SENTENCE APPEALS IN ENGLAND: PROMOTING CONSISTENT SENTENCING THROUGH ROBUST APPELLATE REVIEW

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I. INTRODUCTION

When the Supreme Court mandated in *Booker v. United States*[1] that the federal courts of appeals review all criminal sentences for reasonableness in 2005, it opened the way for significant expansion of the appellate role in sentencing. Before *Booker*, the federal courts of appeals played only a very minor role in sentencing. Defendants did not have a right to appeal their sentences until 1889, and when they were finally granted that right, the federal courts of appeals chose to conduct only a very deferential review, primarily limited to review for some type of legal error.[2] The federal courts of appeals continued to play a more limited role in the sentencing process after the Sentencing Reform Act of 1984 and the development of the Federal Sentencing Guidelines (the "Guidelines," "federal Guidelines," or "Sentencing Guidelines").[3] Their role was primarily an enforcement one, concentrated on ensuring that sentencing courts did not stray far from the strictures of the

* Associate Professor, University of Tennessee College of Law. My deepest thanks to Andrew Ashworth, Jonathan Bild, and Julian Roberts for their thoughtful comments and advice on the English portions of my research. I also owe thanks to Beth Colgan, Jelani Jefferson Exum, George Fisher, Andrew Gilden, Carissa Hessick, Norman Spaulding, and Robert Weisberg for their valuable comments.

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

2. *See generally* Briana Rosenbaum, *Righting the Historical Record: A Case for Appellate Jurisdiction over Appeals of Sentences for Reasonableness under 28 U.S.C. § 1291*, 62 Hastings L.J. 865, 875–99 (2011).

3. *See id.* at 899–900.

Guidelines.[4] The federal courts of appeals deferred to the sentencing judgments of both the district courts and the United States Sentencing Commission (the "Sentencing Commission"), the institution tasked by Congress with developing the Sentencing Guidelines on almost all issues of sentencing law and principles.

Even after *Booker*, when the Supreme Court made the Guidelines advisory and mandated a broad substantive reasonableness review of sentences, the federal courts of appeals have largely rejected the unprecedented opportunity to take a more active role in the sentencing process. They have interpreted *Booker*'s reasonableness review narrowly, upholding sentences so long as district courts consider the purposes of sentencing set out in 18 U.S.C. § 3553(a)—just punishment, deterrence, protection of the public, and rehabilitation—when making their sentencing decisions. Courts of appeals usually will not question the relative weights the sentencing courts place on those purposes, despite the fact that the weight a court attributes to a particular sentencing purpose (say rehabilitation versus protection of the public) often invokes vital questions of sentencing law and policy touching a broader class of cases throughout the criminal justice system.

One of the more prominent examples of this deferential enforcement approach to appellate review is the Supreme Court's decision in *Kimbrough v. United States*,[5] in which the Supreme Court held that district courts could decide whether to reject the old 100-to-one crack-to-powder ratio in the Sentencing Guidelines.[6] After *Kimbrough*, it is entirely up to the judgment of individual district judges whether to treat crack-cocaine

4. *See id.* For excellent arguments regarding the failure of the Sentencing Commission and the federal courts to create a uniform and meaningful common law of sentencing under the federal Guidelines, see Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Policy Rev. 93 (1999); *see also* Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569, 576–77 (2005); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901 (1991); Marc Miller, *Purposes at Sentencing*, 66 S. Cal. L. Rev. 413 (1992); Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (U. Chi. Press 1998).

5. 552 U.S. 85 (2007).

6. *Id.* at 91.

offenses more harshly than powder-cocaine offenses.[7] Such an approach to sentencing design, which leaves fundamental decisions of sentencing policy to the individual judgment of each district judge, can have troubling consequences, including unwarranted sentencing disparity, lack of transparency in sentencing, overreliance on the guidelines to justify sentences, and uncertainty for defendants facing sentencing.[8] This heavy deference to trial courts creates more than just an inconsistency problem. It is more deeply problematic that the resulting disparity is of such broad issues of policy that we would in other contexts normally consider them to be issues of law.

One possible way to fix this problem and promote uniform application of sentencing law would be to expand appellate review to further a common law of sentencing independent of the Sentencing Guidelines. To do so would expand the lawmaking function of the federal courts of appeals, but would leave untouched their enforcement function related to the Guidelines.[9] This expansion of the appellate lawmaking function is uniquely desirable in the post-*Booker* sentencing regime because the advisory nature of the Sentencing Guidelines has undermined their intended function: to further sentencing consistency. Substantive reasonableness review can fill the gap that has resulted. As others before me have explained, the federal courts of appeals could use such review as an opportunity to articulate "general rules over time in the areas of policymaking and policy articulation" that would provide consistency and uniformity in sentencing, but that would also allow judges to consider individual circumstances.[10] Indeed, the Supreme Court has pointed out that appellate review is to play a

7. *See* Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSJCL Amici: *Views from the Field*, 5 Ohio St. J. Crim. L. (Jan. 2008), http://osjclblog spot.com (criticizing the current appellate model that effectively places power to determine matters of criminal policy in the hands of individual judges) (accessed Sept. 16, 2013; copy on file with Journal of Appellate Practice and Process).

8. *See* discussion *infra* Part II(B).

9. The concept of a dual appellate model—enforcement and lawmaking—originated in Professor Reitz's article on this topic. *See* Kevin Reitz, *Sentencing Guidelines Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1450–51 (1997).

10. Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 Wm. & Mary L. Rev. 2123, 2166 (2010).

primary role in maintaining uniformity and reducing disparity in the post-*Booker* advisory-Guidelines sentencing system.[11]

Despite this potential, the appellate lawmaking role has been largely ignored since *Booker*. The primary focus has been enforcement—that is, sorting out how the courts of appeals can continue to ensure compliance with the Guidelines in an advisory-Guidelines world.[12] The failure to consider the appellate lawmaking role is unfortunate, for "appellate review of sentences may present the best hope" for balancing the need for a common law of sentencing with the need for individualized sentences.[13]

Considering the heightened importance placed on appellate review in the post-*Booker* world, we ought to be thinking critically about whether the current design of federal appellate review actually furthers the goal of uniformity in sentencing. Unfortunately, notwithstanding the attention given to the question of whether a common law body of sentencing jurisprudence is a proper objective, few scholars writing after *Booker* have explored the practical administration of a robust model of appellate review in the federal system.[14] This is perhaps because we don't have the historical knowledge to understand how robust appellate review—characterized by both lawmaking and enforcement functions—would work in the context of advisory guidelines. In an article analyzing the *Booker* opinion shortly after it was issued, for example, one

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11. *Booker*, 543 U.S. at 264–65 (forecasting that reasonableness review "will continue to move sentencing in Congress'[s] preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary"); *Kimbrough*, 552 U.S. at 107 ("[A]dvisory 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.'" (quoting *Booker*, 543 U.S. at 264)).

12. O'Hear, *supra* n. 10, at 2166 ("With so much attention focused on the ultimately inconclusive guidelines debate, scholars and policymakers have neglected the role of appellate courts in the sentencing process—except insofar as the appellate courts police guidelines compliance.").

13. *Id.*

14. *See e.g.* Douglas A. Berman, Rita, *Reasoned Sentencing, and Resistance to Change*, 85 Denv. U. L. Rev. 7, 24 (2007) (suggesting that federal courts of appeals should "contribute to the reasoned development of principled and purposeful sentencing law and policy"); Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 Denv. U. L. Rev. 63, 70–71 (2007) (generally envisioning the development of a common law of guidelines precedents).

commentator explained that the Supreme Court's mandate for substantive review of criminal sentences "takes the federal system into uncharted waters" because "[n]o state system has ever conjoined meaningful sentence review with voluntary guidelines."[15]

In this article, I use comparative method to fill that gap, examining appellate review of criminal sentences in England and Wales,[16] and using that examination to reconsider appellate review in the federal courts of appeals. In contrast to the review conducted in the federal courts of appeals, appellate review of criminal sentences in England is quite robust. The English Court of Appeal–Criminal Division has a hundred-year-long history of appellate-court development of sentencing principles through common-law review of sentencing decisions. In addition to filling this lawmaking role, that court has also long been responsible for enforcement of England's guidelines.

Although other scholars have studied the English system of robust appellate review and its ability to further a common-law body of sentencing jurisprudence, these comparative studies are close to forty years old, and all were conducted before the development of the English Sentencing Guidelines in the 1980s.[17] No scholar has offered a comparative study of the modern design of the Court of Appeal in England, which continues to perform its historically robust lawmaking role while enforcing England's modern Sentencing Guidelines. Accordingly, this study provides new insights into how review in the federal courts of appeals can be expanded to promote a common law of sentencing, while at the same time enforcing the post-*Booker* advisory Guidelines.

The appellate court in England conducts *de novo* review of sentencing law and principles to develop a common law of sentencing independent of the English sentencing guidelines. That is, England's Court of Appeal furthers sentencing consistency through its robust appellate lawmaking role, rather than simply through enforcement of the Guidelines. Through this approach, England has applied robust appellate review in a

15. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum. L. Rev. 1082, 1114 n. 120 (2005).

