NOTES

MORE THAN A FORMALITY: THE CASE FOR MEANINGFUL SUBSTANTIVE REASONABLENESS REVIEW

Appellate review of sentencing is under assault. When the Supreme Court rendered the Federal Sentencing Guidelines nonbinding in *United States v. Booker*,[1] it established appellate review of federal sentences for reasonableness to cabin sentencing judges' newly acquired discretion.[2] The substantive component of this review — which authorizes appellate courts to vacate those sentences that reflect clear errors in judgment or that are excessively disproportionate — is a fundament of the post-*Booker* sentencing regime, but one that courts have struggled to implement. Indeed, a troubling consensus is emerging that substantive reasonableness review is unworkable or even undesirable.[3] Such views neglect unwarranted disparities in sentences and threaten to disrupt the feedback loop between courts and the U.S. Sentencing Commission (the Commission) that appellate review was intended to serve. If sentencing is to be fair, appellate courts must do better. This Note argues that they can.

This Note proceeds in five parts. Part I surveys the history of appellate review of federal sentences. Part II relies on case law and recent statements by a variety of stakeholders to examine the state of substantive reasonableness review in the circuit courts. Part III defends meaningful substantive reasonableness review as essential to promoting fairness and uniformity in federal sentencing. Part IV identifies ways in which the courts and the Commission can work toward a more effective and stable system of substantive review. Part V concludes.

I. A BRIEF HISTORY OF APPELLATE REVIEW IN FEDERAL SENTENCING

This Part traces the winding path of appellate review of sentencing from the colonial era to the present day. Section A focuses on the narrow scope of appellate review of sentences prior to the establishment of

---

[1] 543 U.S. 220 (2005); *see id.* at 226–27.

[2] *See id.* at 260–65.

[3] U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING pt. A, at 111 (2012) [hereinafter *BOOKER* 2012 REPORT], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm ("Since *Booker*, where the Court anticipated that appellate review would tend to 'iron out' sentencing differences, the role of appellate review remains unclear, the standards inconsistent, and its effectiveness in achieving uniformity in sentencing is increasingly questionable.").

the Federal Sentencing Guidelines. Section B discusses appellate review under the Guidelines. Section C traces the piecemeal development of reasonableness review in *Booker* and its progeny.

A. Appellate Review of Sentences Prior to the Guidelines

The early colonial practice with respect to sentencing relied on a determinate scheme, in which specific sentences (often death or fines) were prescribed for offenses.[4] However, this rigid system was gradually washed out on a tide of reformist concerns over proportionality, in favor of an indeterminate system wherein judges enjoyed vast discretion to sentence defendants within a statutory range.[5] As a formal matter, sentencing appeals were allowed only under narrow circumstances.[6] As a practical matter, sentences were unreviewable.[7] That sentencing under this system could be said to come down to "what the judge ate for breakfast"[8] does not seem too far from the truth. Without any standards to guide their decisionmaking, without meaningful appellate review, and with few procedural requirements, sentencing judges "made all of the moral, philosophical, medical, penological, and policy choices surrounding what particular sentence to impose upon a particular offender."[9] The sentencing judge was truly "master of his courtroom."[10]

B. Sentencing Reform and a New Role for Appellate Review

The enactment of the Sentencing Reform Act of 1984[11] (SRA) represented a seismic shift in federal sentencing from an entirely indeterminate scheme back to a determinate one — albeit of a very different kind. In large part, the sentencing reform movement of the 1970s and 1980s, which culminated in the enactment of the SRA, was ani-

---

[4] *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 696 (2005).

[5] *See id.* at 696–97.

[6] *See* United States v. Colon, 884 F.2d 1550, 1552 (2d Cir. 1989) ("Prior to passage of the Sentencing Reform Act, appellate review of sentences was unavailable unless they exceeded statutory limits, resulted from material misinformation or were based upon constitutionally impermissible considerations.").

[7] *See* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.").

[8] The caricature is, evidently, not completely fanciful. In a recent study of Israeli judges presiding over parole hearings, the judges were found to be much more likely to issue favorable rulings for prisoners after meal or snack breaks. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889, 6889–90 (2011), *available at* http://www.pnas.org/content/108/17/6889.full.pdf.

[9] Klein, *supra* note 4, at 693.

[10] *Id.*

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

mated by a desire to eliminate the unwarranted disparities perceived to be caused by sentencing judges' unbridled discretion.[12] Given the differing perspectives among judges regarding the purposes of punishment, the relevance of various aggravating and mitigating circumstances, and the relative seriousness of particular crimes,[13] a stark lack of uniformity across the sentencing landscape was hardly surprising.[14] In response to an onslaught of criticism over unwarranted disparities in sentencing from the left, and a concern over rising crime figures and lenient sentencing on the right, Congress enacted the SRA and established the Sentencing Commission.[15]

The Commission was charged with issuing Sentencing Guidelines to be calculated — based on the severity of the offense and the criminal history of the offender — and applied in federal criminal cases, in order to promote uniformity in sentencing. Congress established that the Guidelines, which took effect in 1987,[16] would be mandatory[17] and subject to "departures" only under narrow circumstances.[18] In service of its goal of eliminating unwarranted disparities in sentencing, Congress also assigned federal appellate courts, for the first time, a meaningful role in constraining sentencing judges. In § 3742 of the SRA, Congress provided that when a district court judge departed from or miscalculated the Guidelines, both the government and the defendant could appeal the sentence.[19] The Senate Committee Report on the Comprehensive Crime Control Act of 1984[20] sheds light on what Congress intended when it reshaped the contours of appellate review of federal sentences. To be sure, the SRA was designed to "preserve the concept that the discretion of a sentencing judge has a proper place in

---

[12] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 2, 38–39 (1998); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) ("[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.").

[13] *See* FRANKEL, *supra* note 12, at 8 ("[T]here is no agreement at all among the sentencers as to what the relevant criteria are or what their relative importance may be.").

[14] *See* Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 6 (1997) ("Disparity in sentencing was a natural consequence of this broad and virtually unchecked discretion.").

[15] *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (discussing the key roles played by Senators Ted Kennedy and Strom Thurmond in the passage of sentencing reform legislation).

[16] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2012).

[17] *See* Lee, *supra* note 14, at 8.

[18] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0. The SRA also abolished parole, divesting the U.S. Parole Commission of its ability to control the ultimate length of sentences and limiting reductions in sentences to minor credits for good behavior. *See* Lee, *supra* note 14, at 9.

[19] *See* 18 U.S.C. § 3742(a)–(b) (2012).

[20] Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

sentencing and should not be displaced by the discretion of an appellate court."[21] Yet the Committee envisioned appellate review as essential to "provid[ing] case law development of the appropriate reasons for sentencing outside the guidelines" and as serving a desirable feedback function, by which appellate judges grappling with outlier sentences would "assist the Sentencing Commission in refining the sentencing guidelines as the need arises."[22] The Committee also noted that "[a]ppellate review creates a check upon [district courts'] unlimited power [to sentence], and should lead to a greater degree of consistency in sentencing."[23]

In *Koon v. United States*,[24] the Supreme Court held that sentences departing from the Guidelines were subject to review under a unitary abuse of discretion standard.[25] But Congress amended § 3742(f) as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003[26] (PROTECT Act) to instruct appellate courts to review district courts' application of the Guidelines to the facts de novo, abrogating *Koon* in part.[27] While constitutional rulings would soon displace this regime, the legislative history of the SRA and Congress's response to *Koon* indicate that Congress viewed appellate courts as playing an important role in promoting uniformity in sentencing.

