounds.²⁶⁹ But this does not mean expanded jurisdiction does not have an impact. First, as noted above, the number of sentence appeals rose significantly after *Booker*.²⁷⁰ These increases have a major impact on the workload of the federal court system, which is already struggling with crowded dockets and limited government funds.²⁷¹

In addition, any change in the jurisdiction of the courts has the potential to impact wider areas of the law than originally anticipated. This is even more so if, as Judge Aldisert implied in his *Cooper* dissent, the Court has indeed illegally, and surreptitiously, expanded the jurisdiction of the appellate courts *sua sponte*. Questions of jurisdiction

265. *United States v. Franz*, 886 F.2d 973, 979 n.7 (7th Cir. 1989); *see also Morales*, 898 F.2d at 102.

266. *United States v. Mickelson*, 433 F.3d 1050, 1055 (8th Cir. 2006).

267. *See United States v. Booker*, 543 U.S. 220, 259–60 (2005) (“Without the ‘mandatory’ provision, the [SRA] nonetheless requires judges to take account of the Guidelines together with other sentencing goals [in § 3553(a)].”).

268. *Gall v. United States*, 552 U.S. 38, 41 (2007).

269. *See* authorities cited *supra* note 17.

270. *See supra* text accompanying notes 10–18.

271. *See, e.g., Responding to the Growing Need for Federal Judgeships: The Federal Judicial Act of 2009: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong. 64–65 (2009) (prepared statement of the Am. Bar. Ass’n).

“go[] to the very foundation of our constitutional scheme.”²⁷² As the Supreme Court has explained,

The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.²⁷³

Thus, a deeper analysis of the jurisdictional basis for review of within-guidelines sentences is warranted.

B. TWO POSSIBLE BASES FOR JURISDICTION OVER “REASONABLENESS REVIEW”

There are two alternative ways of interpreting § 3742 that justify review of within-guidelines sentences for reasonableness without improper judicial expansion of jurisdiction. Under the first, one can read § 3742(a)(4) to include review of sentences under the now-advisory Guidelines as sentences “imposed for an offense for which there is no sentencing guideline.”²⁷⁴ As I note below, however, this position also has its flaws. The better reading of § 3742 is that, contrary to the majority view, § 3742 is not the exclusive avenue for appeals of criminal sentences. Under this second theory, § 1291 is still a valid basis for jurisdiction in the sentencing appeals context, and § 3742 merely provides limits on the types of review that the courts of appeals may reach when deciding issues uniquely related to the Guidelines system itself (as opposed to the district courts’ newfound discretion). I discuss each interpretation of § 3742 in turn below.

I. *Section 3742(a)(4) as a Basis for Jurisdiction over Reasonableness Review*

Section 3742(a)(4) provides for the appeal of a sentence that is “imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.”²⁷⁵ Before *Booker*, and still today, § 3742(a)(4) has been used to justify only a very limited number of appeals of sentences that Congress did not include in the guidelines calculus. For example, sentences for state crimes assimilated into federal law by the Assimilative Crimes Act,²⁷⁶ such as state crimes committed on military bases, are not

272. *United States v. Hahn*, 359 F.3d 315, 1333 (10th Cir. 2004) (Murphy, J. dissenting) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998)).

273. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101–02 (1998) (internal citations omitted).

274. 18 U.S.C. § 3742(a)(4) (2006).

275. *Id.*

276. Pub. L. No. 80-772, § 13, 62 Stat. 645 (1948) (codified at 18 U.S.C. § 13 (2006)).

included in the sentencing guidelines.²⁷⁷ These sentences are reviewable under § 3742(a)(4).²⁷⁸

But § 3742(a)(4) may also be a vehicle for reviewing sentences for reasonableness that are imposed under the now-advisory Guidelines. Congress could not have anticipated that the Supreme Court would eviscerate the mandatory nature of the Guidelines as it did in *Booker*. But Congress did anticipate that there may be some offenses that are simply not covered by those Guidelines. To make sure that such offenses, and their resulting sentences, would not be left out of the review process, Congress included § 3742(a)(4) and (b)(4). In its 1984 report, the Senate Committee on the Judiciary provided examples of the types of offenses for which there is no sentencing guideline. These “would include the situations where there is a new law for which no guideline has yet been developed and where an appellate court has invalidated the established guideline and no replacement had yet been determined.”²⁷⁹ The Committee further explained that “[a] sentence not subject to a guideline is . . . open to broad appeal by both sides.”²⁸⁰

