Marquette University Law School
Marquette Law Scholarly Commons

Faculty Publications | Faculty Scholarship

1-1-2009

Explaining Sentences

Michael M. O'Hear
Marquette University Law School, michael.ohear@marquette.edu

Follow this and additional works at: http://scholarship.law.marquette.edu/facpub

Part of the Law Commons

Publication Information
Michael M. O'Hear, Explaining Sentences, 36 Fla. St. U. L. Rev. 459 (2009) (©Florida State University Law Review)

Repository Citation
O'Hear, Michael M., "Explaining Sentences" (2009). *Faculty Publications.* Paper 88.
http://scholarship.law.marquette.edu/facpub/88

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

EXPLAINING SENTENCES

MICHAEL M. O'HEAR*

I. INTRODUCTION 459
II. RISE AND FALL OF THE *CUNNINGHAM* EXPLANATION REQUIREMENT 461
A. Booker *and the Invention of Reasonableness Review* 462
B. Rise of the Cunningham *Rule* 463
C. Rita*: From Explicit to Implicit Explanation* 466
D. After Rita*: A New Hurdle for* Cunningham *Claims* 470
III. A SENTENCING-SPECIFIC CASE FOR THE *CUNNINGHAM* RULE 471
A. Improving the Substantive Quality of Sentencing Decisions 473
B. Improving the Procedural Quality of Sentencing Decisions 476
C. Respecting Sixth Amendment Values 481
D. Improving the Quality of the Guidelines 483
IV. CONCLUSION 485

I. INTRODUCTION

When judges make decisions of real consequence, we normally expect them to explain themselves. Furthermore, when judges explain themselves, we normally expect them to provide reasons why the colorable arguments of the losing side were rejected. But should it be regarded as reversible error when a trial court fails to satisfy explanation norms, particularly when the reviewing court can readily imagine legally adequate reasons for the trial court's decision? The question invites a weighing of competing social interests in judicial economy and fair treatment of litigants. As a general matter, appellate courts have come down on the side of judicial economy and declined to enforce explanation norms.[1]

Although it is easy to appreciate why courts have not endorsed an across-the-board explanation requirement, one can also imagine a system in which explanation norms are enforced selectively with respect to discrete categories of judicial decisions. For instance, given

---

*. Associate Dean for Research and Professor, Marquette University Law School. Editor, *Federal Sentencing Reporter*. B.A., J.D., Yale University. I am grateful for comments on earlier drafts from Michael Cahill, I. Bennett Capers, Carissa Hessick, Adam Kolber, Julian Ku, Katrina Kuh, Ethan Leib, Dan Markel, Alice Ristroph, Mike Simons, Steve Vladek, Verity Winship, and Ekow Yankah. I am also grateful for comments from participants at a faculty workshop at St. John's University Law School and from participants at the 2007 National Sentencing Workshop for Federal Public Defenders.

1. *See, e.g.*, Rita v. United States, 127 S. Ct. 2456, 2468 (2007) ("The law leaves much, in this respect, to the judge's own professional judgment."); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 764 (2006) ("[W]hat at first appear to be statements of a legal duty to go about the process of adjudication in a certain way amount to little more than incantations designed to assure the public, and perhaps the judges themselves, that those responsible for adjudication understand what their obligations entail."); *cf.* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) ("Even within the law itself, decisionmaking devoid of reason-giving is more prevalent than might at first be apparent.").

the significance of the liberty interests involved, sentencing decisions would be an obvious candidate for such enhanced procedural protections. Indeed, in the wake of important changes to federal sentencing law wrought by the Supreme Court's 2005 decision in *United States v. Booker*,[2] it appeared for a short time that the courts might be heading in the direction of heightened explanation requirements in the federal sentencing context. More specifically, in *United States v. Cunningham*,[3] the Seventh Circuit held that the sentencing judge must specifically address nonfrivolous arguments made by a defendant for a sentence below what was recommended by the federal sentencing guidelines (or, to use the federal sentencing lingo, arguments for a downward variance).[4] Variations on the *Cunningham* rule were endorsed in short order by three other circuits.[5]

Despite these early successes, the tide quickly turned against the *Cunningham* rule. It was rejected in some circuits, whittled away to almost nothing in others, and largely eviscerated by a recent Supreme Court decision.[6] As a result of these developments, federal judges are now free in most cases to say little or nothing in response to the arguments that defendants make for a variance. When it comes to judicial explanation requirements, the once promising opportunity for sentencing exceptionalism seems to have evaporated.

This Essay considers the rise and fall of the *Cunningham* rule from descriptive and normative perspectives. Part II describes in more detail the courts' flirtation with a robust explanation requirement for federal sentences. The story is an illuminating case study of how courts adapt new judicial functions to fit old jurisprudential forms—the proverbial new wine being poured into old wineskins. When the Supreme Court revised federal sentencing law in 2005 to provide more discretion for district court judges to vary from the guidelines, the Court also created a new and uncertain function for the federal appellate courts, which were instructed thenceforth to review sentences for reasonableness.[7] Faced then with a variety of rea-

---

2. 543 U.S. 220 (2005).
3. 429 F.3d 673 (7th Cir. 2005).
4. *Id.* at 679.
5. *See, e.g.*, United States v. Sanchez-Juarez, 446 F.3d 1109, 1116-18 (10th Cir. 2006) (vacating sentence on basis of inadequate explanation and noting that the "Seventh Circuit has applied the same reasoning to its review of sentences imposed post-*Booker"* and citing *Cunningham* as authority for requirement that "where a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that 'the sentencing judge [did] not rest on the guidelines alone, but . . . consider[ed] whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors' " (alteration in original)); United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006); United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006).
6. For a more detailed description of these trends, see *infra* Parts II.B-D.
7. *Booker*, 543 U.S. at 264-65.

sonableness challenges by defendants, the appellate courts drew on familiar typologies to categorize and resolve new questions. Some challenges were labeled substantive, and some were labeled procedural. Once the substance/procedure divide was imported into reasonableness review, it was natural for courts to analyze questions labeled "procedural" (as is typically the case with procedural questions) with little regard for the particularities of the substantive setting. Thus, the *Cunningham* question, placed on the procedure side of the divide, was treated as a generic explanation issue. Courts unsurprisingly resolved the issue in the generic way, that is, by rejecting a robust explanation requirement.

In Part III, I take up the underlying normative question. I argue that once the particularities of the federal sentencing context are taken into account, the case for *Cunningham* is much stronger than the courts have recognized. For instance, the *Cunningham* rule likely helps to diminish the effect of subtle cognitive biases that result in the guidelines receiving too much weight in the sentencing calculus relative to other statutory and constitutional considerations. Additionally, the *Cunningham* rule is supported by research on the psychological effects of procedural justice, which suggests that defendants who are treated fairly at sentencing will have more respect for the law and legal authorities than defendants who are treated unfairly. Thus, they will begin serving their sentences better prepared for successful adaptation to prison life and with stronger prospects for rehabilitation. In light of these and other considerations specific to the federal sentencing context, I conclude with a call for the courts to reconsider the post-*Cunningham* cases that have almost entirely sapped the explanation requirement of its vitality.[8]

II. RISE AND FALL OF THE *CUNNINGHAM* EXPLANATION REQUIREMENT

In this Part, I begin with a brief overview of what the Supreme Court did in *Booker*; this overview forms a necessary background to the *Cunningham* story. Next, I proceed to tell the *Cunningham* story in three acts: the development and early (albeit modest) success of the *Cunningham* rule, the undermining of the *Cunningham* rule by the Supreme Court in *Rita v. United States*,[9] and the further whittling away of the rule accomplished by the circuit courts post-*Rita*.

8. The analysis here is not in derogation of broader claims advanced by others that judges ought to be responsive more generally to litigants' arguments. *See, e.g.*, Oldfather, *supra* note 1, at 758 (synthesizing leading theories of adjudication and concluding that the "adjudicative duty" requires that judges "both engage with the parties' arguments and give the appearance of having engaged with the parties' arguments"). Rather, my point is that whatever the strength of the arguments for a general explanation requirement, the arguments are especially strong in the specific context of federal sentencing.

9. 127 S. Ct. 2456 (2007).