C. Booker *and its Progeny*

After the enactment of the SRA, another sentencing revolution — this time, a constitutional one — cut at the heart of the new, determinate sentencing regime and transformed appellate review in the process. In *United States v. Booker*, the Court held that the mandatory Guidelines violated the Sixth Amendment jury trial right by employing judges to find facts at sentencing that automatically increased

---

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

[22] *Id.* at 151; *see also id.* ("For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor.").

[23] *Id.* at 153 (quoting United States v. DiFrancesco, 449 U.S. 117, 142–43 (1980)) (internal quotation marks omitted).

[24] 518 U.S. 81 (1996).

[25] *Id.* at 96–100 ("[W]e are . . . convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions." *Id.* at 97.). Prior to *Koon*, most appellate courts reviewed departures from the Guidelines de novo, factual findings for clear error, and the degree of the departure for reasonableness. *See* Lee, *supra* note 14, at 26–27 & 26 n.155 (collecting cases).

[26] Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.).

[27] *See* 18 U.S.C. § 3742(e) (2012) (providing for de novo review of "the district court's application of the guidelines to the facts").

an offender's Guidelines range (and, thus, his sentence) beyond the range authorized by the jury verdict.[28] To address the constitutional infirmity, the remedial majority (made up of the four Justices who dissented from the constitutional holding and Justice Ginsburg) rendered the Guidelines advisory, thereby imbuing sentencing judges with far more discretion than they had previously enjoyed under the SRA.[29]

The controversial *Booker* remedy also had the significant effect of reshuffling the deck with respect to appellate review under the Guidelines. The remedial majority concluded that the excision of the provision that had made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), necessitated excision of § 3742(e), the appellate review provision that contained "critical cross-references to . . . § 3553(b)(1)"[30] and that authorized de novo review of departures from the Guidelines.[31] But rather than gut appellate review, the remedial majority found that the statute, along with other factors, "impl[ied] a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'"[32] While not elaborating on its contours, the Court defended reasonableness review as "helping to avoid excessive sentencing disparities,"[33] as promoting uniformity by "tend[ing] to iron out sentencing differences,"[34] and as integral to a feedback loop between the courts and the Commission.[35] In a prescient passage in dissent, Justice Scalia wondered whether reasonableness review would "be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion."[36]

Broadly speaking, the sentencing process after *Booker* is as follows: The sentencing judge first considers the presentence report (a summary of the defendant, his crime, and the applicable Guidelines, prepared by a U.S. probation officer).[37] The judge then calculates the applicable Guidelines range, which constitutes "the starting point and the

---

[28] *See* United States v. Booker, 543 U.S. 220, 226–27, 235 (2005) (Stevens, J., delivering the opinion of the Court in part).

[29] *See id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).

[30] *Id.* at 260.

[31] *See id.* at 259–60.

[32] *Id.* at 261 (second alteration in original) (quoting 18 U.S.C. § 3742(e)(3)). The Court also noted that Congress had explicitly set forth the reasonableness standard in § 3742(e) up until 2003, when Congress modified the text to provide for de novo review of departures. *Id.*

[33] *Id.* at 264.

[34] *Id.* at 263.

[35] *See id.* ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.").

[36] *Id.* at 313 (Scalia, J., dissenting in part).

[37] *See* 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c)–(d).

initial benchmark" for the sentence.[38] Both parties are given an opportunity to be heard with respect to an appropriate sentence.[39] Finally, the sentencing judge must weigh the seven factors outlined in § 3553(a)[40] and impose a sentence that is "sufficient, but not greater than necessary," to achieve the statutory purposes of retribution, deterrence, incapacitation, and rehabilitation.[41]

In a trio of cases following *Booker*, the Court sought to clarify the metes and bounds of appellate review. In *Rita v. United States*,[42] the Court held that appellate courts *may* (but need not) apply a presumption of reasonableness to within-Guidelines sentences.[43] The Court further held that appellate courts *may not* adopt a presumption of unreasonableness with respect to non-Guidelines sentences.[44] In contrast to *Rita*, which addressed a narrow question, the Court in *Gall v. United States*[45] sought to provide meaningful guidance to courts of appeals in reviewing sentences. In *Gall*, the Eighth Circuit had applied a proportionality test — which tied the persuasiveness of the justification required to impose a non-Guidelines sentence to the extent of the deviation from the Guidelines[46] — to vacate as unreasonable a thirty-six-month sentence of probation for conspiracy to distribute ecstasy.[47] The Court reversed, holding that while appellate courts may take the degree of variance into account, they may not apply any "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[48] For the first time, the Court outlined (albeit in broad strokes) the two-step process by which appellate courts must conduct reasonableness review of sentences. The Court explained that appellate courts must first ensure that a sentence is *procedurally* reasonable.[49] Second, appellate courts must consider the *substantive*

---

38 *See* Gall v. United States, 552 U.S. 38, 49 (2007).

39 *See id.*; FED. R. CRIM. P. 32(i)(4).

40 The Court in *Rita v. United States*, 551 U.S. 338 (2007), summarized the § 3553(a) factors as follows: "That provision tells the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing . . . ; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution." *Id.* at 347–48.

41 *See* 18 U.S.C. § 3553(a)(2) (outlining these purposes).

42 551 U.S. 338.

43 *Id.* at 341.

44 *Id.* at 354–55. The Court also held that district courts are not permitted to assume a Guidelines sentence is reasonable. *Id.* at 351.

45 552 U.S. 38 (2007).

46 *See* United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) (describing the test).

47 *Id.* at 885.

48 *Gall*, 552 U.S. at 47. The Court cast the Eighth Circuit as applying a standard more akin to de novo review. *Id.* at 56.

49 *See id.* at 51. Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors,

reasonableness of a sentence under an abuse of discretion standard that looks to the totality of the circumstances and to the extent of the deviation from the Guidelines, while giving "due deference" to the district court's weighing of the § 3553(a) factors.[50] While the "appellate court might reasonably have concluded that a different sentence was appropriate," that is "insufficient to justify reversal of the district court."[51] Thus, the Supreme Court required a deferential — but real — inquiry into the substance of sentences.[52]

In *Kimbrough v. United States*,[53] issued on the same day as *Gall*, the Court addressed the scope of substantive reasonableness review in cases where the district court varies from the Guidelines on policy grounds. In *Kimbrough*, the district court imposed a below-Guidelines sentence in part because of its policy disagreement with the 100:1 ratio for crack-cocaine versus powder-cocaine sentences,[54] which the court described as "disproportionate and unjust."[55] The Fourth Circuit vacated the sentence as per se unreasonable because it was based on policy disagreement with the Guidelines.[56] The Supreme Court reversed, holding that the district court's well-reasoned policy disagreement with the Guidelines was not an abuse of discretion because the Commission had not exercised its "characteristic institutional role" in formulating these particular Guidelines.[57] The *Kimbrough* Court suggested that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's"[58] policy disagreement — contemplating a heightened substantive reasonableness review in such cases — but left the question unresolved.[59]

---

selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.*

50 *See id.*

51 *Id.*

52 *Cf.* Rita v. United States, 551 U.S. 338, 354 (2007) ("In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur.").

