

# **Sentencing Law and Policy**

## **Cases, Statutes, and Guidelines**

**Second Edition**

***2011-2012 Supplement***

**Nora V. Demleitner**

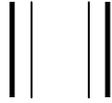
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2011-2012 Supplement for

# **Sentencing Law and Policy**

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Second Edition

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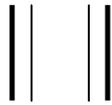
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# Introduction

The practice and study of sentencing law since 2000 has been something like riding a roller coaster, and it shows no sign of stopping. The wild ride has been highlighted by a series of decisions by the United States Supreme Court, starting most visibly with *Blakely* and *Booker* in 2004 and 2005. But in a country with 52 major sentencing systems, the excitement extends far beyond the Supreme Court fireworks. The severe national economic downturn that started in 2008, in particular, has forced nearly every state to assess ways to reduce the every-growing fiscal costs of large prison systems, and has prompted many states to enact or consider new sentencing rules designed to reduce these costs. There is no other area of the law going through this kind of transformation.

The Supreme Court's cases and these new economic realities have attracted new attention from legislators and actors within the criminal justice systems. They have also generated significant new interest in sentencing throughout the legal academy. For those scholars who have been following the past 20-30 years of modern sentencing reforms, this flood of developments and attention is both exciting and baffling. It is exciting because current developments may provide the chance for significant new reforms in an area filled with scholarly and policy problems. It is baffling since a specific focus constitutional doctrines and economic realities are matters that relatively few scholars had emphasized or even considered important.

The idea of "sentencing law" as a coherent field of legal study and practice is itself still in its adolescence. While the turbulence in sentencing law makes for very exciting classes and discussions, it also multiplies the challenges of getting a handle on the field. With the profusion of federal and state cases and the sprouting of many legislative and executive initiatives, teachers and students must continually work to see the still young forest along with the many fascinating trees.

We encourage students and teachers to follow sentencing developments on the Sentencing Law & Policy blog, which can be accessed at [sentencing.typepad.com](http://sentencing.typepad.com). Extensive scholarly discussion of sentencing law can be found in the *Federal Sentencing Reporter* or in special symposia being produced by law reviews. Other cutting-edge developments can be found in new cases, proposed and enacted federal and state legislation, executive branch policy statements and research, individual pieces of legal scholarship, and opinion commentary.



# Chapter 1

## The Purposes of Punishment and Sentencing

### *A. Social Purposes of Sentencing*

#### 1. Stated Purposes

**Page 9. Add this material at the end of note 3.**

Oregon trial judge Michael Marcus has argued forcefully against the principle of limited retributivism in writings on the goals of sentencing. Judge Marcus believes that the aim of the sentencing process should be crime reduction, and he has written provocative articles advocating that sentencing decisions be based on empirical data about what sanctions and programs reduce the likelihood of recidivism for different offenders. See, e.g., Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 *Ohio State Journal of Criminal Law* 671 (2004); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 *Federal Sentencing Reporter* 76 (2003).

Operating with similar concerns, in recent years the Virginia Sentencing Commission has been processing risk offender data to provide Virginia's judges at sentencing with a statistical report that analyzes characteristics of offenders to quantify the likelihood that a particular offender will commit another crime. Virginia's system of risk assessment at sentencing is legally and politically controversial because it attempts to estimate the threat each offender poses to public safety and suggests sentencing outcomes should be influenced by statistical probabilities. See Emily Bazelon, *Sentencing by the Numbers*, *New York Times Magazine*, Jan 2, 2005; Richard P. Kern and Meredith Farrar-

Owens, Sentencing Guidelines with Integrated Offender Risk Assessment, 16 Federal Sentencing Reporter 165 (Feb. 2004).

Relatedly, some academics have started asserting that the debate over punishment theories needs to pay considerably more attention to how different individuals perceive and experience different types of punishment. Professor Adam Kolber, for example, has complained that even though people “vary substantially in their experiences of punishment, our sentencing laws pay little attention to such differences,” which in turn creates “a disconnect between our punishment theories and practices.” See Adam Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009). He put forward these two claims:

First, a successful theory of punishment must take account of offenders’ subjective experiences when assessing punishment severity. Second, given the uses most punishment theories put to the concept of punishment severity, these theories imply that we are obligated to subjectively-calibrate punishment, at least when we can do so in a cost-effective, administrable manner.

*See also* Professors John Bronsteen et al., *Happiness and Punishment*, 76 U. Chi. L. Rev. 1037 (2009) (arguing that punishment theorists, both retributivist and utilitarian, have failed to account for human beings’ ability to adapt to changed circumstances, which can impact whether punishments such as fines and even imprisonment are just or effective).

**Page 16. Add this material after note 4.**

5. *The continued rehabilitation of rehabilitation.* In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court clarified the authority of sentencing courts to consider post-*sentencing* rehabilitation in later *resentencing* proceedings. In this ruling, the Supreme Court not only endorsed evidence of rehabilitation in a federal resentencing proceeding, but stressed that “evidence of post-sentencing rehabilitation may be highly relevant to several of the [statutory] factors that Congress has expressly instructed district courts to consider at sentencing.” Jason Pepper had finished an initial term in prison (subject to review on appeal), and since his release from prison he “had enrolled at a local community college as a full-time student and had earned A's in all of his classes in the prior semester [and had] obtained employment within a few weeks after being released from custody and was continuing to work part-time while attending school.” At his later resentencing, “Pepper informed the court that he was still attending school and was now working as a supervisor for the night crew at a warehouse retailer, where

he was recently selected by management as “associate of the year” and was likely to be promoted the following January. Pepper also stated that he had recently married and was now supporting his wife and her daughter [and] Pepper's father reiterated that Pepper was moving forward in both his career and his family life and that he remained in close touch with his son.” See Chapter 5 for an extended excerpt from this case.

If the Supreme Court has concluded that this sort of evidence of rehabilitation is “highly relevant to several of the [statutory] factors that Congress has expressly instructed district courts to consider at sentencing,” can a federal defendant make a strong case for a sentence reduction at a resentencing when he has demonstrated similar rehabilitation while still within prison walls?

**Page 19. Add this material after paragraph under Notes.**

On his official website both before and after being elected President, Barack Obama has had a list of nearly two dozen topics with links to extended statements about his positions and reform plans in that particular topical area. Notably, none of the listed “Issues” links specifically referenced crime or criminal justice or sentencing. Criminal justice and punishment issues were briefly discussed, however, within the “Issues” link labeled “Civil Rights.” Do you think of crime and punishment issues as a “civil rights” topic, and do you think most policy-makers or voters think of crime and punishment issues this way? If not, why do you think President Obama and his staff, both during his campaign and after his election, decided to locate a discussion of criminal justice issues under a “Civil Rights” heading?

Though the on-line website discussion of criminal justice issues changed somewhat during and after the 2008 campaign, as of summer 2009 the full entry on Whitehouse.gov read this way:

**Lead Criminal Justice Reform**

The President will lead the fight to build a more fair and equitable criminal justice system. He will seek to strengthen federal hate crime legislation and will work to ensure that federal law enforcement agencies do not resort to racial profiling. He supports funding for drug courts, giving first-time, non-violent offenders a chance to serve their sentence, if appropriate, in drug rehabilitation programs that have proven to work better than prison terms in changing behavior. President Obama will also improve ex-offender employment and job retention strategies, substance abuse treatment, and mental health counseling so ex-offenders can successfully re-join society.

See [http://www.whitehouse.gov/issues/civil\\_rights/](http://www.whitehouse.gov/issues/civil_rights/) (last visited Aug. 20,

2009). What purposes of punishment seem most prevalent and significant in this discussion of the President's criminal justice agenda? Do you think President Obama's prominent campaign themes of "Hope" and "Change" have special importance or salience in the context of modern punishment purposes?

**Page 28. Add this material after note 1.**

2. *Using restorative justice models in unique settings.* For various reasons, it may be challenging for most state and federal authorities to move toward restorative justice approaches as a response to traditional crimes now handled through traditional criminal justice systems. But, as suggested in some recent scholarship, restorative justice models may be especially appropriate and effective in some unique settings. See, e.g., Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 *Harv. C.R.-C.L. L. Rev.* 547 (2009); Carrie C. Boyd, *Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?*, 32 *Wm. & Mary Envtl. L. & Pol'y Rev.* 483 (2008); Maria R. Volpe, *Restorative Justice in Post-Disaster Situations: Untapped Potential*, 8 *Cardozo J. Conflict Resol.* 611 (2007); Diana L. Grimes, *Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases*, 63 *Wash & Lee L. Rev.* 1693 (2006).

**Page 39. Add this material after note 3.**

4. *Inferring purposes from extreme sentences in extreme cases.* In December 2008, it was discovered that renown investment financier Bernard Madoff had been running through his asset management firm a giant Ponzi scheme. Madoff, who was 70-years-old and had been running this scheme for decades, was charged and pled guilty to an 11-count federal indictment, and he admitted to defrauding thousands of investors out of tens of billions of dollars. The high-profile case culminated in the imposition in June 2009 of a sentence of 150 years in prison, the maximum prison term permissible in light of the 11 charges. According to press reports, applause broke out in the courtroom after U.S. District Judge Denny Chin in Manhattan ordered Madoff to serve the statutory maximum sentence and Judge Chin said "Here the message must be sent that Mr. Madoff's crimes were extraordinary evil." See Robert Frank & Amir Efrati, "Evil" Madoff Gets 150 Years in Epic Fraud: Victims Cheer Tough Sentence; Judge Slams Financier for

Stonewalling Investigators; True Size of Losses Still a Mystery, Wall Street Journal, June 30, 2009.

What implicit purposes are served by sentencing an elderly offender like Bernie Madoff, who is certain not to live more than a few decades, to the maximum term of 150 years in prison? What implicit purposes are suggested by the applause and cheers from victims concerning that sentence? In extreme cases that generate extreme feelings (and extreme media attention), should punishment purposes necessarily be made more explicit by key sentencing decision-makers?

## ***B. Purposes in Practical Context***

### **3. Politics, Philosophy, and Economics**

**Page 71. Add this material at the end of note 2.**

*3. Varying concerns about disparity, and varying efforts to control disparity, in different contexts.* In modern sentencing reforms, assessing and controlling disparity has been a principal and persistent focus and goal for actors in the federal sentencing system, but has seemed to be a less pressing concern for actors in state sentencing systems. In addition, while considerable attention has been devoted to studying disparities in the administration of the death penalty and in the imposition of prison sentences, very little attention has been paid to disparities in the application of fines and other alternative sanctions. Should concerns about sentencing disparities and efforts to control these disparities be more acute in some particular settings or in certain types of cases involving certain types of punishments?

**Page 75. Add this material at the end of note 2.**

The severe national economic downturn that started in 2008 has forced nearly every state to assess ways to reduce the ever-growing fiscal costs of large prison systems, and has prompted many states to enact or consider new sentencing rules designed to reduce these costs. The Center on Sentencing and Corrections at the Vera Institute of Justice released a report in July 2009, titled “The Fiscal Crisis in Corrections: Rethinking Policies and Practices,” which documented that a majority of states were forced by the 2008 recession to cut budgets in ways that have impacted sentencing and prison policies and practices:

The budgets of at least 26 state departments of corrections have been cut for FY2010, and even those whose budgets have not been cut are reducing expenditures in certain areas ... [and] officials are responding to these reductions [principally] in three areas:

States are reducing healthcare services or joining in purchasing agreements to lower the cost of inmate pharmaceuticals. Many states have reduced corrections staff, instituted hiring freezes, reduced salaries or benefits, and/or eliminated pay increases. Others are consolidating facilities or halting planned expansions. Still others are eliminating or downsizing some programs....

To cut down on new offenses and the incarceration of rule violators, several states are strengthening their community corrections systems. Many states began these efforts in the past few years as part of the national emphasis on helping people successfully return to the community following their release from prison. States are now bolstering both their reentry programs and community supervision programs and working to improve outcomes for people on supervision....

In FY2010, states looking for large cuts have turned to release policies and found that they can identify some groups of people who can be safely released after serving shorter terms behind bars.

Christine S. Scott-Hayward, Center on Sentencing and Corrections, Vera Institute of Justice, *The Fiscal Crisis in Corrections: Rethinking Policies and Practices* at 2 (July 2009), available at [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf).

Through the summer of 2011, these trends have continued and have had a distinctive and distinctively interesting impact on some states traditionally known for their more conservative politics and for a recent history of “tough-on-crime” policies that had previously led to sharp increases in prison populations. A *New York Times* piece discussing these trends published in August 2011 stressed how economic realities, not punishment theory, has been driving these trends: “While liberals have long complained that harsh mandatory minimum sentences for nonviolent offenses like drug possession are unjust, the push to overhaul penal policies has been increasingly embraced by elected officials in some of the most conservative states in the country. And for a different reason: to save money.” Charlie Savage, “Trend to Lighten Harsh Sentences Catches On in Conservative States,” *N.Y. Times*, Aug. 12, 2011. That same month, the American Civil Liberties Union published a major report praising these trends under the title “Smart Reform Is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities” available at <http://www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while>. That report documents bipartisan criminal justice reform

efforts in ten states—Texas, Kansas, Mississippi, South Carolina, Ohio, and Kentucky, California, Louisiana, Maryland, and Indiana—which are all states that, according to the ACLU, “have long had reputations for being ‘tough on crime’.”

**Page 83. Add this material after the note.**

*National Crime Politics in America.* Despite an extraordinarily lengthy and dynamic presidential campaign which included sharply contested primaries in both major political parties, the 2008 election season has included barely any serious national discussion of crime and punishment issues either in the traditional media or in the “new media” of political websites and blogs. Even the websites of the major candidate have few explicit mentions of classic criminal justice concerns. Similarly, during the July 2009 Senate confirmation hearing for then-Judge Sonia Sotomayor, there was extraordinarily little discussion of crime and justice issues, even though a sizeable portion of the Supreme Court docket is filled with criminal cases. The same again proved true during the June 2010 Senate confirmation hearing for then-Solicitor General Elena Kagan.

Why has crime and punishment dropped off the national political radar? Is the notable *lack* of attention given to these issues in national politics a welcome or troublesome development?

# Chapter 2

## Who Sentences?

### *A. Sentencing in the Courtroom*

#### **2. Sentencing Juries**

**Page 107. Add this material after note 4.**

4. *Jury sentencing in the “war on terror.”* After years of legal wrangling over the constitutionality and structure of the military tribunals, the criminal trial via military tribunal of Ramdan Hamdan, Osama bin Laden’s driver, went forward in 2008 and resulted in a conviction. To the surprise of many, the same jury that convicted Hamdan imposed an unexpectedly light sentence, which had the effect of making him eligible for release in less than a year because of the time he had already served in detention at Guantanamo Bay.

What lessons and insights can and should we take away from the surprisingly short sentence imposed upon Hamdan by the military jury that heard his case? Is there reason to think that jury sentencing might be especially appropriate—or especially problematic—for certain types of crimes or for certain types of defendants?

### *B. Legislatures and Commissions*

**Page 112. Add this material at the end of note 1.**

The self-described conservative advocacy group, Right on Crime, includes the elimination of some mandatory minimum sentences for nonviolent offenses among its priority issues for legislatures. The

group's position is based in fiscal conservatism (part of an overall effort to reduce overuse of expensive prison resources) and deference to local priorities as embodied in sentencing judges, "who are the most intimately familiar with the facts of a case and who are well-positioned to know which defendants need to be in prison because they threaten public safety and which defendants would in fact not benefit from prison time." See <http://www.rightoncrime.com/priority-issues/prisons/>.

**Page 113. Add this material at the end of note 4.**

At the federal level, most legislators have generally not expressed any serious interest or concern about modern sentencing severity and increases in the size of the United States prison population. The one exception has been Senator Jim Webb (D-VA) who in 2007 and 2008 conducted hearings through Congress's Joint Economic Commission to examine the direct economic and social costs of mass incarceration and American drug policy. Should legislatures focus on the economic costs and benefits of sentencing law and policy, or are other values necessarily paramount in this arena?

Following-up on these matters, Senator Webb in March 2009 introduced The National Criminal Justice Commission Act of 2009, S.714 Here is how the Act is summarized in a fact-sheet released when Senator Webb introduced this bill:

The National Criminal Justice Commission Act of 2009, introduced by Senator Jim Webb on March 26, 2009, will create a blue-ribbon commission charged with undertaking an 18-month, top-to-bottom review of our entire criminal justice system. Its task will be to propose concrete, wide-ranging reforms designed to responsibly reduce the overall incarceration rate; improve federal and local responses to international and domestic gang violence; restructure our approach to drug policy; improve the treatment of mental illness; improve prison administration; and establish a system for reintegrating ex-offenders.

See <http://webb.senate.gov/email/incardocs/FactSheeti.pdf>; see also Jim Webb, What's Wrong with our Prisons?, PARADE Magazine cover story, Sunday March 29, 2009. Interestingly, Senator Webb has claimed that his bill has garnered wide support from Senators, his legislative proposal to create a new commission to broadly study and assess the nation's criminal justice systems seems to have stalled in Congress. In addition, in late July 2010, a version of Senator Webb's bill was passed by the U.S. House of Representatives.

Do you support the creation of a National Criminal Justice Commission by Congress? Wholly apart from the substantive crime and

punishment reforms that such a Commission might propose, what do you consider the strongest arguments in support, and the strongest arguments against, the creation of such a Commission. Would there be special constitutional or other structural concerns with a *federal* Commission proposing “concrete, wide-ranging reforms” concerning how *states* could or should redesign their criminal justice systems?

**Page 120. Add this material at the end of note 4.**

In California, the possible creation of a sentencing commission has been widely discussed and debated over the last decade. In 2009, as the California struggled to deal with a huge budget deficit, California Governor Arnold Schwarzenegger put forward a set of sentencing and prison reforms proposals that included the creation of a sentencing commission for the state. But because his proposal called for this sentencing commission to have authority to change the state’s sentencing law directly subject only to a legislative veto, the proposal proved especially controversial and the state Assembly eliminated the proposed commission in the version of sentencing and prison reforms it approved. This press account of the state legislative debate spotlights how merely the creation of a sentencing commission quickly became a political charged issue:

“The very term ‘sentencing commission’ has become pretty toxic in California politics,” says Robert Weisberg, a law professor at Stanford University. “It’s often alleged that they take sentencing power away from the legislature.”...

Though the Senate’s version of the prison reform bill included the commission, the idea met fierce resistance from Republicans and some law enforcement groups as the Assembly debated the prison package... Republican lawmakers—who have opposed any bill that would let inmates out of jail early—charged that the commission amounted to a Democratic attempt to go soft on crime.