A. Booker *and the Invention of Reasonableness Review*

Through the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission and authorized the Commission to develop binding new sentencing guidelines for the federal courts.[10] The Commission's guidelines, which took effect in 1987, proved to be quite unpopular with sentencing judges as a result of their complexity, rigidity, and harshness, resulting in persistent calls for a restoration of judicial discretion in the sentencing process.[11] Finally, after nearly two decades of guidelines sentencing, the Supreme Court found the mandatory system unconstitutional in *Booker* and modified the sentencing statute so as to make the system more discretionary.[12]

More specifically, *Booker* determined that the mandatory system violated defendants' Sixth Amendment right to a jury trial because it relied on judicial factfinding to determine which sentence enhancements to apply.[13] By way of a remedy, the Court simply excised the statutory provisions that made the guidelines mandatory, leaving the balance of the Sentencing Reform Act in place.[14] The Court thereby retained the efficiency of judicial factfinding, only now in the service of guidelines that became merely "advisory."[15] After the *Booker* excision, surviving provisions of the Act (codified at 18 U.S.C. § 3553(a)) required district court judges only to "consider" the guidelines when selecting a sentence, alongside several other enumerated factors.[16] Sentencing decisions could still be appealed, but they were subject to a revised standard of review: the appellate courts were to "determine whether the sentence is unreasonable with regard to § 3553(a)."[17]

---

10. *See* S. REP. NO. 98-225, at 37 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3220. For a more detailed description and assessment of the legislation, see Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 772-77 (2006) [hereinafter O'Hear, *Original Intent of Uniformity*].

11. For a discussion of the guidelines and their reception, see O'Hear, *Original Intent of Uniformity*, *supra* note 10, at 777-85.

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

13. *Id.*

14. *Id.*

15. *Id.*

16. For instance, 18 U.S.C. § 3553(a)(2) (2006) requires judges also to "consider" the need for the sentence imposed:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

17. *Booker*, 543 U.S. at 261-62 (internal quotation marks omitted). For a critique of *Booker*'s treatment of appellate review, highlighting tensions between the new standard of review for sentences and traditional appellate functions, see Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1 (2008).

B. Rise of the Cunningham *Rule*

Left with little clear guidance from the Supreme Court on how to do a reasonableness review, the circuit courts of appeals were faced with a daunting task: uncharted waters had to be charted swiftly to handle the steady traffic of sentencing appeals emerging from the trial courts. The appellate courts responded to the exigencies of the situation by assimilating *Booker* as far as possible to the pre-*Booker* sentencing process.[18] Trial courts were thus commanded to first compute the applicable guidelines range, just as they had been doing all along, and only then to consider the possibility of a sentence outside the range.[19] Moreover, if a sentence were imposed within the range, most circuits decided that it should be presumed reasonable.[20]

At the same time, the courts recognized that the presumption of reasonableness could, at least in principle, be rebutted;[21] to hold otherwise would seem inconsistent with *Booker*'s rejection of mandatory guidelines.[22] The appellate courts thus had to develop additional principles to govern reasonableness review. Separate substantive and procedural components of reasonableness were recognized.[23] In the substantive aspect of review, the appellate court had to determine whether the district court reached a "defensible overall result,"[24] taking into account the § 3553(a) factors.[25]

As to procedural reasonableness, Judge Posner offered the first extended treatment of the topic in his opinion for a Seventh Circuit panel in *United States v. Cunningham*.[26] His thoughts were prompted by a post-*Booker* sentencing in which the district court

---

18. *See, e.g.*, United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006) ("In consideration of the § 3553(a) factors, a trial court must calculate the correct guidelines range applicable to a defendant's particular circumstances. As before *Booker*, the standard of proof under the guidelines for sentencing facts continues to be preponderance of the evidence." (citations omitted)); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("This duty to 'consider' the Guidelines will ordinarily require the sentencing judge to determine the applicable Guidelines range even though the judge is not required to sentence within that range. The Guideline range should be determined in the same manner as before *Booker/Fanfan*.").

19. *See, e.g.*, *Cooper*, 437 F.3d at 330; United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005); *Mares*, 402 F.3d at 519; United States v. Cunningham, 429 F.3d 673, 675 (7th Cir. 2005).

20. *See, e.g.*, United States v. Sanchez-Juarez, 446 F.3d 1109, 1114 (10th Cir. 2006); *Cunningham*, 429 F.3d at 675. A minority of circuits rejected the presumption of reasonableness. *See* Rita v. United States, 127 S. Ct. 2456, 2462 (2007) (describing alignment of circuits on this issue).

21. *See, e.g.*, *Cunningham*, 429 F.3d at 675.

22. *See, e.g.*, *Cooper*, 437 F.3d at 331; *Crosby*, 397 F.3d at 115; United States v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005).

23. *See, e.g.*, *Sanchez-Juarez*, 446 F.3d at 1117.

24. United States v. Jiménez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006).

25. *See, e.g.*, United States v. Gale, 468 F.3d 929, 937-39 (6th Cir. 2006) (illustrating substantive review based on the § 3553(a) factors).

26. 429 F.3d at 679.

seemingly gave no consideration to a defendant's argument for a variance based on his long history of psychiatric illness and substance abuse.[27] "[W]hat duty if any," queried Posner, "has the judge to explain his reasoning in imposing a guidelines sentence when the defendant contends that such a sentence would be unreasonable?"[28] The government's position, as summarized by Posner, was that the "judge could have a stamp that said 'I have considered the statutory factors,' which he placed on every guidelines sentence that he imposed—that would be okay."[29] Posner, however, rejected this position as inconsistent with the availability of appellate review:

> [W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise.[30]

At the same time, Posner also rejected the opposite extreme position: "A sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence."[31] Posner thus suggested a procedural requirement keyed to the strength of the defendant's arguments for a downward variance: arguments "clearly without merit" could be rejected without explanation, while other arguments would require a more meaningful response than simply, "I considered the statutory factors and decided to impose a guidelines sentence."[32]

Of course, the line between clearly without merit and arguably with merit is not an entirely certain one, and Posner himself did not offer a clear rule to distinguish the two categories. Yet, his assessment of the specifics of Mr. Cunningham's case (and his decision that Mr. Cunningham's sentence should be vacated) at least pointed in the direction of additional considerations that might help appellate courts to decide whether an argument required a specific response:

> We cannot have much confidence in the judge's considered attention to the factors in this case, when he passed over in silence the principal argument made by the defendant even though the argument was not so weak as not to merit discussion, as it would have been if anyone acquainted with the facts would have known without being told why the judge had not accepted the argument. Diminished mental capacity is a ground stated in the sentencing

---

27. *Id.* at 677-68.
28. *Id.* at 676.
29. *Id.*
30. *Id.* at 679 (citations omitted).
31. *Id.* at 678.
32. *See id.* at 679.

> guidelines themselves for a lower sentence. A judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight.[33]

Posner thus suggested attention to these factors (without suggesting that any single one of them was dispositive): (1) whether the argument in question was one of the principal ones advanced by the defendant; (2) whether the argument was based on a factor previously recognized in the law as an acceptable basis for a below-guidelines sentence; and (3) whether the reasons for rejecting the argument would have been self-evident to "anyone acquainted with the facts."[34]

Cunningham's explanation requirement, which seemingly broke with earlier decisions in the Fifth[35] and Eleventh Circuits,[36] was endorsed in short order by the Third[37] and Tenth Circuits.[38] Additionally, the Sixth Circuit adopted the same requirement but without citing *Cunningham*.[39] Notably, however, none of these decisions rested in any important way on anything specific to the sentencing context. Rather, *Cunningham* and its progeny all turn primarily on the usefulness of district court explanations to facilitate appellate review.[40] But the same consideration would seemingly apply to any reviewable exercise of discretion by a district court judge. Moreover, *Cunningham* itself invoked the countervailing concern for judicial economy that typically dominates the consideration of explanation requirements.[41]

Given that *Cunningham* itself framed the sentencing explanation issue as a generic question of judicial process, there should be little surprise that even the pro-*Cunningham* circuits tended to give *Cun-*

---

33. *Id*. (citation omitted).

34. *Id.*

35. *See* United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required.").

36. *See* United States v. Scott, 426 F.3d 1324, 1330 (11th Cir. 2005) ("[T]he district court explicitly acknowledged that it had considered Scott's arguments at sentencing and that it had considered the factors set forth in § 3553(a). This statement alone is sufficient in post-*Booker* sentences.").

37. *See* United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006).

38. *See* United States v. Sanchez-Juarez, 446 F.3d 1109, 1115 (10th Cir. 2006).

39. *See* United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006) ("Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it.").

40. *See, e.g.*, *id.* ("[Explanation] assures . . . that the reviewing court can intelligently determine whether the specific sentence is indeed reasonable."); United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) ("[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise.").

41. *See Cunningham*, 429 F.3d at 678 ("[A]rguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence.").

ningham a crabbed reading.[42] Indeed, in the year and a half between *Cunningham* and *Rita*, only one additional sentence was clearly vacated on the basis of a *Cunningham* violation,[43] while many decisions rejected *Cunningham*-type claims.[44] Thus, for instance, district courts were permitted to pass in silence over arguments where the defendant failed to explain how the mitigating factors he relied on (military service and difficult childhood) diminished his culpability[45] and where the argument was unsupported by any evidence beyond the defendant's "own self-serving testimony."[46] Courts have also suggested that little explanation is required when the district court rejects an argument that is not the defendant's "principal argument."[47]

Vague in many respects, *Cunningham* could have been read to establish the sort of robust explanation requirement for sentencing that courts have generally resisted in other contexts. Instead, subsequent decisions tended to resolve uncertainties against a strong rule. The Supreme Court effectively confirmed this trend in *Rita v. United States*.