16. In the interest of brevity, I refer to England and Wales together as "England."

17. *See* Part III(A), *infra*.

guidelines system that both: (1) provides sentencing courts with the necessary benchmarks to guide the sentencing decision, and (2) gives sentencing courts the discretion and flexibility they need to assure individualized sentences. The English model thus suggests a new way to design the role of the federal courts of appeals: moving from bodies that merely enforce guidelines to further consistency of sentencing outcomes to bodies that develop sentencing law in a way that furthers consistency of sentencing approach.

Ultimately, I suggest that federal appellate courts borrow aspects of the English "mixed deference" model of appellate review. My model calls for *de novo* review of sentencing law and principles—including review of guidelines interpretations and decisions on how to weigh the statutory purposes of sentencing—but deferential review of other aspects of the sentencing calculation—including fact-finding, the application of sentencing principles and law to the facts, and the choice of actual sentence. The aim is to design the appellate role to provide guidance to sentencing courts and further a common law of sentencing, but to do so in a way that (1) is not anchored in the Guidelines, (2) keeps the bulk of the sentencing decision in the hands of the trial court, and (3) is limited to the issues that the courts of appeals best handle: sentencing law and policy.

II. REASONABLENESS REVIEW IN THE FEDERAL COURTS OF APPEALS

A. Booker *and Substantive Reasonableness Review*

Booker represented the culmination of a line of cases interpreting the Sixth Amendment's guarantee of a right to a jury trial in the context of sentencing. In *Apprendi v. New Jersey*,[18] for example, the Court had held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[19] In *Booker*, the Court applied this *Apprendi* rule to the Guidelines, holding them unconstitutional because a

18. 530 U.S. 466 (2000).

19. *Id.* at 490.

judge—not a jury—found facts that determined the allowable guidelines range and thus "determined the upper limits of sentencing."[20]

The *Booker* Court discussed several options for remedying this unconstitutional deficiency, including: (1) requiring that any facts necessary to impose punishment be submitted to the jury, (2) declaring the federal Guidelines unconstitutional in their entirety, and (3) rendering the Guidelines advisory.[21] Ultimately, the Court chose the third option, rendering the Guidelines advisory. Under the now-advisory Guidelines, district judges need only "consult [the] Guidelines and take them into account when sentencing," but are "not bound" to follow them.[22] As Justice Stevens explained, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[23] After *Booker*, district judges must consider "all of the § 3553(a) factors to determine whether they support the sentence" and only then, after making "an individualized assessment based on the facts presented," can the judge decide whether an outside-guidelines or inside-guidelines sentence is warranted.[24]

The Court recognized that its decision to render the Sentencing Guidelines advisory—and thereby greatly expand the discretion of sentencing judges—undermined Congress's original intent to increase sentencing uniformity.[25] To at least partially remedy this problem, the Court read into the Sentencing Reform Act a "reasonableness" standard of review.[26] The courts of appeals must now review all sentences for reasonableness, "irrespective of whether the trial judge sentences within or outside the guidelines range,"[27] as this reasonableness review will "tend to iron out sentencing

20. *Booker*, 543 U.S. at 236; *see also id.* at 243–44 (invoking *Apprendi* and noting the Court's recognition that "in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants").

21. *Id.* at 246–68 (remedial opinion).

22. *Id.* at 264.

23. *Id.* at 233.

24. *Gall v. U.S.*, 552 U.S. 38, 49–50 (2007).

25. *Booker*, 543 U.S. at 263–64.

26. *Id.* at 264.

27. *Id.* at 260.

differences" and "promote uniformity in the sentencing process."[28]

Reasonableness review contains two parts: procedural and substantive. Procedural reasonableness review is the clearest and less controversial of the two. This is both because the Court has provided clear guidance on what is involved in procedural reasonableness review and because appellate courts have been engaging in some form of procedural review for decades. As the Court has explained, then, procedural reasonableness review entails courts' examining sentences for 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.[29]

The second, more controversial, aspect of reasonableness review is substantive reasonableness review, for which the Court has provided far less guidance. In *Gall*, the Court explained that substantive reasonableness review equated to "a deferential abuse-of-discretion standard,"[30] and that the courts of appeals "must review all sentences—whether inside, just outside, or significantly outside the Guidelines range"—for abuse of discretion, taking into account the "totality of the circumstances."[31] However, apart from offering this general "totality" standard, the Court has offered little guidance on just how deferential substantive reasonableness review should be.

The Court has repeatedly emphasized that the appropriate appellate review is deferential, stressing that the sentencing judge "has greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court" and "is therefore in a superior position to find facts and judge their import under § 3353(a) in each particular case."[32] The Court has also suggested that a "closer review" of a sentence that deviates from the Guidelines is appropriate if the

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28. *Id.* at 263.

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

30. *Id.*

31. *Id.* at 41, 51.

32. *Kimbrough*, 552 U.S. at 109 (quotations omitted).

deviation is based solely on a policy disagreement with the Guidelines.[33] Furthermore, when a sentence varies from the Guidelines, the Court allows—but does not require—appellate courts to "take the degree of variance into account."[34] And similarly, the Court has said that appellate courts may—but are not required to—presume that a within-guidelines sentence is reasonable.[35]

As can be expected, this inconsistent and incomplete description of substantive reasonableness review has led to equally inconsistent and incomplete applications in the circuit courts. As a number of scholars have observed, approaches among and within the courts of appeals vary widely, from those that are highly deferential to district courts' sentencing decisions to those undertaking a closer review of the justifications for sentences.[36] Indeed, one analysis of substantive-reasonableness-review decisions in the Eleventh Circuit described the court's approach as "wildly inconsistent," varying from review that looks like *de novo* review of sentencing factors to quick affirmations of sentences "with no meaningful analysis at all."[37] These inconsistencies have led to widespread criticism throughout the academy.[38]

To further illustrate the various approaches of the federal appellate courts, I will borrow the approach that places appellate judgments into two "camps."[39] The first camp is "extremely deferential to the district court."[40] So long as the district court follows the proper procedures, considers the § 3553(a) factors, and makes a decision that is within reason, courts of appeal in Camp I will not disturb it.[41] The second camp is "less deferential

33. *Id.*

34. *Gall*, 552 U.S. at 47.

35. *Rita v. U.S.*, 551 U.S. 338, 347, 354 (2007).

36. *See e.g.* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. Miami L. Rev. 1115, 1138–53 (2008); Adam Shajnfeld, *The Eleventh Circuit's Selective Assault on Sentencing Discretion*, 65 U. Miami L. Rev. 1133, 1137–38, 1154–57 (2011); Craig D. Rust, Student Author, *When "Reasonableness" Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions After* Rita, Gall, *and* Kimbrough, 26 Touro L. Rev. 75, 90–91 (2010).

37. Harrison, *supra* n. 36, at 1118.

38. *See supra* n. 36 (citing authorities).

39. Rust, *supra* n. 36, at 90–91.

40. *Id.* at 91.

41. *Id.*

to the district court."[42] Review by courts in Camp II usually includes some amount of "re-weighing" of facts in re-evaluating the "district court's decision-making calculus in terms of the weight the judge assigned to each of Congress's stated sentencing goals, as set forth in § 3553(a)."[43]

1. The Camp I Approach: Kimbrough

A majority of substantive reasonableness review decisions are characterized by the Camp I, deferential approach.[44] A famous example of this deferential approach to reasonableness review is *Kimbrough*, in which the Supreme Court held that federal courts of appeals must defer to district court decisions on whether to reject the old 100-to-one crack-to-powder ratio in the Sentencing Guidelines.[45] Kimbrough had pleaded guilty to several drug-related offenses, including possession with intent to distribute more than fifty grams of crack cocaine, which made him subject to a much higher Guideline sentence than if his offense had involved only powder.[46] Accordingly, the sentencing range recommended by the Guidelines was roughly twenty years.[47] The district judge instead sentenced Kimbrough

42. *Id.*

43. *Id.* at 91, 101 (citations and internal quotation marks omitted).

44. Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. Miami L. Rev. 947, 966 (2010); *cf.* Patti B. Saris, Chair, U.S. Sentencing Commn., *Prepared Testimony before H.R. Subcomm. on Crime Terrorism, and Homeland Security*, http://judiciary.house.gov/hearings/pdf/Saris%2010122011.pdf 15–17 (Oct. 12, 2011) (discussing the general dissatisfaction of circuit court judges with "substantive reasonableness review" and the resulting inclination to find some "procedural hook" to justify vacating a sentence) (accessed Sept. 16, 2013; copy on file with Journal of Appellate Practice and Process); Gerard E. Lynch, J., U.S. Ct. of App. For the Second Cir., *Statement*, in *Hearing before U.S. Sentencing Commn.*, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Hearing_Transcript_20120216.pdf 170–71 (Feb 16, 2012) (noting that appellate judges are "very reluctant to get pushed into" deeper appellate review of sentencing decisions and that "it's going to be a tough sell to appellate judges to get them to scrutinize any but outlier sentences") (accessed Sept. 16, 2013; copy on file with Journal of Appellate Practice and Process); *see also infra* n. 76 and accompanying text.