Some Democrats said the commission would have too much power. Recommendations from such a panel, which Gov. Arnold Schwarzenegger and prison officials support, would have been implemented unless legislators acted to stop them.... [O]nce Democratic Assembly leaders struck the sentencing commission from the bill and made other changes, law enforcement groups dropped their opposition.

Michael B. Farrell, California Assembly Passes Diluted Prison Reform Bill: Lawmakers Stripped Out Crucial Reforms Such as a Proposal For an Independent Panel to Review Tough Sentencing Guidelines, Christian Science Monitor, August 2009.

## ***C. Prosecutors***

### **Page 127. Add this material after note 3.**

4. *Prosecutorial involvement and role in systemic criminal justice reforms.* Through 2009, newly appointed Attorney General Eric Holder gave a number of major speeches in which he emphasized that he had ordered the Department of Justice to embark upon “a comprehensive, evidence-based review of federal sentencing and corrections policy.” In one notable speech to the Vera Institute of Justice, Attorney General Holder described his crime-fighting philosophy and the criminal justice review being conducted by the Justice Department in these terms:

In the five months that I have served as Attorney General, I have tried to [assess and determine]... how we can move past politics and ideology in order to get smart on crime.

Getting smart on crime requires talking honestly about which policies have worked and which have not, without fear of being labeled as too hard or, more likely, as too soft on crime. Getting smart on crime means moving beyond useless labels and instead embracing science and data, and relying on them to shape policy. And it means thinking about crime in context—not just reacting to the criminal act, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society....

Although this Administration is still young, we have already started to put into practice what I believe is a data-driven, non-ideological, post-partisan approach to crime. For example, I have asked attorneys throughout the Department to conduct a comprehensive, evidence-based review of federal sentencing and corrections policy. Specifically, the group is examining the federal sentencing guidelines, the Department’s charging and sentencing advocacy practices, mandatory minimums, crack/powder cocaine sentencing disparities, and other racial and ethnic disparities in sentencing. The group is also studying alternatives to incarceration and strategies that help reduce recidivism when former offenders reenter society. We intend to use the group’s findings as a springboard for recommending new legislation that will reform the structure of federal sentencing.

Remarks as Prepared for Delivery by Attorney General Eric Holder at the Vera Institute of Justice’s Third Annual Justice Address (July 9,

2009), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090709.html>.

Is it appropriate and sensible for the Attorney General, as the nation's top prosecutor, to be focused broadly on how best to engineer systemic reforms to the nation's criminal justice systems? Should new state attorneys general follow Holder's lead by having their departments periodically conduct "a comprehensive, evidence-based review" of state sentencing and corrections policies soon after taking office? Are there more or less appropriate ways for top-level prosecutors seek to implement their systemic vision of criminal justice reform—e.g., should Attorneys General feel comfortable seeking to implement significant sentencing policy changes through internal prosecutorial guidelines or should they feel obliged to try to engineer changes only by proposing formal change to relevant criminal statutes (which would, of course, have to be enacted by a legislatures)?

**Page 129. Add this material at the end of problem 2-5.**

In June 2008, the Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), held that the Second Amendment protects an individual right to possess a firearm in the home for self-protection, though the Court left unclear the exact scope of this right or the level of constitutional scrutiny to be given to firearm prohibitions. In dicta, the majority opinion in *Heller* asserted that the holding should not cast doubt on laws that prohibit felons from possessing firearms. Nevertheless, within weeks of the *Heller* ruling, a number of federal defendants began to bring Second Amendment challenges to federal laws that prohibit felons (and certain misdemeanants) from possessing any type of firearm. Relying on dicta in the *Heller* opinion, lower courts at both the state and federal level have consistently rejected efforts by criminal defendants to get some benefit from the *Heller* ruling in a gun prosecution.

In the wake of *Heller*, do prosecutors now have an independent constitutional responsibility to consider the meaning and scope of the Second Amendment right recognized by the Supreme Court when deciding whether and how to pursue federal firearm charges?

In June 2010, the Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), concluded that the interpretation of the Second Amendment in *Heller* was fully incorporated and applicable to the states through the Fourteenth Amendment's Due Process Clause. In the wake of *Heller* and *McDonald*, do prosecutors now have an independent constitutional responsibility to consider the meaning and scope of the

Second Amendment right recognized by the Supreme Court when deciding whether and how to pursue federal and state firearm charges?

The day after the Supreme Court in *McDonald* ruled that the Second Amendment was fully applicable to the states, the district attorney of Wisconsin's Jackson County issued a press release asserting that the *McDonald* ruling "immediately renders some of Wisconsin's current laws unconstitutional" and declaring "that this office will no longer accept law enforcement referrals for violations of [various Wisconsin] statutes" which prohibited possession and carrying of weapons in various public places. See Press Release of Gerald R. Fox (June 29, 2010), at <http://www.co.jackson.wi.us/html/district%20attorney/Documents/McDonald%20vs.%20City%20of%20Chicago.pdf>. Should this DA be lauded for giving *Heller* and *McDonald* a broad reading and for publicly declaring that how he planned to adjust his prosecutorial plans?

---

# Chapter 3

## Regulating Discretion

### *A. Sentencing Guideline Structures*

#### **3. Development and Structure of the Federal Sentencing Guidelines**

**Pages 212-13. Replace last charts with following materials:**

In December 2007, the Supreme Court addressed the standards for reviewing sentencing imposed below the applicable guidelines range in *Gall v. United States*, 128 S. Ct. 586 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (2007). In both these cases, circuit courts had reversed district court decisions to impose a below-guideline sentence and the defendants appealed to the Supreme Court with the hope that the Justices would declare their below guideline sentences to be reasonable. In these cases (both of which are partially reprinted in this Supplement, *infra*), the Supreme Court stressed that circuit review of sentences outside the guideline should be subject to the same deferential abuse-of-discretion standard that is applied when reviewing within-guideline sentences. And the Supreme Court, applying this standard, upheld as reasonable the below-guideline sentences initially given by district courts in *Gall* and *Kimbrough*.

Many district judges, as well as commentators concerned about the rigidity of the guidelines and some post-*Booker* circuit precedents, praised the Supreme Court's emphasis on district court discretion reflected in the *Gall* and *Kimbrough*. And the most recent sentencing statistics from the U.S. Sentencing Commission suggest that district court have felt even more comfortable sentencing outside applicable guideline ranges following the rulings in *Gall* and *Kimbrough*. The latest

official statistics from the U.S. Sentencing Commission, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2011\\_2nd\\_Quarter\\_Report.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_2nd_Quarter_Report.pdf), reveal that in the first two quarters of FY2011, only 54.5% of all sentences were imposed within the calculated federal guideline range. And though the majority of non-guideline sentence were imposed pursuant to motion for a below-guideline sentence filed by the prosecutor (which occurred in 26.5% of all cases), federal district judges decided in 17.1% of all cases to impose a sentence below the guidelines even without a prosecutorial recommendation to do so.

In March 2011, the Supreme Court in *Pepper v. United States*, 131 S. Ct. 1229 (2011), set out the latest gloss on post-*Booker* sentencing purposes and practices in a case affirming the authority of sentencing courts to consider evidence of post-*sentencing* rehabilitation in later sentencing proceedings. In *Pepper*, which is partially reprinted in Chapter 5 of this supplement, the Supreme Court robustly embraced a broad consideration of all of the purposes noted by Congress in 18 U.S.C. 3553(a), including changed assessments of those purposes in light of information about post-sentencing rehabilitation. What is the impact on judicial discretion might we expect from expanding the number and kinds of purposes that can justify sentences?

4. *Recent scholarship on federal sentencing and appellate review after Booker*, Rita, Gall and Kimbrough. The considerable and consequential changes to the federal sentencing landscape engendered by the Supreme Court's rulings in *Booker* and follow-up decisions has be the subject of much academic commentary. Just a sampling of some of the major recent articles on these topics includes: Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 *Stan. L. Rev.* 1 (2010); Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack On Federal Judicial "Leniency," The Supreme Court's Response, And The Future Of Criminal Sentencing*, 44 *Tulsa L. Rev.* 519 (2009); Daniel Richman, *Federal Sentencing In 2007: The Supreme Court Holds – The Center Doesn't*, 117 *Yale L.J.* 1374 (2008); Kate Stith, *The Arc Of The Pendulum: Judges, Prosecutors, And The Exercise Of Discretion*, 117 *Yale L.J.* 1420 (2008); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review Of Sentencing Decisions*, 60 *Ala. L. Rev.* 1 (2008); 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 (2008); William W. Berry III, *Discretion Without Guidance: The Need To Give Meaning To § 3553 After Booker And Its Progeny*, 40 *Conn. L. Rev.* 631 (2008); Lindsay C. Harrison, *Appellate Discretion And Sentencing After Booker*,

62 U. Miami L. Rev. 1115 (2008).

## ***B. Capital Punishment: Regulating Discretion Through Constitutional Rules***

### **Page 240. Replace part of the first full paragraph.**

Though in 2007 the Louisiana Supreme Court upheld the constitutionality of a state statute making child rape a capital offense, the Supreme Court declared in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) that the Eighth Amendment prohibits the death penalty for the offense of child rape where the crime did not result, and was not intended to result, in the death of the victim. This ruling is discussed further and partially reprinted in this Supplement, *infra*.

### **Page 241. Add this material after note 3.**

4. *Recent legislative abolition trends.* In 2011, Illinois passed legislation to abolish the death penalty in the state. Illinois joined other states that also eliminated the death penalty in recent years: New Jersey in 2007, New York in 2007, and New Mexico in 2009. Illinois Governor Pat Quinn described the death penalty in the state as “seriously broken,” based on concerns about the accuracy of the verdicts in many cases. In particular, 20 inmates sentenced to death in Illinois were later exonerated of their alleged crimes. In signing the bill, the governor explained, “If the system can’t be guaranteed 100 percent error-free, then we shouldn’t have the system. It cannot stand. It just is not right in our democracy and system of justice.” See Dave McKinney & Stephen Di Benedetto, Quinn Signs Bill Repealing Illinois Death Penalty, *Chicago Sun-Times*, March 9, 2011.

Do you share the view articulated by Governor Quinn that if the modern death penalty system “can’t be guaranteed 100 percent error-free, then we shouldn’t have the system”? If you do share this view, do you believe there are ways to guarantee that the administration of capital punishment will be “100 percent error-free” or do you simply believe that some risk of error is inevitable and that this alone is sufficient reason for eliminating death as a possible punishment for any crime?

**Page 269. Add this material at the end of note 2.**

In the summer of 2009, two significant events gave more momentum to the so-called innocence movement as it relates to the modern application of the death penalty.

First, on August 17, 2009, the Supreme Court took the unusual step, in response to an “original habeas petition” from Georgia death row inmate Troy Davis, of ordering a lower court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.” See *In re Troy Anthony Davis*, No. 08-1443, (U.S. Aug. 17, 2009). Before this ruling, Davis’s case had already drawn worldwide attention because of post-conviction evidence suggesting his innocence including the recantation of 7 of the 9 witnesses who testified against him at his trial where he was sentenced to death for killing a police officer. (After an extensive evidentiary hearing, in August 2010 a federal district judge denied Davis’ habeas petition by declaring that Davis had failed to clearly establish that he was innocent of the murder for which he had been sentencing to death. See *In re Troy Anthony Davis*, No. 08-1443 (N.D. Ga. Aug. 24, 2010).)

Second, additional evidence emerged in August 2009 to suggest the innocence of Cameron Todd Willingham, who was convicted of murdering his three children by arson in a 1991 house fire and was executed by the state of Texas in 2004. A new report from a national arson expert, prepared for the Texas Forensic Science Commission, concluded that the original investigation of Willingham’s case was seriously flawed and could not support a finding of arson. See David Grann, *Trial By Fire: Did Texas Execute An Innocent Man?*, New Yorker, Sept. 7, 2009.

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**Page 269. Add this material at the end of note 3.**

Emboldened by the *Hill* ruling, as well as new medical research and reports of botched executions, death row inmates in numerous jurisdictions began challenging state lethal injection protocols under the Eighth Amendment. Though taking a variety of forms, defendants generally claimed that the type and sequence of drugs used in standard execution protocols could, if not properly administered, cause extreme and unnecessary pain while masking the pain being experienced by the defendant during the execution. After lower courts in a few states held state procedures to be unconstitutional because they lacked sufficient

safeguards and oversight to ensure that the risk of errors were minimized, the Supreme Court in fall 2007 granted certiorari in one of these cases coming from Kentucky.

On April 16, 2008, the U.S. Supreme Court ruled in *Baze v. Rees*, 128 S. Ct. 1520 (2008), that Kentucky's three-drug protocol for carrying out lethal injections did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. The ruling was split and splintered; seven of nine Justices wrote separate opinions. Kentucky had conducted only one execution by lethal injection, and the opinion for the Court, authored by Chief Justice Roberts, concluded that there was insufficient evidence to find that the state had not made sufficient efforts to reduce the risk of severe pain from its standard three-drug lethal injection process. In his opinion, the Chief Justice suggested that litigants would have to show a genuine risk of severe pain that could be avoided by readily available and feasible alternatives to make out a viable constitutional claim.

# Chapter 4

## Sentencing Inputs: The Crime and Its Effects

### *A. Which Crime?*

#### 1. Real Offense Versus Conviction Offense

**Page 283.** Add this material before the Notes.

### **Derrick Kimbrough v. United States 128 S. Ct. 558 (2007)**

GINSBURG, J.

This Court’s remedial opinion in *United States v. Booker* instructed district courts to read the United States Sentencing Guidelines as “effectively advisory.” In accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence. *Booker* further instructed that “reasonableness” is the standard controlling appellate review of the sentences district courts impose.

Under the statute criminalizing the manufacture and distribution of crack cocaine, 21 U.S.C. § 841, and the relevant Guidelines prescription, § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine. The question here presented is whether, as the Court of Appeals held in this case, “a sentence ... outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.” We hold that, under *Booker*, the cocaine

Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is “greater than necessary” to serve the objectives of sentencing. 18 U.S.C. § 3553(a). In making that determination, the judge may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.

## I

In September 2004, petitioner Derrick Kimbrough was indicted in the United States District Court for the Eastern District of Virginia and charged with four offenses: conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than 50 grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense. Kimbrough pleaded guilty to all four charges.

Under the relevant statutes, Kimbrough’s plea subjected him to an aggregate sentence of 15 years to life in prison: 10 years to life for the three drug offenses, plus a consecutive term of 5 years to life for the firearm offense.<sup>1</sup> In order to determine the appropriate sentence within this statutory range, the District Court first calculated Kimbrough’s sentence under the advisory Sentencing Guidelines. Kimbrough’s guilty plea acknowledged that he was accountable for 56 grams of crack cocaine and 92.1 grams of powder cocaine. This quantity of drugs yielded a base offense level of 32 for the three drug charges. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 2004) (USSG). Finding that Kimbrough, by asserting sole culpability for the crime, had testified falsely at his codefendant’s trial, the District Court increased his offense level to 34. See § 3C1.1. In accord with the presentence report, the court determined that Kimbrough’s criminal history category was II. An offense level of 34 and a criminal history category of II yielded a Guidelines range of 168 to 210 months for the three drug charges. The Guidelines sentence for the firearm offense was

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<sup>1</sup> The statutory range for possession with intent to distribute more than 50 grams of crack is ten years to life. See 21 U.S.C. § 841(b)(1)(A)(iii). The same range applies to the conspiracy offense. See § 846. The statutory range for possession with intent to distribute powder cocaine is 0 to 20 years. See § 841(b)(1)(C). Finally, the statutory range for possession of a firearm in furtherance of a drug-trafficking offense is five years to life. See 18 U.S.C. § 924(c)(1)(A)(i). The sentences for the three drug crimes may run concurrently, see § 3584(a), but the sentence for the firearm offense must be consecutive, see § 924(c)(1)(A).

the statutory minimum, 60 months. See USSG § 2K2.4(b). Kimbrough's final advisory Guidelines range was thus 228 to 270 months, or 19 to 22.5 years.

A sentence in this range, in the District Court's judgment, would have been "greater than necessary" to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a). As required by § 3553(a), the court took into account the "nature and circumstances" of the offense and Kimbrough's "history and characteristics." The court also commented that the case exemplified the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." In this regard, the court contrasted Kimbrough's Guidelines range of 228 to 270 months with the range that would have applied had he been accountable for an equivalent amount of powder cocaine: 97 to 106 months, inclusive of the 5-year mandatory minimum for the firearm charge, see USSG § 2D1.1(c). Concluding that the statutory minimum sentence was "clearly long enough" to accomplish the objectives listed in § 3553(a), the court sentenced Kimbrough to 15 years, or 180 months, in prison plus 5 years of supervised release.<sup>3</sup>

In an unpublished *per curiam* opinion, the Fourth Circuit vacated the sentence. Under Circuit precedent, the Court of Appeals observed, a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."

We granted certiorari to determine whether the crack/powder disparity adopted in the United States Sentencing Guidelines has been rendered "advisory" by our decision in *Booker*.

## II

We begin with some background on the different treatment of crack and powder cocaine under the federal sentencing laws. Crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; it may also be mixed with water and injected. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 5, 12 (Feb.1995), available at <http://www.ussc.gov/crack/exec.htm> (hereinafter 1995 Report). Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is divided into single-dose "rocks" that users smoke. The active ingredient in powder and crack cocaine is the same. The two forms of the drug also have the same physiological and

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<sup>3</sup> The prison sentence consisted of 120 months on each of the three drug counts, to be served concurrently, plus 60 months on the firearm count, to be served consecutively.

psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high.

Although chemically similar, crack and powder cocaine are handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy iv (May 2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf) (hereinafter 2002 Report). This disparity means that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.

The crack/powder disparity originated in the Anti-Drug Abuse Act of 1986 (1986 Act), 100 Stat. 3207. The 1986 Act created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses. Congress sought “to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers.” The 1986 Act uses the weight of the drugs involved in the offense as the sole proxy to identify “major” and “serious” dealers. For example, any defendant responsible for 100 grams of heroin is subject to the five-year mandatory minimum, and any defendant responsible for 1,000 grams of heroin is subject to the ten-year mandatory minimum.

Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: “Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members’ minds a problem of overwhelming dimensions.” Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.

Based on these assumptions, the 1986 Act adopted a “100-to-1 ratio” that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. The Act’s five-year mandatory minimum applies to any defendant accountable for 5 grams of crack or 500 grams of powder; its ten-year mandatory minimum applies to any defendant accountable for 50 grams of crack or 5,000 grams of powder.