It is reasonable to conclude that sentences imposed under the advisory system created in *Booker* should be included in this catchall provision as an additional type of unanticipated sentence. Congress designed the Guidelines “to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.”²⁸¹ Given this purpose, “[s]entences within the Guidelines may be deemed to be reasonable and within the exclusive discretion of the sentencing court solely because of the Commission’s blessing of the permissible range.”²⁸² But when the Supreme Court rendered the Guidelines advisory, the Court, in essence, made all sentences non-Guidelines sentences. Indeed, in light of the Court’s decision to expand the discretion of the sentencing judges, Congress’s aim of uniformity in sentencing would be achieved by making the purely discretionary portion of the sentencing decision—which did not exist under the mandatory Guidelines—reviewable.

However, no court or scholar has adopted such a reading of § 3742(a)(4).²⁸³ One possible explanation is that § 3742(a)(4) covers

277. See, e.g., *United States v. Finley*, 531 F.3d 288, 291–93 (4th Cir. 2008) (applying § 3742(a)(4) to appeal of assimilated sentence of a DUI on a military base); see also *United States v. Booker*, 543 U.S. 220, 262 (2005) (describing supervised release revocation sentences as sentences “imposed where there was no applicable Guideline”).

278. *Booker*, 543 U.S. at 262.

279. S. REP. NO. 98-225, at 153 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3336.

280. *Id.*

281. *Id.* at 150; see also *United States v. Colon*, 884 F.2d 1550, 1555 (2d Cir. 1989) (“The very nature of the sentencing reform enterprise was to establish national standards narrowing the discretion of sentencing judges so as to attain a degree of uniformity.”).

282. *Colon*, 884 F.2d at 1555.

283. Cf. *United States v. Mickelson*, 433 F.3d 1050, 1055 n.2 (8th Cir. 2006) (suggesting, but not

unanticipated “offenses,” not unanticipated “sentences.” Under that subsection, courts of appeals may hear appeals of sentences “imposed for an *offense* for which there is no sentencing guideline.”²⁸⁴ But, under the now-advisory Guidelines scheme, most offenses are still covered by the Guidelines, even if the resulting purely discretionary sentences are not. Judges are still required to apply those Guidelines in determining an “advisory sentence,” even if they now have the discretion to impose a different sentence. Another possible explanation is the fact that § 3742(a)(4) and (b)(4) grant jurisdiction over appeals of sentences that are “plainly unreasonable.” Although the difference between these two standards, if any, is a point of contention among the circuits, it is at least clear that it would be redundant to review a “plainly unreasonable” sentence for “reasonableness.”²⁸⁵

But, assuming that courts want to justify reasonableness review under § 3742 (a position that I in no way suggest is either legal or advisable), inclusion of reasonableness review under the “unanticipated offense” subsection, § 3742(a)(4), rather than the “in violation of law” subsection, § 3742(a)(1), is a more rational interpretation of the statute. By enacting § 3742(a)(4), Congress already suggested its intent to make reasonableness a substantive requirement for those sentences that it could not anticipate in advance. Accordingly, it is rational to include reasonableness review of the unexpectedly advisory Guidelines sentences under that same provision. At least it appears to be less of a stretch than creating a substantive requirement for reasonableness that did not previously exist in order to justify review of sentences for legal error under § 3742(a)(1). Furthermore, this interpretation would also be consistent with the prevailing view that § 3742 provides the exclusive avenue for appellate review of sentences, a view that finds some support in the statutory text and legislative history, as noted above.

2. *Section 1291 as a Basis for Jurisdiction over Reasonableness Review*

That being said, for each of the above analyses—that is, finding jurisdiction to review within-guidelines sentence for reasonableness under either § 3742(a)(1) or (a)(4)—there is a bit of a bitter taste left in the mouth. Under both, the courts are required to adopt an interpretation of those sections that is contrary to past precedent, the plain language of the statute, and Congress’s specific and clearly

deciding, that § 3742(a)(4) could possibly provide a basis for jurisdiction over reasonableness review because, “after *Booker* there is no longer a binding sentencing guideline for any offense”).