C. Rita*: From Explicit to Implicit Explanation*

The Court offered its first major statement on post-*Booker* federal sentencing in the case of Victor Rita. A jury convicted Rita of perjury and related offenses based on false statements that he made in connection with a grand jury investigation.[48] With his guidelines sentencing range calculated at thirty-three to forty-one months,[49] he sought a downward variance based on three factors: (1) as a result of his career in law enforcement, he faced a risk of retribution from other inmates while in prison; (2) he was a decorated veteran of the Armed Forces; and (3) he suffered from a variety of medical condi-

---

42. In light of the way the issue was framed, the real surprise is that an explanation requirement was adopted at all. One way to make sense of the rule is to view it as a response to the pressure created by *Booker* for the appellate courts to establish *some* basis on which guidelines sentences might occasionally be overturned; otherwise, the guidelines would appear to have retained much of their (unconstitutional) mandatory character. And establishing *procedural* grounds for reversal would no doubt have appeared conceptually easier than establishing substantive limitations based on what Posner has labeled the "vague and prolix" § 3553(a) factors. *Id*. at 679.

43. *See Sanchez-Juarez,* 446 F.3d at 1118.

44. *See, e.g.*, United States v. Acosta, 474 F.3d 999, 1004 (7th Cir. 2007); United States v. Tyra, 454 F.3d 686, 688 (7th Cir. 2006).

45. United States v. Brock, 433 F.3d 931, 937 (7th Cir. 2006).

46. *Acosta*, 474 F.3d at 1004.

47. *See id.* (noting, in rejecting defendant's *Cunningham* claim, that neglected argument "was not her principal argument"); United States v. Sankey, 169 F. App'x 484, 487 (7th Cir. 2006) ("Although we conclude that Mr. Sankey did voice these themes at sentencing, he did so only obliquely; they were hardly his 'principal argument,' and so the district court was not required to elaborate in rejecting them.").

48. Rita v. United States, 127 S. Ct. 2456, 2459-60 (2007).

49. *Id*. at 2461.

tions.[50] After Rita presented evidence and argument relating to these factors, the judge asked questions about each of them, but nonetheless chose to impose the guidelines sentence.[51] He offered only a brief explanation of his decision: the Court was " 'unable to find that the [presentence investigation] [report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected . . . .' "[52] The judge concluded that " 'the Court finds that it is appropriate to enter a sentence at the bottom of the Guidelines range.' "[53]

The Fourth Circuit affirmed based on its presumption of reasonableness for sentences imposed within the guidelines[54] and granted certiorari.[55] In its decision, the Supreme Court first ruled that appellate courts may indeed employ a presumption of reasonableness[56] and then affirmed the *substantive* reasonableness of Rita's sentence.[57]

As to procedural reasonableness—the final (and, for our purposes, most important) issue in the case—it is clear that Rita would have had a strong claim in the pro-*Cunningham* circuits that he was entitled to some sort of specific explanation as to why his proposed grounds for a variance were rejected. After all, these constituted his *principal* arguments—indeed, his *only* arguments—at sentencing,[58] their legal merit had been previously recognized,[59] and the supporting evidence was apparently uncontested.[60] Although the district court judge expressly acknowledged the substance of Rita's arguments,[61] it hardly seems a meaningful response to those arguments for the judge to *explain* his sentencing decision merely with the con-

---

50. *Id.*
51. *Id.* at 2461-62.
52. *Id.* at 2462 (quoting transcript).
53. *Id.* (quoting transcript).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 2469-70.
58. *See* United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) (noting significance of "principal" argument in procedural reasonableness analysis).
59. *See* Koon v. United States, 518 U.S. 81, 111-13 (1996) (upholding permissibility of departure based on police officer defendants' special vulnerability to abuse in prison); United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990) (acknowledging permissibility of departure based on military service in unusual cases); U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5H1.4 (2006) [hereinafter GUIDELINES MANUAL] ("Physical condition . . . is not *ordinarily* relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward . . . ." (emphasis added)); *id.* § 5H1.11 ("Military . . . service . . . [is] not *ordinarily* relevant in determining whether a departure is warranted." (emphasis added)).
60. *See Rita*, 127 S. Ct. at 2461-62 (noting that the government argued that offense severity and culpability warranted a guidelines sentence but not indicating that the government countered Rita's evidence with contrary evidence).
61. *Id.* at 2461.

clusory assertion that a guidelines sentence was *appropriate*. Yet, the Supreme Court affirmed.[62]

Rita did not cite or discuss *Cunningham*, but it did recognize a need for appellate courts to ensure that the sentencing process was a reasoned one.[63] At the same time, the Court made clear that judges were not required to express their reasons, but they might instead rely on context and inference to supply *implicit* reasoning:

> [W]e cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; *sometimes it does not*; sometimes a judge simply writes the word "granted," or "denied" on the face of a motion *while relying upon context and the parties' prior arguments to make the reasons clear*. The law leaves much, in this respect, to the judge's own professional judgment.
>
> . . . [W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. *Circumstances* may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical.[64]

Even as to cases in which a colorable argument was advanced for a variance, the Court hedged its language to avoid implying a duty to address the argument expressly: "Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, . . . the judge *will normally* . . . explain why he has rejected those arguments."[65] Here, the Court seemed merely to describe what is usually done, avoiding the use of such words as "shall" or "must" that would connote some sense of obligation.

Thus, while the judge in *Rita* may not have done what other judges *normally* do, the lack of explanation did not violate any legal duty:

> We acknowledge that the judge might have said more. He might have added explicitly that he had heard and considered the evidence and argument; that . . . he thought the Commission in the Guidelines had determined a sentence that was proper in the minerun of roughly similar perjury cases; and that he found that Rita's personal circumstances here were simply not different enough to

---

62. *Id.* at 2470.

63. *See id.* at 2468 ("In the present context, a statement of reasons is important. The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.").

64. *Id.* (emphasis added).

65. *Id.* (emphasis added).

> warrant a different sentence. But context and the record make clear that this, or similar, reasoning, underlies the judge's conclusion. Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.[66]

The Court's analysis here may seem qualified ("[w]here a matter is as conceptually simple as in the case at hand"),[67] but it is hard to see how the *matter* in *Rita* was simpler than in any other case in which a defendant argues for a variance based on the presence of unusual circumstances (say, *Cunningham*, for instance). Indeed, this is precisely the typical form that variance requests take: defendants say, in effect, "Judge, there is something unusual about my case."[68] Under the Court's reasoning, there is no real obligation for the sentencing judge to explain a rejection of this sort of claim; the appellate court will simply infer that the judge determined the case was "not different enough" (at least if the judge made some sort of bare acknowledgement of the defendant's arguments on the record, as the judge had done in *Rita*), and this implicit explanation will be deemed adequate.

In sum, *Rita* effectively transformed a requirement for *explicit* explanation into a requirement for no more than *implicit* explanation. It set the bar so low that the requirement can seemingly be satisfied in nearly all cases by a bare acknowledgement of the defendant's arguments for a variance. Moreover, by framing the procedural reasonableness question as a generic explanation issue (for instance, by invoking the practice of busy trial court judges "simply writ[ing] the word 'granted,' or 'denied' on the face of a motion"[69] as a relevant point of reference), *Rita* reinforced the view that nothing fundamental differentiates sentencing explanations from explanations for more routine types of decisions.[70]

---

66. *Id*. at 2469.

67. *Id.*

68. This sort of argument for a below-guidelines sentence might be contrasted with an argument based on a policy disagreement with the guidelines, taking the generic form of the following: "Judge, my case may be typical, but the guidelines don't handle cases of my type in a way that is consistent with 3553(a)." Recently, the Supreme Court authorized downward variances in response to such arguments in a crack-cocaine case. Kimbrough v. United States, 128 S. Ct. 558, 575 (2007). However, because the Court's analysis emphasized the unusual history of the crack-cocaine guideline (which has been disavowed by the Sentencing Commission itself), it is still not clear how broad the district court's authority is to grant a variance based on a policy disagreement with the guidelines. *See id.*

69. *Rita*, 127 S. Ct. at 2468.