While Congress was considering adoption of the 1986 Act, the

Sentencing Commission was engaged in formulating the Sentencing Guidelines. In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. The Commission modified and adjusted past practice “in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like.”

The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act’s weight-driven scheme. The Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug trafficking offenses. See USSG § 2D1.1(c). In setting offense levels for crack and powder cocaine, the Commission, in line with the 1986 Act, adopted the 100-to-1 ratio. The statute itself specifies only two quantities of each drug, but the Guidelines “go further and set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio.” The Guidelines’ drug quantity table sets base offense levels ranging from 12, for offenses involving less than 250 milligrams of crack (or 25 grams of powder), to 38, for offenses involving more than 1.5 kilograms of crack (or 150 kilograms of powder).

Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity is generally unwarranted. Based on additional research and experience with the 100-to-1 ratio, the Commission concluded that the disparity “fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.” 2002 Report 91. In a series of reports, the Commission identified three problems with the crack/powder disparity.

First, the Commission reported, the 100-to-1 ratio rested on assumptions about “the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.” See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf) (hereinafter 2007 Report) (ratio Congress embedded in the statute far overstates both “the relative harmfulness” of crack cocaine, and the “seriousness of most crack cocaine offenses”). For example, the Commission found that crack is associated with “significantly less trafficking-related violence ... than previously assumed.” It also observed that “the negative effects of prenatal crack cocaine exposure are

identical to the negative effects of prenatal powder cocaine exposure.” The Commission furthermore noted that “the epidemic of crack cocaine use by youth never materialized to the extent feared.”

Second, the Commission concluded that the crack/powder disparity is inconsistent with the 1986 Act’s goal of punishing major drug traffickers more severely than low-level dealers. Drug importers and major traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers. But the 100-to-1 ratio can lead to the “anomalous” result that “retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced.”

Finally, the Commission stated that the crack/powder sentencing differential “fosters disrespect for and lack of confidence in the criminal justice system” because of a “widely-held perception” that it “promotes unwarranted disparity based on race.” Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed “primarily upon black offenders.”

Despite these observations, the Commission’s most recent reports do not urge identical treatment of crack and powder cocaine. In the Commission’s view, “some differential in the quantity-based penalties” for the two drugs is warranted, because crack is more addictive than powder, crack offenses are more likely to involve weapons or bodily injury, and crack distribution is associated with higher levels of crime. But the 100-to-1 crack/powder ratio, the Commission concluded, significantly overstates the differences between the two forms of the drug. Accordingly, the Commission recommended that the ratio be “substantially” reduced.

The Commission has several times sought to achieve a reduction in the crack/powder ratio. In 1995, it proposed amendments to the Guidelines that would have replaced the 100-to-1 ratio with a 1-to-1 ratio. Complementing that change, the Commission would have installed special enhancements for trafficking offenses involving weapons or bodily injury. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25075-25077 (1995). Congress, acting pursuant to 28 U.S.C. § 994(p), rejected the amendments. Simultaneously, however, Congress directed the Commission to “propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines.”

In response to this directive, the Commission issued reports in 1997 and 2002 recommending that Congress change the 100-to-1 ratio prescribed in the 1986 Act. The 1997 Report proposed a 5-to-1 ratio. See United States Sentencing Commission, Special Report to Congress:

Cocaine and Federal Sentencing Policy 2 (Apr. 1997), [http://www.ussc.gov/r\\_congress/newcrack.pdf](http://www.ussc.gov/r_congress/newcrack.pdf). The 2002 Report recommended lowering the ratio “at least” to 20 to 1. Neither proposal prompted congressional action.

The Commission’s most recent report, issued in 2007, again urged Congress to amend the 1986 Act to reduce the 100-to-1 ratio. This time, however, the Commission did not simply await congressional action. Instead, the Commission adopted an ameliorating change in the Guidelines. The alteration, which became effective on November 1, 2007, reduces the base offense level associated with each quantity of crack by two levels. See Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-28572 (2007).<sup>10</sup> This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. Describing the amendment as “only ... a partial remedy” for the problems generated by the crack/powder disparity, the Commission noted that any “comprehensive solution requires appropriate legislative action by Congress.”

### III

... The statute, as modified by *Booker*, contains an overarching provision instructing district courts to “impose a sentence sufficient, but not greater than necessary” to accomplish the goals of sentencing, including “to reflect the seriousness of the offense,” “to promote respect for the law,” “to provide just punishment for the offense,” “to afford adequate deterrence to criminal conduct,” and “to protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a). The statute further provides that, in determining the appropriate sentence, the court should consider a number of factors, including “the nature and circumstances of the offense,” “the history and characteristics of the defendant,” “the sentencing range established” by the Guidelines, “any pertinent policy statement” issued by the Sentencing Commission pursuant to its statutory authority, and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In sum, while the statute still requires a court to give respectful consideration to the Guidelines,

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<sup>10</sup> The amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act. Under the pre-2007 Guidelines, the 5- and 50-gram quantities that trigger the statutory minimums produced sentencing ranges that slightly *exceeded* those statutory minimums. Under the amended Guidelines, in contrast, the 5- and 50-gram quantities produce “base offense levels corresponding to guideline ranges that *include* the statutory mandatory minimum penalties.”

*Booker* “permits the court to tailor the sentence in light of other statutory concerns as well.”

The Government acknowledges that the Guidelines “are now advisory” and that, as a general matter, “courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” But the Government contends that the Guidelines adopting the 100-to-1 ratio are an exception to the “general freedom that sentencing courts have to apply the [§ 3553(a)] factors.” That is so, according to the Government, because the ratio is a “specific policy determination that Congress has directed sentencing courts to observe.” The Government offers three arguments in support of this position. We consider each in turn.

As its first and most heavily pressed argument, the Government urges that the 1986 Act itself prohibits the Sentencing Commission and sentencing courts from disagreeing with the 100-to-1 ratio.<sup>13</sup> The Government acknowledges that the “Congress did not *expressly* direct the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines.” Nevertheless, it asserts that the Act “implicitly” requires the Commission and sentencing courts to apply the 100-to-1 ratio. Any deviation, the Government urges, would be “logically incoherent” when combined with mandatory minimum sentences based on the 100-to-1 ratio.

This argument encounters a formidable obstacle: It lacks grounding in the text of the 1986 Act. The statute, by its terms, mandates only maximum and minimum sentences: A person convicted of possession with intent to distribute 5 grams or more of crack cocaine must be sentenced to a minimum of 5 years and the maximum term is 40 years. A person with 50 grams or more of crack cocaine must be sentenced to a minimum of 10 years and the maximum term is life. The statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence. Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders “at or near” the statutory maximum. 28 U.S.C. § 994(h).

In addition to the 1986 Act, the Government relies on Congress’ disapproval of the Guidelines amendment that the Sentencing

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<sup>13</sup> The Government concedes that a district court may vary from the 100-to-1 ratio if it does so “based on the individualized circumstance [s]” of a particular case. Brief for United States at 45. But the Government maintains that the 100-to-1 ratio is binding in the sense that a court may not give any weight to its own view that the ratio itself is inconsistent with the § 3553(a) factors.

Commission proposed in 1995. Congress “not only disapproved of the 1:1 ratio,” the Government urges; it also made clear “that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to do so in a manner that respects the 100:1 ratio.”

It is true that Congress rejected the Commission’s 1995 proposal to place a 1-to-1 ratio in the Guidelines, and also expressed the view that “the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.” But nothing in Congress’ 1995 reaction to the Commission-proposed 1-to-1 ratio suggested that crack sentences must exceed powder sentences by a ratio of 100 to 1. To the contrary, Congress’ 1995 action required the Commission to recommend a “revision of the drug quantity ratio of crack cocaine to powder cocaine.”

The Government emphasizes that Congress required the Commission to propose changes to the 100-to-1 ratio in *both* the 1986 Act and the Guidelines. This requirement, the Government contends, implicitly foreclosed any deviation from the 100-to-1 ratio in the Guidelines (or by sentencing courts) in the absence of a corresponding change in the statute. But it does not follow as the night follows the day that, by calling for recommendations to change the statute, Congress meant to bar any Guidelines alteration in advance of congressional action. The more likely reading is that Congress sought proposals to amend both the statute and the Guidelines because the Commission’s criticisms of the 100-to-1 ratio concerned the exorbitance of the crack/powder disparity in both contexts.

Moreover, as a result of the 2007 amendment, the Guidelines now advance a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1. Adopting the Government’s analysis, the amended Guidelines would conflict with Congress’ 1995 action, and with the 1986 Act, because the current Guidelines ratios deviate from the 100-to-1 statutory ratio. Congress, however, did not disapprove or modify the Commission-initiated 2007 amendment. Ordinarily, we resist reading congressional intent into congressional inaction. But in this case, Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority under 28 U.S.C. § 994(p). If nothing else, this tacit acceptance of the 2007 amendment undermines the Government’s position, which is itself based on implications drawn from congressional silence.

Finally, the Government argues that if district courts are free to deviate from the Guidelines based on disagreements with the crack/powder ratio, unwarranted disparities of two kinds will ensue. First, because sentencing courts remain bound by the mandatory minimum sentences prescribed in the 1986 Act, deviations from the 100-

to-1 ratio could result in sentencing “cliffs” around quantities that trigger the mandatory minimums. For example, a district court could grant a sizable downward variance to a defendant convicted of distributing 49 grams of crack but would be required by the statutory minimum to impose a much higher sentence on a defendant responsible for only 1 additional gram. Second, the Government maintains that, if district courts are permitted to vary from the Guidelines based on their disagreement with the crack/powder disparity, “defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.”

Neither of these arguments persuades us to hold the crack/powder ratio untouchable by sentencing courts.... Concerning the second disparity, it is unquestioned that uniformity remains an important goal of sentencing. As we explained in *Booker*, however, advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to “avoid excessive sentencing disparities.” These measures will not eliminate variations between district courts, but our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted. And as to crack cocaine sentences in particular, we note a congressional control on disparities: possible variations among district courts are constrained by the mandatory minimums Congress prescribed in the 1986 Act.

Moreover, to the extent that the Government correctly identifies risks of “unwarranted sentence disparities” within the meaning of 18 U.S.C. § 3553(a)(6), the proper solution is not to treat the crack/powder ratio as mandatory. Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities-along with other § 3553(a) factors-when imposing sentences. Under this instruction, district courts must take account of sentencing practices in other courts and the “cliffs” resulting from the statutory mandatory minimum sentences. To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.

#### IV

While rendering the Sentencing Guidelines advisory, we have nevertheless preserved a key role for the Sentencing Commission. As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the “starting point and the initial benchmark.” Congress established the Commission to formulate and constantly refine national sentencing standards. Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to “base its

determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.”

We have accordingly recognized that, in the ordinary case, the Commission’s recommendation of a sentencing range will “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” The sentencing judge, on the other hand, has “greater familiarity with ... the individual case and the individual defendant before him than the Commission or the appeals court.” He is therefore “in a superior position to find facts and judge their import under § 3553(a)” in each particular case. In light of these discrete institutional strengths, a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case “outside the ‘heartland’ to which the Commission intends individual Guidelines to apply.” On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range “fails properly to reflect § 3553(a) considerations” even in a mine-run case.

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of “empirical data and national experience.” Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses “greater than necessary” in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes, even in a mine-run case.

## V

Taking account of the foregoing discussion in appraising the District Court’s disposition in this case, we conclude that the 180-month sentence imposed on Kimbrough should survive appellate inspection. The District Court began by properly calculating and considering the advisory Guidelines range. It then addressed the relevant § 3553(a) factors. First, the court considered “the nature and circumstances” of the crime, see 18 U.S.C. § 3553(a)(1), which was an unremarkable drug-trafficking offense. App. 72-73 (“This defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police

officers—that’s the sum and substance of it—[and they also had] a firearm.”). Second, the court considered Kimbrough’s “history and characteristics.” § 3553(a)(1). The court noted that Kimbrough had no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps, and that he had a steady history of employment.

Furthermore, the court alluded to the Sentencing Commission’s reports criticizing the 100-to-1 ratio, noting that the Commission “recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has.” Comparing the Guidelines range to the range that would have applied if Kimbrough had possessed an equal amount of powder, the court suggested that the 100-to-1 ratio itself created an unwarranted disparity within the meaning of § 3553(a). Finally, the court did not purport to establish a ratio of its own. Rather, it appropriately framed its final determination in line with § 3553(a)’s overarching instruction to “impose a sentence sufficient, but not greater than necessary” to accomplish the sentencing goals advanced in § 3553(a)(2). Concluding that “the crack cocaine guidelines [drove] the offense level to a point higher than is necessary to do justice in this case,” the District Court thus rested its sentence on the appropriate considerations and “committed no procedural error.”

The ultimate question in Kimbrough’s case is “whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of [15 years] and justified a substantial deviation from the Guidelines range.” The sentence the District Court imposed on Kimbrough was 4.5 years below the bottom of the Guidelines range. But in determining that 15 years was the appropriate prison term, the District Court properly homed in on the particular circumstances of Kimbrough’s case and accorded weight to the Sentencing Commission’s consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a). Indeed, aside from its claim that the 100-to-1 ratio is mandatory, the Government did not attack the District Court’s downward variance as unsupported by § 3553(a). Giving due respect to the District Court’s reasoned appraisal, a reviewing court could not rationally conclude that the 4.5-year sentence reduction Kimbrough received qualified as an abuse of discretion....

THOMAS, J., dissenting.

I continue to disagree with the remedy fashioned in *United States v. Booker*. The Court’s post-*Booker* sentencing cases illustrate why the remedial majority in *Booker* was mistaken to craft a remedy far broader than necessary to correct constitutional error. The Court is now confronted with a host of questions about how to administer a sentencing

scheme that has no basis in the statute. Because the Court's decisions in this area are necessarily grounded in policy considerations rather than law, I respectfully dissent....

Applying the statute as written, it is clear that the District Court erred by departing below the mandatory Guidelines range. I would therefore affirm the judgment of the Court of Appeals vacating petitioner's sentence and remanding for resentencing.

[Justice Alito also dissented, stating that “[f]or the reasons explained in my dissent in *Gall v. United States* I would hold that, under the remedial decision in *Booker* a district judge is still required to give significant weight to the policy decisions embodied in the Guidelines....”]

## Notes

1. *The long debate over crack sentencing.* As the *Kimrough* decision details, the differential treatment of crack and powder cocaine offenses has long been a source of significant controversy and dynamic inter-branch debate in the federal sentencing system. Given this long-standing debate, it was not surprising that some district courts utilized the new discretion afforded by the *Booker* decision to impose sentences below applicable guideline ranges in crack cases. Before the ruling in *Kimrough*, however, most circuit courts declared unreasonable any decision to impose a sentence below the crack guidelines based simply on a policy disagreement with the severity levels established by the crack guidelines incorporating the 100-to-1 ratio. The ruling in *Kimrough* has been important to the operation of the advisory guidelines in part because the Government conceded that courts are generally authorized after *Booker* to vary from guideline ranges “based solely on policy considerations, including disagreements with the guidelines,” and because the Supreme Court rejected the Government's claims that this post-*Booker* sentencing authority did not extend to cases involving the crack guidelines.

2. *The Fair Sentencing Act of 2010.* In summer 2010, Congress finally responded to the long-standing criticisms of the unfairness of the 100-to-1 ratio incorporated into the triggering quantities for statutory mandatory minimum sentencing terms for powder and crack cocaine. Through the Fair Sentencing Act of 2010, which was signed into law by President Barack Obama on August 3, 2010, Congress adjusted upward the amount of crack needed to trigger mandatory minimum prison terms. Though President Obama's Department of Justice and many public

policy groups urged Congress to completely equalize the sentencing provisions for powder and crack cocaine, Congress settled on a compromise proposal that produced a new 18-to-1 ratio for powder and crack sentences by raising from 5 to 28 grams and from 50 to 280 grams the amount of crack needed to trigger 5- and 10-year minimum prison terms. The Fair Sentencing Act also completely eliminated the mandatory minimum prison term for simple possession of crack cocaine.

In addition to changing the trigger amounts for applicable minimum prison terms, the Fair Sentencing Act of 2010 ordered the U.S. Sentencing Commission to promulgate new emergency guidelines in accord with the statutory changes made by Congress. The Act's instructions to the U.S. Sentencing Commission also included a list of aggravating and mitigating factors that Congress wished to have reflected in revised crack sentencing guidelines. The Commission is tasked with producing revised drug sentencing guidelines before the end of 2010, and some public policy groups and commentators have urged the Commission to seize the passage of the Fair Sentencing Act as an opportunity to significantly revise the existing structure for drug sentencing under the guidelines.

3. *The uncertain reach of Kimbrough.* Because of the long debate over the crack guidelines, and because the Sentencing Commission had written numerous reports criticizing its own guidelines, the broader applicability of principles set forth in *Kimbrough* are subject to debate. The Supreme Court's opinion in *Kimbrough* emphasized, based on the Commission's own criticisms, that the crack guidelines did "not exemplify the Commission's exercise of its characteristic institutional role" because these guidelines "did not take account of 'empirical data and national experience.'" In arguing that other guidelines should still be given significant weight after *Booker*, the Government asserts many other settings that other guidelines do reflect and exemplify the Commission's exercise of its characteristic institutional role. In contrast, federal defendants have repeatedly argued that many guidelines, not just those for crack offenses, fail to reflect the Commission's expertise in assessing "empirical data and national experience."

How should a district court assess and resolve after *Booker* whether certain guidelines "exemplify the Commission's exercise of its characteristic institutional role"? Because the Commission, other than in the crack setting, has produced very few in-depth reports or public analyses focused on the foundation and soundness of particular guidelines, advocates have often point to snippets of legislative history and public Commission records and meeting materials when developing post-*Kimbrough* arguments about how to regard different offense

guidelines. After *Kimbrough*, may district courts conduct their own investigation – perhaps even having a sentencing hearing to hear arguments or even testimony about the background and development of a particular guideline – when deciding how much weight that particular guideline is to be afforded? Should they? Must they?

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## **2. Multiple Convictions**

**Page 293. Add this material at the end of note 2.**

In early 2008, the Supreme Court took up a case from Oregon presenting the issue of whether *Blakely* requires facts that permit a judge to impose consecutive sentences under state law must be proven to a jury. In a 5-4 decision authored by Justice Ginsburg, *Oregon v. Ice*, 129 S. Ct. 711 (2009), the Supreme Court declared that the Sixth Amendment, as construed in *Apprendi* and *Blakely*, should not be extended to preclude states from allowing judges to find those fact necessary to the imposition of consecutive sentences.