53 552 U.S. 85 (2007).

54 *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-3 (codified as amended at 21 U.S.C. § 841 (2012)); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2004). Under the relevant statute and Guidelines, "a drug trafficker dealing in crack cocaine [was] subject to the same sentence as one dealing in 100 times more powder cocaine." *Kimbrough*, 552 U.S. at 91. Congress has since reduced the disparity to 18:1. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)(1)).

55 *Kimbrough*, 552 U.S. at 93 (quoting 1 Joint Appendix at 72, *Kimbrough*, 552 U.S. 85 (No. 06-6330)) (internal quotation mark omitted).

56 *Id.*

57 *Id.* at 109–10.

58 *Id.* at 109.

59 *See id.*

By establishing substantive reasonableness review, the Court empowered circuit courts to vacate the relatively rare sentence that is unduly lenient or severe[60] or that gives rise to a firm conviction that the district court's weighing of the § 3553(a) factors yielded an unreasonable sentence.[61] As elucidated by the Second Circuit, substantive reasonableness review "provide[s] a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was *shockingly high, shockingly low, or otherwise unsupportable as a matter of law*."[62] Properly applied, this approach maintains the deference to sentencing courts required by *Booker* and *Gall*, "while still recognizing the responsibility to examine the actual sentence itself (quite apart from the procedures employed in arriving at the sentence)."[63] Unfortunately, as discussed in the next Part, that responsibility has increasingly become the subject of doubt and derision.

II. SUBSTANTIVE REASONABLENESS REVIEW IN THE CIRCUIT COURTS

In *Booker*, the remedial majority expressed confidence that appellate courts "will prove capable . . . of applying [the reasonableness] standard across the board."[64] After eight years of percolation in the federal courts, that confidence appears to have been misplaced. The workability of substantive reasonableness review has been the subject of withering criticism from the bench, the academy, and the Sentencing Commission itself. This Part surveys the state of substantive reasonableness review in the circuit courts and identifies problematic circuit splits that reflect the instability of the doctrine.

---

[60] As Judge Calabresi has noted, substantive reasonableness is a "term of art," concerned less with whether the Guidelines are fair as applied to offenders in general (though that is a consideration after *Kimbrough*) and more with whether a given sentence is an outlier. *See* United States v. Ingram, 721 F.3d 35, 43 (2d Cir. 2013) (Calabresi, J., concurring) ("When the legislature tells judges that repeated small-scale drug transactions should be punished more severely than rape . . . it may well be 'substantively reasonable' for judges to impose such disproportionate sentences, as instructed, and yet appropriate for them to decry the instruction itself as absurd." *Id.* at 44 n.9 (citation omitted)).

[61] *See, e.g.*, United States v. Ressam, 679 F.3d 1069, 1087 (9th Cir. 2012) ("[W]e may reverse if . . . we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." (quoting United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009)) (internal quotation marks omitted)).

[62] United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009) (emphasis added) (analogizing the substantive reasonableness standard to the "manifest-injustice" and "shocks-the-conscience" tests).

[63] *Id.*

[64] United States v. Booker, 543 U.S. 220, 263 (2005) (Breyer, J., delivering the opinion of the Court in part).

A. Stakeholders' Views

Advocates of substantive reasonableness review have puzzled over how to reconcile the deference that *Gall* and *Kimbrough* require with appellate courts' mandate to constrain sentencing discretion and "iron out sentencing differences."[65] Judge D. Michael Fisher of the Third Circuit argues that the "Supreme Court has yet to adequately define the substantive reasonableness prong of the *Gall* test," leading the circuit courts to diverge in ways that "have been compounded by inconsistencies in *Gall* and *Kimbrough*."[66] The view that the Supreme Court has muddled substantive reasonableness review — and the abuse of discretion standard it entails — is prevalent[67] and was recently expressed by the Sentencing Commission itself in its report on the impact of *Booker*.[68] Arguing that "the federal circuits have failed to develop consistent and sound approaches to reasonableness review,"[69] Professor Douglas Berman's troubling conclusion is that rather than helping to rein in outliers as the Court envisioned in *Booker*, appellate review of sentences "may be further exacerbating and reifying" disparities, and that further intervention by the Supreme Court is necessary.[70]

Other stakeholders either never had or have lost faith in the viability of substantive reasonableness review. At a public hearing in 2009, Judge Jeffrey Sutton of the Sixth Circuit stated that he was "starting to wonder" whether appellate review of sentences is "worth it"[71] and elaborated that he was at "close to a loss . . . in what [he] . . . should be doing when it comes to reviewing sentences for substantive reason-

---

[65] *Id.*; *see* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1115–16 (2008) (describing the "conflicting imperatives" after *Booker*).

[66] D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 650 (2011).

[67] *See, e.g.*, Laura I. Appleman, *Toward a Common Law of Sentencing:* Gall*,* Kimbrough*, and the Search for Reasonableness*, 21 FED. SENT'G REP. 3, 3 (2008) (commenting that *Gall* and *Kimbrough* "failed to clarify the definition of reasonableness, leaving courts in the same indeterminate muddle as before"); Tim Cone, *Substantive Reasonableness Review of Federal Criminal Sentences: A Proposed Standard*, 33 N. ILL. U. L. REV. 65, 67–68 (2012) (describing *Gall*'s observations as failing to "congeal into concrete parameters").

[68] *BOOKER* 2012 REPORT, *supra* note 3, at 3 ("The appellate courts lack adequate standards and uniform procedures in spite of a number of Supreme Court rulings addressing them, and the ultimate outcome of the substantive review of a sentence may depend in part on the circuit in which the appeal is brought.").

[69] Brief of Washington Legal Foundation and Criminal Law Scholars as Amici Curiae in Support of Petitioner at 13, Rubashkin v. United States, 133 S. Ct. 106 (2012) (No. 11-1203), 2012 WL 1611812 [hereinafter Brief of WLF].

[70] *Id.* at 10–11.