284. 18 U.S.C. § 3742(a)(4) (2006) (emphasis added).

285. See *United States v. Miller*, No. 09-11063, 2011 WL 692988, at *1 (5th Cir. Mar. 1, 2011) (discussing a split among the circuit courts regarding whether to apply *Booker*’s reasonableness standard to appellate review of supervised release under § 3742(a)(4)).

expressed intent.

But there is an alternative interpretation of § 3742 that would not require a sua sponte change in substantive criminal law: that 28 U.S.C. § 1291 is still, and has been, a valid basis for jurisdiction in the sentencing appeals context.²⁸⁶

The Eleventh Circuit first articulated a version of this theory in *United States v. Fossett*.²⁸⁷ In that case, the court had to decide whether courts of appeals had the statutory jurisdiction to hear an appeal by a defendant who argued that a district court erred in refusing a downward departure.²⁸⁸ As noted above, all courts that had already decided the issue found that § 3742 defined the exclusive jurisdictional basis for sentencing appeals, and that the statute prohibited appeals by sentences of downward departures.²⁸⁹ The Eleventh Circuit disagreed. In a surprising change from the predominant view, the *Fossett* court held that § 3742 never caused the repeal of § 1291; § 1291 remained in force and continued to provide for jurisdiction over sentencing appeals.²⁹⁰ Section 3742, the court held, “does not regulate the jurisdiction of the courts of appeals over appeals themselves; rather, section 3742 defines the claims that the court of appeals may hear in reviewing an appeal.”²⁹¹ In essence, the court saw § 1291 as defining the scope of jurisdiction, while § 3742 merely limited the scope of review.

Nevertheless, the result of the Eleventh Circuit’s novel interpretation of § 1291 was the same as that of the other courts of appeals on this issue. Although the Eleventh Circuit recognized its statutory jurisdiction to hear appeals of downward departures, it agreed with the other courts of appeals that § 3742 prevented defendants from challenging the refusal to depart on appeal.²⁹²

Perhaps because the Eleventh Circuit’s *Fossett* decision had the same result of foreclosing appeals of refusals to depart downward, that decision received little notice. In fact, it was barely mentioned again until 2004, when the Tenth Circuit cited the *Fossett* court’s jurisdictional analysis as support for its holding in *United States v. Hahn* that appellate courts have jurisdiction under § 1291 to hear appeals of legally enforceable waivers.²⁹³ In *Hahn*, the defendant entered into a plea agreement on sexual exploitation charges, specifically waiving the right to appeal his sentence under § 3742.²⁹⁴ The district court subsequently

286. 28 U.S.C. § 1291 (2006).

287. 881 F.2d 976 (11th Cir. 1989).

288. *Id.* at 978–79.

289. *See supra* text accompanying notes 232–35.

290. 881 F.2d at 978–79.

291. *Id.* at 979.

292. *Id.* at 979–80.

293. 359 F.3d 1315, 1321 n.4 (10th Cir. 2004).

294. *See id.* at 1317.

sentenced him a term of twenty-four years' imprisonment to be served consecutively with a previous sentence of forty years' imprisonment for weapons and marijuana charges.²⁹⁵ The district court ordered that the sentences run consecutively only after finding that the court lacked the discretion to issue concurrent sentences.²⁹⁶ The defendant appealed his sentence, arguing the sentence was unlawful because the district court incorrectly assumed it did not have the discretion to order concurrent sentences.²⁹⁷ The government opposed on the grounds that (1) the defendant waived the right to appeal under § 3742; and, (2) the court of appeals did not have jurisdiction because the waiver itself was not "in violation of the law" under § 3742(a)(1) and no other § 3742(a) factor applied.²⁹⁸