## ***B. Assessing Offense Seriousness***

### **2. Qualitative Assessments of Harm**

**Page 308. Replace the last part of note 2 with this material.**

In 2008, the Supreme Court declared that it was unconstitutional for states to respond to the crime of child rape with the death penalty through the following opinion.

**Patrick Kennedy v. Louisiana**  
**128 S. Ct. 2641 (2008)**

KENNEDY, J.

Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, the State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. See La. Stat. Ann. § 14:42 (West 1997 and Supp.1998). This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

**I**

Petitioner’s crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. At 9:18 a.m. on March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped....

L.H. was transported to the Children’s Hospital. An expert in pediatric forensic medicine testified that L.H.’s injuries were the most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. The injuries required emergency surgery....

The trial began in August 2003. L.H. was then 13 years old. She testified that she “‘woke up one morning and [petitioner] was on top of [her].” She remembered petitioner bringing her “[a] cup of orange juice and pills chopped up in it” after the rape and overhearing him on the telephone saying she had become a “young lady.” ...

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana affirmed. . . .

**II**

[W]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them ‘the most deserving of execution. Though the death penalty is not invariably unconstitutional, see *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court insists upon confining the instances in which the punishment can be imposed...

In [Eighth Amendment] cases the Court has been guided by objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions. . . . The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose....

### III

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. . . .

Louisiana reintroduced the death penalty for rape of a child in 1995. See La. Stat. Ann. § 14:42 (West Supp.1996). . . . Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana’s lead: Georgia, see Ga. Code Ann. § 16-6-1 (2007) (enacted 1999); Montana, see Mont. Code Ann. § 45-5-503 (2007) (enacted 1997); Oklahoma, see Okla. Stat., Tit. 10, § 7115(K) (West 2007 Supp.) (enacted 2006); South Carolina, see S.C. Code Ann. § 16-3-655(C)(1) (Supp. 2007) (enacted 2006); and Texas, see Tex. Penal Code Ann. § 12.42(c)(3) (West Supp. 2007) (enacted 2007); see also Tex. Penal Code Ann. § 22.021(a) (West Supp. 2007). . . .

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse....

Respondent insists that the six States where child rape is a capital offense, along with the States that have proposed but not yet enacted applicable death penalty legislation, reflect a consistent direction of change in support of the death penalty for child rape. Consistent change might counterbalance an otherwise weak demonstration of consensus.

See *Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change”); *Roper*, 543 U.S. at 565 (“Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded”). But whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.

Respondent and its amici identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. . . . Aside from pending legislation, it is true that in the last 13 years there has been change towards making child rape a capital offense. This is evidenced by six new death penalty statutes, three enacted in the last two years. But this showing is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. . . .

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.... Nine States — Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas — have permitted capital punishment for adult or child rape for some length of time between the Court’s 1972 decision in *Furman* and today.... Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963....

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007[,] are the only two individuals now on death row in the United States for a nonhomicide offense.

After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape.

#### IV

As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. The

Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures....

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, "life may not be nearly so happy as it was" but it is not beyond repair. 433 U.S. at 598. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." *Trop*, 356 U.S., at 99, 100 (plurality opinion). Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment....

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken....

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," *Coker*, 433 U.S., at 598 (plurality opinion), they cannot be compared to murder in their "severity and irrevocability."

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. . . . [U]nder respondent's approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. . . . [And i]t is not a solution simply to apply to this context the aggravating factors developed for capital murder. . . . All of these standards have the potential to result in some inconsistency of application....

Our concerns are all the more pronounced where, as here, the death penalty for this crime has been most infrequent. . . . Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure...

Our decision is consistent with the justifications offered for the death penalty. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.

As in *Coker*, here it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function. This argument does not overcome other objections, however. The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.

There is an additional reason for our conclusion that imposing the death penalty for child rape would not further retributive purposes. In

considering whether retribution is served, among other factors we have looked to whether capital punishment has the potential to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim.

It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L. H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather. And in the end the State made L.H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: "[L.H.] is asking you, asking you to set up a time and place when he dies." Tr. 121 (Aug. 26, 2003).

Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement.

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when

the crime was committed. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. These matters are subject to fabrication or exaggeration, or both. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

With respect to deterrence, if the death penalty adds to the risk of non-reporting, that, too, diminishes the penalty's objectives. Underreporting is a common problem with respect to child sexual abuse. See Hanson, Resnick, Saunders, Kilpatrick, & Best, Factors Related to the Reporting of Childhood Rape, 23 *Child Abuse & Neglect* 559, 564 (1999) (finding that about 88% of female rape victims under the age of 18 did not disclose their abuse to authorities); Smith et al., Delay in Disclosure of Childhood Rape: Results From A National Survey, 24 *Child Abuse & Neglect* 273, 278-279 (2000) (finding that 72% of women raped as children disclosed their abuse to someone, but that only 12% of the victims reported the rape to authorities). Although we know little about what differentiates those who report from those who do not report, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member. The experience of the amici who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. See Brief for National Association of Social Workers et al. as Amici Curiae 11-13. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. See Rayburn, Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes, 78 *St. John's L. Rev.* 1119, 1159-1160 (2004). It might be argued that, even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all. Whatever balance the legislature strikes, however, uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.

## V

Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing. The Court, it will be argued, by the act of addressing the constitutionality of the death penalty, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.

These concerns overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." ... The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed....

### **ALITO, J., dissenting.**

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty." Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant

arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision....

A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty. The Court also argues that "a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim," and may discourage the reporting of child rape.

These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is "cruel and unusual" punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should — and presumably do — take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause to cut off the normal democratic processes," *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C. J., dissenting), but the Court forgets that warning here.

The Court also contends that laws permitting the death penalty for the rape of a child create serious procedural problems. Specifically, the Court maintains that it is not feasible to channel the exercise of sentencing discretion in child-rape cases, and that the unreliability of the testimony of child victims creates a danger that innocent defendants will be convicted and executed. Neither of these contentions provides a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted.

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way." Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense.

Moreover, it takes little imagination to envision other limiting factors that a State could use to structure sentencing discretion in child rape cases. Some of these might be: whether the victim was kidnapped, whether the defendant inflicted severe physical injury on the victim, whether the victim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims.

The Court refers to limiting standards that are “indefinite and obscure,” but there is nothing indefinite or obscure about any of the above-listed aggravating factors. Indeed, they are far more definite and clear-cut than aggravating factors that we have found to be adequate in murder cases. For these reasons, concerns about limiting sentencing discretion provide no support for the Court’s blanket condemnation of all capital child-rape statutes.

That sweeping holding is also not justified by the Court’s concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court’s evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. There is precedent for requiring special corroboration in certain criminal cases. For example, some jurisdictions do not allow a conviction based on the uncorroborated testimony of an accomplice. A State wishing to permit the death penalty in child-rape cases could impose an analogous corroboration requirement.

After all the arguments noted above are put aside, what is left? What remaining grounds does the Court provide to justify its independent judgment that the death penalty for child rape is categorically unacceptable? I see two.

The first is the proposition that we should be “most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty.” But holding that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not “extend” or “expand” the death penalty. Laws enacted by the state legislatures are presumptively constitutional, and until today, this Court has not held that capital child rape laws are unconstitutional.

Consequently, upholding the constitutionality of such a law would not “extend” or “expand” the death penalty; rather, it would confirm the status of presumptive constitutionality that such laws have enjoyed up to this point. And in any event, this Court has previously made it clear that “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.” *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991).

The Court’s final—and, it appears, principal—justification for its holding is that murder, the only crime for which defendants have been executed since this Court’s 1976 death penalty decisions, is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. But the Court makes little attempt to defend these conclusions.

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?...

I have no doubt that, under the prevailing standards of our society, robbery, the crime that the petitioner in *Enmund* intended to commit, does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. And the Court does not take the position that no harm other than the loss of life is sufficient. The Court takes pains to limit its holding to “crimes against individual persons” and to exclude “offenses against the State,” a category that the Court stretches—without explanation—to include “drug kingpin activity.” But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court’s acknowledgment that “[r]ape has a permanent psychological, emotional,

and sometimes physical impact on the child.” As the Court aptly recognizes, “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape.”

The rape of any victim inflicts great injury, and “[s]ome victims are so grievously injured physically or psychologically that life is beyond repair.” *Coker*, 433 U.S., at 603 (opinion of Powell, J.). “The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 *Ariz. L. Rev.* 197, 208-209 (2003). See also *State v. Wilson*, 96-1392, p 6 (La. Sup. Ct. 12/13/96), 685 So. 2d 1063, 1067; Broughton, “On Horror’s Head Horrors Accumulate”: A Reflective Comment on Capital Child Rape Legislation, 39 *Duquesne L. Rev.* 1, 38 (2000). Long-term studies show that sexual abuse is “grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.” C. Bagley & K. King, *Child Sexual Abuse: The Search for Healing* 2 (1990).

It has been estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered “seriously disturbed.” A. Lurigio, M. Jones, & B. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 *Fed. Probation* 69, 70 (1995). Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide. Meister, *supra*, at 209; Broughton, *supra*, at 38; Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 *Am. J. Crim. L.* 79, 88 (1997).

The deep problems that afflict child-rape victims often become society’s problems as well. Commentators have noted correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. Broughton, *supra*, at 38; Glazer, *supra*, at 89; *Handbook on Sexual Abuse of Children* 7 (L. Walker ed. 1988). Victims of child rape are nearly 5 times more likely than nonvictims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution. *Ibid.*

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden.

Conclusory references to “decency,” “moderation,” “restraint,” “full progress,” and “moral judgment” are not enough.

## **2. Quantitative Assessments of Harm**

**Page 313. Add this material at the end of note 2.**

In June 2008, the Supreme Court in *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008), held that the Second Amendment protects an individual right to possess a firearm in the home for self-protection, though the Court left unclear the exact scope of this right or the level of constitutional scrutiny that must now be given to firearm prohibitions. Before *Heller*, federal sentencing enhancements for possessing a firearm in furtherance of a drug crime have been broadly applied – e.g., defendants would regularly be subject to such an enhancement based on the presence of a gun in an upstairs bedroom closet even if all the evidence of drug dealing was confined to a basement location. In the wake of *Heller*, should a defendant be able to challenge the application of any sentencing enhancement based on possession of a gun in the home if the defendant can make a credible claim that the gun was only kept for personal self-protection and was never used or brandished in connect with any criminal activity taking place in the home?

### ***C. The Role of Victims and the Community***

**Page 337. Add this material after note 5.**

6. *Should there be any limit on the manner or means of victim and community input at sentencing?* In our electronic age, there are a variety of manners and means through which victim and community input might be presented to a sentencing judge or jury. Especially in murder cases, the family of the victim may have a personal archive of pictures, songs, videos, websites, and other materials that might be presented to showcase the best features and best moments of the person killed. Should there be any limit on what kinds of visual materials can be presented at sentencing? If a community is struggling with the effects of a certain crime in a particular neighborhood, should prosecutors consider creating a neighborhood video to show to judges at the sentencing of any and all persons convicted on this crime?

In November 2008, the U.S. Supreme Court denied cert in a pair of cases from California in which defendants objected to the admission of videos during the sentencing phase of their capital trials. Justice John

Paul Stevens authored a separate statement in which he detailed the nature of these video's and explained his view that the Justices had an obligation to place legal limits on how victim impact evidence could be presented:

These two capital cases raise questions concerning the admissibility of so-called "victim impact evidence" during the penalty phase of a capital trial. The term is a misnomer in capital cases because the evidence does not describe the impact of the crime on the victim -- his or her death is always an element of the offense itself. Rather, it describes the impact of the victim's death on third parties, usually members of the victim's family.

In the first of these cases, petitioner Douglas Kelly was convicted of murdering 19-year-old Sara Weir. The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting Weir's life from her infancy until shortly before she was killed. The video was narrated by the victim's mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with a view of her grave marker and footage of people riding horseback in Alberta, Canada -- the "kind of heaven" in which her mother said she belonged.

In the second case, petitioner Samuel Zamudio was convicted of robbing and murdering Elmer and Gladys Benson. Two of the victims' daughters and two of their grandchildren testified about the effects of the murders on themselves and their families. During one daughter's testimony the prosecution played a video containing 118 photographs of the victims at various stages of their lives, including their childhood and early years of marriage. The photographs showed the couple raising their children, serving in the military, hunting, fishing, vacationing, bowling, celebrating holidays and family events, and attending recognition dinners for Gladys's community service. The last three photographs in the montage showed, in order, Gladys' grave marker with the inscription readable, Elmer's grave marker with the inscription readable, and both grave markers from a distance, each accompanied by a vase of flowers.

In both cases the California Supreme Court upheld the admissibility of the videos. The court explained that the video admitted during Kelly's sentencing "expressed no outrage" and contained no "clarion call for vengeance," but "just implied sadness." 42 Cal. 4th, at 797, 171 P. 3d, at 558. Similarly, the court held that the video shown during Zamudio's penalty phase proceedings was "not unduly emotional." 43 Cal. 4th, at 367, 181 P. 3d, at 137. Only one dissenting justice expressed any concern that the evidence had the potential to "imbue the proceedings with 'a legally impermissible level of emotion.'" 42 Cal. 4th, at 803, 171 P. 3d, at 575 (Moreno, J., concurring and dissenting). No member of the court suggested that the evidence

shed any light on the character of the offense, the character of the offender, or the defendant's moral culpability....

Victim impact evidence is powerful in any form. But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.

Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment....

These videos are a far cry from the written victim impact evidence at issue in [our prior cases]. In their form, length, and scope, they vastly exceed the "quick glimpse" the Court's majority contemplated when it [approved victim impact testimony in capital cases]. At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.

Kelly v. California, 129 S. Ct, 564, 564-67 (2008).

Do you agree with Justice Stevens that the Supreme Court "has a duty to consider" limits should be placed on the use of victim-related evidence in capital cases? From what constitutional provision does this duty stem? Does this duty only apply in capital cases where evidence is typically being presented to a sentencing jury, or should there be constitutional limits on the victim-related information that can be presented to a judge considering non-capital sentencing options? And what exactly should those limits be?

# Chapter 5

## Sentencing Inputs: The Offender's Record and Background

### *A. Prior Criminal Record*

**Page 357. Add this material after note 7.**

8. *Struggles to apply federal violent crime enhancements.* A number of different federal statutes and guidelines provide for significantly enhanced federal sentences when a defendant's prior offenses included a "crime of violence," or an "aggravated felony," or a "violent felony." Lower courts have been struggling for years to apply these terms, especially in the context of the federal Armed Career Criminal Act which provides for a mandatory minimum prison term of 15 years. Over the last three terms, the Supreme Court has gotten involved in trying to make sense of what kinds of prior state offenses should be considered a "violent felony." *See* *Chambers v. United States*, 129 S. Ct. 687 (2009) (considering whether a Illinois state conviction for failure to report to prison could qualify as a "violent felony"); *Begay v. United States*, 128 S. Ct. 1581 (2008) (considering whether a New Mexico state conviction for DUI could qualify as a "violent felony"); *James v. United States*, 550 U.S. 192 (2007) (considering whether a Florida state conviction for attempted burglary could qualify as a "violent felony").

### ***C. The Offender’s Character and Circumstances***

**Page 409. Add this material before Problem 5-5.**

#### **Brian Michael Gall v. United States 128 S. Ct. 586 (2007)**

STEVENS, J.

In two cases argued on the same day last Term we considered the standard that courts of appeals should apply when reviewing the reasonableness of sentences imposed by district judges. The first, *Rita v. United States*, 127 S. Ct. 2456 (2007), involved a sentence within the range recommended by the Federal Sentencing Guidelines; we held that when a district judge’s discretionary decision in a particular case accords with the sentence the United States Sentencing Commission deems appropriate “in the mine run of cases,” the court of appeals may presume that the sentence is reasonable.

The second case, *Claiborne v. United States*, involved a sentence below the range recommended by the Guidelines, and raised the converse question whether a court of appeals may apply a “proportionality test,” and require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances. We did not have the opportunity to answer this question because the case was mooted by Claiborne’s untimely death. We granted certiorari in the case before us today in order to reach that question, left unanswered last Term. We now hold that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard. We also hold that the sentence imposed by the experienced District Judge in this case was reasonable.

#### **I**

In February or March 2000, petitioner Brian Gall, a second-year college student at the University of Iowa, was invited by Luke Rinderknecht to join an ongoing enterprise distributing a controlled substance popularly known as “ecstasy.” Gall — who was then a user of ecstasy, cocaine, and marijuana — accepted the invitation. During the ensuing seven months, Gall delivered ecstasy pills, which he received from Rinderknecht, to other conspirators, who then sold them to consumers. He netted over \$30,000.

A month or two after joining the conspiracy, Gall stopped using ecstasy. A few months after that, in September 2000, he advised Rinderknecht and other co-conspirators that he was withdrawing from the conspiracy. He has not sold illegal drugs of any kind since. He has, in the words of the District Court, “self-rehabilitated.” He graduated from the University of Iowa in 2002, and moved first to Arizona, where he obtained a job in the construction industry, and later to Colorado, where he earned \$18 per hour as a master carpenter. He has not used any illegal drugs since graduating from college.

After Gall moved to Arizona, he was approached by federal law enforcement agents who questioned him about his involvement in the ecstasy distribution conspiracy. Gall admitted his limited participation in the distribution of ecstasy, and the agents took no further action at that time. On April 28, 2004 — approximately a year and a half after this initial interview, and three and a half years after Gall withdrew from the conspiracy — an indictment was returned in the Southern District of Iowa charging him and seven other defendants with participating in a conspiracy to distribute ecstasy, cocaine, and marijuana, that began in or about May 1996 and continued through October 30, 2002. The Government has never questioned the truthfulness of any of Gall’s earlier statements or contended that he played any role in, or had any knowledge of, other aspects of the conspiracy described in the indictment. When he received notice of the indictment, Gall moved back to Iowa and surrendered to the authorities. While free on his own recognizance, Gall started his own business in the construction industry, primarily engaged in subcontracting for the installation of windows and doors. In his first year, his profits were over \$2,000 per month.

Gall entered into a plea agreement with the Government, stipulating that he was “responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana.” In the agreement, the Government acknowledged that by “on or about September of 2000,” Gall had communicated his intent to stop distributing ecstasy to Rinderknecht and other members of the conspiracy. The agreement further provided that recent changes in the Guidelines that enhanced the recommended punishment for distributing ecstasy were not applicable to Gall because he had withdrawn from the conspiracy prior to the effective date of those changes.