[71] *Public Hearing Before the U.S. Sentencing Commission in Chicago, Ill.* 205 (2009) [hereinafter *Chicago Hearing*] (remarks by Hon. Jeffrey S. Sutton, J., U.S. Court of Appeals for the Sixth Circuit), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf.

ableness."[72] Judge Edith Jones of the Fifth Circuit has echoed this sentiment, writing that the reasonableness standard "defies appellate explanation."[73] Judge Jones described sitting on an oral argument calendar where sentences "were shown to vary by multiples of four and more from other sentences for the same offense."[74] Judge Jones posited that the court had "no principled way to disagree with, much less overturn, such disparate sentences" and that "[r]easonableness review has essentially become no appellate review."[75] More bluntly voicing the frustration shared by many on the appellate bench, Chief Judge William Riley of the Eighth Circuit described appellate review as so diminished as to be a "waste of time."[76]

While most agree that the system is broken, many district court judges and some federal defenders do not. That district court judges tend to "view the appeals process as functioning well"[77] is not terribly surprising, given the routine deference to their sentences. That many federal public defenders have expressed satisfaction with the system[78] presents more of a puzzle. To understand this perspective, consider that in the period between *Booker* and *Rita* — when courts more often believed substantive reasonableness review had teeth — appellate courts reversed only 3.5% of above-Guidelines sentences that were appealed by defendants, but reversed 78.3% of below-Guidelines sentences appealed by the government.[79] The Fifth Circuit, strikingly, reversed

---

[72] *Id.* at 207.

[73] Hon. Edith H. Jones, C.J., U.S. Court of Appeals for the Fifth Circuit, Statement Before the U.S. Sentencing Commission 4 (Nov. 20, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Jones.pdf.

[74] *Id.*

[75] *Id.*

[76] *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 27 n.107 (2011) (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n) [hereinafter *Saris Testimony*] (quoting *U.S. Sentencing Commission National Training Seminar in New Orleans, LA* (June 17, 2010) (remarks of Hon. William Riley, J., U.S. Court of Appeals for the Eighth Circuit)).

[77] *Id.* at 24.

[78] *See, e.g.*, Raymond Moore, Fed. Pub. Defender for the Dists. of Colo. & Wyo., Statement Before the U.S. Sentencing Commission 7–11 (Oct. 21, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Moore_Testimony.pdf (arguing that appellate review was "working as it should" in the Eighth and Tenth Circuits, despite the fact that, at the time of his statement, the Eighth Circuit had not reversed a sentence as substantively unreasonable since *Gall*). One public defender has even argued for a more limited version of substantive reasonableness review than many circuits currently apply, under which "substantive" review would focus on the district court's decisionmaking process. *See* Cone, *supra* note 67, at 76–82.

[79] Jason D. Hawkins, First Assistant Fed. Pub. Defender for the N. Dist. of Tex., Statement Before the U.S. Sentencing Commission 34 (Nov. 19, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Hawkins.pdf.

1% of the former and 100% of the latter.[80] Little wonder, then, that public defenders would argue that strict deference to sentencing judges is appropriate.[81] If public defenders' resistance to strengthening appellate review is in fact a product of this imbalanced treatment, their opposition only highlights the poverty of the current system.

The upshot is that, as the Chair of the Sentencing Commission has acknowledged, "[a]ppellate courts rarely address the substantive reasonableness of a sentence."[82] Rather, courts typically review robustly for procedural reasonableness (as they must under *Gall*) and stop there.[83] Some observers have identified a tendency by appellate judges to seek "procedural hook[s]" when they wish to reverse sentences based on substance,[84] warping the procedural inquiry and limiting the feedback that the Commission receives through appellate review. Worse, the *Rita* presumption that a Guidelines sentence is reasonable has proven to be nonbinding in theory but a rubber stamp in fact[85] — an unfortunate development given that the Commission itself has acknowledged the tendency of certain Guidelines to result in "penalty ranges [that] are too severe for some offenders and too lenient for other offenders."[86] Indeed, of the thousands of such sentences appealed, only one within-Guidelines sentence has been overturned by a *Rita*-

---

[80] *Id.*

[81] *See id.* at 31–34. It bears mention that offenders appeal vastly more sentences than the government does; they have little incentive not to exercise that right, even if the appeal is frivolous. The government, on the other hand, may be expected to appeal only outlier sentences that stand a substantial chance of remand or that might impact future cases.

[82] *Saris Testimony*, *supra* note 76, at 23.

[83] *See* BOOKER 2012 REPORT, *supra* note 3, pt. B, at 31 ("Perhaps because some judges perceive a lack of clarity about the level of deference afforded to the district court in the standard for substantive reasonableness, the vast majority of sentencing appeals are decided not on substantive reasonableness, but on procedural issues . . . ."); *see also* Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1595 (2012) ("For the most part, courts review[] the guideline compliance and the procedural, not substantive, reasonableness of the decisions below.").

[84] *BOOKER* 2012 REPORT, *supra* note 3, pt. B, at 31 (quoting Hon. Gerard Lynch, J., U.S. Court of Appeals for the Second Circuit, Remarks at the U.S. Sentencing Commission National Training Seminar (2010)) (internal quotation marks omitted) (identifying the practice and describing it as "intellectually dishonest"). For a competing view regarding this hidden dynamic, see Judge Calabresi's concurrence in *United States v. Ingram*. 721 F.3d 35, 45 (2d Cir. 2013) (Calabresi, J., concurring) ("The closer a sentence comes to the boundary of the substantively reasonable, the more attentive will (and should) our procedural scrutiny be.").

[85] *See* Brief of WLF, *supra* note 69, at 4 (describing the practical effect of the presumption as a "sentencing safe-harbor, making all within-Guideline sentences effectively immune from substantive reasonableness review").

[86] U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES, at xviii (2013), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf (discussing the child-pornography provisions of § 2G2.2 of the Guidelines); *see also* United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (referring to the capacity of Guidelines calculations to "so run amok that they are patently absurd on their face").

presumption circuit as substantively unreasonable.[87] Without some correction, judges will increasingly view substantive reasonableness review as a formality,[88] and the functions of appellate review as envisioned by both Congress and the Court will be diminished.

B. Circuit Splits

Unsurprisingly, widespread skepticism of substantive reasonableness review, combined with limited Supreme Court guidance, has given rise to a number of notable circuit splits. These splits illustrate the confusion in the circuit courts over the scope of their mandate to review the substance of sentences. In applying *Gall*, the circuit courts have divided over the level of deference owed to sentences both within and outside the Guidelines — a state of play that, with respect to the former, has been blessed by the Supreme Court's decision in *Rita*. As noted above, circuits that apply the *Rita* presumption have effectively transformed it into an irrebuttable one and have refused to examine even obvious outlier sentences because they are within the Guidelines.[89] This rubber-stamp approach appears to have seeped into these courts' treatment of non-Guidelines sentences as well. For example, in *United States v. Huffstatler*,[90] faced with a substantive reasonableness challenge to a 450-month sentence (the product of an 85-month upward variance), the Seventh Circuit essentially noted that the sentence was procedurally sound and affirmed. With respect to the length of the sentence, the court explained:

> Finally, Huffstatler's sentence, though above the guidelines range, was reasonable. The sentencing judge correctly calculated the guidelines range and then reviewed the § 3553(a) factors . . . in some detail before announcing that a longer sentence was justified. *We require nothing more*.[91]

---

[87] *See* United States v. Wright, 426 F. App'x 412, 416–17 (6th Cir. 2011) (vacating sentence as substantively unreasonable because sentencing judge impermissibly assumed that defendant had committed crimes for which he had evaded prosecution).