The Tenth Circuit disagreed. Even if the defendant waived his right to appeal under § 3742, the court held that it could still assert jurisdiction over the appeal of the sentence as a "final order" under § 1291.²⁹⁹ The court found two bases for support of its decision. First, as the court explained, repeals by implication are disfavored, and Congress did not "clearly" express its intent to repeal "the pre-1984 scope of § 1291" through the enactment of § 3742.³⁰⁰ Second, the court pointed out that the scope of § 1291 jurisdiction prior to the passage of the SRA included "an abuse of discretion review" over sentencing errors, including errors such as that asserted by Hahn.³⁰¹

The precise scope of the *Hahn* decision is unclear. Presumably, the court's opinion can be taken as an endorsement of the view that § 1291 provides jurisdiction over all sentence appeals, regardless of the language of § 3742. If Congress did not repeal the pre-1984 scope of jurisdiction under § 1291 through the enactment of § 3742, and if § 1291 includes no jurisdictional limitation on sentence appeals, presumably § 3742 provides no jurisdictional bar to the review of sentences today.

However, we know this is not the Tenth Circuit's position. To this day, the Tenth Circuit follows the majority position and refuses to hear appeals of requests to depart downward because courts of appeals "have no jurisdiction to review a refusal to depart" under § 3742.³⁰² The Tenth

295. *Id.* at 1317–18.

296. *Id.*

297. *Id.* at 1318.

298. *Id.* at 1320.

299. *Id.* at 1320–22.

300. *Id.* (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

301. *Id.* at 1321 & n.5 (citing *Koon v. United States*, 518 U.S. 81, 96–100 (1996)).

302. See *United States v. Coddington*, 118 F.3d 1439, 1441 (10th Cir. 1997) (quoting *United States v. Belt*, 89 F.3d 710, 714 (10th Cir. 1996)); see also *United States v. Chavez-Diaz*, 444 F.3d 1223, 1229 (10th Cir. 2006) (holding that, after *Booker*, although the court still did not have jurisdiction to review the district court's discretionary decision to deny a downward departure, it would review the ultimate sentence for reasonableness).

Circuit has not yet explained the discord between this position and its position on the viability of § 1291 jurisdiction over sentence appeals in *Hahn*. Nevertheless, several aspects of the *Hahn* court's analysis are helpful in determining the current scope of § 1291 in sentencing appeals.

In analyzing whether § 1291 still provides a valid means of jurisdiction over sentencing appeals, the *Hahn* court first observed that, if § 3742 is interpreted as the exclusive means of appellate jurisdiction over sentencing appeals, then § 3742 must act as an implied repeal of § 1291.³⁰³ Before the SRA, § 1291 unquestionably provided the jurisdictional hook for sentencing appeals. Now, under the majority position, it does not; only an implied repeal of § 1291 would accomplish this. The court then listed several canons of statutory construction to help it determine whether Congress did, in fact, impliedly repeal § 1291. First, the court acknowledged that, ordinarily, “where a specific provision conflicts with a general one, the specific governs.”³⁰⁴ Here, the more specific statute, § 3742, appears to conflict with the more general statute, § 1291, in that § 3742 excludes specific types of sentences from appellate review. Even the *Hahn* court acknowledged that “[s]trictly adhering to this canon [of statutory construction] would require courts to accept sentencing appeals exclusively under § 3742(a).”³⁰⁵

The *Hahn* court dismissed this conclusion, though, stating that another canon of statutory construction is “more applicable to this case.”³⁰⁶ According to this second canon, “clearly expressed congressional intention” is required before a court will hold that a statute is repealed by implication.³⁰⁷ Furthermore, as the *Hahn* court pointed out, “An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.”³⁰⁸

With these principles in mind, the *Hahn* court held that Congress did not “clearly express[]” its intent to repeal § 1291, and thus, that statute still provides jurisdiction over appeals of criminal sentences.³⁰⁹ As the *Hahn* court points out, § 3742(a) “does not explicitly limit” § 1291.³¹⁰ In fact, § 1291 is never mentioned—neither in the statute itself nor in the legislative history surrounding the enactment of § 3742.³¹¹ Moreover, § 3742 does not “cover the field” of § 1291: § 3742 covers far less than

303. *Hahn*, 359 F.3d at 1321–22.

304. *Id.* at 1321 (citing *Edmond v. United States*, 520 U.S. 651, 657 (1997)).