In her presentence report, the probation officer concluded that Gall had no significant criminal history; that he was not an organizer, leader, or manager; and that his offense did not involve the use of any weapons. The report stated that Gall had truthfully provided the Government with all of the evidence he had concerning the alleged offenses, but that his

evidence was not useful because he provided no new information to the agents. The report also described Gall's substantial use of drugs prior to his offense and the absence of any such use in recent years. The report recommended a sentencing range of 30 to 37 months of imprisonment.

The record of the sentencing hearing held on May 27, 2005, includes a "small flood" of letters from Gall's parents and other relatives, his fiance, neighbors, and representatives of firms doing business with him, uniformly praising his character and work ethic. The transcript includes the testimony of several witnesses and the District Judge's colloquy with the Assistant United States Attorney (AUSA) and with Gall. The AUSA did not contest any of the evidence concerning Gall's law-abiding life during the preceding five years, but urged that "the Guidelines are appropriate and should be followed," and requested that the court impose a prison sentence within the Guidelines range. He mentioned that two of Gall's co-conspirators had been sentenced to 30 and 35 months, respectively, but upon further questioning by the District Court, he acknowledged that neither of them had voluntarily withdrawn from the conspiracy.

The District Judge sentenced Gall to probation for a term of 36 months. In addition to making a lengthy statement on the record, the judge filed a detailed sentencing memorandum explaining his decision, and provided the following statement of reasons in his written judgment:

The Court determined that, considering all the factors under 18 U.S.C. 3553(a), the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, which was sufficient, but not greater than necessary to serve the purposes of sentencing.

At the end of both the sentencing hearing and the sentencing memorandum, the District Judge reminded Gall that probation, rather than "an act of leniency," is a "substantial restriction of freedom." In the memorandum, he emphasized:

[Gall] will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization

from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.

Finally, the District Judge explained why he had concluded that the sentence of probation reflected the seriousness of Gall's offense and that no term of imprisonment was necessary:

Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life.

## II

The Court of Appeals reversed and remanded for resentencing. [It] held that a sentence outside of the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed." Characterizing the difference between a sentence of probation and the bottom of Gall's advisory Guidelines range of 30 months as "extraordinary" because it amounted to "a 100% downward variance," the Court of Appeals held that such a variance must be-and here was not-supported by extraordinary circumstances.

Rather than making an attempt to quantify the value of the justifications provided by the District Judge, the Court of Appeals identified what it regarded as five separate errors in the District Judge's reasoning: (1) He gave "too much weight to Gall's withdrawal from the conspiracy"; (2) given that Gall was 21 at the time of his offense, the District Judge erroneously gave "significant weight" to studies showing impetuous behavior by persons under the age of 18; (3) he did not "properly weigh" the seriousness of Gall's offense; (4) he failed to consider whether a sentence of probation would result in "unwarranted" disparities; and (5) he placed "too much emphasis on Gall's post-offense rehabilitation." As we shall explain, we are not persuaded that these factors, whether viewed separately or in the aggregate, are sufficient to support the conclusion that the District Judge abused his discretion. As a

preface to our discussion of these particulars, however, we shall explain why the Court of Appeals' rule requiring "proportional" justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*.

### III

In *Booker* we invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1), which made the Sentencing Guidelines mandatory, and § 3742(e), which directed appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.

In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a 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.

As an initial matter, the approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range. Even the Government has acknowledged that such a presumption would not be consistent with *Booker*.

The mathematical approach also suffers from infirmities of application. On one side of the equation, deviations from the Guidelines range will always appear more extreme-in percentage terms-when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the

Guidelines gives no weight to the “substantial restriction of freedom” involved in a term of supervised release or probation.

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual “special conditions” imposed by the court. Gall, for instance, may not patronize any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer.

On the other side of the equation, the mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications. Does withdrawal from a conspiracy justify more or less than, say, a 30% reduction? Does it matter that the withdrawal occurred several years ago? Is it relevant that the withdrawal was motivated by a decision to discontinue the use of drugs and to lead a better life? What percentage, if any, should be assigned to evidence that a defendant poses no future threat to society, or to evidence that innocent third parties are dependent on him? The formula is a classic example of attempting to measure an inventory of apples by counting oranges.

Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted “proportional review”—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.

As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is

warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Practical considerations also underlie this legal principle. “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.” Brief for Federal Public and Community Defenders et al. as Amici Curiae 16. “The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.” Moreover, district courts “have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.” *Koon v. United States*, 518 U.S. 81, 98 (1996).

“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” The uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions. As we shall now explain, the opinion of the Court of Appeals in this case does not reflect the requisite deference and does not support the conclusion that the District Court abused its discretion.

#### IV

As an initial matter, we note that the District Judge committed no significant procedural error. He correctly calculated the applicable Guidelines range, allowed both parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning. The Court of Appeals found that the District Judge erred in failing to give proper weight to the seriousness of the offense, as required by § 3553(a)(2)(A), and failing to consider whether a sentence of probation would create unwarranted disparities, as required by § 3553(a)(6). We disagree.

Section 3553(a)(2)(A) requires judges to consider “the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” The Court of Appeals concluded that “the district court did not properly weigh the seriousness of Gall’s offense” because it “ignored the serious health risks ecstasy poses.” Contrary to the Court of Appeals’ conclusion, the District Judge plainly did consider the seriousness of the offense. It is true that the District Judge did not make specific reference to the (unquestionably significant) health risks posed by ecstasy, but the prosecutor did not raise ecstasy’s effects at the sentencing hearing. Had the prosecutor raised the issue, specific discussion of the point might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative.

The Government’s legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law is at least to some extent offset by the fact that seven of the eight defendants in this case have been sentenced to significant prison terms. Moreover, the unique facts of Gall’s situation provide support for the District Judge’s conclusion that, in Gall’s case, “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.”

Section 3553(a)(6) requires judges to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The Court of Appeals stated that “the record does not show that the district court considered whether a sentence of probation would result in unwarranted disparities.” As with the seriousness of the offense conduct, avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities.

[It] is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. The District Judge regarded Gall’s voluntary withdrawal as a reasonable basis for giving him a less severe sentence than the three codefendants discussed with the AUSA, who neither withdrew from the conspiracy nor rehabilitated themselves as Gall had done. We also note that neither the Court of Appeals nor the Government has called our attention to a comparable defendant who received a more severe sentence.

Since the District Court committed no procedural error, the only question for the Court of Appeals was whether the sentence was reasonable—i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of probation and justified a substantial deviation from the Guidelines range. As we shall now explain, the sentence was reasonable. The Court of Appeals’ decision to the contrary was incorrect and failed to demonstrate the requisite deference to the District Judge’s decision.

## V

The Court of Appeals gave virtually no deference to the District Court’s decision that the § 3553(a) factors justified a significant variance in this case. Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review of the facts presented and determined that, in its view, the degree of variance was not warranted.

The Court of Appeals thought that the District Court “gave too much weight to Gall’s withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines.” This criticism is flawed in that it ignores the critical relevance of Gall’s voluntary withdrawal, a circumstance that

distinguished his conduct not only from that of all his codefendants, but from the vast majority of defendants convicted of conspiracy in federal court. The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. See 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

The Court of Appeals thought the District Judge "gave significant weight to an improper factor" when he compared Gall's sale of ecstasy when he was a 21-year-old adult to the "impetuous and ill-considered" actions of persons under the age of 18. The appellate court correctly observed that the studies cited by the District Judge do not explain how Gall's "specific behavior in the instant case was impetuous or ill-considered."

In that portion of his sentencing memorandum, however, the judge was discussing the "character of the defendant," not the nature of his offense. He noted that Gall's criminal history included a ticket for underage drinking when he was 18 years old and possession of marijuana that was contemporaneous with his offense in this case. In summary, the District Judge observed that all of Gall's criminal history "including the present offense, occurred when he was twenty-one-years old or younger" and appeared "to stem from his addictions to drugs and alcohol." The District Judge appended a long footnote to his discussion of Gall's immaturity. The footnote includes an excerpt from our opinion in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), which quotes a study stating that a lack of maturity and an undeveloped sense of responsibility are qualities that "often result in impetuous and ill-considered actions." The District Judge clearly stated the relevance of these studies in the opening and closing sentences of the footnote:

Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. [The recent National Institute of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.

Given the dramatic contrast between Gall's behavior before he joined the conspiracy and his conduct after withdrawing, it was not unreasonable for the District Judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future.

Finally, the Court of Appeals thought that, even if Gall's rehabilitation was dramatic and permanent, a sentence of probation for participation as a middleman in a conspiracy distributing 10,000 pills of ecstasy "lies outside the range of choice dictated by the facts of the case." If the Guidelines were still mandatory, and assuming the facts did not justify a Guidelines-based downward departure, this would provide a sufficient basis for setting aside Gall's sentence because the Guidelines state that probation alone is not an appropriate sentence for comparable offenses. But the Guidelines are not mandatory, and thus the "range of choice dictated by the facts of the case" is significantly broadened. Moreover, the Guidelines are only one of the factors to consider when imposing sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment.

We also note that the Government did not argue below, and has not argued here, that a sentence of probation could never be imposed for a crime identical to Gall's. Indeed, it acknowledged that probation could be permissible if the record contained different—but in our view, no more compelling—mitigating evidence. Arg. 37-38 (stating that probation could be an appropriate sentence, given the exact same offense, if "there are compelling family circumstances where individuals will be very badly hurt in the defendant's family if no one is available to take care of them").

The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. See 18 U.S.C. §§ 3553(a)(2)(B), (C).

The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due

deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed.

SOUTER, J., concurring.

I join the Court's opinion here, as I do in today's companion case of *Kimbrough v. United States*, which follow *United States v. Booker*, and *Rita v. United States*. My disagreements with holdings in those earlier cases are not the stuff of formally perpetual dissent, but I see their objectionable points hexing our judgments today. After *Booker*'s remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.

ALITO, J., dissenting.

The fundamental question in this case is whether, under the remedial decision in *United States v. Booker*, a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision. I would answer that question in the affirmative and would therefore affirm the decision of the Court of Appeals.

## I

In *Booker*, a bare majority held that the Sentencing Reform Act of 1984 violated the Sixth Amendment insofar as it required district judges to follow the United States Sentencing Guidelines, but another bare majority held that this defect could be remedied by excising the two statutory provisions, 18 U.S.C. §§ 3553(b)(1) and 3742(e), that made compliance with the Guidelines mandatory. As a result of these two holdings, the lower federal courts were instructed that the Guidelines must be regarded as “effectively advisory,” and that individual sentencing decisions are subject to appellate review for “reasonableness.” The *Booker* remedial opinion did not explain exactly what it meant by a system of “advisory” guidelines or by “reasonableness” review, and the opinion is open to different interpretations.... [The best] reading is that sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance.

[At various] points in the [*Booker*] remedial opinion, the Court expressed confidence that appellate review for reasonableness would help to avoid “excessive sentencing disparities” and “would tend to iron out sentencing differences.” Indeed, a major theme of the remedial opinion, as well as our decision last Term in *Rita v. United States* was that the post-*Booker* sentencing regime would still promote the Sentencing Reform Act’s goal of reducing sentencing disparities.

It is unrealistic to think this goal can be achieved over the long term if sentencing judges need only give lip service to the Guidelines. The other sentencing factors set out in § 3553(a) are so broad that they impose few real restraints on sentencing judges. Thus, if judges are obligated to do no more than consult the Guidelines before deciding upon the sentence that is, in their independent judgment, sufficient to serve the other § 3553(a) factors, federal sentencing will not “move ... in Congress’ preferred direction.” On the contrary, sentencing disparities will gradually increase. Appellate decisions affirming sentences that diverge from the Guidelines (such as the Court’s decision today) will be influential, and the sentencing habits developed during the pre-*Booker* era will fade.

Finally, in reading the *Booker* remedial opinion, we should not forget the decision’s constitutional underpinnings. *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. The Court has held that (at least under a mandatory guidelines system) a defendant has the right to have a jury, not a judge, find facts that increase the defendant’s authorized sentence. It is telling that the rules set out in the Court’s opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner’s sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court’s opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray....

I recognize that the Court is committed to the *Blakely-Booker* line of cases, but we are not required to continue along a path that will take us further and further off course. Because the *Booker* remedial opinion may be read to require sentencing judges to give weight to the Guidelines, I would adopt that interpretation and thus minimize the gap between what the Sixth Amendment requires and what our cases have held.

## II

Read fairly, the opinion of the Court of Appeals holds that the District Court did not properly exercise its sentencing discretion because it did not give sufficient weight to the policy decisions reflected in the

Guidelines. Petitioner was convicted of a serious crime, conspiracy to distribute “ecstasy.” He distributed thousands of pills and made between \$30,000 and \$40,000 in profit. Although he eventually left the conspiracy, he did so because he was worried about apprehension. The Sentencing Guidelines called for a term of imprisonment of 30 to 37 months, but the District Court imposed a term of probation....

If the question before us was whether a reasonable jurist could conclude that a sentence of probation was sufficient in this case to serve the purposes of punishment set out in 18 U.S.C. § 3553(a)(2), the District Court’s decision could not be disturbed. But because I believe that sentencing judges must still give some significant weight to the Guidelines sentencing range, the Commission’s policy statements, and the need to avoid unwarranted sentencing disparities, I agree with the Eighth Circuit that the District Court did not properly exercise its discretion.

Appellate review for abuse of discretion is not an empty formality. A decision calling for the exercise of judicial discretion “hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.” And when a trial court is required by statute to take specified factors into account in making a discretionary decision, the trial court must be reversed if it “ignored or slighted a factor that Congress has deemed pertinent.”

Here, the District Court “slighted” the factors set out in 18 U.S.C. §§ 3553(a)(3), (4), and (5)—namely, the Guidelines sentencing range, the Commission’s policy statements, and the need to avoid unwarranted sentencing disparities. Although the Guidelines called for a prison term of at least 30 months, the District Court did not require any imprisonment—not one day. The opinion of the Court makes much of the restrictions and burdens of probation, but in the real world there is a huge difference between imprisonment and probation. If the District Court had given any appreciable weight to the Guidelines, the District Court could not have sentenced petitioner to probation without very strong countervailing considerations.

The court listed five considerations as justification for a sentence of probation: (1) petitioner’s “voluntary and explicit withdrawal from the conspiracy,” (2) his “exemplary behavior while on bond,” (3) “the support manifested by family and friends,” (4) “the lack of criminal history, especially a complete lack of any violent criminal history,” (5) and his age at the time of the offense, 21.

Two of the considerations that the District Court cited — “the support manifested by family and friends” and his age — amounted to a direct rejection of the Sentencing Commission’s authority to decide the most basic issues of sentencing policy. In the Sentencing Reform Act,

Congress required the Sentencing Commission to consider and decide whether certain specified factors—including “age,” “education,” “previous employment record,” “physical condition,” “family ties and responsibilities,” and “community ties”—“have any relevance to the nature [and] extent ... of an appropriate sentence.” 28 U.S.C. § 994(d). These factors come up with great frequency, and judges in the pre-Sentencing Reform Act era disagreed regarding their relevance. Indeed, some of these factors were viewed by some judges as reasons for increasing a sentence and by others as reasons for decreasing a sentence. For example, if a defendant had a job, a supportive family, and friends, those factors were sometimes viewed as justifying a harsher sentence on the ground that the defendant had squandered the opportunity to lead a law-abiding life. Alternatively, those same factors were sometimes viewed as justifications for a more lenient sentence on the ground that a defendant with a job and a network of support would be less likely to return to crime. If each judge is free to implement his or her personal views on such matters, sentencing disparities are inevitable.

In response to Congress’ direction to establish uniform national sentencing policies regarding these common sentencing factors, the Sentencing Commission issued policy statements concluding that “age,” “family ties,” and “community ties” are relevant to sentencing only in unusual cases. See United States Sentencing Commission, Guidelines Manual §§ 5H1.1 (age), 5H1.6 (family and community ties). The District Court in this case did not claim that there was anything particularly unusual about petitioner’s family or community ties or his age, but the court cited these factors as justifications for a sentence of probation. Although the District Court was obligated to take into account the Commission’s policy statements and the need to avoid sentencing disparities, the District Court rejected Commission policy statements that are critical to the effort to reduce such disparities.

The District Court relied on petitioner’s lack of criminal history, but criminal history (or the lack thereof) is a central factor in the calculation of the Guidelines range. Petitioner was given credit for his lack of criminal history in the calculation of his Guidelines sentence. Consequently, giving petitioner additional credit for this factor was nothing more than an expression of disagreement with the policy determination reflected in the Guidelines range.

The District Court mentioned petitioner’s “exemplary behavior while on bond,” but this surely cannot be regarded as a weighty factor.

Finally, the District Court was plainly impressed by petitioner’s “voluntary and explicit withdrawal from the conspiracy.” As the Government argues, the legitimate strength of this factor is diminished by petitioner’s motivation in withdrawing. He did not leave the

conspiracy for reasons of conscience, and he made no effort to stop the others in the ring. He withdrew because he had become afraid of apprehension. While the District Court was within its rights in regarding this factor and petitioner's "self-rehabilitat[ion]," as positive considerations, they are not enough, in light of the Guidelines' call for a 30-to 37-month prison term, to warrant a sentence of probation.

## Notes

1. *The debate over offender circumstances in federal sentencing.* Are the majority and the dissent in *Gall* really debating how much weight should be given to the guideline sentencing range in this case or rather whether to respect the Sentencing Commission's basic policy decision to afford offender-related circumstances no role in the calculation of guideline ranges? In light of the provisions of 3553(a), must a district court now give more weight to offender circumstances than do the guidelines?

Are there particular offender circumstances that arose in *Gall* that should be a more regularized and quantified aspect of guideline sentencing? If you were a member of the U.S. Sentencing Commission, would you consider as a response to *Gall* a proposal to have a formal reduction to the guideline range based on, for example, voluntary withdrawal from a conspiracy?

2. *New U.S. Sentencing Commission policy statements on offender circumstances.* Perhaps in part in response to *Gall* and to an increasing number of district judges referencing offender circumstances when deciding to sentence below applicable guideline ranges after *Booker*, the U.S. Sentencing Commission during its 2010 amendment cycle proposed revisions to the policy statements in Chapter Five, Part H, addressing specific offender characteristics. These amendments change the language in various policy statements that had deemed age, mental and emotional conditions, physical condition, and military service "not ordinarily relevant" to deciding whether a sentence should include a departure outside the guidelines. The new proposed guidelines policy statements, which will become effective on November 1, 2010 (absent congressional intervention), now provides the factors of age, mental and emotional conditions, physical condition, and military service "may be relevant" in determining whether a departure is warranted if these factors are "present to an unusual degree and distinguish the case from the typical cases." The policy statements for other commonly discussed offender circumstances, factors such as family circumstances and community service, were not amended and they remain subject to the

Sentencing Commission’s admonition that such factors are “not ordinarily relevant” in determining whether a departure is warranted.