70. To be sure, one might argue that *Rita* actually improved the lot of defendants with *Cunningham* claims in those circuits that had not adopted the *Cunningham* rule; by going to all of the trouble of showing how an explanation for Rita's sentence might be inferred from the record, the Court might be seen as implicitly acknowledging the existence of an explanation requirement. On the other hand, such a victory for defendants in the non-

D. After Rita*: A New Hurdle for* Cunningham *Claims*

As appellants advanced *Cunningham* claims after *Rita*, they had to surmount two difficult hurdles established by the case law. First, the pre-*Rita* cases suggested stringent limitations on what arguments would trigger an explanation requirement (e.g., only the defendant's "principal argument"[71]). Second, *Rita* indicated that the explanation requirement (even in the narrow circumstances in which it was actually triggered) could be satisfied in most cases by inferences drawn from the sentencing judge's bare acknowledgement of the defendant's arguments.[72]

The post-*Rita* cases then raised a third important hurdle, with at least two circuits thus far holding that defendants are obligated to

---

Cunningham circuits could only be regarded as a hollow one given how low the bar was set for satisfying the explanation requirement. This dynamic was apparent in the Ninth Circuit's post-*Rita* decision in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc), in which the court seemed to accept some variation of the *Cunningham* rule. *See id.* at 992-93 (citing *Rita*, 127 S. Ct. at 2468) ("[W]hen a party raises a specific, nonfrivolous argument . . . in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position."). Nonetheless, *Carty* found the rule satisfied based on the case's similarities to *Rita*. *Id.* at 995.

71. *See supra* text accompanying note 47. For a post-*Rita* case that rests on similar reasoning, see United States v. Tahzib, 513 F.3d 692, 694-95 (7th Cir. 2008), which explains that sentencing judge need not specifically address "stock" arguments by defendant at sentencing.

72. For an example of a post-*Rita* case that turned on the court's recognition that *Rita* substantially curtailed the explanation requirement in this way, see United States v. Liou, 491 F.3d 334 (6th Cir. 2007). The defendant, Liou, argued for a variance based on his family and business responsibilities. *Id.* at 336. Even though the sentencing judge "did not specifically explain why it was not more moved by Liou's family circumstances or why they were less of a concern than the need for the sentence to reflect the seriousness of the offense and to promote respect for the law," the Sixth Circuit affirmed. *Id.* at 340. The court's decision was based on a brief comment made by the sentencing judge as to voluntary surrender: " 'Now, the Court is going to permit Mr. Liou to voluntarily surrender . . . and in light of his family circumstances and in light of his business, the Court is going to give him 60 days to put his affairs in order before reporting to serve this sentence.' " *Id.* (quoting Sentencing Hearing Transcript). In holding this was an adequate response to Liou's arguments, the Sixth Circuit found the case similar to *Rita*: "[A]s in *Rita*, 'context and the record make clear' that the sentencing judge understood Liou's family and business obligations but did not believe they outweighed other § 3553(a) factors that the judge found more pertinent." *Id.* (quoting *Rita*, 127 S. Ct. at 2469). Moreover, recent decisions have suggested that *Rita* contravened "robust[]" readings of precedent that established an explanation requirement. *Id.* at 339 n.4; *see also* United States v. Perez-Perez, 512 F.3d 514, 515-16 (9th Cir. 2008) (rejecting *Cunningham*-type claim in light of *Rita*); United States v. Bonilla, 524 F.3d 647, 657-58 (5th Cir. 2008) (same).

For a contrasting example of a post-*Rita* case that seemingly failed to recognize the significance of *Rita* for procedural reasonableness review, see United States v. Miranda, 505 F.3d 785, 791-92, 796 (7th Cir. 2007). Curiously, the court cited *Rita*, not as potentially undermining, but as supporting *Cunningham*. *Id.* at 796. Quoting the language in *Rita*, which indicated that the judge "will normally" explain why he has rejected a defendant's arguments, the Seventh Circuit characterized *Rita* as "clarif[ying] the need for a district court to explain its response to nonfrivolous arguments." *Id. Miranda* thus transformed a seemingly descriptive statement from the Supreme Court ("will normally") into a prescriptive one.

make a contemporaneous objection to a sentencing judge's failure to explain.[73] If no objection is made at the sentencing hearing, then the issue will be reviewed by the appellate court under the highly deferential plain error standard.[74] In effect, this means that the sentencing hearing becomes a trap for the unwary, with inexperienced or inattentive counsel costing defendants the ability to advance *Cunningham* claims on appeal.

The objection rule is justified, of course, on grounds of judicial economy: it is more efficient to have the judge explain the sentence at the time it is imposed than in a separate hearing after an appeal.[75] Indeed, for analogous reasons, express objection is a common requirement for procedural errors outside the sentencing context.[76] Notably, however, a defendant may freely appeal the *length* of a sentence without objecting at the sentencing hearing.[77] Thus, the objection rule nicely illustrates the significance of treating *Cunningham* problems as generic procedural issues. Although the *substance* of a sentence need not be specifically preserved for appeal, an explanation failure—placed on the other side of the substance/procedure divide—is viewed in such a way that concerns for judicial economy become paramount and any sentencing-specific considerations recede into the background.

III. A SENTENCING-SPECIFIC CASE FOR THE *CUNNINGHAM* RULE

In the tumultuous first few months after *Booker*, four circuits that were struggling with the challenge of giving content to reasonableness review expressly endorsed what I have referred to as the *Cunningham* explanation requirement:[78] the sentencing judge must expressly respond to all nonfrivolous arguments made by a defendant for a downward variance. However, the four *Cunningham* circuits failed to develop a conceptual foundation for this requirement that connected it to the specifics of the sentencing context. Not surprisingly then, concerns about judicial economy seem to have overcome the initial burst of interest in the explanation requirement. The

---

73. United States v. Vonner, 516 F.3d 382, 385-86 (6th Cir. 2008) (en banc); United States v. McComb, 519 F.3d 1049, 1054 (10th Cir. 2007).

74. *Vonner,* 516 F.3d at 386.

75. *See id.* at 391 (stating that the objection requirement "has the salutary effect of encouraging the resolution of those issues at the sentencing hearing—when they matter most and when they can be most readily resolved").

76. *Id.* at 385; *see also* FED. R. CRIM. P. 51(b) (establishing the general rule that issues are preserved for later review by making a contemporaneous objection).

77. *Vonner,* 516 F.3d at 389.

78. United States v. Sanchez-Juarez, 446 F.3d 1109, 1116-18 (10th Cir. 2006); United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006); United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006); United States v. Cunningham, 429 F.3d 673, 678-79 (7th Cir. 2005).

Cunningham rule has little apparent life today outside of the Sixth Circuit,[79] and even in that circuit, there has been a spirited pushback through the adoption of a contemporaneous objection requirement.[80]

Although not recognized by the courts, a good sentencing-specific case can be made for the *Cunningham* rule. Demanding explanations in this context need not open the door to a flood of *Cunningham*-type claims with respect to more routine judicial decisions. Rather, sentencing may be viewed as a type of decision subject to its own distinct normative mandates—mandates that apply to sentencing procedure no less than sentencing substance and that properly inform any determination of whether a sentence has been imposed in a *reasonable* manner.

Numerous justifications exist for developing the sentencing-specific case for the *Cunningham* rule. First, requiring judges to address arguments for downward variances diminishes the cognitive biases that result from calculating the guidelines range at the outset of the sentencing process, thereby improving the substantive quality of sentencing decisions. Second, responding to defendant arguments (even if they are ultimately rejected) communicates a message of respect for defendants, strengthening what social psychologists call "procedural justice effects,"[81] thereby advancing fundamental purposes of the Sentencing Reform Act.[82] Third, the explanation requirement enhances the reality and perception of compliance with the constitutional mandate of *Booker* that the guidelines may not be treated as binding. Finally, the explanation requirement advances the Sentencing Reform Act's goal of evolutionary sentencing guidelines that are progressively improved by the Sentencing Commission over time.[83]

These four considerations are described in greater detail in the Sections that follow. In light of these concerns, the courts ought to reconsider the various doctrines (for instance, the permissibility of implicit explanations and the principal argument and contemporaneous objection requirements) that have sapped the *Cunningham* rule of its vitality.[84]

---

79. For an example of a recent Sixth Circuit case in which a defendant prevailed on a *Cunningham*-type claim, see United States v. Peters, 512 F.3d 787, 788-89 (6th Cir. 2008).

80. *See supra* text accompanying notes 73-74.

81. *See infra* notes 104-08 and accompanying text.

82. *See infra* notes 115-22 and accompanying text.

83. *See* S. REP. NO. 98-225, at 63-64 (1984), *reprinted in* 1984 U.S.C.C.A.N 3182, 3246-47; *see also* GUIDELINES MANUAL, *supra* note 59, § 1A1.1 cmt. background (noting the Act empowered the Commission with ongoing responsibilities to monitor the guidelines and make appropriate changes).

