
CRIMINAL LAW — SENTENCING GUIDELINES — SECOND CIRCUIT HOLDS WITHIN-GUIDELINES CHILD PORNOGRAPHY SENTENCE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE. — *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).

The child pornography sentencing guideline — section 2G2.2 of the U.S. Sentencing Guidelines¹ — faces mounting scholarly and judicial criticism that it is an unduly harsh and empirically unsupported product of political posturing.² A recent surge in prosecutions for child pornography crimes has therefore been accompanied by a wave of below-guideline variances.³ Recently, in *United States v. Dorvee*,⁴ the Second Circuit joined this trend by holding a within-Guidelines sentence under section 2G2.2 procedurally and substantively unreasonable. Although *Dorvee* may raise concerns about judicial discretion, its analysis is grounded and structured by idiosyncratic features of section 2G2.2, institutional checks and balances on sentencing policy, and standards derived from administrative and constitutional law. *Dorvee*'s main virtue is thus a sophisticated and balanced approach to sentencing that should powerfully influence use of the Guidelines.

Justin K. Dorvee was arrested on October 19, 2007, when he arrived at a parking lot in upstate New York to meet, photograph, and engage in sexual conduct with a fourteen-year-old boy named “Seth.”⁵ “Seth,” however, was actually an undercover officer with the Warren County Sheriff’s Office.⁶ Eleven months later Dorvee pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2).⁷ He admitted to engaging in sexually explicit conversation online with two persons he believed to be fourteen-year-old boys — both undercover officers — and to transmitting videos of

¹ U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010).

² See Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT’G REP. 310, 314–16 (2003); Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (Jan. 1, 2009) (unpublished manuscript) (on file with the Harvard Law School Library), available at http://fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

³ See, e.g., *United States v. Hanson*, 561 F. Supp. 2d 1004, 1008–12 (E.D. Wis. 2008).

⁴ 616 F.3d 174 (2d Cir. 2010). The original opinion in this case was issued on May 11, 2010. *United States v. Dorvee*, 604 F.3d 84 (2d Cir. 2010). An amended version was released, sua sponte, on August 4, 2010. This comment discusses the amended version, which, unlike the original, omitted any reference to the Second Circuit’s sometimes-invoked relaxed plain error standard, see *Dorvee*, 616 F.3d at 179–80 & n.2, and cited additional critiques of section 2G2.2, see *id.* at 184–86 (citing Vinegrad, *supra* note 2; Stabenow, *supra* note 2).

⁵ See Brief for Defendant-Appellant Justin K. Dorvee at 6, *Dorvee*, 616 F.3d 174 (No. 09-0648-cr).

⁶ *Dorvee*, 616 F.3d at 176.

⁷ Brief for Defendant-Appellant Justin K. Dorvee, *supra* note 5, at 3; see 18 U.S.C. § 2252A(a)(2) (2006 & Supp. III 2009).

himself masturbating.⁸ A post-arrest search of Dorvee's residence yielded thousands of images and at least 100 videos depicting minors engaged in sexually explicit conduct.⁹ Dorvee admitted to trading these materials, which included depictions of prepubescent minors and sadomasochistic conduct, with approximately twenty people online.¹⁰

A presentence report (PSR) calculated an initial range of 262 to 327 months under section 2G2.2.¹¹ However, because a statutory maximum becomes the Guidelines sentence when it is lower than an initial calculation, the PSR set Dorvee's Guidelines sentence at 240 months.¹² Dorvee responded by objecting to the application of several section 2G2.2 enhancements and requesting a non-Guidelines sentence.¹³ His submission included a psychological evaluation reporting that he was "simply too passive, shy, socially anxious, retiring, introverted, submissive, unsure of himself and distrustful" to "push or develop a relationship with any other person, child or adult, unless the other person took the lead."¹⁴ This report concluded that Dorvee was "not a predator" and "unlikely to re-offend" given proper treatment.¹⁵

Judge McAvoy sentenced Dorvee to 240 months, less 194 days for time served on a related state sentence.¹⁶ Discounting expert testimony, the court expressed concern that if "given the opportunity . . . [Dorvee] would have sexual relations . . . with a younger boy, ages 6 to 15."¹⁷ It also explained that, under 18 U.S.C. § 3553(a), this twenty-year sentence would achieve the penological goals of specific and general deterrence, public safety, and rehabilitation.¹⁸ Rejecting Dorvee's plea for a non-Guidelines sentence, the court reasoned that "the guideline sentence is 262 to 327, and [the] sentence imposed . . . is relatively far below the guideline, although not terribly far."¹⁹ Dorvee appealed, arguing that this sentence was procedurally and substantively unreasonable and that the process used to enact one of the applicable enhancements violated the separation of powers.²⁰

The Second Circuit vacated and remanded for resentencing. Writing for the panel, Judge Parker²¹ held Dorvee's twenty-year sentence

⁸ *Dorvee*, 616 F.3d at 176.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 176–77.