45. *Kimbrough*, 522 U.S. at 91, 111.

46. *Id.* at 91–93. Under the then-existing Guidelines, a defendant holding one gram of crack cocaine was punished as if it were 100 grams of powder cocaine. *Id.* at 91 (citing 21 U.S.C. § 841 and *Guidelines Manual* § 2D1.1).

47. *Id.* at 92 (describing Guidelines-based calculation that yielded sentence of between nineteen years and twenty-two and a half years).

to the mandatory minimum sentence of fifteen years, in part because he disagreed with the 100-to-one ratio, and he noted in his opinion that the case exemplified the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing."[48] The Fourth Circuit vacated that sentence, finding a sentence outside the Guidelines range per se unreasonable when based on a "disagreement" with the Guidelines themselves.[49]

The Supreme Court reversed, holding that a sentencing judge may deviate from the Guidelines if "a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing,"[50] and that the decision to deviate from the crack/powder ratio for policy reasons was reasonable in Kimbrough's situation.[51] After *Kimbrough*, then, courts of appeals must review decisions that deviate from the Guidelines under the same standard applied to all post-*Booker* sentences: reasonableness.[52]

While the Court's decision may be lauded for its reasoned rejection of a greatly reviled sentencing policy, the most striking part of the *Kimbrough* decision for the purpose of this article is what the Court did not hold: that the crack/powder ratio is unwarranted as a matter of law. The Court instead left this to the discretion of individual district judges, even though it failed to provide district courts with any guidance on either: (1) how to decide whether to follow the ratio, or (2) what a new ratio might look like.

2. The Camp I Approach Meets the Camp II Approach: McBride

The majority and dissenting opinions in *United States v. McBride*[53] illustrate both reviewing courts' typical hesitation to

48. *Id.* at 93.

49. *Id.*

50. *Id.* at 91.

51. *Id.* at 110–11.

52. *Id.* at 111 (noting that the "ultimate question" is "whether the sentence was reasonable," in that it was both supported by—and could be justified by—application of the sentencing factors outlined in 18 U.S.C. § 3553(a)); *see also id.* at 97–112 (concluding that Kimbrough's sentence was reasonable in part because the Sentencing Commission had not exercised its "characteristic institutional role" by consulting empirical evidence or referring to national experience and the crack/powder ratio produced sentences that were unwarranted and inconsistent with the purposes of punishment described in § 3553(a)).

53. 511 F.3d 1293 (11th Cir. 2007).

provide guidance on sentencing policy and the more active approach to sentence review. The facts are straightforward: McBride pleaded guilty to distribution of child pornography after he was found with hundreds of photos and videos of child pornography, some involving prepubescent minors and sadistic or masochistic material.[54] He had an extensive history of physically abusing and molesting children; had admitted being sexually attracted to children; had violated a court order to stay away from children; and had already failed in several treatment programs.[55] The Guidelines recommended a prison term ranging from thirteen to sixteen years, but the district court sentenced McBride to only seven years in prison followed by ten years of supervised release, citing the extreme hardship that he had endured as a child.[56] Indeed, the district-court opinion called the defendant's history—which included violent physical abuse by his mother and uncle at age two and sexual abuse by his grandfather—"perhaps one of the worst histories" the district judge had ever seen.[57]

The government appealed, calling the sentence substantively unreasonable because the district court had put too much weight on the defendant's past hardship and not enough on the need for incapacitating a repeat pedophile.[58] The Eleventh Circuit observed on appeal that the district court had considered the need to protect the public.[59] In light of this, the Court affirmed the sentence as reasonable, despite suggesting that it was uncomfortable with the district court's sentencing choice:

> Even if we were to disagree with the weight that the district court gave to Defendant's history of abuse, we will only reverse a procedurally proper sentence if we are 'left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors.[60]

54. *Id.* at 1295.
55. *Id.* at 1295–96.
56. *Id.* at 1296.
57. *Id.* at 1298.
58. *Id.* at 1296–98.
59. *Id.* at 1298.
60. *Id.* at 1297.

In contrast, the *McBride* dissent would have found the sentence substantively unreasonable for overvaluing the defendant's past hardship and not sufficiently considering "the seriousness of the offense, the need for deterrence, and the need to protect the public."[61] Not only was the sentence too low, according to the dissenting judge, but he asserted that nothing less than "a term of lifetime supervised release" would adequately protect the public.[62]

This juxtaposition provides a particularly clear example of the two camps. The *McBride* majority follows the deferential approach used in *Kimbrough*: The goal is simply to determine whether the sentence can be justified, and so long as the sentencing court has some basis in reason to justify the sentence, the appellate court will not interfere. After *McBride*, it is up to district judges in the Eleventh Circuit to determine whether a defendant's past hardship should be a mitigating factor in a case involving possession of child pornography, and, if it should be, when. But what purposes of punishment are fulfilled by taking past hardship into account? Does a background of hardship make the defendant less culpable because it caused his later pedophilia? If not, is mitigation merely an act of mercy? And is showing mercy a proper consideration in such a case? Under a Camp I process, district judges must formulate, and then answer, these questions for themselves. They have no guidance on how to deal with similarly situated defendants in subsequent cases.

But the *McBride* dissent hits these issues head on, stating clearly that deterrence is key: "Allowing someone who will unquestionably continue to remain a danger to society's most vulnerable citizens—its children—to live free of any restrictions at any age, let alone at such a young age . . . is substantively unreasonable."[63] District judges required to sentence pedophiles under such a rubric would know how to structure the evaluation of a similar case.

3. The Camp II Approach: Pugh, Amezcua-Vasquez, *and* Padilla

Examples of the less deferential, Camp II, approach to

61. *Id.* at 1299 (Dubina, J., dissenting).
62. *Id.* at 1300.
63. *Id.*

appellate review include *United States v. Pugh*,[64] *United States v. Amezcua-Vasquez*,[65] and *U.S. v. Jayyousi (Padilla)*.[66] In *Pugh*, the Eleventh Circuit held that a sentence of only five years' probation was unreasonable for a defendant who had unintentionally downloaded child pornography.[67] In finding Pugh's sentence unreasonable, the Eleventh Circuit discussed several philosophies of punishment that were ill-served by a sentence of probation, including the need for deterrence of crimes that create an incentive for the production of child pornography and the need to treat the crime of child pornography seriously.[68]

Similarly, the Ninth Circuit in *Amezcua-Vasquez* overturned a sentence of four years and four months as substantively unreasonable because the district court had applied a sixteen-level sentence enhancement based on a twenty-five-year-old violent felony.[69] Although the Ninth Circuit agreed that the old felony conviction was an aggravating factor, it held that the district judge should have taken the age of the conviction into account in setting the amount of the enhancement.[70]

And in the case involving José Padilla, the Eleventh Circuit held that a seventeen-year sentence for inciting terrorism—twelve years below the Guidelines level—was substantively unreasonable.[71] Holding that the district court gave too much weight to the fact that Padilla had allegedly been tortured during pretrial confinement[72] and noting that the district court also

64. 515 F.3d 1179 (11th Cir. 2008). Like *McBride*, *Pugh* was decided by the Eleventh Circuit, whose practice of applying conflicting levels of deference in substantive reasonableness decisions has been subject to criticism. *See supra* n. 36 (collecting commentary).

65. 567 F.3d 1050 (9th Cir. 2009).

66. 657 F.3d 1085 (11th Cir. 2011) (including *U.S. v. Padilla*).

67. *Pugh*, 515 at 1182–83.

68. *Id.* at 1194–99.

69. 567 F.3d 1050, 1055 (9th Cir. 2009).

70. *Id.* at 1055–56. The Ninth Circuit's criticisms of the illegal re-entry Guidelines in *Amezcua-Vasquez* ultimately resulted in changes to the Guidelines. *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, 36-MAR Champion 36, 38 n. 43 (2012).

71. *U.S. v. Jayyousi*, 657 F.3d 1085, 1117–19 (11th Cir. 2011) (including *U.S. v. Padilla*).

72. *Id.* at 1118.

failed to consider his "terrorism training,"[73] the Eleventh Circuit emphasized the importance of incapacitating terrorists, who "are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation."[74]

Despite the promise of these Camp II examples, there is reason to doubt that meaningful appellate guidance on sentencing principles will become the norm. First, these types of opinions are rare, as most courts are highly deferential when faced with substantive reasonableness appeals.[75] One recent study of appellate reasonableness review decisions shows that, in the six years since the Supreme Court's decision in *Gall*, the federal courts of appeals had by the summer of 2013 reversed only forty-four sentences for substantive unreasonableness—twenty as unreasonably high and twenty-four as unreasonably low.[76] Furthermore, when the courts of appeals provide more meaningful and binding sentencing guidance, they usually do so only when forced to justify the rare decisions in which they hold sentences unreasonable. Thus, as *Pugh*, *Amezcua-Vasquez*, and *Padilla* demonstrate, appellate guidance on sentencing policy is often prescriptive and provides guidance for only the outer fringes of acceptable sentencing choice. By issuing lawmaking judgments in these very safe fringe cases, appellate courts are engaging in the most limited lawmaking role; they are merely policing the edges of sentencing discretion.