[88] Karin J. Immergut, U.S. Attorney for the Dist. of Or., Statement Before the U.S. Sentencing Commission 13 (May 27, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Immergut_testimony.pdf ("[S]entencing judges now know that any sentence they impose will be affirmed as substantively reasonable, so long as they commit no procedural errors and properly calculate the advisory range."). At one public hearing, a Vice Chair of the Commission complained that "district court judges throughout the country are getting to the view that as long as they justify their sentence one way or the other, it is going to be upheld on appellate review." *Public Hearing Before the U.S. Sentencing Commission in New York, N.Y.* 457 (2009) [hereinafter *New York Hearing*] (statement of Ruben Castillo, Vice Chair, U.S. Sentencing Comm'n), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf.

[89] *See, e.g.*, United States v. Rubashkin, 655 F.3d 849, 869 (8th Cir. 2011) (affirming twenty-seven-year Guidelines sentence for nonviolent first-time offender convicted of white-collar crimes with a perfunctory recitation of the presumption).

[90] 571 F.3d 620 (7th Cir. 2009) (per curiam).

[91] *Id.* at 624 (emphasis added).

Meanwhile, those courts that do not apply the *Rita* presumption have been willing to conduct a more searching review of both Guidelines and non-Guidelines sentences.[92] In the same vein, some courts hold that they may reweigh the § 3553(a) sentencing factors to some degree in reviewing the substance of sentences, while others suggest that this is an illegitimate exercise.[93]

In addition, the Court's decision in *Kimbrough*, which allows sentencing judges to depart from the Guidelines due to policy disagreement under certain circumstances, has led to circuit splits regarding the degree of deference owed to such disagreement under substantive reasonableness review. *Kimbrough* left open the question whether "closer review may be in order" when a variance from the Guidelines is based solely on policy disagreement or whether such disagreement remains subject to significant deference.[94] If these variances are entitled to such deference, the specter of unwarranted intracircuit and intradistrict disparities looms, as sentencing judges are bound to disagree with one another on questions of policy.[95]

The most prominent example of a *Kimbrough*-based circuit split regarding the deference owed to policy-based variances concerns the child-pornography Guidelines, codified at § 2G2.2 of the Guidelines.[96] Whereas the Commission generally developed the Guidelines "using an empirical approach based on data about past sentencing practices, in-

---

[92] *See, e.g.*, United States v. Dorvee, 616 F.3d 174, 182–88 (2d Cir. 2010) (overturning Guidelines sentence for child-pornography distribution as substantively unreasonable).

[93] *See* Cone, *supra* note 67, at 68 (noting the disparity). *Compare, e.g.*, United States v. McQueen, 727 F.3d 1144, 1156 (11th Cir. 2013) ("We are therefore still required to make the calculus ourselves, and are obliged to remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." (quoting United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008))), *with, e.g.*, United States v. Tomko, 562 F.3d 558, 575 (3d Cir. 2009) (limiting its review of district court's weighing of the § 3553(a) factors to district court's procedure).

[94] Kimbrough v. United States, 552 U.S. 85, 109 (2007); *see also* Fisher, *supra* note 66, at 655–56 (noting the ambiguity). While *Kimbrough*'s syntax arguably authorizes appellate courts to exercise closer review in appropriate circumstances, the Court has confirmed that this question remains unresolved. *See* Peugh v. United States, 133 S. Ct. 2072, 2080 n.2 (2013). Concurring in *Pepper v. United States*, 131 S. Ct. 1229 (2011), Justice Breyer stated that he would resolve the question in favor of applying closer review. *Id.* at 1254–55 (Breyer, J., concurring in part and concurring in the judgment).

[95] The approach of district courts in the Eighth Circuit to the child-pornography Guidelines illustrates this inevitability. *Compare* United States v. Shipley, 560 F. Supp. 2d 739, 743, 746 (S.D. Iowa 2008) (varying downward from a Guidelines range of 210–240 months for possession of child pornography to a sentence of 90 months), *and* United States v. Baird, 580 F. Supp. 2d 889, 890, 896 (D. Neb. 2008) (similarly varying downward), *with* United States v. Fiorella, 602 F. Supp. 2d 1057, 1074–76 (N.D. Iowa 2009) (sentencing defendant to statutory maximum of 360 months for possession of child pornography and noting that it did not share aforementioned district courts' policy disagreement).

[96] *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2012).

cluding 10,000 presentence investigation reports,"[97] § 2G2.2 is the product of a series of congressional interventions designed to make the Guidelines harsher, often resulting in Guidelines ranges near to or exceeding the statutory maximum even in mine-run cases.[98] Some appellate courts, such as the Third Circuit, have suggested that the child-pornography Guidelines lack an empirical basis (like the crack-cocaine Guidelines at issue in *Kimbrough*), and have deferred to sentencing judges' policy disagreement in this area on that ground.[99] The Sixth and Eleventh Circuits, by comparison, have applied closer review to vacate sentences that were based on policy disagreement with the same Guidelines.[100]

III. PUTTING THE SUBSTANCE BACK INTO REASONABLENESS REVIEW

Substantive reasonableness review is broken, but can it be fixed? Or, as many observers have argued[101] and some courts have suggested,[102] is appellate review of the substance of sentences not fit for principled application? This Part defends the desirability and legitimacy of a more robust form of substantive reasonableness review than is currently practiced by the majority of the circuit courts. Substantive reasonableness review performs several important functions that are diminished when courts treat it as a rubber stamp. Most prominently, it provides a remedy for egregious errors in judgment on a case-by-case basis, checking the instincts of sentencing judges who, like all of

---

[97] *Kimbrough*, 552 U.S. at 96 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpart 2, cmt. 3 (2012)).

[98] *See* Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Nullification*, 30 GA. ST. U. L. REV. (forthcoming 2014) (manuscript at 17–18), *available at* http://ssrn.com/abstract=2232936.

[99] *See* United States v. Grober, 624 F.3d 592, 608, 611 (3d Cir. 2010) (upholding a significant downward variance in sentence, based on the district court's disagreement with the severity of § 2G2.2, from 253–293 months to the mandatory minimum of five years). As a formal matter, the government in *Grober* did not challenge the district court's authority to vary under *Kimbrough*, but rather attacked its policy disagreement as procedurally unreasonable. *Id.* at 599–601.

[100] *See, e.g.*, United States v. Bistline, 665 F.3d 758, 760, 761, 768 (6th Cir. 2012) ("scrutiniz[ing] closely" policy disagreement with § 2G2.2, *id.* at 761 (quoting United States v. Herrera-Zuniga, 571 F.3d 568, 585 (6th Cir. 2009)) (internal quotation marks omitted), and vacating sentence of one night's confinement and ten years' supervised release as substantively unreasonable); United States v. Irey, 612 F.3d 1160, 1166, 1202–03, 1212 (11th Cir. 2010) (en banc) (applying the "closer review," *id.* at 1203, contemplated by *Kimbrough* to vacate 17.5 year sentence for sexual-abuse crimes as unduly lenient).

[101] *See supra* pp. 959–60.