Are there any special facets of the particular offender circumstances of age, mental and emotional conditions, physical condition, and military service that now justify this change in the guidelines’ policy statements? Do you think the new language in these policy statements will have a significant impact how district judges make their sentencing judgments? Do you think there are certain types of offenders, or defendants who have committed certain types of offenses, who will be especially likely to press arguments for departures based on these new guidelines? Is there a risk that those defendants with the resources to hire psychologists to produce a report asserting the defendant suffers from mental and emotional conditions will benefit disproportionately from these new guidelines?

3. *Prosecutorial discretion and offender circumstances.* Why did the United States Attorney in Iowa charge Brian Gall? Why did this office pursue an appeal after the district court in a reasoned opinion decided that a term of probation was a sufficient sentence? Might one test of whether a substantial below guideline sentence is reasonable by asking whether a prosecutor could or would plausibly decline to charge the crime at all and/or whether a prosecutor might have readily accepted a plea deal to the sentencing term ultimately imposed by the district judge?

**Page 409. Add this material right after Problem 5-5.**

### **Jason Pepper v. United States 131 S. Ct. 1229 (2011)**

**SOTOMAYOR, J.\***

This Court has long recognized that sentencing judges “exercise a wide discretion” in the types of evidence they may consider when imposing sentence and that “[h]ighly relevant-if not essential-to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Williams v. New York*, 337 U.S. 241 (1949). Congress codified this principle at 18 U.S.C. § 3661, which provides that “[n]o limitation shall

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\* Chief Justice Roberts and Justices Scalia, Kennedy, and Ginsburg joined this opinion; Justices Breyer and Alito joined Part III.

be placed on the information” a sentencing court may consider “concerning the [defendant's] background, character, and conduct,” and at § 3553(a), which sets forth certain factors that sentencing courts must consider, including “the history and characteristics of the defendant,” § 3553(a)(1). The United States Court of Appeals for the Eighth Circuit concluded in this case that the District Court, when resentencing petitioner after his initial sentence had been set aside on appeal, could not consider evidence of petitioner's rehabilitation since his initial sentencing. That conclusion conflicts with longstanding principles of federal sentencing law and Congress' express directives in §§ 3661 and 3553(a). Although a separate statutory provision, § 3742(g)(2), prohibits a district court at resentencing from imposing a sentence outside the Federal Sentencing Guidelines range except upon a ground it relied upon at the prior sentencing—thus effectively precluding the court from considering postsentencing rehabilitation for purposes of imposing a non-Guidelines sentence—that provision did not survive our holding in *United States v. Booker*, 543 U.S. 220 (2005), and we expressly invalidate it today.

We hold that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range....

## I

In October 2003, petitioner Jason Pepper was arrested and charged with conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846. After pleading guilty, Pepper appeared for sentencing before then-Chief Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa. Pepper's sentencing range under the Guidelines was 97 to 121 months. The Government moved for a downward departure pursuant to USSG § 5K1.1 based on Pepper's substantial assistance and recommended a 15 percent downward departure. The District Court, however, sentenced Pepper to a 24-month prison term, resulting in an approximately 75 percent downward departure from the low end of the Guidelines range, to be followed by five years of supervised release. The Government appealed Pepper's sentence, and in June 2005, the Court of Appeals for the Eighth Circuit reversed and remanded for resentencing in light of our intervening decision in *Booker*. (*Pepper I*)(2005). Pepper completed his 24-month sentence three days after *Pepper I* was issued and began serving his term of supervised release.

In May 2006, the District Court conducted a resentencing hearing

and heard from three witnesses. In his testimony, Pepper first recounted that while he had previously been a drug addict, he successfully completed a 500-hour drug treatment program while in prison and he no longer used any drugs. Pepper then explained that since his release from prison, he had enrolled at a local community college as a full-time student and had earned A's in all of his classes in the prior semester. Pepper also testified that he had obtained employment within a few weeks after being released from custody and was continuing to work part-time while attending school. Pepper confirmed that he was in compliance with all the conditions of his supervised release and described his changed attitude since his arrest. (“[M]y life was basically headed to either where—I guess where I ended up, in prison, or death. Now I have some optimism about my life, about what I can do with my life. I'm glad that I got this chance to try again I guess you could say at a decent life .... My life was going nowhere before, and I think it's going somewhere now”).

Pepper's father testified that he had virtually no contact with Pepper during the 5-year period leading up to his arrest. Pepper's drug treatment program, according to his father, “truly sobered him up” and “made his way of thinking change.” He explained that Pepper was now “much more mature” and “serious in terms of planning for the future,” and that as a consequence, he had re-established a relationship with his son.

Finally, Pepper's probation officer testified that, in his view, a 24-month sentence would be reasonable in light of Pepper's substantial assistance, postsentencing rehabilitation, and demonstrated low risk of recidivism. The probation officer also prepared a sentencing memorandum that further set forth the reasons supporting his recommendation for a 24-month sentence.

The District Court adopted as its findings of fact the testimony of the three witnesses and the probation officer's sentencing memorandum. The court granted a 40 percent downward departure based on Pepper's substantial assistance, reducing the bottom of the Guidelines range from 97 to 58 months. The court then granted a further 59 percent downward variance based on, *inter alia*, Pepper's rehabilitation since his initial sentencing.<sup>3</sup> The court sentenced Pepper to 24 months of imprisonment, concluding that “it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send this defendant back to prison.”

The Government again appealed Pepper's sentence, and the Court of

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<sup>3</sup> The court also cited Pepper's lack of a violent history and, to a lesser extent, the need to avoid unwarranted sentencing disparity with Pepper's co-conspirators.

Appeals again reversed and remanded for resentencing. (*Pepper II*)(2007). The court concluded that, while it was “a close call, [it could not] say the district court abused its discretion” by granting the 40 percent downward departure for substantial assistance. The court found the further 59 percent downward variance, however, to be an abuse of discretion. In doing so, the court held that Pepper’s “post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance.” The court stated that evidence of postsentencing rehabilitation “ ‘is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing,’ ” and permitting courts to consider post-sentencing rehabilitation at resentencing “would create unwarranted sentencing disparities and inject blatant inequities into the sentencing process.”<sup>4</sup> The Court of Appeals directed that the case be assigned to a different district judge for resentencing.

After the Court of Appeals' mandate issued, Pepper's case was reassigned on remand to Chief Judge Linda R. Reade. In July 2007, Chief Judge Reade issued an order on the scope of the remand from *Pepper II*, stating that “[t]he court will not consider itself bound to reduce [Pepper's] advisory Sentencing Guidelines range by 40% pursuant to USSG § 5K1.1.” In the meantime, Pepper petitioned this Court for a writ of certiorari, and in January 2008, we granted the petition, vacated the judgment in *Pepper II*, and remanded the case to the Court of Appeals for further consideration in light of *Gall v. United States*, 552 U.S. 38 (2007).

On remand, the Court of Appeals held that *Gall* did not alter its prior conclusion that “post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance.” The court again reversed the sentence and remanded for resentencing.

In October 2008, Chief Judge Reade convened Pepper's second resentencing hearing. Pepper informed the court that he was still attending school and was now working as a supervisor for the night crew at a warehouse retailer, where he was recently selected by management as “associate of the year” and was likely to be promoted the following January. Pepper also stated that he had recently married and was now supporting his wife and her daughter. Pepper's father reiterated that Pepper was moving forward in both his career and his family life and that he remained in close touch with his son.

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<sup>4</sup> The Court of Appeals also held that the District Court “further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation.”

In December 2008, Chief Judge Reade issued a sentencing memorandum. Noting that the remand language of *Pepper III* was nearly identical to the language in *Pepper II*, the court again observed that it was “not bound to reduce [Pepper's] advisory Sentencing Guidelines range by 40%” for substantial assistance and concluded that Pepper was entitled only to a 20 percent downward departure because the assistance was “timely, helpful and important” but “in no way extraordinary.” The court also rejected Pepper's request for a downward variance based on, *inter alia*, his postsentencing rehabilitation.

The District Court reconvened Pepper's resentencing hearing in January 2009. The court's decision to grant a 20 percent downward departure for substantial assistance resulted in an advisory Guidelines range of 77 to 97 months. The court also granted the Government's motion under Rule 35(b) of the Federal Rules of Criminal Procedure to account for investigative assistance Pepper provided after he was initially sentenced. The court imposed a 65-month term of imprisonment, to be followed by 12 months of supervised release.<sup>5</sup>

The Court of Appeals affirmed Pepper's 65-month sentence. (*Pepper IV*)(2009). As relevant here, the Court of Appeals rejected Pepper's argument that the District Court erred in refusing to consider his postsentencing rehabilitation. The court acknowledged that “Pepper made significant progress during and following his initial period of imprisonment” and “commend[ed] Pepper on the positive changes he has made in his life,” but concluded that Pepper's argument was foreclosed by Circuit precedent holding that “post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance.”...

We granted Pepper's petition for a writ of certiorari to decide ...whether a district court, after a defendant's sentence has been set aside on appeal, may consider evidence of a defendant's postsentencing rehabilitation to support a downward variance when resentencing the defendant, a question that has divided the Courts of Appeals...<sup>6</sup> We now

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<sup>5</sup> After the District Court resentenced Pepper to 65 months' imprisonment, Pepper was returned to federal custody. On July 22, 2010, after we granted Pepper's petition for a writ of certiorari, the District Court granted his motion for release pending disposition of the case here.

<sup>6</sup> Compare, *e.g.*, *United States v. Lorenzo*, 471 F.3d 1219, 1221 (C.A.11 2006) (*per curiam*) (precluding consideration of postsentencing rehabilitative conduct); *United States v. Sims*, 174 F.3d 911, 913 (C.A.8 1999) (same), with *United States v. Lloyd*, 469 F.3d 319, 325 (C.A.3 2006) (permitting consideration of postsentencing rehabilitation in exceptional cases); *United States v. Hughes*, 401 F.3d 540, 560, n. 19 (C.A.4 2005) (instructing district court to adjust Guidelines calculation on remand “if new circumstances have arisen or events occurred since [defendant] was sentenced that impact the range

vacate the Eighth Circuit's ruling....

## II

“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81 (1996). Underlying this tradition is the principle that “the punishment should fit the offender and not merely the crime.” *Williams*, 337 U.S., at 247.

Consistent with this principle, we have observed that “both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” *Williams*. In particular, we have emphasized that “[h]ighly relevant-if not essential-to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.” Permitting sentencing courts to consider the widest possible breadth of information about a defendant “ensures that the punishment will suit not merely the offense but the individual defendant.”

In 1970, Congress codified the “longstanding principle that sentencing courts have broad discretion to consider various kinds of information” at 18 U.S.C. § 3577 (1970 ed.). *United States v. Watts*, 519 U.S. 148 (*per curiam*). Section 3577 (1970 ed.) provided:

“*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” (Emphasis added.)

In the Sentencing Reform Act of 1984 (SRA), Congress effected fundamental changes to federal sentencing by creating the Federal Sentencing Commission and introducing the Guidelines scheme. In doing so, however, Congress recodified § 3577 without change at § 3661. The Sentencing Commission, moreover, expressly incorporated § 3661 in the Guidelines:

“In determining the sentence to impose within the guideline

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prescribed by the guidelines”).

range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.” USSG § 1B1.4 (2010) (emphasis added).

Both Congress and the Sentencing Commission thus expressly preserved the traditional discretion of sentencing courts to “conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.”

The SRA did constrain sentencing courts' discretion in important respects, most notably by making the Guidelines mandatory and by specifying various factors that courts must consider in exercising their discretion. In our seminal decision in *Booker*, we held that where facts found by a judge by a preponderance of the evidence increased the applicable Guidelines range, treating the Guidelines as mandatory in those circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt. Our remedial opinion in *Booker* invalidated two offending provisions in the SRA, (invalidating 18 U.S.C. §§ 3553(b)(1), 3742(e)), and instructed the district courts to treat the Guidelines as “effectively advisory.”

Our post-*Booker* opinions make clear that, although a sentencing court must “give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.” *Kimbrough v. United States*, 552 U.S. 85 (2007). Accordingly, although the “Guidelines should be the starting point and the initial benchmark,” district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for “reasonableness.” *Gall*, 552 U.S., at 49-51. This sentencing framework applies both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal.

In light of the federal sentencing framework described above, we think it clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.

Preliminarily, Congress could not have been clearer in directing that “[n]o limitation ... be placed on the information concerning the background, character, and conduct” of a defendant that a district court

may “receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. The plain language of § 3661 makes no distinction between a defendant's initial sentencing and a subsequent resentencing after a prior sentence has been set aside on appeal. We have recognized that “the broad language of § 3661” does not provide “any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.” A categorical bar on the consideration of postsentencing rehabilitation evidence would directly contravene Congress' expressed intent in § 3661.

In addition, evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to “the history and characteristics of the defendant.” § 3553(a)(1). Such evidence may also be pertinent to “the need for the sentence imposed” to serve the general purposes of sentencing set forth in § 3553(a)(2)-in particular, to “afford adequate deterrence to criminal conduct,” “protect the public from further crimes of the defendant,” and “provide the defendant with needed educational or vocational training ... or other correctional treatment in the most effective manner.” §§ 3553(a)(2)(B)-(D). Postsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under § 3553(a) to “impose a sentence sufficient, but not greater than necessary” to comply with the sentencing purposes set forth in § 3553(a)(2).

As the original sentencing judge recognized, the extensive evidence of Pepper's rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence in this case. Most fundamentally, evidence of Pepper's conduct since his release from custody in June 2005 provides the most up-to-date picture of Pepper's “history and characteristics.” At the time of his initial sentencing in 2004, Pepper was a 25-year-old drug addict who was unemployed, estranged from his family, and had recently sold drugs as part of a methamphetamine conspiracy. By the time of his second resentencing in 2009, Pepper had been drug-free for nearly five years, had attended college and achieved high grades, was a top employee at his job slated for a promotion, had re-established a relationship with his father, and was married and supporting his wife's daughter. There is no question that this evidence of Pepper's conduct since his initial sentencing constitutes a critical part of the “history and characteristics” of a defendant that Congress intended sentencing courts to consider.

Pepper's postsentencing conduct also sheds light on the likelihood that he will engage in future criminal conduct, a central factor that district courts must assess when imposing sentence. As recognized by

Pepper's probation officer, Pepper's steady employment, as well as his successful completion of a 500-hour drug treatment program and his drug-free condition, also suggest a diminished need for "educational or vocational training ... or other correctional treatment." § 3553(a)(2)(D). Finally, Pepper's exemplary postsentencing conduct may be taken as the most accurate indicator of "his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." Accordingly, evidence of Pepper's postsentencing rehabilitation bears directly on the District Court's overarching duty to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing.

In sum, the Court of Appeals' ruling prohibiting the District Court from considering any evidence of Pepper's postsentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives in §§ 3661 and 3553(a).

*Amicus* ... advances two principal arguments in defense of the Court of Appeals' ruling: (1) 18 U.S.C. § 3742(g)(2), which restricts the discretion of a resentencing court on remand to impose a non-Guidelines sentence, effectively forecloses consideration of a defendant's postsentencing rehabilitation; and (2) permitting district courts to consider postsentencing rehabilitation would defeat Congress' objectives under § 3553(a). We are not persuaded.

*Amicus'* main argument relies on 18 U.S.C. § 3742(g)(2).... That provision states that when a sentence is set aside on appeal, the district court to which the case is remanded:

shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

In operation, § 3742(g)(2) restricts the discretion of a district court on remand by precluding the court from imposing a sentence outside the Guidelines range except upon a "ground of departure" that was expressly relied upon in the prior sentencing and upheld on appeal. *Amicus* thus correctly contends that, on its face, § 3742(g)(2) effectively forecloses a resentencing court from considering evidence of a defendant's postsentencing rehabilitation for purposes of imposing a non-Guidelines

sentence because, as a practical matter, such evidence did not exist at the time of the prior sentencing. As the Government concedes, however, § 3742(g)(2) is invalid after *Booker*....

We did not expressly mention § 3742(g)(2) in *Booker*, but the rationale we set forth in that opinion for invalidating §§ 3553(b)(1) and 3742(e) applies equally to § 3742(g)(2). As with those provisions, § 3742(g)(2) requires district courts effectively to treat the Guidelines as mandatory in an entire set of cases. Specifically, § 3742(g)(2) precludes a district court on remand from imposing a sentence “outside the applicable guidelines range” except upon a “ground of departure” that was expressly relied upon by the court at the prior sentencing and upheld by the court of appeals. In circumstances in which the district court did not rely upon such a departure ground at the prior sentencing, § 3742(g)(2) would require the court on remand to impose a sentence within the applicable Guidelines range, thus rendering the Guidelines effectively mandatory. Because in a large set of cases, judicial factfinding will increase the applicable Guidelines range beyond that supported solely by the facts established by the jury verdict (or guilty plea), requiring a sentencing judge on remand to apply the Guidelines range, as § 3742(g)(2) does, will often result in a Sixth Amendment violation for the reasons we explained in *Booker*. Accordingly, as with the provisions in *Booker*, the proper remedy here is to invalidate § 3742(g)(2)....

*Amicus*' next cluster of arguments focuses on Congress' sentencing objectives under § 3553(a). Preliminarily, *amicus* contends that even if § 3742(g)(2) is constitutionally invalid, that provision reflects a congressional policy determination that only information available at the time of original sentencing should be considered, and that this policy determination should inform our analysis of whether § 3553(a) permits consideration of postsentencing rehabilitation evidence. This argument, however, is based on a faulty premise.

Contrary to *amicus*' contention, § 3742(g)(2) does not reflect a congressional purpose to preclude consideration of evidence of postsentencing rehabilitation at resentencing. To be sure, § 3742(g)(2) has the incidental effect of limiting the weight a sentencing court may place on postsentencing rehabilitation by precluding the court from resentencing outside the Guidelines range on a “ground of departure” on which it did not previously rely. But on its face, nothing in § 3742(g)(2) prohibits a district court from considering postsentencing developments—including postsentencing rehabilitation—in selecting a sentence *within* the applicable Guidelines range. Section 3742(g)(2) also does not apply to resentencings that occur for reasons other than when a sentence is overturned on appeal and the case is remanded (*e.g.*, when a

sentence is set aside on collateral review under 28 U.S.C. § 2255). In such circumstances, § 3742(g)(2) does not restrict a district court at all, much less with respect to consideration of postsentencing developments. Accordingly, because we see no general congressional policy reflected in §3742(g)(2) to preclude resentencing courts from considering postsentencing information, that provision has no bearing on our analysis of whether §3553(a) permits consideration of evidence of postsentencing rehabilitation.