And a final reason to doubt the future viability of the Camp II approach is the fact that it is subject to considerable criticism. For example, one commentator characterized the *Pugh* court's "overreach" in conducting what the author called "*de novo* review" rather than reviewing for abuse of discretion.[77] Another accused the Eleventh Circuit of "ignoring *Gall*" and failing to give sufficient deference to the discretion of the sentencing

73. *Id.* at 1117.

74. *Id.* at 1117 (quoting *U.S. v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003)).

75. *See* n. 44, *supra* (collecting authorities).

76. Administrative Office of the U.S. Courts, Office of Defender Services, Sentencing Resource Counsel, *Appellate Decisions after* Gall, http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf (Aug. 9, 2013) (accessed Sept. 17, 2013; copy on file with Journal of Appellate Practice and Process).

77. *See* Harrison, *supra* n. 36, at 1152.

court.[78] And, after *Amezcua-Vasquez*, a third accused the Ninth Circuit of "creat[ing] an unjustified exception to uniformly deferential review" that ultimately "undermines the Ninth Circuit's policy of promoting district court discretion."[79]

B. Negative Consequences of Deferential Review

The above analysis reveals several negative consequences of deferential review. First, it raises the potential for application of different sentencing policies throughout the judicial system. This point has been ably made in a critique of *Kimbrough* that characterizes the Supreme Court as "[g]ranting district courts leeway on how to value the different factors," noting that this "would mean that different courts sentence under different rules of law."[80] Under such a scheme, "[o]ne court might heavily value the reduction of disparity, for example, while another might most heavily favor parsimony."[81] Judge Lynch of the Second Circuit once articulated a similar concern, arguing persuasively that "we cannot have a coherent public policy on narcotics if half the sentencing judges are fighting a 'war on drugs' and the other half are pursuing non-punitive rehabilitative treatment options."[82] Indeed, "the law cannot claim to be fair and just when the same defendant may serve 15 years in prison or receive a short stay in a treatment program depending on the policy preferences of the judge before whom he happens to appear."[83]

Furthermore, the need for guidance on sentencing policy is heightened as a result of the Supreme Court's decision in *Booker* to render the Guidelines advisory. Cases like *Kimbrough* and *McBride* demonstrate the district courts' wide latitude after *Booker* to reject the Guidelines—in part or in whole—so long as

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78. Rose Duffy, Student Author, *The Return of Judicial Discretion*, 45 Idaho L. Rev. 223, 246–47 (2008).

79. Student Author, *Ninth Circuit Finds a Within-Guidelines Sentence for Illegal Reentry to be Substantively Unreasonable:* United States v. Amezcua-Vasquez, 123 Harv. L. Rev. 2096, 2096 (2010).

80. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 Ala. L. Rev. 1, 27 (2008).

81. *Id.* at 28.

82. Lynch, *supra* n. 7, at 2.

83. *Id.*

there is some basis in reason for the decision. After *Booker*, district judges may consider a number of factors that were prohibited under the mandatory Guidelines, including drug or alcohol addiction, socioeconomic status, and factors like a lack of appropriate adult supervision and family support during childhood that suggest a disadvantaged upbringing.[84] Yet without guidance on how to apply these factors, and in particular, how these factors relate to the purposes of punishment, there is a danger that district courts will simply choose not to exercise their discretion at all.[85] Indeed, one observer has pointed out that "[g]iven the potential for confusion, it may prove easier to apply the guidelines in most cases and then use boilerplate language to justify that decision."[86]

Another concern with the deference given to district judges on issues of sentencing policy is the resulting uncertainty for the defendant. As one commentator has noted, because defendants do not know the policy preferences of the sentencing judge, their ability to prepare an effective defense is undermined.[87]

Theoretically, the Sentencing Commission has been charged by statute with reviewing sentencing decisions and shaping sentencing principles in response.[88] Section 991(b)(1) of Title 28 tasks the Sentencing Commission with establishing "sentencing policies and practices" for the federal criminal justice system that—(A) "assure the meeting of the [§ 3553(a)] purposes of sentencing," (B) "provide certainty and fairness," and "avoid[] unwarranted sentencing disparities," and (C) "reflect . . . advancement in knowledge of human behavior." But the Commission has been subject to significant criticism for its failure to perform these roles.[89] First, a number of scholars have

84. *Rita*, 551 U.S. at 364–65 (Stevens & Ginsburg,, JJ., concurring); William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in *Mitigation and Aggravation at Sentencing* 247, 253–59 (Julian V. Roberts ed., Cambridge U. Press 2011).

85. Berry, *supra* n. 84, at 258–59 (discussing sentencing judges' reluctance to depart from the Guidelines).

86. *Id.* at 259.

87. Student Author, *Seventh Circuit Upholds Rejection of Diminished Capacity as Mitigating Factor*, United States v. Garthus, 125 Harv. L. Rev. 1104, 1110 (2012) (citing *Apprendi*).

88. 28 U.S.C. § 991(b)(1) (1988) (available at http://uscode.house.gov).

89. *See supra* n. 4 (collecting authorities).

argued that the Commission has rejected its statutory mandate to "assure the meeting of the [§ 3553(a)] purposes of sentencing" in developing the Guidelines.[90] Under this mandate, the Commission had an obligation "to build a system on a foundation of purposes and to give guidance to judges as to how purposes should be factored into determining sentences under the guidelines."[91] Instead, the Commission chose an "empirical approach" to sentence uniformity, determining the "average" of prior sentences and setting numerical ranges of appropriate sentences based on these averages.[92] And "[t]hough an empirical analysis may provide a useful starting point, purposes are needed to explain deviations from the empirically produced sentences."[93]

Second, even if the Commission did undertake to review sentencing decisions for application of sentencing principles, it is unlikely that such decisions, as they are currently written, will yield meaningful information about the sentencing purposes and policies animating individual sentencing choices. Scholars have observed that actual sentencing opinions often offer little more than information about sentencing results.[94] Despite *Booker*'s

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90. 28 U.S.C. § 991(b)(1)(A); *see also* Miller, *supra* n. 4, at 438–50; Berman, *supra* n. 4, at 100–02; William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 after* Booker *and Its Progeny*, 40 Conn. L. Rev. 631, 644 (2008).

91. Miller, *supra* n. 4, at 442 (citing Sen. Rpt. 98-225 at 75 (1984), reprinted in 1984 U.S.C.C.A.N. 3183, 3258).

92. *Id.* at 438–43; *but see* Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions after* Kimbrough, 93 Marq. L. Rev. 717, 728 (2009) (explaining that "[t]he process that the Commission used to determine past practice has been the subject of repeated methodological criticism," and arguing that, "[s]ince they were originally promulgated, the Guidelines have drifted further away from their original empirical basis").

93. Miller, *supra* n. 4, at 443.

94. *See* Robert Weisberg, *Guideline Sentencing, Traditional Defenses, and the Evolution of Substantive Criminal Law Doctrine*, 7 Fed. Senten. Rep. 168, 168 (1994) (noting that sentencing decisions under the Guidelines have been composed of "more complication of detail than richness of concept"); Berman, *supra* n. 4, at 106 & nn. 203–05 (citing the lack of meaningful discussion of sentencing purposes in sentencing decisions as evidence that the judiciary has taken an "insignificant role in sentencing lawmaking under the Guidelines"); Reitz, *supra* n. 9, at 1447–50 (discussing evolution of sentencing in modern era), 1500 (noting that a "nagging concern for anyone who advocates high levels of judicial creativity in sentence review is the very short list of inspiring opinions that have ever been written in the field"); *see also* Micheal M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 Marq. L. Rev. 751 (2009) (proposing a framework for reviewing the adequacy of sentence explanations on appeal); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 65 (2010) (advocating for written explanation of sentencing decisions to create a

mandate to consider the § 3553(a) factors independently, sentencing decisions still contain little discussion of purposes of punishment or penological philosophy. As one scholar observed before *Booker*,

> [e]ven though every sentencing case called for the resolution of a range of issues that could be informed by broad normative concepts, and even though the [Sentencing Reform Act] instructs judges to consider the traditional purposes of punishment when ascribing sentences, very rarely did these concepts or purposes find expression in sentencing opinions.[95]

And, finally, even if sentencing courts undertook to provide more information on sentencing purposes, it is doubtful that the Commission, Congress, or the public as a practical matter would be able to synthesize the substantive philosophies behind the vast number of sentencing decisions that are issued in the federal district courts.[96] Robust appellate review of sentences, especially review of the weight of the § 3553(a) factors, thus provides a more transparent way to communicate judicial practices to the Commission and the legislature.