84. I leave for another day, as *Cunningham* itself did, a full elaboration of what precisely a district court judge should be required to do in order to satisfy the explanation requirement. It is, of course, too much to expect strict scientific or syllogistic disproof of de-

A. Improving the Substantive Quality of Sentencing Decisions

In the post-*Booker* world, sentences are to be based on the full set of § 3553(a) factors, of which the advisory guidelines range is only one.[85] Thus, there would be grounds to worry about the substantive quality of sentencing decisions if the guidelines range were systematically given a greater weight than any of the other § 3553(a) factors.[86] Yet, the post-*Booker* case law has precisely that effect insofar as it mandates that sentencing judges calculate the guidelines range *before* they evaluate any of the other § 3553(a) factors.[87] As a large body of cognitive psychology research has demonstrated, the order of the steps in a decisionmaking process (here, considering the guidelines first and then grounds for variance under § 3553(a) later) can exert a powerful influence over the outcomes reached, triggering a

---

fendants' claims; the theories of punishment embraced by § 3553(a) are too indeterminate to permit such decisive disproof. *See, e.g.*, Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*, 74 SOC. RES. 307, 318-21 (2007) (identifying difficulties with deterrence theory). I have in mind more what Professor Mashaw has referred to as a "thinner sense of rationality." JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 199 (1985). In any event, as Professor Schauer's analysis of reason-giving suggests, explanation should normally invoke some form of general principle: "[O]rdinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself. When we provide a reason for a particular decision, we typically provide a rule, principle, standard, norm, or maxim broader than the decision itself . . . ." Schauer, *supra* note 1, at 641 (emphasis omitted).

Nor would I necessarily contemplate written opinions. *See generally* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283 (2008) (discussing costs and benefits of written opinions). It is also an interesting question whether the *Cunningham* requirement should extend to government requests for upward variances. Some justifications I offer for *Cunningham* apply equally to government and defendant requests (e.g., strengthening the feedback loop to the Sentencing Commission) and some do not (e.g., advancing rehabilitation prospects through procedural justice effects). Similarly, many of these justifications apply with comparable force to sentencing in state courts, although I ultimately ground much of the argument here on the particular history and law of federal sentencing, and my conclusions are accordingly limited to that setting.

85. United States v. Booker, 543 U.S. 220, 245 (2005).

86. To be sure, one might argue that there can be no conflict between the guidelines and § 3553(a) because the Commission itself has been required to develop the guidelines in light of the § 3553(a) factors. *See* 28 U.S.C. § 991(b) (2006). Yet, even the Commission has not claimed that the guidelines fully account for all factors relevant to the sentencing decision, which is why the guidelines endorsed the use of "departures" even before *Booker*. *See, e.g.*, GUIDELINES MANUAL, *supra* note 59, § 1A1.1 ed. note (reprinting introductory note to original 1987 edition of Guidelines Manual, at A.4(b)) (explaining that a departure mechanism was adopted, in part, because of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision"). Moreover, the guidelines have been subject to considerable criticism for their failure to implement a coherent theory of just punishment, which is one of the § 3553(a) factors, and for their neglect of offender characteristics, which is another. *See, e.g.*, O'Hear, *Original Intent of Uniformity*, *supra* note 10, at 780-81; *see also* 18 U.S.C. §§ 3553(a)(1)-(2)(A) (2006). Thus, variances from the guidelines should not be regarded as necessarily, or even presumptively, inconsistent with § 3553(a).

87. *See* Gall v. United States, 128 S. Ct. 586, 596 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.").

number of different forms of cognitive bias that (in this setting) will tend to give more weight to the guidelines and diminish the attention paid to the other § 3553(a) considerations raised by the defendant.[88]

First, there is the anchoring effect: a large body of research indicates "that the articulation of a number—even an arbitrarily selected number—at the start of a decision-making process may play an important role in shaping the final outcome."[89] Thus, the initial articulation of the numbers constituting the guidelines range may cause those numbers to exert an important gravitational pull on the ultimate sentencing decision.[90]

Second, there is the phenomenon of belief perseverance: as people process new information, they generate theories about its meaning and significance; information received later tends to be assimilated to the theory.[91] In the guidelines context, calculating the guidelines sentence first means that the judge will focus initially on the information made relevant by the guidelines, which overwhelmingly tends to be aggravating in nature: the harm caused by the offense, the dangerousness of the defendant's conduct, and the defendant's criminal history.[92] In the face of such information, the judge is apt to form a theory that the offense was a severe one and the defendant is a depraved person. Variance-related information, by contrast, will tend to

---

88. None of this is to say, of course, that guidelines sentences are inevitable—a conclusion that is demonstrably false. *See* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 1 (2007) (indicating that only 60.8% of cases were sentenced within the guidelines range in fiscal year 2007). However, the frequency of below-range sentences is a misleading indicator of how open judges are to defendant requests for a variance, as more than two-thirds of below-range sentences are jointly requested by both defendant and prosecutor and thus offer judges the very attractive prospect of a consensual resolution unlikely to be appealed. *Id.* The real test of a judge's receptivity to variance requests is in the cases in which he or she is resisted by the government. With respect to these cases, the cognitive psychology literature gives us reason to be concerned that judges are giving undue weight to the guidelines, which might be manifest both in variance rates and in the magnitude of variances granted. *See infra* text accompanying notes 89-95.

89. Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After* Booker, 37 MCGEORGE L. REV. 627, 645 (2006) [hereinafter O'Hear, *Duty to Avoid Disparity*]; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515-19 (2004) (describing the anchoring effect). To be sure, it is important to realize that the strength of this and other forms of cognitive bias may vary considerably among different individuals and in different situations and the results of laboratory studies (typically involving undergraduate students) should not be uncritically ascribed to highly educated decisionmakers operating in professional settings. Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72-73 (2002). Studies of judges, however, do indicate that judicial decisions are hardly immune from anchoring effects and other forms of bias. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19-29 (2007).

90. O'Hear, *Duty to Avoid Disparity*, *supra* note 89, at 645.

91. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 608-14 (2002).

92. O'Hear, *Original Intent of Uniformity*, *supra* note 10, at 778-78, 781.

be mitigating facts regarding the defendant's difficult upbringing and economic circumstances, cognitive limitations, mental illness, family responsibilities, prior good works, postoffense rehabilitative efforts, and the like. Assimilated to an earlier-formed theory of depravity, however, this information is easily discounted: for instance, the presentation of difficulties in life may be seen as an attempt to shift responsibility for the offense to others; cognitive limitations and mental illness may be seen as support for the view that the defendant is a dangerously unstable person with poor prospects for rehabilitation; and postoffense rehabilitative efforts may be seen as insincere and self-serving.

Finally, the guidelines may be given more weight as a result of cognitive dissonance effects: in general, those who are required to expend considerable effort or perform onerous tasks in order to achieve a goal will tend to view that goal more favorably as a result.[93] The calculation of guidelines sentences is viewed by many judges as an onerous task, and it sometimes requires considerable judicial effort,[94] particularly where there are factual or legal disputes as to the scope of relevant conduct, magnitude of loss, role in the offense, and the like. Sentencing hearings can often become multiday bench trials.[95] In such cases, judges may view the guidelines range as more salient simply as a result of the effort expended in its calculation.

Fortunately, researchers have identified certain types of procedural safeguards that reduce cognitive bias in decisionmaking. For instance, "directing experimental subjects to consider alternative or opposing arguments, positions, or evidence has been found to ameliorate the adverse effects of several biases, including the primacy or anchoring effect [and the] biased assimilation of new evidence."[96] The *Cunningham* explanation requirement, of course, helps to ensure that such consideration of alternative or opposing arguments occurs before a guidelines sentence is imposed. Moreover, an explanation requirement has been found, in and of itself, to diminish some forms of cognitive bias.[97] More generally, the explanation requirement can

---

93. Stern, *supra* note 91, at 612.

94. *See* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1256 (1997) ("[T]he Guidelines require judges to address many quantitative and definitional issues in excruciating detail . . . .").

95. *See, e.g.*, United States v. Olivero, 552 F.3d 34, 38 (1st Cir. 2009) (two-day sentencing hearing); United States v. Acosta-Roman, 549 F.3d 1, 2 (1st Cir. 2008) (four-day sentencing hearing on applicability of single six-level enhancement); United States v. Griffin, 510 F.3d 354, 371 (2d Cir. 2007) (noting that sentencing hearing included four days of testimony).