¹² *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (2010).

¹³ *Dorvee*, 616 F.3d at 177.

¹⁴ *Id.*

¹⁵ *Id.* at 177–78.

¹⁶ *Id.* at 176.

¹⁷ *Id.* at 178 (first and third alterations in original).

¹⁸ *Id.*; see also 18 U.S.C. § 3553(a) (2006).

¹⁹ *Dorvee*, 616 F.3d at 178–79.

²⁰ *Id.* at 179; Brief for Defendant-Appellant Justin K. Dorvee, *supra* note 5, at 32–40.

²¹ Judge Parker was joined by Judges Cabranes and Underhill.

procedurally and substantively unreasonable. The court therefore declined to reach Dorvee's separation of powers argument.²²

Addressing procedural reasonableness, the court first rejected Dorvee's claim that several Guidelines enhancements were improperly applied.²³ The court then noted that, although the PSR had correctly identified the Guidelines range as 240 months, the district court seemed to use 262 to 327 as its benchmark.²⁴ The district court thus committed procedural error, since "[i]f the district court [initially] miscalculates . . . it cannot properly account for atypical factors."²⁵

Observing that it was not barred from considering procedure and substance on a single appeal, the court did just that.²⁶ It began by emphasizing that, because the Guidelines are only advisory, courts remain bound by a duty to impose a sentence "sufficient, but not greater than necessary," to achieve the penological goals specified in § 3553(a)(2).²⁷ Substantively unreasonable sentences, which are "manifestly unjust" or "shock[] the conscience," fail that test.²⁸

The court quickly noted two problems with the sentence below. First, in light of expert record evidence to the contrary, the district court excessively relied on its belief that Dorvee might sexually assault a child in the future.²⁹ Second, the district court's "cursory explanation" of deterrence failed to explain why a maximum sentence was required to deter both Dorvee and offenders with similar characteristics, thereby failing § 3553(a)'s requirement of parsimony in sentencing.³⁰

Turning to substantive reasonableness, the court added that these errors were "compounded by the fact that the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires."³¹ Whereas the United States Sentencing Commission (USSC) usually employs empirical methods, the court observed that section 2G2.2 has been rendered in-

²² *Dorvee*, 616 F.3d at 179.

²³ *Id.* at 180.

²⁴ *Id.* at 180–81.

²⁵ *Id.* at 182.

²⁶ *Id.*

²⁷ *Id.* (quoting *United States v. Samas*, 561 F.3d 108, 110 (2d Cir. 2009)).

²⁸ *Id.* at 183 (quoting *United States v. Rigas*, 583 F.3d 108, 122–23 (2d Cir. 2009)) (internal quotation marks omitted). The Second Circuit articulated its substantive reasonableness standard clearly in *United States v. Rigas*, 583 F.3d 108. *See id.* at 123 (explaining that manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards all "provide 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").

²⁹ *Dorvee*, 616 F.3d at 183.

³⁰ *Id.* at 184.

³¹ *Id.*

creasingly harsh — over USSC protest — by a spate of congressional mandates.³² As a result, “even in run-of-the-mill cases,” section 2G2.2 metes out sentences in excess of the statutory maximum.³³ It thus “violates the principle . . . that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.”³⁴ The court further stressed that, “[h]ad Dorvee actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower.”³⁵

Analogizing the Guidelines to ordinary “agency determinations,” the court emphasized that its “deference to the Guidelines is not absolute or even controlling”³⁶ — particularly when a guideline does not reflect an exercise of the USSC’s “characteristic institutional role.”³⁷ Such assessments must be made case by case, as judges reflect upon their own “expertise at sentencing” to “determine the weight owed” to the Guidelines.³⁸ Comparing the lack of expertise behind section 2G2.2’s enhancements to that behind the crack cocaine / powder cocaine disparity at issue in *Kimbrough v. United States*,³⁹ and noting that “a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses,”⁴⁰ the court held that this “analysis applies with full force to [section] 2G2.2.”⁴¹ District courts should therefore “take seriously the broad discretion they possess in fashioning sentences under [section] 2G2.2” when “dealing with an eccentric Guideline of highly unusual provenance.”⁴²

Turning back to Dorvee, the court held that “it would be manifestly unjust to let [his] sentence stand.”⁴³ The court therefore vacated the sentence below and remanded for resentencing.