C. Critiques of Robust Appellate Review

There is a significant debate over how far federal appellate courts should go in reviewing the substance of criminal sentencing decisions. A wide body of scholarship opposes robust appellate review of sentencing discretion, proposing instead various tiered systems of appellate review that include more deferential review for sentences within the Guidelines and more robust review for sentences that significantly depart from them.[97] Some have gone even further, seeking the elimination of

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sentencing "jurisprudence," and noting that "careful statements of reasons are essential to meaningful appellate review of sentencing decisions" after *Booker* (quotation omitted)).

95. Berman, *supra* n. 4, at 106.

96. *See* Ryan W. Scott, *The Skeptic's Guide to Information Sharing at Sentencing*, 2013 Utah L. Rev. ___ (forthcoming) (expressing doubt over whether lower court decisions can contribute to a common law of sentencing due to practical limits on data-sharing) (copy on file with author).

97. *See e.g.* D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 Duq. L. Rev. 641, 670–73 (2011); Jeffrey S.

substantive reasonableness review almost entirely.[98] Despite disagreement on the details, these limited-review authors agree on one thing: The courts of appeals should not substitute their judgment for that of the district courts on how to weigh the factors identified in § 3553(a).[99]

I have identified three primary bases for the hesitancy to broaden the appellate role to include evaluation of sentencing purposes.[100] I call these the functional, institutional, and normative critiques of robust appellate review.

1. The Institutional Argument

The institutional critique, also called the you-are-there rationale, is that district judges are the best actors to make sentencing decisions due to their extensive experience with sentencing and close contact with the evidence in the cases

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Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 Denv. U. L. Rev. 79, 85–91 (2007); Rust, *supra* n. 36, at 107–12.

98. *See e.g.* Harrison, *supra* n. 36, at 1154–58 (proposing that appellate review be limited to review for illegality, irrationality, improper considerations, and failure to consider a relevant factor); Cravens, *supra* n. 44, at 973–74 (advocating purely procedural reasonableness review as the "the sole sensible bounds on the discretion of the district judges in the sentencing context"); David C. Holman, Student Author, *Death by A Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment,* 50 Wm. & Mary L. Rev. 267, 271 (2008) (arguing that appellate review should be limited to procedural reasonableness, which the author refers to as "procedural correctness"); *see also Gall*, 552 U.S. at 60 (Scalia, J., concurring) (reiterating the view that "any appellate review of sentences for substantive reasonableness will necessarily result in a sentencing scheme constitutionally indistinguishable from the mandatory Guidelines struck down in *United States v. Booker*").

99. *See e.g.* Harrison, *supra* n. 36, at 1156 ("When a court of appeals begins questioning how the district court weighs the statutory factors, it crosses the threshold of necessary deference that the Supreme Court has articulated in *Rita*, *Gall*, and *Kimbrough*.").

100. A fourth basis, Justice Scalia's constitutional concern, is not covered here. According to Justice Scalia, every time an appellate court reverses a sentence as too high, it establishes a fact that must be found in later cases to justify the higher sentence. *Rita*, 551 U.S. at 369 (Scalia & Thomas, JJ., concurring in part and in the judgment). Thus, he says, "some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present," and substantive review by judges is unconstitutional under the Court's *Apprendi* jurisprudence. *Id.* at 369–70, 373. Because the focus of this Article is whether a robust system of appellate review is workable, I leave responding to Justice Scalia's argument for future discussion. In any event, the model proposed here, which merely shifts sentencing discretion within the same institution, from one judicial actor to another, does not threaten the jury's role in the way prohibited by the *Apprendi* line of cases.

before them.[101] This argument is frequently cited by both scholars and the Supreme Court to justify deferential appellate review of sentencing decisions.[102]

But recent research provides strong reasons to doubt sentencing judges' dominance over all aspects of the choice of sentence. Indeed, a summary of the psychological research on cognition "casts much doubt on the familiar grounds given by appellate courts for deference."[103] The science shows, for example, that "the appellate judge's reliance on a 'cold transcript' may actually help by providing insulation from misleading visual cues at the in-person sentencing hearing."[104] This sort of evidence suggests at a minimum that "justification for deference is not uniformly strong across the board."[105]

2. The Normative Argument

The second critique of robust appellate review, which I call the "normative argument," is that deferential appellate review is necessary in a guidelines regime to prevent over-enforcement of guidelines and to allow trial courts to arrive at individualized sentences. It is generally accepted that trial courts must be able to pick a sentence that is appropriate for each individual defendant, and to do this they need broad discretion at sentencing.[106] Scholars who subscribe to this view often point out that when appellate courts have played a more robust role in curbing sentencing discretion in guidelines regimes, it has led to the opposite result: sentences that are overly harsh, anchored inflexibly within the Guidelines, and inappropriate for particular

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101. *See* Harrison, *supra* n. 36, at 1157–58 (citing Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 182 (1978)).

102. *See e.g. Kimbrough*, 552 U.S. at 109; *Koon v. U.S.*, 518 U.S. 81, 113 (1996); *see also* Harrison, *supra* n. 36, at 1158 (citing *Koon*).

103. O'Hear, *supra* n. 10, at 2166.

104. *Id.* at 2127.

105. *Id.* at 2128; *see also* Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 Fed. Sentenc. Rep. 19, 20 (1996) (criticizing the Supreme Court's assertion in *Koon* that district courts have an "institutional advantage" over appellate courts in sentencing).

106. *See e.g. Pepper v. U.S.*, ___ U.S. ___, ___, 131 S. Ct. 1229, 1239–40 (2011).

individuals.[107] Accordingly, to protect individualized sentences and to avoid over-enforcement of the Guidelines, appellate courts must remain mostly bystanders in the sentencing process, limiting their role to review for procedural and legal errors and policing only the most extreme variances from the Guidelines.[108]

3. The Functional Argument

The final argument—the functional argument—maintains that there is no principled way to implement substantive reasonableness review without resorting to re-sentencing at the appellate level. This argument is perhaps best articulated in the assertion that "when judges try to find content for substantive reasonableness analysis, they simply replace the sentencing court's judgment with their own,"[109] and the companion recognition that "[i]f discretion is to have any robust meaning, any integrity of meaning, in the sentencing context, there can be no such thing as substantive unreasonableness."[110] Sentencing observers thus do not see how appellate courts can question procedurally proper sentences other than by applying a loose standard like "unless the appellate court would have decided otherwise."[111] For these scholars, appellate review in sentencing is essentially binary: Either we provide district courts with discretion on all aspects of sentencing within procedural and statutory bounds, or the appellate court acts as a second sentencing court.

III. SENTENCE APPEALS IN ENGLAND

The following study of appellate review of sentences in England gives us reasons to question all three of the usual

107. *See e.g.* Sutton, *supra* n. 97 at 79, 81–82 (describing the normative, or "individualized sentencing" argument, and noting that there were few departures during the mandatory-guidelines era "because guidelines-centric appellate review was rigorous").

108. *Cf. id.* at 83–90 (proposing a "sliding-scale" appellate review, increasing the issues to be reviewed on appeal as the sentence gets further from the advisory guidelines range), 89 (warning that such review "raises the specter of advancing consistency at the expense of individualized sentencing" and could potentially "reinstate mandatory guidelines").

109. Cravens, *supra* n. 44, at 970.

110. *Id.* at 966.

111. *Id.* at 973.

critiques—functional, normative, and institutional—against robust appellate review. As will be demonstrated below, through application of what I call a "mixed deference approach," the Court of Appeal in England reviews sentencing decisions for substantive reasonableness without unwarranted encroachment of sentencing discretion and without over-enforcement of the English Guidelines. Furthermore, by embracing its lawmaking function, the English Court of Appeal works in tandem with the institution that is tasked with developing guidelines—the Sentencing Council for England and Wales—to provide sentencing courts with benchmarks to guide the sentencing decision, while at the same time allowing for the discretion needed in the trial court to reach an individualized sentence.

A. Prior Comparative Work on Sentence Appeals

Before describing the modern sentencing model in England, it is first helpful to summarize the prior comparative work on robust appellate review that is the foundation for my own research. Comparative work on criminal sentencing had its heyday in the 1960s through 1980s when, as one contemporary scholar put it, "Judicial reform [was] in the air."[112] Prior to that time, federal district courts were almost completely unconstrained in their sentencing powers; appellate review was limited to claims of legal error.[113]

In the 1960s and 1970s, however, scholars began to lament the disparate, biased, and discriminatory sentences that marked the criminal justice system at the time.[114] These scholars called for change, offering a diverse array of proposals designed to control sentencing discretion and thereby inject uniformity and

112. Daniel J. Meador, *Criminal Appeals: English Practices and American Reforms* vii (U. Press of Va. 1973).

113. *See* Rosenbaum, *supra* n. 2, at 875–99.