[E]vidence of postsentencing rehabilitation may be highly relevant to several of the sentencing factors that Congress has specifically instructed district courts to consider. *Amicus*, however, argues that consideration of postsentencing rehabilitation is inconsistent with two sentencing factors: §3553(a)(5), which directs sentencing courts to consider “any pertinent policy statement” of the Sentencing Commission, and §3553(a)(6), which requires courts to consider “the need to avoid unwarranted sentenc[ing] disparities among defendants with similar records who have been found guilty of similar conduct.”

With regard to §3553(a)(5), *amicus* points to the Sentencing Commission's policy statement in USSG §5K2.19, which provides that “[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense[,] are not an appropriate basis for a downward departure when resentencing the defendant for that offense.” According to *amicus*, that policy statement is “clear and unequivocal,” and as an exercise of the Sentencing Commission's “core function,” should be given effect.

To be sure, we have recognized that the Commission post-*Booker* continues to “fil[l] an important institutional role” because “[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” Accordingly, we have instructed that district courts must still give “respectful consideration” to the now-advisory Guidelines (and their accompanying policy statements). As *amicus* acknowledges, however, our post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views. That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.

[The court then critiqued and rejected the Commission's view in commentary that departures based on postsentencing rehabilitation would “(1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) [governing good time credit] and other statutory provisions for reducing the time to be served by an imprisoned

person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.”]

In a closely related vein, *amicus* argues that consideration of postsentencing rehabilitation is inconsistent with §3553(a)(6), which requires sentencing courts to consider the need to avoid unwarranted sentencing disparities.... But *amicus* points to no evidence, nor are we aware of any, suggesting that Congress enacted §3553(a)(6) out of a concern with disparities resulting from the normal trial and sentencing process. The differences in procedural opportunity that may result because some defendants are inevitably sentenced in error and must be resentenced are not the kinds of “unwarranted” sentencing disparities that Congress sought to eliminate under §3553(a)(6)....

Finally, we note that §§ 3553(a)(5) and (a)(6) describe only two of the seven sentencing factors that courts must consider in imposing sentence. At root, *amicus* effectively invites us to elevate two § 3553(a) factors above all others. We reject that invitation.

For the reasons stated above, we hold that the Court of Appeals erred in categorically precluding the District Court from considering evidence of Pepper's postsentencing rehabilitation after his initial sentence was set aside on appeal. District courts post-*Booker* may consider evidence of a defendant's postsentencing rehabilitation at resentencing and such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range....

On remand, the District Court should consider and give appropriate weight to [evidence of postsending rehabilitation], as well as any additional evidence concerning Pepper's conduct since his last sentencing in January 2009. Accordingly, we vacate the Eighth Circuit's judgment in respect to Pepper's sentence and remand the case for resentencing consistent with this opinion....

**BREYER, J., concurring in part and concurring in the judgment.**

.... Like the majority, I believe *Booker* requires us to hold 18 U.S.C. § 3742(g)(2) unconstitutional. And, like the majority, I believe that the law does not require a sentencing court to follow a Guideline policy statement that forbids taking account of postsentencing rehabilitation. United States Sentencing Commission, Guidelines Manual § 5K2.19 (Nov.2010) (USSG). I would emphasize, however, that this conclusion does not leave a sentencing court free to disregard the Guidelines at will. To the contrary, the law permits the court to disregard the Guidelines only where it is “reasonable” for a court to do so. And an appellate court must be guided by the basic sentencing objectives of the statutes that create the Guidelines in determining whether, in disregarding the Guidelines, the sentencing court has acted unreasonably....

[I]ndividualized sentencing is not the only relevant tradition. A just legal system seeks not only to treat different cases differently but also to treat like cases alike. Fairness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences. Indeed, when Congress enacted the sentencing statutes before us, it focused upon the unfair way in which federal sentencing failed to treat similar offenders similarly. And Congress wrote statutes designed primarily (though not exclusively) to bring about greater uniformity in sentencing....

**ALITO, J., concurring in part, concurring in the judgment in part, and dissenting in part.**

... I agree with the Court that the decision below cannot be affirmed on the basis of 18 U.S.C. § 3742(g), as *amicus* suggests. This provision was designed to function as part of the mandatory Guidelines scheme that the Court struck down in *United States v. Booker*. Although *amicus*' argument is ingenious, even the sort of surgery sanctioned in *Booker* cannot transform this provision into one that can survive in the post-*Booker* world.

I also concur in the judgment to the extent that it holds that the decision below regarding evidence of postsentencing rehabilitation must be reversed. That decision, which entirely precluded consideration of such evidence, was consistent with the policy statement in § 5K2.19 of the United States Sentencing Guidelines, but “[t]he *Booker* remedial decision ... does not permit a court of appeals to treat the Guidelines' policy decisions as binding.” *Kimbrough v. United States*, 552 U.S. 85 (2007) (ALITO, J., dissenting).

Under *Booker*, however, district judges are still required in almost all cases to give significant weight to the policy decisions embodied in the Federal Sentencing Guidelines. Congress delegated to the Sentencing Commission the authority to make policy decisions regarding federal sentencing, see 18 U.S.C. §§ 3553(a)(4), (5), and requiring judges to give significant weight to the Commission's policy decisions does not run afoul of the Sixth Amendment right that the mandatory Guidelines system was found to violate, *i.e.*, the right to have a jury make certain factual findings that are relevant to sentencing.

While I continue to believe that sentencing judges should be required to give significant weight to all Guidelines provisions and policy statements, the Court in *Kimbrough* held that sentencing judges may not be required to give weight to some unusual policy decisions....

Anyone familiar with the history of criminal sentencing in this country cannot fail to see the irony in the Court's praise for the sentencing scheme exemplified by *Williams v. New York*. By the time of the enactment of the Sentencing Reform Act in 1984, this scheme had

fallen into widespread disrepute. Under this system, each federal district judge was free to implement his or her individual sentencing philosophy, and therefore the sentence imposed in a particular case often depended heavily on the spin of the wheel that determined the judge to whom the case was assigned.

Some language in today's opinion reads like a paean to that old regime, and I fear that it may be interpreted as sanctioning a move back toward the system that prevailed prior to 1984. If that occurs, I suspect that the day will come when the irrationality of that system is once again seen, and perhaps then the entire *Booker* line of cases will be reexamined.

**THOMAS, J., dissenting.**

[Justice THOMAS dissented based on his belief that the *Booker* remedy should be limited to cases where there are actual Sixth Amendment violations, and because Pepper admitted facts that] would support a much longer sentence than the 65 months he received, there is no Sixth Amendment problem in this case....

Although this outcome would not represent my own policy choice, I am bound by the choices made by Congress and the Federal Sentencing Commission. Like the majority, I believe that postsentencing rehabilitation can be highly relevant to meaningful resentencing. In light of Pepper's success in escaping drug addiction and becoming a productive member of society, I do not see what purpose further incarceration would serve. But Congress made the Guidelines mandatory, see 18 U.S.C. § 3553(b)(1), and authorized USSG § 5K2.19. I am constrained to apply those provisions unless the Constitution prohibits me from doing so, and it does not here.]

# Chapter 6

## Procedure and Proof at Sentencing

### *A. Constitutional Sentencing Procedures: Trial Versus Sentencing*

**Page 467-68. Replace the end of note 2 with this material.**

In early 2008, the Supreme Court took up a case from Oregon presenting the issue of whether *Blakely* requires facts that permit a judge to impose consecutive sentences under state law must be proven to a jury. In a 5-4 decision authored by Justice Ginsburg, *Oregon v. Ice*, 129 S. Ct. 711 (2009), the Supreme Court declared that the Sixth Amendment, as construed in *Apprendi* and *Blakely*, should not be extended to preclude states from allowing judges to find those fact necessary to the imposition of consecutive sentences.

Intriguingly, two of the five Justices voting to limit the reach of *Apprendi* and *Blakely* in *Oregon v. Ice* were two of the Justices who were in the majority in those earlier cases: Justices Ginsburg and Stevens. This fact, and Court's emphasis in *Ice* on the traditional role of judges in finding certain types of sentencing facts, has led observers to conclude that now a majority of justices are prepared and perhaps even eager to restrict the reach of *Apprendi* and *Blakely* and may thus continue to rebuff efforts by defendants to extent the *Apprendi* rule to a range of sentencing-related factual findings that state and federal laws still call for judges to make.

## ***B. Procedural Realities***

**Page 491. Add this material before the notes.**

### **Jose Padilla v. Kentucky 130 S. Ct. 1473 (2010)**

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STEVENS, J.\*

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. . . . We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

#### I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. [Deportation] or removal is now virtually inevitable for a vast number of noncitizens

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\* Justices Breyer, Ginsburg, Kennedy, and Sotomayor joined this opinion. – Eds.

convicted of crimes.

[In the Immigration and Nationality Act of 1917, Congress for the first time] made classes of noncitizens deportable based on conduct committed on American soil. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States.”

[The] Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien shall not be deported.” This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was consistently interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation. Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis. ...

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996. Under contemporary law, if a noncitizen has committed a removable offense ... his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance.

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

## II

Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court. ...

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland v. Washington*, 466 U.S. 668 (1984). Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it most difficult to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.

## III

Under *Strickland*, we first determine whether counsel’s representation fell below an objective standard of reasonableness. Then we ask whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. The first prong – constitutional deficiency – is necessarily linked to the practice and expectations of the legal community: the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. We long have recognized that

prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Although they are only guides, and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-718 (2002); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993). ...

We too have previously recognized that preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). Likewise, we have recognized that preserving the possibility of discretionary relief from deportation under § 212(c) of the 1952 INA, repealed by Congress in 1996, would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial. We expected that counsel who were unaware of the discretionary relief measures would follow the advice of numerous practice guides to advise themselves of the importance of this particular form of discretionary relief.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of ... any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its

own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

#### IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case, though counsel is required to provide accurate advice if she chooses to discuss these matters. Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. [We believe, however, that] that there is no relevant difference between an act of commission and an act of omission in this context.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis. ...

There is no reason to doubt that lower courts – now quite

experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea – an opportunity to withdraw the plea and proceed to trial – imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth

Amendment right to effective assistance of counsel. The severity of deportation – the equivalent of banishment or exile – only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.<sup>15</sup>

## V

It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. ...

ALITO, J., concurring in the judgment.\*

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, immigration law can be complex; it is a legal specialty of its own; and some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. The Court nevertheless holds

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<sup>15</sup> To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev.2/2003), <http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf> (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, e.g., Cal. Penal Code Ann. § 1016.5; Fla. Rule Crim. Proc. 3.172(c)(8); N.Y. Crim. Proc. Law Ann. § 220.50(7); N. C. Gen. Stat. Ann. § 15A-1022; Ohio Rev. Code Ann. § 2943.031; Tex. Code Ann. Crim. Proc., Art. 26.13(a)(4).

\* Chief Justice Roberts joined this opinion. – Eds.

that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is “succinct and straightforward” – but not, perhaps, in other situations. This vague, halfway test will lead to much confusion and needless litigation.

## I

Under *Strickland*, an attorney provides ineffective assistance if the attorney’s representation does not meet reasonable professional standards. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. While the line between “direct” and “collateral” consequences is not always clear, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess – and very often do not possess – expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are serious, but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters. ...

Because many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court’s opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act], but instead fall under a broad category of crimes, such as crimes involving moral turpitude or aggravated felonies.” M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences

of Criminal Activity (Sept. 20, 2006). ...

Defense counsel who consults a guidebook on whether a particular crime is an “aggravated felony” will often find that the answer is not “easily ascertained.” For example, the ABA Guidebook answers the question “Does simple possession count as an aggravated felony?” as follows: “Yes, at least in the Ninth Circuit.” § 5.35, at 160. After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit’s view, the ABA Guidebook continues: “Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43).” ...

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 (“Writing bad checks may or may not be a CIMT”); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked). ...

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel’s duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. ... This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer?

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court’s rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as

statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. [Twenty-eight] states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information.

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel. [The] Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far.

...

## II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. [Thorough] understanding of the intricacies of immigration law is not within the range of competence demanded of attorneys in criminal cases. By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. ...

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea,

the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel – or that it embodies a voluntary and intelligent decision to forsake constitutional rights.

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. [The] vast majority of the lower courts considering claims of ineffective assistance in the plea context have distinguished between defense counsel who remain silent and defense counsel who give affirmative misadvice. ...

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

### III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien

defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject. ...

SCALIA, J, dissenting.\*

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a criminal prosecution – not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of Justice Alito’s concurrence, I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, and that the right to “the assistance of counsel” includes the right to *effective* assistance. Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions. ... We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense – advice at trial, of course, but also advice at postindictment interrogations and lineups, and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the

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\* Justice Thomas joined this opinion. – Eds.

legally trained agents of the state. ...

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand – to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within the range of competence demanded of attorneys in criminal cases. We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel – even those extending beyond defense against the prosecution – become constitutional commands. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point. [It] seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence’s suggestion that counsel must warn defendants of potential removal consequences – what would come to be known as the “*Padilla* warning” – cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e). ...

The Court’s holding prevents legislation that could solve the problems addressed by today’s opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given. Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel’s misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today’s sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the

consequences of bad advice to that well defined area.

# Chapter 7

## Sentencing Outcomes: The Scale of Imprisonment

### *C. Competing Explanations for Growth*

**Page 551. Add this material at the end of note 1.**

The severe national economic downturn that started in 2008 forced nearly every state to assess ways to reduce the growing fiscal costs of large prison systems, and has prompted many states to enact or consider new sentencing rules designed to reduce these costs. A report from the Center on Sentencing and Corrections at the Vera Institute of Justice released a report in July 2009, titled “The Fiscal Crisis in Corrections: Rethinking Policies and Practices,” which documented that a majority of states were forced by the 2008 recession to cut prison budgets in ways that impacted sentencing and prison policies and practices.

### *E. Limiting Imprisonment under Eighth Amendment*

**Page 575. Add this material at the end of note 5.**

The most important and dynamic issue actively being debated and litigated in the area of proportionality for noncapital sentences is the question of life without the possibility of parole (“LWOP”) sentences for offenders who committed non-homicide crimes as juveniles. The United States Supreme Court has taken up two cases from Florida raising this issue in their October 2009 Term, *Sullivan v. Florida* and *Graham v. Florida*. Joe Sullivan, now 33, was convicted at age 13 for the rape of an

elderly woman in her home. Terrance Graham, now 22, received the same sentence when he was 17 for an armed robbery and burglary committed when he was on probation. Both sentences were upheld by Florida's state courts, and dozens of amicus briefs from a variety of public policy groups were submitted in the two cases.

## **Terrance Jamar Graham v. Florida** **130 S. Ct. 2011 (2010)**

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KENNEDY, J.

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause ....

### **I**

Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbecue restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment.

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement.... The trial court accepted the plea agreement.

The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial and was released on June 24, 2003.

[O]n the night of December 2, 2004, Graham again was arrested, ... [for participating] in a home invasion robbery ... [an additional attempted robbery]. ... [H]e was 34 days short of his 18th birthday.... The trial court held hearings on Graham's violations about a year later.... The trial court ... found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, ...by associating with persons engaged in criminal activity [and avoiding arrest].... [At sentencing the] trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

Graham filed a motion in the trial court challenging his sentence under the Eighth Amendment[, which was] denied .... The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes. The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." The court concluded further that Graham was incapable of rehabilitation. Although Graham "was given an unheard of probationary sentence for a life felony ... wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." The Florida Supreme Court denied review. We granted certiorari.

## II

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). "...

The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances.... “[P]unishments of torture,” for example, “are forbidden.” *Wilkinson v. Utah*, 99 U.S. 130, 136 (1879).... For the most part, however, the Court’s precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime....

The Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant’s seventh nonviolent felony, the crime of passing a worthless check. *Solem v. Helm*, 463 U.S. 277 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a “narrow proportionality principle,” that “does not require strict proportionality between crime and sentence” but rather “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.*, at 997, 1000-1001.

...

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant’s crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U.S., at 1005 (opinion of KENNEDY, J.). “[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality” the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.... If this comparative analysis “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual.

The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the

other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals.... In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 (2002)....

In the cases adopting categorical rules the Court has taken the following approach. The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” *Kennedy*, 554 U.S., at \_\_\_, 128 S. Ct. 2641 the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper, supra*, at 564.

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.... This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins, Roper*, and *Kennedy v. Louisiana* 128 S. Ct. 2641 (2008).

### III

#### A

The analysis begins with objective indicia of national consensus.... Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. Federal law also allows for the possibility of life without parole for offenders as young as 13. Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing.... Actual sentencing practices are an important part of the Court’s inquiry into consensus. Here, an examination of actual sentencing practices in jurisdictions

where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent.... [There appear to be] 129 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 52 are imprisoned in just 10 States -- California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia -- and in the federal system.... Thus, only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders -- and most of those impose the sentence quite rarely -- while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization....

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court's other Eighth Amendment cases. This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 ... a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson.... [T]he comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual....

The sentencing practice now under consideration is exceedingly rare. And it is fair to say that a national consensus has developed against it.

## **B**

Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." *Roper*, 543 U.S., at 575. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.

*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense

of responsibility”); they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.” 543 U.S., at 569-570. These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.*, at 573. Accordingly, “juvenile offenders cannot with reliability be classified among the worst offenders.” *Id.*, at 569.... Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Roper*, 543 U.S., at 570. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Ibid.* These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply....

There is a line “between homicide and other serious violent offenses against the individual.” *Kennedy*, 128 S. Ct. 2641, 2660. Serious nonhomicide crimes “may be devastating in their harm ... but ‘in terms of moral depravity and of the injury to the person and to the public,’ ... they cannot be compared to murder in their ‘severity and irrevocability.’” *Id.*, at 2660. This is because “[l]ife is over for the victim of the murderer,” but for the victim of even a very serious nonhomicide crime, “life . . . is not over and normally is not beyond repair.” *Ibid.*

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is “the second most severe penalty permitted by law.” *Harmelin*, 501 U.S., at 1001.... [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. [The] sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency.... As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” *Naovarath v. State*, 105 Nev. 525 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole.... [I]n *Solem*, the only previous case

striking down a sentence for a term of years as grossly disproportionate, the defendant's sentence was deemed "far more severe than the life sentence we considered in *Rummel*," because it did not give the defendant the possibility of parole. 463 U.S., at 297.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. ...