This well-reasoned opinion may prompt worries about unfettered judicial discretion and expansive future application. *Dorvee*, however,

³² *Id.* at 184–86.

³³ *Id.* at 186 (“An ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction.”).

³⁴ *Id.* at 187 (citing *Gall v. United States*, 128 S. Ct. 586, 600 (2007)).

³⁵ *Id.* In this hypothetical, a defendant with the same criminal history background as Dorvee (namely, none) would face a Guidelines range of 151 to 188 months in prison. *Id.*

³⁶ *Id.* at 188.

³⁷ *Id.* (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007)) (internal quotation mark omitted).

³⁸ *Id.*

³⁹ 128 S. Ct. 558.

⁴⁰ *Dorvee*, 616 F.3d at 188 (quoting *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008)) (internal quotation marks omitted).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

contains limits responsive to such concerns. Descriptively, notwithstanding post-*Booker* trends and *Dorvee*'s strong language, the federal judiciary remains broadly inhospitable to claims of substantive unreasonableness. *Dorvee* thus stands out as an anomaly, though one explicable by circumstances peculiar to the child pornography context. Further, *Dorvee* offers a compelling doctrinal framework that can guide future courts and establish limiting principles based on concepts familiar from administrative law. Rather than fear a set of open-ended sentencing challenges citing *Dorvee*, judges should applaud the court's critique of section 2G2.2 and embrace the panel's reasoning.

The specter of freewheeling judicial discretion still haunts a sentencing landscape recovering from the shock of two major transformations. The first occurred in 1987, when guidelines that enjoyed strong bipartisan support took effect and dramatically limited judicial power in the name of expertise, severity, and increased certainty in punishment.⁴⁴ This regime engendered sharp criticism⁴⁵ and widespread judicial disenchantment.⁴⁶ Ultimately, however, a renewed constitutional focus on juries played the starring role in a counterrevolution that sparked to life in *Apprendi v. New Jersey*⁴⁷ and caught fire in *United States v. Booker*.⁴⁸ *Booker*'s restoration of judicial discretion was soon followed by a series of cases that further empowered judges to vary from the Guidelines.⁴⁹ Celebrated by some as a victory over the devil they knew, these decisions raised fears amongst others about the devil that seemed forgotten.⁵⁰ Given that recent data show a steady migration away from Guidelines ranges,⁵¹ such critiques remind us of the dangers posed by unstructured discretion.

⁴⁴ See Nancy Gertner, *From Omnipotence to Impotence*, 4 OHIO ST. J. CRIM. L. 523, 524–31 (2007).

⁴⁵ Critics emphasized racial inequality, see generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006), and distorted political incentives, see Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–11, 530–32, 585–87 (2001). See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

⁴⁶ See Gertner, *supra* note 44, at 524 (“[B]etween 1987 and 1989 . . . two hundred judges declared [the Guidelines] to be unconstitutional.”). Although the Supreme Court upheld the Guidelines, see *Mistretta v. United States*, 488 U.S. 361 (1989), the Guidelines remained judicially unpopular, see FED. JUDICIAL CTR., PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 15 (1994).

⁴⁷ 530 U.S. 466 (2000); see also *Blakely v. Washington*, 542 U.S. 296 (2004).

⁴⁸ 543 U.S. 220 (2005).

⁴⁹ E.g., *Gall v. United States*, 128 S. Ct. 586 (2007).

⁵⁰ Cf. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 280 (2006) (“[F]ederal prosecutors . . . have reacted with a marked lack of enthusiasm . . .”).

⁵¹ See Douglas A. Berman, *Mining (and Spinning?) the Latest, Greatest Sentencing Data from the US Sentencing Commission*, SENT’G L. & POL’Y (Sept. 7, 2010, 11:06 AM),

Read in this light, *Dorvee* initially suggests reason to worry. Whereas *Kimbrough* merely opened the door to the rejection of guidelines that do not reflect USSC expertise, *Dorvee* took a big step through that door. As Professor Douglas Berman writes, *Dorvee* arguably made section 2G2.2 an “unsafe harbor” that forces district courts to “articulate a very strong and special reason to sentence *within* the child porn guideline.”⁵² This semipermeable ceiling on reasonable sentences seems to provide little guidance to judges balancing the formidable danger posed by sex offenders against § 3353’s command of parsimony in sentencing. Moreover, *Dorvee* used the potent yet vague standard of “substantive reasonableness,” thereby opening the door to a bevy of frontal assaults on other guidelines that might litter the doctrinal landscape with similarly “unsafe” harbors.