96. Mitchell, *supra* note 89, at 133.

97. *See* Guthrie et al., *supra* note 89, at 36-38 (discussing how explanation requirements often induce deliberation and reduce intuitive or impressionistic reactions that may be biased); Mitchell, *supra* note 89, at 134-35 (noting how explanation requirements may reduce certain gain/loss framing effects in choice).

be seen as a way to enhance accountability,[98] which can "attenuate biases that arise from lack of self-critical attention to one's decision processes and failure to use all relevant cues."[99]

Nonetheless, adopting new safeguards to reduce cognitive bias in a decisionmaking process does not always result in a net gain: the transaction costs may outweigh the benefits of substantively improved decisions. It is important to remember, however, what is at stake in the sentencing decision. The extraordinary deprivation of liberty represented by extended incarceration stands out as perhaps the most significant decision that can be made by a judge—certainly far more so than, say, monetary awards in civil cases or routine case management orders. Our constitutional due process jurisprudence properly recognizes that the need for reliable decisionmaking is at its zenith when the individual interests at stake are most important.[100] The same logic justifies enhanced safeguards under the rubric of procedural reasonableness to increase the quality of sentencing decisions, particularly when it is clear that the structure of the decisionmaking process is bound to create biases in favor of just one of several statutorily mandated sentencing factors.[101]

B. Improving the Procedural Quality of Sentencing Decisions

Procedural safeguards have a value that goes beyond their contribution to accurate, well-considered outcomes. A rational, responsive decisionmaking process conveys a message of respect for the basic human dignity of the individuals affected by the decision, regardless of the ultimate content of the decision. Professor Mashaw has developed this insight in a particularly influential fashion in his dignitary theory of due process.[102] Of particular relevance for present purposes,

---

98. Mitchell, *supra* note 89, at 135.

99. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 265 (1999).

100. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that the liberty lost when parole is revoked constitutes a "grievous loss" and warrants due process protections).

101. To some extent, substantive problems may be rectified on appeal through substantive reasonableness review. On the other hand, not all substantively flawed sentences are appealed, appealed competently, or reviewed capably by a conscientious appellate panel, so it may still be worthwhile to provide the extra procedural safeguard. More fundamentally, substantive reasonableness review determines only whether the sentence is defensible and not whether a better sentence might have been imposed. *See supra* note 24 and accompanying text. Even assuming that this minimal requirement is satisfied in all cases, the *Cunningham* rule may still have value in directing the attention of district court judges to factors that establish the preferability of a below-guidelines sentence.

102. For the most complete elaboration of this theory, see generally MASHAW, *supra* note 84, at 158-238. For a discussion of the significance of Professor Mashaw's work, see Lawrence B. Solum, *Procedural Justice,* 78 S. CAL. L. REV. 181, 263 (2004), which stated

Mashaw emphasizes the value of comprehensibility and rationality in a decisionmaking process:

> [Incomprehensible processes] take away the participants' ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by the system. To avoid contributing to this sense of alienation, terror, and ultimately self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works. In the end, there also must be some guarantee, usually by articulation of the basis for the decision, that the issues, evidence, and processes were meaningful to the outcome. This reason giving is necessary, both to redeem prior promises of rationality, and to provide guidance for the individual's future planning. In this latter aspect, reason giving confirms the participant, even in the face of substantive disappointment, as engaging in an ongoing process of rational and self-regarding action.[103]

The *Cunningham* rule, of course, responds nicely to Mashaw's reason-giving imperative.[104]

This imperative acquires special force in the realm of criminal law for its connection to the rehabilitative project of the criminal justice system.[105] In order to see why, it is helpful to consider what a large

---

that "[t]he best account of the dignitary value of participatory process has been developed by Jerry Mashaw."

103. MASHAW, *supra* note 84, at 175-76. To be clear, Mashaw's argument for reason-giving demands no more than a thin form of rationality; it does not preclude decisions that are "mistaken or foolish in some—even many—cases." *Id.* at 199. Yet, some sort of explanation for the decision remains necessary if we are to conceive genuinely of the individual as an "autonomous moral agent entitled to self-respect." *Id.*

104. A fuller defense of the *Cunningham* rule in Mashaw's terms might look like this: Post-*Booker* sentencing promises that decisions will be based on the full panoply of § 3553(a) factors and thereby invites argument and evidence that go beyond the scope of the guidelines. Where a defendant takes up this invitation, it hardly seems respectful to render a decision as to which there is no clear indication that the invited argument and evidence were even considered. Such a system seemingly cares little about living up to its promises to the defendant of a rational and participatory decisionmaking process, about providing the defendant with an ability to participate effectively in the later appellate process for review of the sentence, or about helping the defendant to understand the true moral significance of the punishment he or she is about to suffer. *Cf.* Schauer, *supra* note 1, at 658 (discussing reason-giving as a way of showing respect).

105. The larger point suggested here is that criminal procedure requirements should be developed so as to complement the aims of substantive criminal law—a point that has also been effectively made by Professor Bibas. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1362 (2003) ("A procedure may be constitutional, efficient, procedurally fair, and even accurate but still be deeply unwise. If the procedure undermines important values of substantive criminal law, we should reject it no matter how efficient it is."). Although rehabilitation no longer plays the dominant role that it once did, it remains a core objective of the American criminal justice system. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 433-35 (2008) [here-

body of social psychology research teaches about procedural justice: when the people affected by a decisionmaking process perceive the process to be just, they are much more likely to accept the outcomes of the process, even when the outcomes are adverse.[106] Moreover, acceptance of decisions made by *legal* actors is associated with higher levels of perceived legitimacy of the legal system as well as a heightened sense of obligation to obey the law and cooperate with legal authorities.[107] Such procedural justice effects have been found in a multitude of studies involving a wide range of social groups in a wide variety of different settings, including in the interactions of criminal defendants with their lawyers and police.[108] Thus, there is good reason to believe that procedural justice is capable of contributing to the internalization of the sorts of values that we would associate with rehabilitation. Indeed, the Supreme Court itself has recognized the intuitive appeal of this point with respect to parole revocation procedures.[109]

Procedural justice effects not only have an important connection to the rehabilitative project of criminal law, but also more broadly to the efficient functioning of the criminal justice system. As I have described at greater length elsewhere, the nominally coercive machinery of criminal justice depends to a surprising extent on the cooperation of the defendants moving through the system.[110] For instance, the investigation and prosecution functions benefit tremendously from high numbers of confessions and guilty pleas, as well as frequent jailhouse snitching and testimony by defendants against codefendants. Likewise, given how probation departments are notoriously spread thin, the effective supervision of defendants on pretrial release, probation, and parole requires high levels of voluntary cooperation by defendants. All of this suggests that procedural justice—with its capacity to increase compliance with the law and legal authorities—can make important contributions to the criminal justice system's basic objective of achieving efficient crime control.

And there are good reasons to think that the *Cunningham* rule will enhance perceptions of procedural justice.[111] Social psychologist

---

inafter O'Hear, *Plea Bargaining*] (discussing the continuing importance of rehabilitation in American criminal justice systems).

106. For a more detailed summary of this research, see O'Hear, *Plea Bargaining*, *supra* note 105, at 420-24.

107. *Id*. at 421-22.

108. *Id*. at 422.

109. Morrissey v. Brewer, 408 U.S. 471, 484 (1972) ("And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.").

110. O'Hear, *Plea Bargaining*, *supra* note 105, at 433-35.

111. Adam Lamparello has also invoked procedural justice effects as a reason for more robust explanation requirements for federal sentences. However, he has done so within the context of a much broader reform proposal that would obviate the need for *Cunningham* by

Tom Tyler, a longtime leader in the procedural justice field, has identified various attributes of decisionmaking processes that are associated with lay perceptions of procedural justice, including the following: (1) whether the people involved had an opportunity to state their case ("voice"); (2) whether the authorities were seen as unbiased, honest, and principled ("neutrality"); (3) whether the authorities were seen as benevolent and caring ("trustworthiness"); and (4) whether the people involved were treated with dignity and respect.[112] Explanation connects to at least two of these attributes. First, explanation contributes to perceived neutrality to the extent that it demonstrates that the decisionmaker was truly unbiased, honest, and principled.[113] And, second, perceived trustworthiness is enhanced when the authorities demonstrate that they have actually considered the information offered during voice opportunities.[114] Thus, the empirical research on the content of procedural justice dovetails with more philosophical approaches, such as Mashaw's.[115]

Importantly, the Sentencing Reform Act of 1984, the very foundation of modern federal sentencing law, was largely premised on the basic insight advanced in this Section: even when handing out long prison sentences, it is important for judges to treat defendants in a respectful manner in order to facilitate their successful adaptation to prison life and eventual rehabilitation. Although it is often asserted

---

eliminating any weight for the guidelines in the sentencing calculus. Adam Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 COLUM. HUM. RTS. L. REV. 115, 156-58 (2006).

112. Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 380-82 (2003).

113. *See id.*

114. *See* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 441 (1992) ("Without considering their arguments, people believe that the authority cannot be acting benevolently . . . .").