114. *See* Reitz, *supra* n. 9, at 1443–50 (detailing efforts to reform appellate review in the 1960s and 1970s and reasons for ultimate failure of such reform efforts). For leading reformist arguments, see Marvin E. Frankel, *Criminal Sentences: Law Without Order* (Hill & Wang 1973); Daniel J. Meador, *The Review of Criminal Sentences in England*, in *ABA Project on Minimum Standards for Criminal Justice—Standards Relating to Appellate Review of Sentences* 94 (Appendix C) (1st ed. ABA 1969).; Gerhard O.W. Mueller & Fre Le Poole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 Vand. L. Rev. 411 (1968); Stanley A. Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405 (1968).

fairness into criminal sentencing. One of the popular proposals at the time was to broaden appellate review of criminal sentences with the aim of developing a common law of criminal sentencing principles.[115] These reformists believed that "a regularized, rule-of-law approach to sentencing at the trial court level would provide an intelligible basis for review on appeal," and that "appellate courts, habituated to the task of pronouncing law for jurisdiction-wide application, would contribute thoughtfully to the overall development of a consistent body of sentencing jurisprudence."[116]

However, robust review of criminal sentences was practically unheard of at the time, at least in the federal courts of appeals. Accordingly, scholars searched for outside comparisons, hoping to provide models upon which to base a successful and workable system of appellate review of criminal sentences. It turned out that there were many such models, as numerous foreign jurisdictions—and even a few state jurisdictions—included some aspect of appellate review of sentencing in their criminal justice systems.[117] Studies of several of these jurisdictions began to appear, examining a wide variety of models of appellate review from throughout the world.[118] England provided a particularly valuable comparison because robust appellate review of criminal sentences had been occurring there for decades and thus had been thoroughly tested. Scholars[119] presented detailed accounts of the English system of appellate review of criminal sentences, providing evidence that

> a court exercising appellate jurisdiction over sentences can develop a meaningful case law of sentencing, provided that it is prepared to take a sufficiently broad view of its

115. *See* Reitz, *supra* n. 9, at 1447–49.

116. *Id.* at 1448.

117. *See generally* Mueller & Le Poole, *supra* n. 114 (documenting numerous examples).

118. *See e.g. id.*; D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 Ala. L. Rev. 193 (1968) (evaluating sentencing appeals in England); David J. Halperin, *Sentence Reviews in Maine: Comparisons and Comments*, 18 Maine L. Rev. 133 (1966) (offering a comparison of various state jurisdictions that offer appellate review of sentences, including Maine, Connecticut, Massachusetts, and Illinois); *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453 (1960) (evaluating the experience of the Connecticut Sentence Review Division) [hereinafter "Case Study"].

119. *See e.g.* Meador, *supra* n. 114; Thomas, *supra* n. 118.

> function and discard the normal approach of an appellate court in seeking only errors or abuses.[120]

These accounts showed that a common law of sentencing through robust appellate review was a practical reality.

This comparative work also contributed to the wave of overwhelming criticism against those United States jurisdictions that had failed to adopt a system of appellate review of sentences (which, incidentally, was almost all of them). As two scholars studying appellate review of criminal sentences in foreign jurisdictions lamented at the time, "[i]t can be attributable only to chance or ignorance that the American system, which permits no review of judicial choice in sentencing, has not been declared unconstitutional."[121]

As is well known, however, Congress did not choose appellate review as its means of reforming federal sentencing. Instead, it implemented the mandatory Federal Sentencing Guidelines, choosing to opt for consistency in sentencing by mandating specific sentencing outcomes instead of through development of a common law of sentencing, or a consistent sentencing approach. But this mandatory guidelines system "failed to live up to the expectations of reformers,"[122] at least in part because "[r]ather than arriving at guidelines to implement *all* of the purposes of the [Sentencing Reform Act], the Commission emphasized one issue above all others, the problem of sentencing disparity."[123] So long as "one judge was doing the same thing as another," it appeared to matter little which principles their sentences furthered or whether their sentencing choices were indeed correct.[124]

At this point, comparative work took a backseat, as courts and observers spent the next twenty years attempting to grapple with, make sense of, and criticize the new federal mandatory sentencing regime. However, comparative study has enjoyed a resurgence in recent years, as observers turn away from the

120. Thomas, *supra* n. 118, at 225.

121. Mueller & Le Poole, *supra* n. 114, at 413.

122. Gertner, *supra* n. 4, at 571.

123. *Id.* at 576 (emphasis original).

124. *Id.*

federal guideline system.[125] Indeed, some scholars have questioned the modern dominance of the federal Guidelines—both as a model for sentencing reform and as a focus of academic research—and have suggested research into the systems used by other jurisdictions to find alternative ways to reform sentencing law and practice.[126]

This prior comparative work provides several important insights about appellate review of criminal sentences, two of which are particularly relevant to this study. First, these studies provide evidence to suggest that the creation of a common law of sentencing through appellate review can have significant benefits. These include, for example, relief from excessive sentences,[127] transparency of sentencing policies enabling "informed public criticism" of the criminal process,[128] and the development of uniform policies of punishment in advance of legislative guidance or expressions of public consensus in the area.[129]

Despite this evidence of promise, these studies also consistently show that appellate review must be designed correctly in order to obtain most of these benefits. First, appellate review must be guided by some standards or principles to actually allow for development of uniform theories of punishment. Studies of jurisdictions where the appellate courts simply resentence the defendant without explanation show that these courts do not contribute to the development of a common

125. Examples of more recent comparative studies of criminal sentence appeals include Reitz, *supra* n. 9 (comparing the design of sentence appeals in Pennsylvania, Minnesota, and the federal courts); Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, in *Sentencing and Sanctions in Western Countries* 259, 272–75 (Michael H. Tonry ed., Oxford U. Press 2001) (offering a review of sentencing issues on an international scale, including sentence appeals and limits on sentencing discretion, and suggesting further comparative research in this area); Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 Case W. Res. L. Rev. 1 (2002); D.A. Thomas, *The Role of the Court of Appeal in the English Sentencing System*, 10 Fed. Senten. Rep. 259 (1998) (examining the role of the Court of Appeal in developing sentencing guidelines before the creation of the Sentencing Council for England and Wales); and Susanne Di Pietro, *The Development of Appellate Sentence Review in Alaska*, 75 Judicature 143 (Oct./Nov. 1991).

126. *See e.g.* Reitz, *supra* n. 9, at 1502.

127. Randall T. Shepard, *Robust Appellate Review of Sentences: Just How British Is Indiana?* 93 Marq. L. Rev. 671, 680–811 (2009).

128. Case Study, *supra* n. 118, at 1476–77.

129. Thomas, *supra* n. 118, at 208.

law of sentencing in a meaningful way. For example, a much-cited 1968 case study of the Connecticut Sentence Review Division concluded that its failure to articulate the specific sentencing principles that formed the basis of its decisions led to that court's failure to contribute to a "field of sentencing."[130] Although the Division had full power to review and revise sentences, it usually merely substituted a different sentence on appeal without linking the new sentence to specific sentencing purposes.[131] As a result, appellate review added little value other than "as a res[t]raint on palpably unreasonable sentencing decisions."[132]

A similar finding appears in a modern study of sentence appeals in the military justice system, which, like the 1968 Connecticut model, includes *de novo* review of sentences on appeal.[133] But military appellate courts provide limited information or justification for their decisions on whether a sentence is appropriate, despite having a broad authority to review sentencing decisions.[134] Accordingly, appellate courts in the military justice system act as a check only on a case-by-case basis and do not establish a common law of sentencing "appropriateness."[135]

Studies like these tell us that, at the least, a sentencing system must include an articulation of the aims of sentencing that appellate courts can use to develop a sentencing jurisprudence.[136] As one commentator observed of Indiana's

130. Case Study, *supra* n. 118, at 1477.

131. *Id.* at 1476 (noting "the Division's reluctance to articulate sentencing policies").

132. *Id.*

133. Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. Rev. 79, 89–90 (2010).

134. *Id.*

135. *Id.*

136. Mueller & Le Poole, *supra* n. 114, at 422–24 (calling on American jurisdictions to develop a "statement of penal correctional aims" as a "necessary step toward developing a sound sentencing and sentence review system"); Griffin & Katz, *supra* n. 125, at 4–18 (citing the legislature's development of sentencing principles, such as reasonableness, proportionality, punishment, and public protection, as important to the success of the advisory guidelines regime in Ohio); Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 Fed. Senten. Rep. 233, 238–39 (2005) (stating that an advisory guidelines system can work only if its components include "goals for sentencing clearly set by the sentencing commission and/or the state's highest court" and "meaningful appellate review"); Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?* 27 Am. Crim. L. Rev. 367, 388–89 (1989) (warning

robust appellate review model, "the absence of any global substantive framework . . . makes it difficult for courts on appeal to perceive when a given sentence deviates from the system-wide norm."[137] Accordingly, commentators have long advocated for legislative and judicial articulation of a substantive sentencing framework, including both general statements about the "recognized aims of penal-correctional policy" and offense-specific criteria "by which the perpetrator and his deed should be evaluated."[138]

Furthermore, researchers in other jurisdictions have observed that deference to trial courts on issues of sentencing law and policy impedes the development of a common law of sentencing.[139] These studies show that using standards like "clear and convincing evidence" and "reasonable judge" prevent appellate courts from providing meaningful guidance on the meaning of principles of punishment.[140] As a practical matter this means that, to develop uniform criteria of sentencing, appellate courts must review the application of sentencing principles *de novo*. As one pre-guidelines study of English appellate review put it, "[a] court which will intervene only where there is an abuse of discretion by the trial judge automatically limits its potential contribution to the widest generalities, and probably to the context of procedure."[141] To "have sufficient scope to deal with the fundamental issues of penal philosophy which are the basic problems of sentencing in a modern system," a court of appeal "must be prepared to discard [this] narrow approach . . . in favor of a broader

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that, unless Canada implemented "explicitly stated norms or principles," appellate courts were likely to reject a lawmaking role, as did the federal courts of appeals in the United States).