Situating *Dorvee* in context offers some relief from these concerns. The judiciary’s low tolerance for claims of substantive unreasonableness has largely cabined the radical potential of reasonableness doctrine. Several circuits afford within-Guidelines sentences a presumption of reasonableness on appeal,⁵³ and others recognize that Guidelines sentences are usually substantively reasonable.⁵⁴ Moreover, judges have responded powerfully to the “anchoring effect”⁵⁵ and “ideology”⁵⁶ of Guidelines calculations since *Booker*. Recent data accordingly indicate “remarkable stability in the operation and application of the advisory federal guideline sentencing system.”⁵⁷ As district courts engineer a “very slow and very steady” shift away from the Guidelines,⁵⁸ appellate restraint thus remains grounded by temperament and doctrine. Such restraint also reflects institutional limitations. Sentencing policy involves a complex economy of congressional signals, prosecutorial policies, USSC expertise, and circuit politics, all of which check and balance judicial power.⁵⁹ *Dorvee* may not prompt

http://sentencing.typepad.com/sentencing_law_and_policy/2010/09/mining-and-spinning-the-latest-greatest-sentencing-data-from-the-us-sentencing-commission.html.

⁵² Douglas A. Berman, *Why the Second Circuit’s Dorvee Reasonableness Ruling Could (and Should) Be So Significant*, SENT’G L. & POL’Y (May 14, 2010, 2:08 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2010/05/why-the-second-circuits-dorvee-reasonableness-ruling-could-and-should-be-so-significant.html.

⁵³ See *Rita v. United States*, 127 S. Ct. 2456, 2462 (2007) (identifying these circuits).

⁵⁴ See, e.g., *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006).

⁵⁵ See Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 117–26 (2008).

⁵⁶ See Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 267 (2009).

⁵⁷ Berman, *supra* note 51.

⁵⁸ *Id.*

⁵⁹ See STITH & CABRANES, *supra* note 45, at xi; Bowman, *supra* note 45, at 1328–49; Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds — The Center Doesn’t*, 117 YALE L.J. 1374, 1385–1411 (2008); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and*

notable backlash because section 2G2.2 attracted few supporters,⁶⁰ but ongoing battles over the fraud guidelines exemplify the vigorous institutional dialogue that typically shapes judicial power.⁶¹ *Dorvee* is therefore unlikely to open any floodgates; rather, it marks an institutionally appropriate course correction for a uniquely broken guideline.

Guidelines break for many reasons. “[S]ome Guidelines are born broken, some Guidelines achieve brokenness in application, and some Guidelines have brokenness thrust upon them by the evolution of sentencing law and practice.”⁶² Section 2G2.2 has managed all three.⁶³ *Dorvee* will thus sit comfortably atop an expanding stringcite of opinions varying from section 2G2.2.⁶⁴ These opinions, along with § 3553(a) and expert evidence, create a “common law of sentencing” that can guide judges facing child pornography cases.⁶⁵ Though less structured than the Guidelines, such an approach bears the virtue of reintroducing reasoned analysis, expertise, proportionality, and perhaps even mercy into a decisionmaking process previously defined by an overdose of severity and politics.⁶⁶

Dorvee’s reasoning should also prove influential well beyond section 2G2.2. Judge Gertner has described a “robust body of law that critically evaluates the Guidelines” and “reflect[s] traditional judicial evaluations of administrative rules.”⁶⁷ This kind of inquiry, exemplified by *Dorvee*, asks whether a guideline is well reasoned, supported by data, consistent with larger penological goals, subject to ongoing revision, and aligned with other USSC findings.⁶⁸ Such analysis is not

the Exercise of Discretion, 117 YALE L.J. 1420, 1428–36 (2008). Prosecutorial discretion is especially important. See Richman, *supra*, at 1386. Prosecutors request Guidelines sentences in about 74% of cases, see U.S. SENT’G COMM’N, PRELIMINARY QUARTERLY DATA REPORT (2010), though recent reforms may lower this figure, see Memorandum from Eric H. Holder, Jr., Att’y Gen., to All Federal Prosecutors (May 19, 2010) (on file with the Harvard Law School Library).