305. *Id.*

306. *Id.*

307. *Id.* (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

308. *Id.* (quoting *Branch*, 538 U.S. at 273).

309. *Id.* at 1321–22.

310. *Id.* at 1321 n.6.

311. *See id.* at 1322 (“The legislative history of § 3742 does not discuss its impact on § 1291.”).

§ 1291, which includes jurisdiction over both civil and criminal appeals.³¹² And finally, the *Hahn* court noted that Congress repeatedly expressed its “intent to expand appellate review over sentencing,” not to limit it.³¹³ For these reasons, the court held that Congress did not impliedly repeal § 1291, and that statute provides the basis for appellate jurisdiction over sentencing appeals.³¹⁴

The analysis in *Hahn* is compelling. At the very least, one would have imagined that if Congress did intend to repeal a bedrock statute that had provided jurisdiction over sentence appeals for almost a century, it would have mentioned that intent, or that statute, somewhere. But Congress did not. In enacting the SRA and related provisions, Congress directed its entire focus on creating its Guidelines scheme.

Nevertheless, the *Hahn* court’s conclusion—that § 1291 still exists in full force after the enactment of the SRA—has at least one fundamental flaw: There can be no doubt that Congress intended to foreclose review of at least some specific sentencing decisions by enacting § 3742. For example, Congress did not provide for review of (1) appeals by defendants of failures to sentence below the Guidelines, and (2) appeals by the government of failures to sentence above the Guidelines.³¹⁵ The fact that Congress left these kinds of appeals out of § 3742 unquestionably manifests Congress’s intent to foreclose review of these decisions. Such a conclusion is in line with Congress’s intent in enacting the SRA: Since Congress’s overriding goal was to promote consistent sentencing, decisions by sentencing judges not to depart from those guidelines ranges were of little concern. These are exactly the types of sentencing appeals that Congress feared would be “frivolous” and would clog the courts.³¹⁶ Furthermore, Congress specifically stated that the Guidelines were drafted so as to “preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court.”³¹⁷ It cannot be questioned, then, that Congress intended to impose some limits on the scope of review over sentencing decisions under the Guidelines.

This intent to foreclose review of specific sentencing decisions makes § 1291 and § 3742 in “irreconcilable conflict,” suggesting, under the implied repeal rule referred to in *Hahn*, that Congress impliedly

312. *Id.*

313. *Id.* (citing S. REP. NO. 98-225, at 150–53 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3333–36)).

314. *Id.*

315. See *supra* note 229.

316. See *supra* text accompanying notes 237–39.

317. S. REP. NO. 98-225, at 150 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3333.

repealed § 1291, at least in part, through the enactment of § 3742.³¹⁸ Furthermore, under a rule of statutory construction not mentioned in *Hahn*, congressional intent may be revealed though the maxim, *expressio unius est exclusio alterius*, or “expressing one item of an associated group or series excludes another left unmentioned.”³¹⁹ Applying this “rule of exclusion” to § 3742, there can be no doubt that Congress intended to foreclose review of specific types of sentences when it listed the available sentencing appeals in § 3742(a)(1)–(4).

On the other hand, there is no such clear expression of Congress’s intent to foreclose review of sentences under the now-advisory Guidelines. Indeed, as the majority in the Third Circuit’s *Cooper* decision points out, “in enacting §§ 3742(a)(1) and (b)(1), Congress could not have contemplated that the sentencing scheme it adopted would later be declared advisory.”³²⁰ The Supreme Court in *Booker* created an entirely new kind of sentencing decision, a sentence pronounced under the advisory Guidelines. This advisory-Guidelines sentence simply did not exist at the time Congress enacted the SRA. Congress could not have “intended” to exclude review of a sentencing decision it did not contemplate.³²¹ Accordingly, it would stretch reason to say that § 1291 and § 3742 are “in irreconcilable conflict” over whether appellate courts have jurisdiction over appeals of sentences under the advisory Guidelines scheme created in *Booker*.