137. Shepard, *supra* n. 127, at 681.

138. Mueller & Le Poole, *supra* n. 114, at 423.

139. Griffin & Katz, *supra* n. 125, at 67–68 (asserting that "[t]he trial judge's determination of the law is not entitled to deference," and that "[i]ssues of law are matters to be decided through the appellate process"); Case Study, *supra* n. 118, at 1466 (characterizing it as "extremely difficult if not impossible to deduce what aim or aims of the criminal law are being emphasized" in the Division's decisions and similarly difficult to "abstract any sentencing principles" from them).

140. Case Study, *supra* n. 118, at 1476 (noting that "a 'reasonable judge' test" provides "little assistance to a trial judge seeking a positive statement of principles for future application").

141. Thomas, *supra* n. 118, at 220.

view."[142] Furthermore, courts of appeals must affirmatively articulate the sentencing policies that guide their decisions on review in order for those policies to develop into a common law of sentencing.[143] In sum, we have known for more than fifty years that if appellate courts are not willing to "assume[] the role of an affirmative policy-maker," there will be no "generally applicable sentencing criteria" for the lower courts to apply.[144]

These observations together provide some evidence of the elements necessary to ensure successful implementation of sentencing policy through robust appellate review. They are also critical to consider as part of any modern effort to revise the appellate function after *Booker*.

B. The Role of the Appellate Court in England

The modern appellate court plays a significant role in the English criminal sentencing system, as it performs both broad enforcement and lawmaking functions. Regarding enforcement, the Court of Appeal in England is responsible for ensuring that sentencing decisions comply with the law, including the sentencing guidelines. In this way, the Court of Appeal's role is similar to that of the enforcement role of federal appellate courts—to ensure guidelines compliance. But the Court of Appeal in England also performs a significant lawmaking function that goes far beyond that of the federal courts of appeals. From its creation in 1907 until the late 1990s, the Court of Appeal in England shaped much of the law and policy of sentencing through common law review of trial court sentencing decisions. Although the Court of Appeal now shares its lawmaking function with an independent sentencing commission, called the Sentencing Council for England and Wales (the "Sentencing Council"), the Court of Appeal has nevertheless retained an important lawmaking role. In sharp contrast to most appellate courts in the United States, the post-guidelines English Court of Appeal has embraced the opportunity to help shape sentencing law and policy by

142. *Id.*
143. Case Study, *supra* n. 118, at 1466, 1474–75.
144. *Id.* at 1477.

continuing its common law review of sentencing policy, at the same time as taking on the duty to enforce the guidelines.

1. The Basic Structure of Sentencing in England

The sentencing system in England is, in many ways, strikingly similar to the post-*Booker* federal sentencing system.[145] Like the practice in the federal courts of appeals, the English system is characterized by: (1) a legislature that sets mandatory minimums and maximums and general sentencing policies, (2) an independent sentencing body (the Sentencing Council for England and Wales) that is responsible for developing and issuing guidelines, and (3) an appellate court, the Court of Appeal–Criminal Division, which reviews the sentencing decisions of the trial courts.

Legislative guidance on sentencing policy is fairly limited, and is roughly equivalent to the guidance provided by Congress to the federal courts of appeals. As one commentator explains, "[t]he role of legislation as a source of English sentencing law has . . . largely been one of providing powers and setting outer limits to their use."[146] Just as Congress has authorized the establishment of sentencing ranges for use in the federal courts, Parliament has established sentencing ranges for each crime, sometimes including mandatory minimums.[147] It has also enacted statutory provisions articulating principles of sentencing meant to provide general guidance to the courts in making sentencing decisions.[148] For example, § 152(2) of the Criminal Justice Act of 2003 provides that

> [t]he court must not pass a custodial sentence unless it is of

145. Readers interested in both the English sentencing system generally and the history and modern practice of appellate review in England might consult *Sentencing Guidelines, Exploring the English Model* (Andrew Ashworth & Julian V. Roberts eds. Oxford U. Press 2013); *Archbold: Criminal Pleading, Evidence, and Practice 2013* (James Richardson ed., 61st ed., Sweet & Maxwell 2012); John Sprack, *A Practical Approach to Criminal Procedure* (14th ed., Oxford U. Press 2012); Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed., Cambridge U. Press 2010); Thomas, *supra* n. 125; D.A. Thomas, *Principles of Sentencing* (2d ed., Ashgate Publg. Co. 1979); D.A. Thomas, *Principles of Sentencing* (1st ed., Heinemann Educ. Books 1970); Meador, *supra* n. 114; and Thomas, *supra* n. 118.

146. Ashworth, *supra* n. 145, at 25.

147. *See generally id.* at 24–27.

148. *Id.*

> the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.[149]

And Parliament has also provided that, where a custodial sentence is imposed, it must be "for the shortest term . . . that in the opinion of the court is commensurate with the seriousness of the offence."[150] Through provisions like these, Parliament has established a general policy in favor of non-prison alternatives, parsimony, and proportionality.[151]

Parliament has also articulated five "purposes of sentencing" that a sentencing court must consider in imposing sentence.[152] These are "the punishment of offenders, . . . the reduction of crime (including its reduction by deterrence), . . . the reform and rehabilitation of offenders, . . . the protection of the public, . . . and the making of reparation by offenders to persons affected by their offences."[153] But like Congress in the United States, Parliament has historically delegated the task of developing further sentencing policy to other institutions, first to the Court of Appeal and later to both the Court of Appeal and the Sentencing Council. I describe these two institutions next.

A single court hears all appeals of criminal sentences in England and Wales: the Court of Appeal–Criminal Division (the "Court of Appeal," the "Court," or the "Criminal Division").[154]

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149. Criminal Justice Act, (2003) § 152(2) (available at http://www.legislation.gov.uk/ukpga/2003/44/contents). In response to this provision, the Court of Appeal has created the "custodial threshold," which requires a court to determine whether prison is necessary before evaluating the appropriate length of any sentence. *R. v. Seed & Stark*, [2007] EWCA (Crim) 254, [439]; [2007] 2 Cr. App. R. (S.) 69 (pointing out that if the custodial threshold has not been passed, "no custodial sentence can be imposed").

150. Criminal Justice Act, (2003) § 153.

151. *See Seed & Stark*, [2007] EWCA (Crim) 254 [439–40] (noting the provisions in the 2003 Act that favor non-prison alternatives and address the need for parsimony in punishment).

152. Criminal Justice Act, (2003) § 142(1).

153. *Id.* Those familiar with federal sentencing will recognize these principles as similar to the sentencing purposes used in the United States—just punishment, deterrence, protection of the public, and rehabilitation. *See* 18 U.S.C. § 3553(a).

154. Originally, the Court of Appeal–Criminal Division was known as the Court of Criminal Appeal. Sprack, *supra* n. 145, at 470. Its name and makeup have changed in a number of ways, for reasons irrelevant to this article. *See id.* at 470–71 (discussing the evolution of the English criminal sentence appeal tribunal). To avoid confusion, I will consistently refer to the Court of Appeal–Criminal Division as the "Court of Appeal," the

Hearing appeals of convictions and sentences is the Court of Appeal's only work.[155] Although the Court of Appeal is a single court, it is in fact made up of different panels of at least three Lord Justices of Appeal, pulled from the thirty-seven Justices who sit on the wider Court of Appeal.[156] In addition, various other judges (such as judges of the lower trial courts, known as crown courts) may be asked to sit on Criminal Division appeals.[157] The Lord Chief Justice is president of the Criminal Division, and often issues some of its more important decisions as a way of giving them greater authority.[158]

Another difference between the English appellate system and practice in the federal courts of appeals is the scope of evidence heard on appeal: The Court of Appeal is not limited to the evidence introduced in the trial court.[159] The appellant can request, and the Court of Appeal can order, that additional evidence or witnesses be presented at the hearing.[160] As one observer has noted, appellate review in England is designed to "determine whether at the time the case is before the [Court of Appeal], and on the information then available, the sentence should be affirmed or altered."[161] To achieve this purpose of determining the appropriate sentence at the time of the appeal, it may be seen as necessary that the Court of Appeal be able to hear all evidence relevant to that determination.[162] This approach to the appellate function is in sharp contrast to the approach in most United States jurisdictions, where the review is usually to determine whether the trial judge erred in some way on the information then before her. As the analysis below shows, this difference casts doubt on the ability to transfer one aspect of the English Court of Appeal's review of sentences, namely the

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"Court," or the "Criminal Division," regardless of the tribunal's name when the action discussed took place.