115. This should not be surprising, as both approaches ultimately focus on dignity and respect. According to Tyler and his coauthor E. Allen Lind, the psychological mechanisms underlying the procedural justice effects are related to a basic human desire to maintain social status: because people "derive much of their social identity from their standing as full-fledged members of their group or society," fair procedures matter to the extent that they convey positive messages as to social standing. Tom R. Tyler & E. Allen Lind, *Procedural Justice, in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 76 (Joseph Sanders & V. Lee Hamilton eds., 2001). As Mashaw suggests, explained decisions communicate a message of respect for the autonomy and rationality of participants in the decisionmaking process, while an unexplained decision sends the opposite message—one that must be regarded as stigmatizing in a liberal-democratic political community. *See* MASHAW, *supra* note 84, at 176. Thus, an explained sentencing decision, even if adverse to the defendant, provides implicit reassurance to the defendant that he or she retains at least some minimal level of social standing and thereby promotes the following: acceptance of the decision, trust in legal institutions, a sense of security as to "the long-term gains from group membership," Tyler & Lind, *supra,* at 76, and a willingness to "invest . . . in an ordered society." *Id.* at 77.

that the Act's purpose was to reduce unwarranted sentencing disparities,[116] the statute's legislative history reveals that minimizing disparity was not viewed as an end in itself.[117] For instance, Marvin Frankel, whose 1973 book *Criminal Sentences: Law Without Order* is widely regarded as the impetus for federal sentencing reform,[118] characterized disparity as an affront to defendant dignity.[119] He expressed a concern that unrestrained judicial discretion at sentencing bred anger and anxiety among defendants, and he asserted that inconsistencies in treatment fueled resentment among prison inmates, impairing their prospects for rehabilitation and contributing to outbreaks of prison violence and disorder.[120] Such concerns were then echoed in the Senate Judiciary Committee's report on the Act, which expressed concerns regarding fairness to defendants, the tendency for disparities to promote disrespect for the law, and the evidence that disparities contributed to disciplinary problems in prisons.[121] Similarly, the statutory text itself requires judges to impose sentences and the Commission to develop guidelines that take into account the need for sentences to "promote respect for the law" and to provide defendants with "correctional treatment in the most effective manner."[122]

Taking into account this broader constellation of purposes—not just minimizing disparity per se but also treating defendants with due regard for their dignitary interests, enhancing defendants' rehabilitative prospects, and contributing to orderly and effective corrections administration—the *Cunningham* requirement seems perfectly congruent with the Sentencing Reform Act's intended accomplishments.

What of the view (suggested by *Rita*) that, whatever the importance of responding to defendant arguments, those responses may generally be inferred from the context and circumstances of the case? Recall, for instance, the analysis of the record in *Rita* itself. According to the Court, the fact that the judge asked counsel questions regarding the defendant's arguments reassures us that the judge actually did consider them, while the reasons they were rejected may be inferred from the essential nature of guidelines sentencing: "[T]he

---

116. O'Hear, *Original Intent of Uniformity*, *supra* note 10, at 772-73.

117. *See* S. REP. NO. 98-225, at 52-53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235-36 (acknowledging that, while the primary goal of sentencing reform is to eliminate unwarranted sentencing disparity, guidelines requiring a judge to examine the characteristics of a particular offense and defendant will actually enhance the individualization of sentences).

118. O'Hear, *Original Intent of Uniformity*, *supra* note 10, at 759.

119. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 11, 17 (1973).

120. *Id.* at 96-97.

121. S. REP. NO. 98-225, at 45-46, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3228-29.

122. 18 U.S.C. §§ 3553(a)(2)(A), (D) (2006); *see also* 28 U.S.C. § 991(b)(1)(A) (2006) (requiring the Commission establish sentencing policies in conformance with § 3553(a)(2)).

Guidelines had determined a sentence that was proper in the minerun of roughly similar perjury cases; and . . . Rita's personal circumstances here were simply not different enough to warrant a different sentence."[123]

The problem with this reasoning is that the explanation inferred by the Court is both unhelpfully vague and not clearly any more plausible than a number of other possible explanations. In truth, one can easily imagine a number of different explanations for the judge's decision, each of which would have its own distinct moral significance.[124] For instance, the judge may have decided that past military or public service of some sort is, as an empirical matter, routine among perjury defendants and therefore incapable of removing Rita from the "heartland" of perjury cases.[125] Or the judge might have decided that sentences must be based on retributive principles and that military service has no bearing on Rita's just deserts. Or the judge might have decided that military service is not, as a general matter, indicative of good character. Or the judge might have decided that military service was as much an aggravating characteristic as a mitigating one, inasmuch as Rita's service should have instilled in him a greater appreciation of law and order and of the sacrifices made by others to preserve these social values.

This analysis of *Rita* illustrates why, for an open-textured decisionmaking process (such as the one contemplated by § 3553(a)), context and circumstances will almost always be a poor substitute for express explanation. Of course, it will usually be possible to imagine a rational basis for the judge's decision after the fact, but to find such a hypothetical explanation adequate (as was done in *Rita*) is to conflate procedural and substantive review. Properly understood, procedural justice requires not just the *possibility* that the judge could have considered and rejected the defendant's arguments on neutral, rational grounds, but also some meaningful reassurance that the judge actually did so.

C. *Respecting Sixth Amendment Values*

The proguidelines cognitive bias effects described in Part A are a concern not only from the standpoint of the substantive quality of sentencing decisions under § 3553(a), but also from the standpoint of

123. Rita v. United States, 127 S. Ct. 2456, 2469 (2007).

124. Moreover, from the procedural justice perspective, the judge's questioning of counsel need not be construed in wholly positive terms: after all, the questioning invited a higher level of participation and implicitly promised even more by way of judicial consideration of the defendant's arguments. The subsequent failure to address those arguments as the sentence was imposed may thus constitute even more of a dignitary affront than if the arguments had initially evoked less attention.

125. *See Rita*, 127 S. Ct. at 2461.

showing respect for core constitutional values. Recall that *Booker* invalidated the mandatory guidelines system on Sixth Amendment grounds, making clear that the finding by judges of aggravating facts resulting in mandatory sentence enhancements violated defendants' jury-trial rights.[126] *Booker* and the other progeny of *Apprendi v. New Jersey*[127] have embraced a vision of robust checks and balances in the criminal justice system[128]—of the need, as the Court put it in *Blakely v. Washington*,[129] for a "circuitbreaker in the State's machinery of justice."[130] Mandatory guidelines based on judicial factfinding contravene this vision because no actor with discretionary authority (that is, neither a judge nor a jury) stands between the prosecutor and the defendant with the capacity to determine that a sentence enhancement, although literally applicable, is nonetheless inappropriate in the specific case at hand.[131] To the extent that the guidelines exert a special gravitational pull in the sentencing process—that is, to the extent that the guidelines have something of a de facto binding character—the guidelines subtly undermine these Sixth Amendment values.

Although these concerns may not rise to the level of a constitutional violation, the desire for checks and balances that undergirds the jury-trial right surely merits attention in determining what constitutes a reasonable sentencing process. A system in which judges categorically decline to second-guess guidelines-mandated sentence enhancements is not a system that respects Sixth Amendment values, but is rather one dominated by prosecutors (in the sense that only prosecutors exercise meaningful discretion in the distribution of punishment). And when judges fail to explain their rejection of defendants' arguments for below-guidelines sentences, we have little assurance that judges are doing anything but categorically following the guidelines.

Of course, this may be a misperception: the unexplained sentence may have a good, if unarticulated, explanation, and discretion may have been truly exercised. Yet, as the Supreme Court has recognized in other contexts, the public has an important interest in maintaining the appearance that officeholders appropriately discharge their

---

126. United States v. Booker, 543 U.S. 220, 245 (2005).

127. 530 U.S. 466 (2000).

128. Michael M. O'Hear, *The End of* Bordenkircher*: Extending the Logic of* Apprendi *to Plea Bargaining*, 84 WASH. U. L. REV. 835, 875-76 (2006) [hereinafter O'Hear, *End of* Bordenkircher].

129. 542 U.S. 296 (2004).

130. *Id.* at 306.

131. *See* O'Hear, *End of* Bordenkircher, *supra* note 128, at 858-60 (discussing how mandatory sentencing regimes take the discretionary authority away from juries). Nonetheless, as I have explained elsewhere, a jury in a mandatory sentencing guidelines system can still perform the requisite circuitbreaking role through the exercise of its nullification power. *Id.*

duties.[132] Moreover, the social psychology research suggests an additional reason to be concerned about perceptions here: procedural justice effects are promoted when decisionmakers clearly acknowledge the legal rights of those affected by their decisions, but may be undermined by the perception that the rights are not taken seriously.[133] Thus, a defendant's perception (whether or not accurate) that his or her judge automatically applied the guidelines, without regard to his or her Sixth Amendment rights, may diminish the defendant's sense of respect for the law and the legal system.