Nor can it be said that Congress intended § 3742 to so “cover the field” of sentencing appeals that § 3742 “is clearly intended as a substitute” for § 1291.³²² Again, as the *Hahn* court explained, § 1291 is never mentioned, either in the statute or in the legislative history.³²³ Furthermore, § 3742 was never meant as a statute to govern appeals of discretionary sentences under an advisory guidelines scheme. Although the Senate Judiciary Committee did refer to § 3742 as including a “comprehensive system of review of sentences,”³²⁴ this statement must be understood in the context of the mandatory Guidelines system Congress was creating at the time. Congress may have targeted § 3742 to cover all types of sentencing decisions that could arise under a mandatory sentencing scheme, but it did not, and could not, take into account sentencing decisions made entirely at the discretion of the district court. No such thing existed under the system then in force. Furthermore, in the

318. See *supra* text accompanying note 308.

319. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

320. *United States v. Cooper*, 437 F.3d 324, 328 (3d Cir. 2006).

321. *Id.*

322. *United States v. Hahn*, 359 F.3d 1315, 1322 (10th Cir. 2004).

323. See *id.* (“The legislative history of § 3742 does not discuss its impact on § 1291.”).

324. S. REP. NO. 98-225, at 155 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3338.

five years since the *Booker* decision, Congress has been silent on the issue of reasonableness review, despite the massive increase in sentence appeals. This suggests Congress's intention to allow reasonableness review, despite the jurisdictional limitations set forth in § 3742.

In light of this, it cannot be said that there is clear and convincing evidence of congressional intent to repeal § 1291, at least as far as that statute governs appeals of the ultimate, purely discretionary portion of the sentencing decision existing today. In at least that instance, §§ 1291 and 3742 are merely two statutes touching on the same subject, not statutes "in conflict." In *United States v. Barnes*, an early statutory interpretation case, the Supreme Court provided guidance on how courts should interpret two statutes covering the same topic:

The . . . natural, if not . . . necessary inference in all such cases is, that the legislature intends the new laws to be auxiliary to, and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a *manifest and total repugnancy in the provisions*, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.³²⁵

In light of the legislative history, § 3742 and § 1291 can be easily read together to determine Congress's overall intent.³²⁶ First, we know from the legislative history and from § 3742 itself that Congress intended to expand review of sentences beyond that available prior to the SRA.³²⁷ We also know, however, that Congress did not intend for that review to be unlimited.³²⁸ It is at least clear that Congress intended to foreclose review of some, but not all, sentencing decisions by failing to include them in § 3742. There is a "manifest and total repugnancy in the provisions" at least to the extent that § 1291 grants jurisdiction generally, and § 3742 restricts access to specific types of sentencing decisions made under the Sentencing Guidelines.

325. *United States v. Barnes*, 222 U.S. 513, 520 (1912) (emphasis added) (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842)).

326. To state that I am attempting to determine Congress's "intent" here is admittedly a bit confusing. Congress intended *nothing* with regard to review of sentences for reasonableness when it enacted § 3742—in fact, it did not think about this kind of review at all. One would not be unreasonable to point out that the canons of statutory construction mentioned above are designed to help understand congressional intent, *id.* at 519, and cannot miraculously divine what Congress "would have wanted" in some make-believe version of events. Hence Justice Scalia's criticism in his dissent in *Booker* that "[o]nly in Wonderland" can the Court imply a standard of review from a statute when it had just severed the standard of review Congress explicitly provided. *United States v. Booker*, 543 U.S. 220, 309 (Scalia, J., dissenting). Nevertheless, in enacting § 1291, Congress *did* intend to create a broad review of final decisions of the district courts. The question for this discussion is whether § 3742, which naturally says nothing about appellate review of sentences under a then-nonexistent advisory Guidelines scheme, can be said to trump the older, broader, grant of jurisdiction in § 1291. The canons of statutory interpretation are specifically designed to help us answer this kind of question.

327. *Hahn*, 359 F.3d at 1322.

328. See *supra* text accompanying notes 232–44.

The logical conclusion from this is that § 3742 works in tandem with § 1291, limiting judicial review of only those sentencing decisions that are part of Congress's sentencing Guidelines scheme but leaving intact the general grant of jurisdiction over sentence appeals under § 1291. So, for example, an appellate court cannot review the specific decision by a district court not to depart from the guidelines range—§ 3742 blocks that review.³²⁹ But, appellate courts retain the power under § 1291 to review the ultimate, purely discretionary portion of the sentencing decision for reasonableness, as required by *Booker*.