[102] *See, e.g.*, United States v. Levinson, 543 F.3d 190, 197 (3d Cir. 2008) ("[W]e find it difficult to give direction when we are ourselves endeavoring to understand our role in reviewing sentences . . . .").

us, are fallible.[103] Based on that function alone, it would be inadvisable to allow substantive reasonableness review to fade into obsolescence, even if it were destined to be inconsistently applied. However, there are more subtle ways in which meaningful substantive reasonableness review serves the purposes of sentencing.

First, the mere possibility of reversal on substantive grounds (a somewhat embarrassing prospect[104]) promotes more thoughtful and careful sentencing. As it stands, this constraining function has been weakened by the toothlessness of review. At public hearings before the Commission, district court judges have commented that they do not believe judges consider the prospect of reversal when sentencing.[105] More robust reasonableness review would incentivize district court judges to probe their reasons for imposing a particular sentence and to ensure that the chosen sentence does not create unwarranted disparities between similarly situated defendants.

Second, substantive reasonableness review is an integral component of what Congress hoped would be a feedback loop between the courts, the Sentencing Commission, and Congress.[106] The legislative history of the SRA reveals that Congress envisioned that appellate review would "assist the Sentencing Commission in refining the sentencing guidelines as the need arises."[107] That feedback function is frustrated when courts refuse to inquire into the substantive reasonableness of sentences, as this review is one of the courts' "only means of addressing systemic problems with the Sentencing Guidelines."[108] In recent years, some appellate courts have demonstrated the promise that this feedback loop holds by articulating their disagreement with certain

---

[103] Asked whether he often feels that he may have been "wrong" or "misguided" in deciding on a given sentence, federal District Court Judge Richard G. Kopf responded:

> I do. I second-guess myself all the time. . . . I don't think that many judges would disagree with me about that. Picking a sentence and imposing it on another human being, no matter how it's rationalized, and particularly in the federal system where the goals of sentencing are very broad and conflicting at times, one can never be — or at least I've never been — certain that a sentence that I imposed is the correct one. I try to do my best and that's about all I can do.

The Incredible Case of the Bank Robber Who's Now a Law Clerk (NPR radio broadcast Sept. 10, 2013), *available at* http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=219295368&m=219368004.

[104] As one great playwright once noted, "passed sentence may not be recall'd / But to our honour's great disparagement." WILLIAM SHAKESPEARE, THE COMEDY OF ERRORS act 1, sc. 1.

[105] *Chicago Hearing*, *supra* note 71, at 122. When asked a question to this effect, one district court judge responded "probably not very much." *Id.* Another stated that "[i]t doesn't really cross [his] mind." *Id.*

[106] *See* Pepper v. United States, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring in part and concurring in the judgment) ("Trial courts, appellate courts, and the Commission all have a role to play in what is meant to be an iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system.").

[107] S. REP. NO. 98-225, at 151 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334.

[108] United States v. Corsey, 723 F.3d 366, 378 (2d Cir. 2013) (per curiam) (Underhill, J., concurring).

Guidelines and motivating revisions on the part of the Commission. For example, the Commission revised the illegal reentry Guideline on the basis of a Ninth Circuit decision[109] that critiqued its operation; and the Second Circuit in *United States v. Dorvee*[110] provided "valuable feedback" to the Commission by explaining why the Guidelines for child pornography tend to produce substantively unreasonable sentences.[111] Regrettably, the appellate courts' treatment of the *Rita* presumption as effectively irrebuttable has undermined the potential of the feedback loop by impeding critical analysis of the Guidelines in those jurisdictions.

Third, contrary to the conventional wisdom that appellate judges are ill-equipped to question the substantive reasonableness of sentences, their more detached position offers significant advantages. The competence argument — that district court judges understand the intricacies of the case, can observe demeanor, and are expert at sentencing[112] — has long been used to justify great deference to sentencing judges by the Supreme Court (including, notably, in *Gall*[113]) as well as by lower appellate courts.[114] Judge Sutton pithily expounded on this point in a recent opinion, noting that, "[w]hile trial judges sentence individuals face to face for a living, we review transcripts for a living. No one sentences transcripts."[115] Yet the competence argument emphasizes the relative advantages of sentencing judges, while neglecting the relative advantages of appellate judges. For one, while district court judges actually engage in the practice of sentencing, their natural perspective is limited to their own cases and practices.[116] Appellate

---

109 United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009).

110 616 F.3d 174 (2d Cir. 2010).

111 *Improving the Advisory Guideline System: Public Hearing Before the U.S. Sentencing Commission* 22 (2012) (statement of Henry J. Bemporad, Fed. Pub. Defender for the W. Dist. of Tex.) (identifying these cases as serving the feedback function).

112 Hon. Robert W. Pratt, C.J., U.S. Dist. Court for the S. Dist. of Iowa, Statement Before the U.S. Sentencing Commission 7 (Oct. 21, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Pratt_Testimony.pdf.

113 Invoking "[p]ractical considerations," the *Gall* Court posited that sentencing judges' superior familiarity with the defendant and the case relative to appellate courts, as well as their greater experience with sentencing in general, justifies deference. *See* Gall v. United States, 552 U.S. 38, 51–52 (2007).

114 *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971); *see also* United States v. Levinson, 543 F.3d 190, 196 (3d Cir. 2008) ("We do not seek to second guess. Given the widely recognized institutional advantages that district courts have in access to and consideration of evidence, we would be foolish to try.").

115 United States v. Poynter, 495 F.3d 349, 351 (6th Cir. 2007); *cf. generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (casting sentencing as a violent act that takes place between judge and offender).

116 Perhaps in recognition of this limitation, prior to the passage of the SRA, sentencing judges in the Eastern District of Michigan were required to consult a sentencing panel familiar with the case before issuing a sentence. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 38 n.185 (2008).

judges, by virtue of their institutional position, enjoy a bird's-eye view of sentencing practices across the districts within their circuits. For that reason, they are far better positioned to assess whether a sentence qualifies as an outlier than a district court judge who would have to make an active effort to understand how his sentencing practices rate with those of his colleagues. Moreover, an appellate judge is actually presented with 50–200% more sentencing decisions than a given district court judge, because each appellate case has three judges to a panel.[117] With regard to the notion that "being there" creates comparative advantages that the appellate court cannot and should not question, Professor Michael O'Hear has marshaled behavioral and social science to cast doubt on that intuitive account. As it turns out, humans are not especially good at evaluating demeanor evidence.[118] Particularly relevant to sentencing, psychologists have shown that when perceiving others, people often conflate emotions of "shame" and "embarrassment" with those of "guilt" and "contrition" — the latter of which judges rely on in individuating punishment.[119] O'Hear concludes that "the appellate judge's necessary reliance on a transcript may be less a limitation than a source of institutional advantage."[120] At the very least, then, appellate panels bring an entirely different and worthwhile perspective to evaluating sentences, which should not be trivialized in the allocation of decisionmaking authority.

Furthermore, the notion that appellate courts are simply not in a position to question the substantive judgments of sentencing judges is belied by the effective practice of other jurisdictions. Across the pond, English and German appellate courts have long played important roles in constraining sentencing judges' discretion.[121] In Indiana, state appellate courts review sentences under a liberal "inappropriate[ness]" standard and may revise the sentence imposed and substitute a sentence of their choice.[122]

---

117 *See* Frank O. Bowman III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 FED. SENT'G REP. 19, 21 (1996) (demonstrating this proposition).