D. Improving the Quality of the Guidelines

From their inception, the guidelines were intended to be developed through an evolutionary process in which empirical data would inform ongoing improvements in the guidelines system.[134] Through their case-by-case sentencing decisions, district court judges were recognized from the start as an important source of such empirical data. As the original edition of the guidelines put it, "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines . . . ."[135]

The Commission's interest in collecting and analyzing district court reasoning makes sense. District court judges occupy a unique position in the federal criminal justice system. Their perspective is more like that of a prosecutor or public defender than that of an appellate judge, inasmuch as they see many more criminal cases than appellate judges and in much richer detail. Perhaps most importantly, district court judges routinely get to see the faces and hear the voices of defendants, defendants' family members, victims, and frontline law enforcement personnel. Yet, they remain life-tenured judges—freed from the strictures of the advocate's role and largely insulated from political and bureaucratic pressures. This unique perspective (although one that is, of course, limited in its own ways) provides the district court judge with important insights into such matters as the relative severity of different types of offenses, the ef-

---

132. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) ("[W]e spoke in *Buckley* of the perception of corruption inherent in a regime of large individual financial contributions . . . as a source of concern almost equal to *quid pro quo* improbity . . . ." (citation omitted) (internal quotation marks omitted)).

133. *See* Tyler, *supra* note 114, at 440-41.

134. GUIDELINES MANUAL, *supra* note 59, § 1A1.1 ed. note (reprinting introductory note to original 1987 edition of Guidelines Manual, at A.3); *see also* 28 U.S.C. § 991(b)(1)(C) (2006) (providing that one of the purposes of the Sentencing Commission includes establishing sentencing policies and practices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

135. GUIDELINES MANUAL, *supra* note 59, § 1A1.1 ed. note (reprinting introductory note to original 1987 edition of Guidelines Manual, at A.4.B).

fects of incarceration on defendants and defendants' families, the significance of apology, the structure of criminal organizations, and the exercise of discretion by police and prosecutors. In its ongoing process of analysis and guidelines improvement, the Commission may benefit a great deal from such insights.[136]

Before *Booker*, however, the cramped nature of the departure jurisprudence did little to encourage judges to say much when they refused to depart,[137] leaving unrealized the vision of a robust role for district courts in the policymaking process. *Booker*, of course, holds the potential for a much enhanced feedback loop, but only if district court judges actually share their insights on the record. Their interest in putting their analysis on the record conflicts with, as Judge Posner puts it, "the temptation to a busy judge to impose the guidelines sentence and be done with it."[138] For this reason, the *Cunningham* requirement may help policymakers by inducing district court judges to fight this temptation, think more carefully about individual cases in light of their experiences in sentencing many other cases, and draw explicit connections between their personal insights and the § 3553(a) factors. Putting all of this reasoning on the record can only help the evolutionary process that guidelines development is intended to be.[139]

---

136. As Professor Chanenson has argued, the appellate courts, Congress, and the public would also benefit from the information that district court judges might convey in more thorough explanations of their sentencing decisions. Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147-48 (2006).

137. *See, e.g.*, United States v. Castano-Vasquez, 266 F.3d 228, 234 (3d Cir. 2001) (noting that district court judge was not obligated to explain a refusal to depart); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999) ("By its own hand, the judiciary has undermined or simply underused the mechanisms which were intended to foster judicial involvement in the [Sentencing Reform Act's] evolutionary lawmaking process.").

138. United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).

139. The *Cunningham* requirement may also enhance the quality of prosecutors' work. As Professor Simons has observed, although federal prosecutors have long possessed tremendous discretion in charging, they have not traditionally connected the exercise of that discretion with the punishment theory. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 305 (2009). Simons sees *Booker* as hopeful development in this regard: now "prosecutors *must* engage with the traditional purposes of sentencing—if only to oppose defense requests for sentences below the advisory Guidelines range." *Id.* at 349. He suggests that *Booker* may thereby contribute to more carefully targeted uses of sentence enhancement statutes: "*Booker*, by forcing prosecutors to engage with the basic principles of punishment, now provides a framework for prosecutors to think about the justice of sentencing enhancements." *Id.* at 351. However, it is hard to see how motivated prosecutors will be to engage seriously with the § 3553(a) factors if judges do not seem so engaged. But, if judges explain their variance rulings as a matter of course, then prosecutors may see variance issues as warranting more careful attention. Moreover, the feedback provided by judges in their explanations should help prosecutors to become (using Simons' term) even better "punishment theorists."

IV. CONCLUSION

In the post-*Booker* world, federal sentencing decisions are now recognized as discretionary ones, but they are unlike the myriad of other discretionary decisions that district court judges make day in and day out: issuing scheduling orders, resolving discovery disputes, making evidentiary rulings, and the like. Not only are the stakes much higher when a sentence is imposed, but the decision is embedded within a unique and complex set of legal mandates and public policy concerns, including the need to ensure that the full range of § 3553(a) factors are given due attention, to promote procedural justice effects, to reassure defendants that their Sixth Amendment rights are being respected, and to provide a robust feedback loop to the Commission consistent with the vision of evolutionary sentencing guidelines. Thus, while the costs of a strong explanation requirement may appropriately be viewed as prohibitive with respect to more run-of-the-mill types of judicial decisions, the sentencing-specific considerations described here may warrant a different conclusion in the sentencing context.

Because the courts have not focused on what is unique about sentencing, the explanation requirements for federal sentences have been degraded, as Professor Oldfather has characterized explanation norms generally, to "little more than incantations designed to assure the public . . . that those responsible for adjudication understand what their obligations entail."[140] When it comes to sentencing decisions, our courts of appeals can and should be more demanding. In particular, the appellate courts can highlight the importance of explanation by taking *Cunningham*-type claims more seriously instead of summarily rejecting the claims based on dubious distinctions (e.g., whether the ignored argument was the defendant's *principal* one) and unnecessary procedural obstacles (e.g., the contemporaneous objection requirement). *Rita*'s embrace of inferred explanations should also be reconsidered, although that step may have to await action by the Supreme Court.[141]

The more general point is that our courts should more consistently recognize the unique importance of the sentencing process.

---

140. Oldfather, *supra* note 1, at 764.

141. I say "may" because it is possible to read *Rita* not as prescribing how reasonableness review *must* be conducted, but as a grant of discretion to the courts of appeals to determine for themselves how to review sentences post-*Booker*. Notably, the Court permitted the courts of appeals to employ a presumption of reasonableness for guidelines sentences, but it did not require such a presumption. *See* United States v. Carty, 520 F.3d 984, 994 (9th Cir. 2008) (en banc) (rejecting use of presumption in Ninth Circuit post-*Rita*); Rita v. United States, 127 S. Ct. 2456, 2459 (2007) ("The most important question before us is whether the law *permits* the courts of appeals to use this presumption. We hold that it does." (emphasis added)). Similarly, *Rita* might be read to permit explanations to be inferred, but not as requiring the lower appellate courts to do so.

The American tradition is to load up the criminal *trial* with procedural safeguards, but to leave sentencing largely untouched by formal procedural requirements.[142] The advent of sentencing guidelines served to regularize the process a bit, but the guidelines system ultimately adopted procedures more akin to civil or administrative adjudications than to a criminal trial.[143] The enduring contribution of *Apprendi*, *Booker*, and related Supreme Court cases has been to remind us that sentencing truly is a *criminal* proceeding and that concerns regarding judicial economy must accordingly give way more quickly in the sentencing context than in civil and administrative proceedings.[144] The particular concerns we have for a careful, respectful process when a criminal defendant's guilt is determined have much the same urgency when a sentence is selected and imposed. This is not to say that a sentencing proceeding must look exactly like a criminal trial, but it is to suggest that the sentencing process ought to embody a comparable level of dedication to doing both substantive and procedural justice.

---

142. *See, e.g.*, Williams v. New York, 337 U.S. 241, 251-52 (1949) (holding that use of hearsay evidence at sentencing does not violate the Due Process Clause).

143. GUIDELINES MANUAL, *supra* note 59, § 6A1.3 (establishing that admissibility of evidence at a sentencing hearing is not governed by rules of evidence and, in commentary, advising that factual disputes be resolved by preponderance of the evidence standard).

144. *See, e.g.*, United States v. Booker, 543 U.S. 220, 244 (2005) (acknowledging that jury factfinding "may impair the most expedient and efficient sentencing of defendants"); Ring v. Arizona, 536 U.S. 584, 607 (2002) (observing in extending jury-trial right to capital sentencing proceedings that the Sixth Amendment right "has never been efficient; but it has always been free" (citation omitted)).