The penological justifications for the sentencing practice are also relevant to the analysis. Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate -- retribution, deterrence, incapacitation, and rehabilitation -- provides an adequate justification.

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U.S., at 571....

Deterrence does not suffice to justify the sentence either. *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest...that juveniles will be less susceptible to deterrence." *Ibid.* Because juveniles' lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed.... Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable....

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an “escalating pattern of criminal conduct,” but it does not follow that he would be a risk to society for the rest of his life.... A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.

Finally there is rehabilitation, a penological goal that forms the basis of parole systems. The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, *e.g.*, Cullen & Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 *Criminal Justice* 2000, pp. 119-133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability. A State’s rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.... [T]hose who were below ...[18] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.... The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society....

#### D

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “[t]he climate of international opinion concerning the acceptability of a particular punishment” is also “not irrelevant.” *Enmund*, 458 U.S., at 796, n. 22. The Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual. Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice* 4 (2007). An updated version of the study concluded that Israel’s “laws allow for parole review of juvenile offenders serving life terms,” but expressed reservations about how that parole review is implemented. De la Vega & Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S. F. L. Rev. 983, 1002-1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not

appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release ... for offences committed by persons below eighteen years of age." Brief for Petitioner 66; Brief for Amnesty International et al. as *Amici Curiae* 15-17. As we concluded in *Roper* with respect to the juvenile death penalty, "the United States now stands alone in a world that has turned its face against" life without parole for juvenile nonhomicide offenders. 543 U.S., at 577.

The State's *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. as *Amici Curiae* 14-16; Brief for Sixteen Members of United States House of Representatives as *Amici Curiae* 40-43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for nonhomicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." *Roper, supra*, at 578....

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida affirming Graham's conviction is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

**ROBERTS, C.J., concurring in the judgment.**

I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring "narrow proportionality" review of noncapital sentences and (2) our conclusion in *Roper v. Simmons*, 543 U.S. 551 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status -- together with the nature of his criminal conduct and the extraordinarily severe punishment imposed -- lead me to conclude that his sentence of life without parole is unconstitutional....

Graham's case arises at the intersection of two lines of Eighth Amendment precedent. The first consists of decisions holding that the Cruel and Unusual Punishments Clause embraces a "narrow proportionality principle" that we apply, on a case-by-case basis, when asked to review noncapital sentences. This "narrow proportionality principle" does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only rarely need to engage in extended analysis to determine that a sentence is not constitutionally disproportionate, and "successful challenges" to noncapital sentences will be all the more "exceedingly rare," *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)....

Our cases indicate that courts conducting "narrow proportionality" review should begin with a threshold inquiry that compares the gravity of the offense and the harshness of the penalty. This analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history....

Only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality, should courts proceed to an "intra-jurisdictional comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an "inter-jurisdictional" comparison with sentences imposed for the same crime in other jurisdictions. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the Eighth Amendment.

The second line of precedent relevant to assessing Graham's sentence consists of our cases acknowledging that juvenile offenders are generally -- though not necessarily in every case -- less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper*, 543 U.S. 551 we extended the prohibition on executions to those who committed their crimes before the age of 18....

Today, the Court views *Roper* as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they "cannot with reliability be classified among the worst offenders." *Id.*, at 569.

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that the death penalty is different from other punishments in kind rather than degree. It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are "less severe than death" despite involving "forfeiture of some of the most basic liberties." 543 U.S., at 573-574. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish that the "narrow proportionality" review applicable to noncapital cases itself takes the personal "culpability of the offender" into account in examining whether a given punishment is proportionate to the crime. There is no reason why an offender's juvenile status should be excluded from the analysis. Indeed, given *Roper*'s conclusion that juveniles are typically less blameworthy than adults, 543 U.S., at 571, an offender's juvenile status can play a central role in the inquiry....

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not

every juvenile should. But all will receive the protection that the Eighth Amendment requires.

Applying the “narrow proportionality” framework to the particular facts of this case, I conclude that Graham's sentence of life without parole violates the Eighth Amendment.

I begin with the threshold inquiry comparing the gravity of Graham's conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence -- armed burglary of a nondomicil with an assault or battery -- is a serious crime deserving serious punishment. So too is the home invasion robbery that was the basis of Graham's probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham's degree of personal culpability, he committed the relevant offenses when he was a juvenile -- a stage at which, *Roper* emphasized, one's “culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” 543 U.S., at 571. Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults. Graham's youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham's in-court statements -- including his request for a second chance so that he could “do whatever it takes to get to the NFL” -- underscore his immaturity.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was particularly dangerous -- at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshes sentence available under our precedents for any crime, and the most severe sanction available for a nonhomicide offense. Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections (which suggested a sentence of four years), and the state prosecutors (who asked that he be sentenced to 30 years in prison for the armed burglary). No one in Graham's case

other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality. Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007-2008: The Guidebook to Corrections in Florida 35. Unsurprisingly, Florida's juvenile criminals receive similarly low sentences -- typically less than five years for burglary and less than seven years for robbery. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison....

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes.

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? See Musgrave, *Cruel or Necessary? Life Terms for Youths Spur National Debate*, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See *3 Sentenced to Life for Gang Rape of Mother*, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule -- applicable well beyond the particular facts of Graham's case -- that a sentence of life without parole imposed on any juvenile for any nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing inherently unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes -- like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor -- are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have "diminished" culpability relative to adults who commit the same crimes, *Roper*, 543 U.S., at 571, but that does not mean that their culpability is always insufficient to justify a life sentence. It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died -- as Cunningham surely expected she would -- so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able "with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."

The Court is of course correct that judges will never have perfect foresight -- or perfect wisdom -- in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them.

\* \* \*

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age -- together with the nature of his criminal activity and the unusual severity of his sentence -- tips the constitutional balance....

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution.... We should grant Graham the relief to which he is entitled under the Eighth Amendment. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.

**THOMAS, J., dissenting.\***

The Court holds today that it is “grossly disproportionate” and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the “moral” question of whether this sentence can ever be “proportionat[e]” when applied to the category of offenders at issue here.

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

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\* Justice Scalia joined this opinion in full, and Justice Alito joined in part. – Eds.

## Notes

1. *The debate over categorical or case-by-case approaches to the Eighth Amendment.* While the five Justices in the majority and the Chief Justice all agree that Terrance Graham's LWOP sentence violated the Eighth Amendment, they dispute whether to reach this result through application of a categorical rule or case-by-case analysis. Does the express text of the Eighth Amendment's prohibition of "cruel and unusual punishments" provide support for one approach or the other? Taking an originalist perspective, would the Framers likely favored one approach or the other?

2. *When and how can juvenile offenders like Terrance Graham seek parole?* The *Graham* opinion indicates that juvenile offenders who commit nonhomicide offenses can still be subject to life sentences, but they must be given a "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (In a later passage, the *Graham* court explains that a "State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.") Can (and should) executive branch officials in Florida now declare that it will not consider any request for parole from Terrance Graham until he reaches at least age 75? If not given even a chance at parole for the next 50 years, can (and should) Terrance Graham challenge in federal court the failure of executive branch officials in Florida to provide him with an earlier opportunity for parole?

3. *Graham's impact on other sentences for other crimes and other offenders.* Will the holding and opinions in *Graham* likely impact any sentences other than life without parole for juvenile nonhomicide offenders? Could a state insulate its punishment from constitutional attack by providing that the most severe sentence for juvenile offenders in nonhomicide cases will be a term of 75-years of imprisonment? Could any adult nonhomicide offender subject to an LWOP sentence or any juvenile homicide offender subject to an LWOP sentence press an effective Eighth Amendment challenge in the wake of *Graham*? Do you think defendants serving life sentences or very long prison terms would have preferred that the case-by-case approach to the Eighth Amendment advocated by Chief Justice Roberts had carried the day?

**Page 578. Add this material at the end of note 8.**

9. *Recent academic perspectives.* Inspired perhaps by the seemingly uninspired work of the Supreme Court’s modern Eighth Amendment jurisprudence, there is a significant array of new academic commentary concerning how the constitution’s prohibition on Cruel and Unusual Punishments should be interpreted and applied. See, e.g., Rachel E. Barkow, *The Court of Life and Death: the Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009); Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. Mem. L. Rev. 465 (2008); John F. Stinneford, *The Original Meaning of “Unusual”:* the Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U.L. Rev. 1739, 1739 (2008); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. Davis L. Rev. 111 (2007); Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 Harv. J.L. & Pub. Pol’y 35 (2007); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 Notre Dame L. Rev. 1149 (2006); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 475 (2005); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677 (2005); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571 (2005); Erwin Chemerinsky, *The Constitution and Punishment*, 56 Stan. L. Rev. 1049, 1063-65 (2004).

**Page 578. Add this material after note 2 and renumber current note 3 to be 4.**

3. *The Plata (California Prison) Case.* As part of a larger conversation in many states about the fiscal and policy wisdom of mass incarceration, some litigants have tried to resuscitate an ancient (c. 1970s to the early 1990s) strategy for prison reform: civil rights litigation. Forty years ago prison reform litigation in the federal and state courts was a major driver of prison reform. Judges such as the legendary federal judge Frank Johnson in Alabama took over entire systems, sometimes for decades, and managed them through special masters, ongoing hearings, and personal visits to prison facilities. See Malcolm Feeley & Edward Rubin, *Judicial Policy Making And The Modern State:*

How The Courts Reformed America's Prisons (1998). See also Marc Miller, *Wise Masters*, 51 *Stan. L. Rev.* 1751 (1999).

Through a series of judicial and legislative rulings including a significant narrowing of federal habeas corpus relief (see chapter 7), and culminating in the 1996 Prison Litigation Reform Act (PLRA), the opportunity to challenge prison conditions through litigation and the power of courts to grant “structural” relief were significantly narrowed, and some observers would say eviscerated. Pub. L. No. 104-134, 110 Stat. 1321. See, e.g., Brian Ostrom, Roger Hanson & Fred Cheesman, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 *Notre Dame L. Rev.* 1525 (2002-2003); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 *J. Con. Law* 1 (2009).

Among the many barriers to prison litigation in the PRLA are a requirement that claimants exhaust administrative review, and a requirement that a court “shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A).

Against this legal and policy background, an amazing case has emerged from federal review of the massive California prison system. Litigation with roots in a lawsuit filed in 1990—before the PLRA—and focusing on both the mental and physical health of inmates ultimately came before a three judge court empanelled under the PLRA.

The three-judge court heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons’ design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.

In *Brown v. Plata*, 131 S. Ct.1910 (May 23, 2011), in a 5-4 decision, the Supreme Court upheld the order of the three judge panel. Justice Kennedy’s opinion for the court noted:

For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result....

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man....

This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights. The order of the three judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed.

Justice Scalia issued a typically restrained dissent.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals.

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.

Justice Alito's dissent also aimed at the policy implications of the order as much as the legal authority on which it was built:

The decree in this case is a perfect example of what the Prison Litigation Reform Act was enacted to prevent.

The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.

The Eighth Amendment imposes an important—but limited—restraint on state authority in this field. The Eighth Amendment prohibits prison officials from depriving inmates of “the minimal civilized measure of life's necessities.” Federal courts have the responsibility to ensure that this constitutional standard is met, but undesirable prison conditions that do not violate the Constitution are beyond the federal courts' reach.

In this case, a three-judge court exceeded its authority under the Constitution and the PLRA. The court ordered a radical reduction in the California prison population without finding that the current population level violates the Constitution....

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.

## Note

1. *Prison reform reform*. The decision in *Brown v. Plata* arrives at the same time as prison and punishment policies through the states are being reconsidered, largely but not solely driven by economic considerations. See, e.g., Charlie Savage, Trend to Lighten Harsh Sentences Catches On in Conservative States, *N.Y. Times* (Aug. 12, 2011) (“Fanned by the financial crisis, a wave of sentencing and parole reforms is gaining force as it sweeps across the United States, reversing a trend of “tough on crime” policies that lasted for decades and drove the nation's incarceration rate to the highest — and most costly — level in the developed world.”). California remains the most important state not to

have implemented any form of modern guideline sentencing reforms, though the topic has reemerged on state policy-maker's radars. See *State of Emergency: The California Correctional Crisis*, Fed. Sent'g Rep., Vol. 22, No. 3 (Feb. 2010). Will *Brown v. Plata* stand as a fascinating but unique echo of reform eras past, or signal the beginning of a new era of punishment reforms, with the judicial role yet to be determined. And in the spirit of reflective or "adaptive" policy-making, will researchers take up the implicit challenge in the opinion of the three judge panel and the Supreme Court dissenters and evaluate the impact of significant reductions in the California state prison population. And if they do, will the public, or anyone in a policy-making setting (including courts) care?

# Chapter 8

## Sentencing Outcomes: Nonprison Punishments

### *A. Traditional Alternatives*

#### **2. Probation**

**Page 608. Add this material at the end of note 4.**

Increased reliance on probation as an alternative to more expensive prison sentences attracts some support from political conservatives, who approach the issue from a vantage point of fiscal responsibility. The reform advocacy group Right on Crime describes one of its priority issues in these terms:

Increase the use of custodial supervision alternatives such as probation and parole for nonviolent offenders. In many cases, these programs can also be linked to mandatory drug addiction treatment and mental health counseling that would prevent recidivism. States' daily prison costs average nearly \$79.00 per day, compared to less than \$3.50 per day for probation.

See <http://www.rightoncrime.com/priority-issues/prisons/>.

### ***C. Collateral Sanctions***

**Page 663. Add this material at the end of note 6.**

7. *Federal involvement in sex offender registration and tracking.* Congress enacted the Adam Walsh Child Protection and Safety Act in summer 2006, which created a national sex offender registry and encouraged states to adopt a uniform three-tier system for sex offender registration requirements. This Act also created a new federal crime for failing to register and update information as required by state or federal law. Though subject to various legal challenges, most lower courts have upheld the authority of Congress to require sex offender registration and to criminalize a failure to register.

# Chapter 9

## Race, Class, and Gender

### *A. African-Americans in the Criminal Justice System*

**Page 686. Add this material at the end of note 5.**

In August 2009, Governor Beverly Purdue of North Carolina signed the state's Racial Justice Act into law after an extended period of legislative action surrounding this death penalty statute. The North Carolina Racial Justice Act provides that pre-trial defendants and death-row inmates can challenge racial bias in the death penalty system through the use of statistical studies. A sufficient statistical showing requires prosecutors to rebut the claim that the statistical disparities indicate racial bias in the application of the death penalty in a particular case.

In July 2010, Michael Radelet, a professor of sociology at the University of Colorado, and Glenn Pierce, a criminologist at Northeastern University, published a study of over 15,000 North Carolina homicides between 1980 and 2008. The study concluded that a convicted killer is three times more likely to receive a death sentence if the victim is white rather than black, a finding consistent with studies of capital punishment in other states. The study attempted to control for additional crimes committed by the offender at the time of the murder, but it did not control for the offender's prior criminal record.

The statute allows inmates currently on death row in the state to file claims of racial discrimination to be proven through statistical evidence. Public defender organizations in North Carolina cooperated to assemble evidence to support such claims. By the time the statutory filing deadline arrived in August 2010, 148 of the 159 inmates on death row had filed claims. The director of a nonprofit organization that assists defendants in capital cases suggested that all death row petitions under the Racial Justice Act be consolidated and handled by a special judge.

**Page 699. Add this material at the end of note 4.**

In May 2007, the United States Sentencing Commission unanimously adopted an amendment that sought to respond to long-standing complaints about the crack-powder disparity by modestly reducing crack cocaine guidelines levels across the board. In the original guidelines, the Commission established guideline ranges that were set above applicable mandatory minimum penalties for crack set by Congress: for example, the guideline range for first time crack offenses involving 5 or more grams of crack cocaine was 63 to 78 months, while the statutory mandatory minimum was 5 years (or 60 months). Similarly, the guideline range for the 50 or more gram level, which has a mandatory minimum of 120 months imprisonment, was 121-151 months. The 2007 amendment reduces the base offense level for crack cocaine offenses so that the sentencing range includes, rather than exceeds, any applicable statutory mandatory minimum. Thus, for first time offenders at the 5 and 50 gram levels, the guideline ranges after the amendment are 51-63 months and 97-121 months. Similar reductions are made for crack cocaine amounts below and above mandatory minimum thresholds.

In a press release accompanying its amendment, the Commission “emphasized and expressed its strong view that the amendment is only a partial solution to some of the problems associated with the 100-to-1 drug quantity ratio. Any comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action by Congress.” *See* U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses (April 27, 2008), at <http://www.usc.gov/PRESS/rel0407.htm>.

This amendment attracted relatively little congressional attention, and took effect on November 1, 2007. Thereafter in December 2007, the Sentencing Commission voted unanimously to give retroactive effect to this amendment, effective on March 3, 2008. Although this decision was more controversial and led to then-Attorney General Michael Mukasey to encourage Congress to pass legislation to overrule the Commission’s decision, serious Congressional opposition never developed to this retroactivity decision. As a result of these actions, approximately 1500 inmates became eligible for immediate release and as many as 20,000 inmates could potentially have their sentences reduced in the coming years.

In August 2010, the Fair Sentencing Act of 2010 became law. The federal statute reduces the disparity between crack and powder cocaine

sentencing under mandatory minimums. The new statutory law, which only applies prospectively, reduces the crack-powder sentencing disparity from 100-to-1 under the former law to about 18-to-1 under the FSA by raising the amounts of crack needed to trigger applicable mandatory minimum sentencing terms.

In addition to changing the trigger amounts for applicable minimum prison terms, the Fair Sentencing Act of 2010 ordered the U.S. Sentencing Commission to promulgate new emergency guidelines in accord with the statutory changes made by Congress. The Act's instructions to the U.S. Sentencing Commission also included a list of aggravating and mitigating factors that Congress wished to have reflected in revised crack sentencing guidelines. The Commission is tasked with producing revised drug sentencing guidelines before the end of 2010, and some public policy groups and commentators have urged the Commission to seize the passage of the Fair Sentencing Act as an opportunity to significantly revise the existing structure for drug sentencing under the guidelines. In addition, once the U.S. Sentencing Commission promulgates new crack guidelines, it is likely that these public policy groups and commentators will urge the Commission to give its new guidelines retroactive application.

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