118 Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2142 (2010) (pointing to an "emerging consensus in the legal and social science literature").

119 *Id.* at 2144–47.

120 *Id.* at 2148–49.

121 *See* Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, LAW & CONTEMP. PROBS., no. 1, 2013, at 161, 184 (noting that English appellate case law "has served as a major tool to establish standards of uniformity and coherence in English sentencing"); *see also* Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 69–70 (1983) (noting that appellate judges, guided by their own sense of equity and justice, have set narrow limits on trial courts' sentencing discretion).

122 *See* Randall T. Shepard, *Robust Appellate Review of Sentences: Just How British Is Indiana?*, 93 MARQ. L. REV. 671, 671, 677 (2009). Speaking directly to the institutional competence

Fourth, meaningful substantive reasonableness review best effects the sentencing regime that Congress intended to create when it passed the SRA in 1984 and established appellate review. Congress instituted appellate review as part of its overarching effort to curb the immense discretion of sentencing judges: it expected appellate courts to enforce adherence to the Guidelines and "to provide case law development of the appropriate reasons for sentencing outside the guidelines."[123] Indeed, when the Supreme Court instructed appellate courts not to engage in de novo review of departures under the SRA, Congress explicitly restored that power. While Congress's expectations regarding the binding nature of the Guidelines were upset in *Booker*, this constitutional development only amplified the importance of meaningful substantive review to achieving Congress's goals of cabining sentencing discretion and eliminating unwarranted disparities.

Finally, mitigating the difficulties caused by *Kimbrough* requires robust substantive reasonableness review (or "closer review," to use the language of *Kimbrough*) of policy disagreement with the Guidelines. *Kimbrough* inevitably creates intradistrict disparities, as judges who disagree with the Guidelines will issue shorter sentences than will judges who do not share that disagreement.[124] The result is that a given offender's sentence might depend entirely on the luck of the judicial draw. This consequence exemplifies the unwarranted disparities that Congress sought to eliminate with the SRA and that the remedial majority in *Booker* sought to guard against by establishing reasonableness review.[125] While sentencing judges' factual determinations merit deference for all the well-rehearsed reasons, *Kimbrough* can be read to extend the same deference to what are essentially *legal* determinations that, outside the deferential realm of appellate review of sentencing, "would ordinarily be subject to de novo review."[126]

---

issue, the Indiana Court of Appeals argued in one case that "the appellate process is uniquely suited to dispassionate consideration of the [appropriateness of the sentence] free of the everyday pressures of a trial courtroom." Cunningham v. State, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984).

123 S. REP. NO. 98-225, at 151 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334.

124 *See supra* note 95 and accompanying text (demonstrating this dynamic within the Eighth Circuit).

125 *See Chicago Hearing*, *supra* note 71, at 118 (statement of Dabney L. Friedrich, Comm'r) (voicing concerns that *Kimbrough* might ultimately undermine the goals of the SRA). Judge Gerard Lynch has identified the disparities caused by *Kimbrough* as "the biggest problem with the current system" and has called for de novo review in such cases. *See BOOKER* 2012 REPORT, *supra* note 3, at 43 n.292 (quoting *U.S. Sentencing Commission Public Hearing on Federal Sentencing Options After* Booker 104–05 (2012) (testimony of Hon. Gerard Lynch, J., U.S. Court of Appeals for the Second Circuit)).

126 Hessick & Hessick, *supra* note 116, at 27.

Review of arguably "broken"[127] Guidelines is desirable; the prospect of sentencing judges in the same district reaching differing conclusions on that inquiry without ultimate resolution is not. Indeed, the Sentencing Commission recently advocated for Congress to enact a "heightened standard of review" for sentences predicated on policy disagreement with the Guidelines.[128] In the absence of congressional intervention, however, circuit courts should exercise the "closer review" of policy disagreement that is contemplated, if not mandated, by *Kimbrough*. From a perspective that values uniformity in sentencing, the particular substantive conclusions that the appellate courts reach matter less than that they leverage their ability to give guidance on controversial Guidelines to district court judges.[129] Considering *United States v. Irey*[130] and *United States v. Dorvee* in tandem is instructive: In *Irey*, the Eleventh Circuit exercised "closer review" of the district court's policy disagreement and conveyed its view that the child-pornography Guidelines were not excessively harsh in mine-run cases.[131] In *Dorvee*, by contrast, though not formally a case involving "closer review" under *Kimbrough*, the Second Circuit encouraged policy disagreement with the child-pornography Guidelines by holding that a Guidelines sentence was substantively unreasonable in part because these Guidelines were unduly severe.[132] The Second Circuit encouraged district court judges "to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."[133] By comparison, the Seventh Circuit missed an opportunity to weigh in on the status of the child-pornography Guidelines in *Huffstatler*, when it dismissed the defendant's argument that his above-Guidelines sentence, in relying on Guidelines so methodolog-

---

[127] Douglas A. Berman, *Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines*, 21 FED. SENT'G REP. 182, 182 (2009).

[128] *BOOKER* 2012 REPORT, *supra* note 3, at 112 ("[The] Commission believes that the current lack of rigorous appellate review of policy disagreements undermines the role of the guidelines system and risks increasing unwarranted sentencing disparity as judges substitute their own policy judgments for the collective policy judgments of Congress and the Commission.").

[129] *Cf.* United States v. Corsey, 723 F.3d 366, 378 (2d Cir. 2013) (per curiam) (Underhill, J., concurring) ("Until this Court weighs in on the merits of the loss guideline, sentences in high-loss cases will remain wildly divergent as some district judges apply the loss guideline unquestioningly while others essentially ignore it. The widespread perception that the loss guideline is broken leaves district judges without meaningful guidance in high-loss cases; that void can only be filled through the common law, which requires that we reach the substantive reasonableness of these sentences.").

[130] 612 F.3d 1160 (11th Cir. 2010) (en banc).

[131] *See id.* at 1203.

[132] *See* United States v. Dorvee, 616 F.3d 174, 183, 187 (2d Cir. 2010).

[133] *Id.* at 188.

ically flawed as to be invalid, was unreasonable.[134] Similarly, the Eighth Circuit has repeatedly declined invitations to weigh in on the merits of § 2G2.2, asserting that such arguments — for unstated reasons — are properly made not to the appellate court, but rather to the district court.[135] Disparity between circuits with respect to disagreement with particular Guidelines is inevitable, but by leveraging their ability to engage in "closer review" of policy disagreement, appellate courts can make the policy determinations and thus promote uniformity within their circuits.