This conclusion is not only the logical reading of both § 3742 and § 1291, but it also resolves an area of tension in the post-*Booker* case law. As I have already noted, all courts of appeals today take jurisdiction over review of sentences for reasonableness under § 3742(a)(1), claiming that an unreasonable sentence violates the law.³³⁰ However, these same courts have also held, post-*Booker*, that they will continue to dismiss appeals of refusals to depart downward on jurisdictional grounds.³³¹ This rule, as noted above, was based on the “conclusion that 18 U.S.C. § 3742(a) and (b) reflect Congress's intent to foreclose review of a sentencing court's decision not to depart.”³³² Thus, on one hand, the appellate courts tell us that they cannot review discretionary decisions not to depart because § 3742 precludes review of within-guidelines sentences, but they will review within-guidelines sentences for reasonableness under § 3742 because the Supreme Court said they could. These positions are directly contradictory and undermine the integrity of the courts and the rule of law.³³³

The position I advocate here would resolve this tension. Under my thesis, refusals to depart downwards, which are at the heart of Congress's sentencing Guidelines scheme,³³⁴ could not be reviewed under § 3742. But the overall sentence could still be reviewed for reasonableness under § 1291. This conclusion has the same result—that is, allowing jurisdiction to review for reasonableness but barring review of specific sentencing decisions as intended by Congress—and yet avoids the contradictory reading of the same statute plaguing the courts of appeals today.

329. See *supra* text accompanying notes 232–34.

330. See, e.g., *United States v. Cooper*, 437 F.3d 324, 327–28 (3d Cir. 2006).

331. See, e.g., *id.* at 332–33.

332. *Id.* at 333.

333. There is a similar tension between the position that the courts of appeals can review sentences for reasonableness under § 3742, and the position that the courts do not have jurisdiction to review a denial of a Rule 35(b) sentence reduction because § 3742 precludes it. See *United States v. Bowers*, 615 F.3d 715, 725–28 (6th Cir. 2010) (discussing contradictory positions of the courts on jurisdiction over sentencing decisions, but nevertheless holding that denials of Rule 35(b) sentence reduction motions are unreviewable). Again, my reading of § 3742 and § 1291 would resolve this tension.

334. See 18 U.S.C. § 3553(b) (2006) (permitting a deviation from the Guidelines only in certain limited circumstances).

I acknowledge that my reading of § 1291 as providing for jurisdiction over reasonableness review may feel somewhat contrived, just as the justification of jurisdiction under § 3742(a)(1) does. This is probably because the result under both interpretations is to allow for more appeals of sentences than originally intended by Congress when it enacted the SRA. Yet such is the inevitable result from the Supreme Court's decision in *Booker* to reinvent the Guidelines; any interpretation of jurisdiction under the SRA after *Booker* will inevitably include a determination of what Congress would have wanted in a world that Congress never anticipated. There is a key difference between the majority position and mine, though: I do not attempt to stretch the SRA beyond its clear boundaries. Instead, I interpret a historical and bedrock jurisdictional statute of general application to include review of district court decisions that are not part of the SRA scheme Congress enacted. Furthermore, my interpretation of § 1291 and § 3742 avoids incorrect and contradictory interpretations of § 3742 and still comports with the intent of Congress to provide for limited review of specific sentencing decisions mandated by the Guidelines.

After complaining at length above about the confusion the courts have caused by failing to distinguish between “jurisdiction” and “standard of review,” I would be remiss in making the same mistake here. It is difficult to tell definitively whether, in enacting § 3742, Congress thought it was describing jurisdiction, thereby implicating § 1291, or describing the scope of review, presumably leaving § 1291 untouched.³³⁵ On the one hand, it is a “well established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by ‘clear and convincing evidence.’”³³⁶ On the other, as I explained in Part III.A., there are several strong indications that Congress meant § 3742 to define the exclusive jurisdiction of the courts of appeals, at least in the mandatory Guidelines sentencing context.³³⁷ These include, among others, the use of exclusive language in the statute, the attempt to make a comprehensive system of