⁶⁰ See generally sources cited *supra* note 2.

⁶¹ See, e.g., *United States v. Ovid*, No. 09-CR-216 (JG), 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010) (assessing recent judicial, USSC, and prosecutorial views of the fraud guidelines).

⁶² Douglas A. Berman, *Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines*, 21 FED. SENT’G REP. 182, 182 (2009).

⁶³ See sources cited *supra* note 2.

⁶⁴ For citations to cases varying from section 2G2.2, see *United States v. Morace*, 594 F.3d 340, 346–47 (4th Cir. 2010); and *United States v. Stall*, 581 F.3d 276, 284 n.2 (6th Cir. 2009). *Dorvee* has already been favorably cited and described as “important” by the Third Circuit. See *United States v. Grober*, Nos. 09-1318, 09-2120, 2010 WL 4188237, at *11 (3d Cir. Oct. 26, 2010).

⁶⁵ Gertner, *supra* note 56, at 278; see also *id.* at 278–79. Dissenting in *United States v. Grober*, 2010 WL 4188237, Judge Hardiman surveyed past district court evaluations of section 2G2.2 and argued that, because the court below failed to consider case-specific factors in a similar manner, it committed procedural error. *Id.* at *23 (Hardiman, J., dissenting in part). His argument suggests one possible form of a common law of sentencing for child pornography cases.

⁶⁶ See sources cited *supra* note 2.

⁶⁷ Gertner, *supra* note 56, at 275.

⁶⁸ See *Dorvee*, 616 F.3d at 187–88; Gertner, *supra* note 56, at 275–76.

typically all-or-nothing. The more clearly a guideline meets these criteria, a point regularly contested in government and defense counsel sentencing submissions, the more weight it deserves. Only in rare cases would a categorical rejection of any given guideline be justified at either the district or appellate level — as it was in *Dorvee*, where section 2G2.2 shocked the conscience, yielded markedly disproportionate outcomes, and rested on shoddy analytical foundations.

This inquiry repurposes doctrines familiar from judicial review of agency decisionmaking, mixing multifactor *Skidmore* analysis with a “hard look” at the underlying basis of agency action.⁶⁹ It also resembles Eighth Amendment jurisprudence in emphasizing proportionality across crimes, thus suggesting connections between *Dorvee* and familiar constitutional proportionality review that may guide future courts engaged in similar analysis.⁷⁰ Further, it secures separation of powers by retaining a measure of judicial independence against the USSC — a nominal Article III entity subject to pervasive congressional influence.⁷¹ Ideally, congressional delegation and USSC expertise flow jointly into a strong argument for within-Guidelines sentences. When these forces diverge, however, as they did when Congress modified section 2G2.2 in direct contravention of expert USSC advice,⁷² judicial pushback is appropriate. Article III courts, after all, have a strong interest in independence — and such pushback is crucial to the institutional dialogue that balances sentencing discretion.⁷³

Dorvee’s importance thus lies mainly in the structure it offers the judicial voice, drawing on familiar tools to justify and limit its conclusion. This “administrative critique” provides a persuasive model for advocates and courts, charting a path forward for judicial use of the Guidelines and outlining a framework that respects institutional competence while ensuring judicial independence.

⁶⁹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency . . . [varies], and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (citing *Skidmore*, 323 U.S. at 139–40)). *Dorvee* analogized judicial deference to the Guidelines and *Skidmore* deference to agency decisions, see *Dorvee*, 616 F.3d at 188, an appropriate posture given the USSC’s role as an ever-present amicus curiae whose generalized advice must be considered, scrutinized, and tailored to each case.

⁷⁰ See *Dorvee*, 616 F.3d at 187–88. Leading cases on proportionality include *Ewing v. California*, 538 U.S. 11 (2003); and *Harmelin v. Michigan*, 501 U.S. 957 (1991). Their guidance may be limited, however, by the Court’s inconsistent articulations of this doctrine. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1052–67 (2004).

⁷¹ See Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 221–22 (2005).

⁷² See generally Skye Phillips, *Protect Downward Departures: Congress and the Executive’s Intrusion into Judicial Independence*, 12 J.L. & POL’Y 947 (2004).

⁷³ See *Mistretta v. United States*, 488 U.S. 361, 407 (1989).