IV. RECOMMENDATIONS

As critics have noted, while substantive reasonableness review sounds nice in theory, that does not make it workable in practice.[136] The reasonableness inquiry, concerned as it is with constraining the district court's considerable discretion, is admittedly an open-ended one based on the specific facts and circumstances of a case. Yet appellate judges are well acquainted with reviewing for abuse of discretion and applying vague standards.[137] The difficulty of the inquiry is no excuse for abdication. When appellate judges accept that their role in this context is legitimate and desirable, a "common law of sentencing"[138] that will further inform the sentencing process at both the district and appellate levels is far more likely to develop.[139]

To that end, there are a number of steps that appellate courts and the Commission can take to guide substantive review and promote its principled application. Appellate courts, for their part, should utilize the tools that the Supreme Court has granted them to police the

---

134 United States v. Huffstatler, 571 F.3d 620, 623 (7th Cir. 2009) (per curiam).

135 *See* United States v. Muhlenbruch, 682 F.3d 1096, 1102 (8th Cir. 2012) (citing United States v. Shuler, 598 F.3d 444, 448 (8th Cir. 2010)).

136 *See, e.g.*, *Chicago Hearing*, *supra* note 71, at 236 (remarks of Hon. Frank H. Easterbrook, C.J., U.S. Court of Appeals for the Seventh Circuit) ("It would be very nice to have some definition of reasonableness, but I tend to agree . . . that it's elusive.").

137 *See* STITH & CABRANES, *supra* note 12, at 171 ("The circumstances in civil and criminal cases in which a federal trial judge exercises his informed judgment subject to appellate review for 'abuse of discretion' are many and varied . . . .").

138 *Id.* at 170.

139 *See* Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 140–41 (2006), http://www.yalelawjournal.org/images/pdfs/50.pdf. Judge Nancy Gertner, formerly of the U.S. District Court for the District of Massachusetts, has more recently noted that, in the absence of meaningful appellate analysis, district courts are far more active than appellate courts in fostering a common law of sentencing. *Advice for the US Sentencing Commission from Former USDJ Nancy Gertner*, SENT'G L. & POL'Y (Sept. 30, 2013, 10:15 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2013/09/advice-for-the-us-sentencing-commission-from-former-usdj-nancy-gertner.html. While district court participation is surely valuable, the participation of appellate courts with precedential authority is indispensable.

boundaries of district court discretion.[140] In evaluating whether a district court abused its discretion, appellate courts should consider the extent of a sentence's deviation from the Guidelines (as permitted by *Gall*) and from the sentences of similarly situated offenders; assess whether the district court's reasoning is sound and whether the § 3553(a) factors emphasized by the district court can bear the weight assigned to them; and determine whether, in light of the totality of the circumstances, a sentence is shockingly high or low. Courts should apply the "closer review" suggested by *Kimbrough* and establish guidance for lower courts with respect to whether policy disagreement with particular Guidelines is an encouraged practice or reversible error. Courts should also recognize that remanding for resentencing is not a very costly remedy, as sentencing hearings are relatively short, discrete affairs.[141] Courts concerned that a remand will fall on deaf ears may instruct a district court to impose a sentence within a particular range[142] or remand the case to a new judge for resentencing.[143]

Circuit courts that apply the *Rita* presumption should refrain from treating Guidelines ranges as an absolute safe harbor, especially when sentences involve arguably broken Guidelines. By developing case law regarding when the presumption "can be rebutted on appeal," such circuits "would help ensure, as *Rita* envisioned, that sentencing judges actively consult all the § 3553(a) factors when deciding to impose a within-Guidelines sentence."[144] Similarly, all circuit courts can maximize the value of the feedback loop envisioned by Congress by engaging critically with the Guidelines, even while still affirming sentences. Judge Calabresi took this approach in *Ingram*, when he suggested in concurrence that a twelve-year sentence for the sale of one gram of crack cocaine was "headed towards unreasonableness."[145] In Judge Calabresi's view, his opinion marked the initiation of a dialogue with lawmakers in an effort to "prevent disreputable laws from endur-

---

[140] *See* Fisher, *supra* note 66, at 652 ("*Booker* and its progeny have built the foundations of a strong system of appellate review. This system, if followed, actually vests some discretion in the courts of appeals to prevent the unfettered use of discretion at the district court level.").

[141] *See* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1097 (2009) ("The costs associated with resentencing are minimal, especially as compared to the costs of a new trial or the costs of a new capital sentencing proceeding." (footnote omitted)); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 83 (2012).

[142] *Cf.* United States v. Irey, 612 F.3d 1160, 1224–25 (11th Cir. 2010) (en banc) (instructing district court judge to impose thirty-year sentence on remand).

[143] *See, e.g.*, United States v. Paul, 561 F.3d 970, 972 (9th Cir. 2009) (per curiam) (remanding to new judge after district court failed to reduce sentence adequately on original remand).

[144] Brief of WLF, *supra* note 69, at 15.

[145] United States v. Ingram, 721 F.3d 35, 44 (2d Cir. 2013) (Calabresi, J., concurring).

ing."[146] Courts would do well to embrace substantive reasonableness review as an opportunity to engage in such conversations.

The Commission, for its part, can facilitate principled review by amending the Guidelines to explain (a) the purposes behind particular Guidelines, (b) the structure employed by those Guidelines to achieve those purposes, and (c) the empirical data that was relied on in developing the Guidelines.[147] The Commission is "[l]argely unencumbered by the requirements of the Administrative Procedure Act."[148] As a result, the Commission's explanations for its Guidelines are "strikingly terse and conclusory,"[149] and courts have little information regarding the underlying rationales of particular Guidelines.[150] As one appellate advocate stated, "it's extremely difficult to explain why a sentence is or is not reasonable . . . when the Commission has not displayed what . . . purposes the guideline was intended to serve, let alone how the guideline elements were meant to achieve that purpose."[151] By amending the Guidelines in this fashion, the Commission would give appellate judges a desperately needed touchstone for reviewing the reasonableness of sentences.[152] Once judges believe that substantive reasonableness review is workable and principled, the pursuit will only become better defined as case law develops and the feedback loop between the courts, the Commission, and Congress is revitalized.

V. CONCLUSION

Though embattled, substantive reasonableness review has been affirmed and reaffirmed by the Supreme Court. While many circuit courts have resisted it, to the point that observers describe it is as functionally nonexistent, such resistance only reifies unwarranted disparities that the reasonableness standard was implemented to remedy. Appellate courts are equipped to review sentences for substantive reasonableness in a principled manner that promotes uniformity and fairness in sentencing. To not take up this challenge comes at far too high a cost.

---

146 *Id.* at 44 n.9.

147 *See* Carol A. Brook, Exec. Dir., Fed. Defender Program for the N. Dist. of Ill., Statement Before the U.S. Sentencing Commission 15 (Sept. 10, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Brooks_testimony.pdf (noting that judges, defense lawyers, and prosecutors have called for these changes to the Guidelines).

148 STITH & CABRANES, *supra* note 12, at 95.

149 Ronald F. Wright, *Amendments in the Route to Sentencing Reform*, 13 CRIM. JUST. ETHICS 58, 64 (1994).

150 STITH & CABRANES, *supra* note 12, at 56.

151 *See Public Hearing Before the U.S. Sentencing Commission in Stanford, Cal.* 312 (statement of Davina Chen, Assistant Fed. Pub. Defender for the Cent. Dist. of Cal.).

152 Brook, *supra* note 147, at 15.