335. If the courts could not consistently articulate the reason for the rule of nonreview, it is not surprising that Congress couldn't clarify exactly what it intended to expand by listing out various avenues of appeal in § 3742. In its Senate Report accompanying the Comprehensive Crime Control Act of 1983, the Committee on the Judiciary describes appellate review of sentences pre-SRA as “unavailab[le]” with few exceptions due to the fact that “sentencing judges have traditionally had almost absolute discretion to impose any sentence legally available in a particular case.” S. REP. NO. 98-225, at 150 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333 (citing *United States v. Dorszynski*, 418 U.S. 424 (1974)). While this may accurately describe the practical effect of the rule of nonreview, it does not sufficiently describe the basis for that rule (policy or jurisdictional).

336. *S. Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 914 (2d Cir. 1976) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)) (holding that the Court of Claims has exclusive jurisdiction over challenges by providers to reimbursement determinations made under the Medicare Act).

337. *See supra* notes 232–44 and accompanying text.

criminal appeals through amendment of various criminal procedure statutes, and the various indications in the legislative history that review would be confined to the types of sentences listed in § 3742.³³⁸ The *Fossett* position—that is, that § 3742 merely describes the scope of review on appeals of sentencing decisions³³⁹—ignores this compelling evidence. Accordingly, it is much more likely that Congress intended § 3742 to describe the jurisdiction of the federal courts of appeals in the mandatory Guidelines context.

CONCLUSION

Through the above analysis, I have established several key points. First, despite the conventional wisdom, courts of appeals have had the jurisdiction to review criminal sentences under § 1291 since at least 1891. This jurisdiction was almost unlimited, the only possible exception being the ability to modify sentences on appeal. Although courts routinely rejected appeals of the length of sentences for “lack of power” or “lack of jurisdiction,” they did so erroneously, due to a kind of common law inertia, relying on sound bites from older decisions without fully analyzing the basis for those decisions. In fact, this “rule of nonreview” was based not on jurisdiction but on a policy of deference to the sentencing judge—a policy that can be changed at any point, by either Congress or the Supreme Court. The Supreme Court did just that in *Booker*. By mandating review of sentencing decisions for reasonableness, the Supreme Court may have expanded the scope of review of sentencing decisions, and thus the number of appeals that courts of appeals would have to hear, but it did not improperly expand the jurisdiction of those courts—it was there all along.

The Court’s expansion of appellate review in *Booker* was also consistent with the scope of appellate jurisdiction available after the SRA. It is beyond doubt that Congress intended, through the enactment of the SRA and the Guidelines, to provide an expanded, but at the same time finite, review of criminal sentences on appeal. It did so by listing in § 3742 the types of sentences that the courts of appeals could review and by making § 3742 the exclusive avenue for appeal of sentences under the Guidelines, presumably to the exclusion of other appellate jurisdiction statutes like § 1291. However, the Supreme Court in *Booker* created an entirely new type of sentencing decision, a purely discretionary decision that lies outside Congress’s Guidelines system and, thus, outside the limits of § 3742. Accordingly, at least for these types of sentences, § 1291 remains the basis for jurisdiction over reasonableness appeals.

One might ask: Why didn’t the Supreme Court, or the appellate

338. See *supra* notes 232–44 and accompanying text.

339. *United States v. Fossett*, 881 F.2d 976, 979 (11th Cir. 1989).

courts for that matter, just say so? We cannot overlook the fact that, despite several opportunities to do so after *Booker*, the Supreme Court has not even attempted to explain the jurisdictional basis for the reasonableness review it created. Given the failure to address the jurisdictional basis for reasonableness review, one could presume that the Supreme Court did not actually examine either § 1291 or § 3742 when deciding *Booker*. Because jurisdiction is fundamental to a court's power to adjudicate, one must assume that the Court would not want to be viewed as dismissive of such bedrock principles of law.

For this reason alone, the courts of appeals and the Supreme Court should take the earliest opportunity to clarify the jurisdictional basis for the multitude of reasonableness appeals now brought in federal courts. Perhaps more importantly, clarification of the basis for appellate jurisdiction will avoid the conclusion that the Supreme Court improperly expanded the jurisdiction of the courts of appeals, usurping Congress's power to expand the jurisdiction of the federal courts.