155. Sprack, *supra* n. 145, at 470–71.

156. *Id.* at 471 (also noting, however, that "[a]ppeals against sentence may be determined by a two judge court").

157. *Id.* at 471–72.

158. *Id.* at 471; Ashworth, *supra* n. 145, at 36 (noting that "[t]hese judgments acquired authority from the fact that the Lord Chief Justice laid them down").

159. Sprack, *supra* n. 145, at 491–93.

160. *Id.*

161. Meador, *supra* n. 114, at 139.

162. *Id.* at 116 (noting that "the Court is not limited to the trial record").

ability to modify sentences on appeal, to the federal courts of appeals.

Prior to creation of the Court of Appeal–Criminal Division by the Court of Appeal Act of 1907, there was no right to appellate review of criminal sentences.[163] As one commentator has explained, the Court of Appeal was established to address the concern that judges were sentencing defendants according to wildly diverse sentencing philosophies.[164] In one court, a judge might be emphasizing the cumulative principle, under which a defendant's sentence increases as his criminal history increases, while in another the judge might be sentencing according to a proportionality philosophy.[165] "The solution which was eventually adopted" to address this disparity "was the introduction of appellate review,"[166] so that the set of uniform sentencing principles established by the new court would introduce uniformity into the sentencing process.[167]

The jurisdiction and function of the Court of Appeal have changed little since its creation in 1907. The Court of Appeal hears appeals of cases from the crown courts,[168] which preside over jury trials involving the more serious crimes, such as murder, manslaughter, robbery, and rape.[169] The Court of Appeal has broad jurisdiction over sentence appeals. Under section 11(3) of the Criminal Appeal Act of 1968, the Criminal Division may hear an appeal "if they consider that the Appellant should be sentenced differently for an offence for which he was

163. Sprack, *supra* n. 145, at 470.

164. Thomas, *supra* n. 125, at 259.

165. *Id.*

166. *Id.*

167. *Id.*

168. Defendants in England and Wales are sentenced in one of two courts, the crown courts or the magistrates' courts. The magistrates' courts deal with the bulk of the criminal trials in England, hearing cases involving the least serious criminal offenses, such as minor thefts and driving infractions. Magistrates may sentence criminal offenders only to a maximum of six months imprisonment per charge, or a total of twelve months for all charges. Although these courts handle the bulk of the criminal cases, the Court of Appeal has little to no interaction with them because defendants sentenced in magistrate courts appeal their sentences to the crown courts. On appeal, the crown court reviews sentences *de novo*, and may order any sentence that appears just. Commentators see the crown courts' appellate role as mostly a guard against excessive sentences. For all practical purposes, crown court sentencing decisions are final. *See generally* D.A. Thomas, *Sentencing in England*, 42 Md. L. Rev. 90, 91–94 (1983); Ashworth, *supra* n. 145, at 1–6.

169. Sprack, *supra* n. 145, at 9–10.

dealt with by the court below."[170] Additionally, on appeal, Criminal Division panels may vary the sentences imposed and substitute their own sentences "as they think appropriate for the case."[171] The only legislative restriction on this power is that, on appeal by the defendant, the Court of Appeal may not impose a sentence that is higher than the sentence originally imposed at trial.[172] However, the Court of Appeal can increase a sentence on appeal by the Government.[173]

The Court of Appeal has not chosen to exercise the full extent of its jurisdiction in the context of sentence review. Instead, over time, it has developed its own standards of review, stating that it will not reverse a sentence unless it is "wrong in principle" or "manifestly excessive."[174] In practical terms, these standards of review lead to three different types of sentencing decisions in England: (1) guidelines judgments, (2) excessive sentence modifications, and (3) policy guidance. Each is described in the following sections.

The Court of Appeal fulfilled its legislative purpose of establishing uniformity of sentencing principles and responding to perceived disparity of sentencing by developing both common law sentencing principles, and, starting in the 1970s, sentencing guidelines.[175] As one sentencing scholar has explained, "[t]his area of judge-made law was a commendable attempt to impose a greater degree of consistency upon an area of law where traditionally there had been wide discretion and divergence of approach."[176]

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170. Criminal Appeal Act, (1968) § 11(3) (available at http://www.legislation.gov.uk/ukpga/1968/19/contents).

171. *Id.*

172. *Id* § 4(3); *see also* Thomas, *supra* n. 125, at 260; *cf.* Criminal Appeal Act (1968) § 11(3) (providing that "the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below").

173. Criminal Justice Act, (1988) § 36 (available at http://www.legislation.gov.uk/ukpga/1988/33/contents). These government appeals are referred to as "Attorney General's References." Thomas, *supra* n. 125, at 260.

174. Thomas, *supra* n. 125, at 260.

175. *See id.* at 259–62 (discussing history of policy guidance and guidelines judgments in the Court of Appeal).

176. Martin Wasik, *The Status and Authority of Sentencing Guidelines*, 39 Bracton L.J. 9, 11 (2007).

However, the appellate review system had its problems too. By the 1980s, it became clear that the appellate model for creation of sentencing law and policy had some "inherent disadvantages."[177] Most importantly, the appellate process, which addresses issues on a case-by-case basis, made it difficult to develop "general principles, or aggravating or mitigating factors which might cut across a range of offenses."[178] As two observers pointed out at the time, "[i]t has been clear for some years that English sentencing law lacks any coherent rationale."[179]

To address this problem, in 1998, Parliament established the precursor to the current Sentencing Council, the Sentencing Advisory Panel ("SAP"). As originally conceived, the SAP was something in the nature of a think tank. That is, it was a body of individuals recruited from across the world of criminal sentencing—judges, prosecutors, defense attorneys, and academics—who would research sentencing issues and policies and provide advice and guidance to the Court of Appeal in deciding cases before it. Importantly, the Court of Appeal remained the sole body responsible for issuing, developing, and revising sentencing guidelines. After 1998, though, the SAP advised the Court in this task.[180]

Fairly quickly, however, there was a push to provide the SAP with lawmaking powers, particularly to allow for the development of general guidelines without having to wait for a related appeal, as the Court of Appeal is obliged to do.[181] In response, in 2003, Parliament created the Sentencing Guidelines Council ("SGC"), which now had the power to "create guidelines across a wide range of issues that are relevant to

177. *Id.*

178. *Id.*

179. Martin Wasik & Andrew von Hirsch, *Statutory Sentencing Principles: The 1990 White Paper*, 53 Modern L.R. 508, 508 (1990).

180. For further information on the creation of the SAP and its evolution into the Sentencing Council, see Andrew Ashworth & Julian V. Roberts, *The Origins and Nature of the Sentencing Guidelines in England and Wales*, in *Sentencing Guidelines, Exploring the English Model* 1, 3–5 (Andrew Ashworth & Julian V. Roberts eds. Oxford U. Press 2013).

181. *See id.* at 4–5 (discussing the 2001 Home Office Sentencing Review and its critique of the Court of Appeal's involvement in implementing sentencing guidelines).

sentencing."[182] The SAP remained in existence after the 2003 Act, studying sentencing policy and providing advice to the SGC, not the Court of Appeal. In 2009, Parliament essentially combined the functions of the SGC and the SAP into one body, the Sentencing Council for England and Wales (the "Sentencing Council"), which exists today.[183] Sentencing guidelines issued either by SGC before 2003 or the Sentencing Council after 2003 are called "Definitive Sentencing Guidelines."[184]

Finally, unlike the United States Sentencing Commission, the Sentencing Council does not have exclusive jurisdiction to develop sentencing guidelines and policy guidance. Parliament has re-affirmed the Court of Appeal's lawmaking power, specifying that the creation of the Sentencing Council did not abrogate the power of the Court of Appeal to "provide guidance relating to the sentencing of offenders in a judgment of the court."[185] The Court of Appeal thus continues to enforce, review, and revise its old sentencing guidelines and develop new guidelines as needed. It also issues decisions interpreting the Sentencing Council's Definitive Guidelines, both broadly and as applied in specific cases. Finally, as always, the Court of Appeal provides guidance on general sentencing principles.

The result is that, in the English system, the Sentencing Council and the Court of Appeal work in tandem to develop and

182. Criminal Justice Act, (2003) explanatory n. at ¶ 56, http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpgaen_20030044_en.pdf (accessed Oct. 21, 2013; copy on file with Journal of Appellate Practice and Process).

183. Coroners and Justice Act, (2009) §§ 118–124, 135 (available at http://www.legislation.gov.uk/ukpga/2009/25/contents); *see also* Ashworth & Roberts, *supra* n. 180, at 3–5 (discussing legislative and historical origins of the Sentencing Council).

184. A brief historical aside will be interesting to those familiar with the history of sentencing in the federal courts of the United States. Around 2007, the Sentencing Council in England briefly considered whether the Definitive Guidelines should be made mandatory and whether the country should switch to a grid-based guideline system, such as exists in many U.S. jurisdictions. The Council ultimately rejected such a model after receiving overwhelming criticism. *See e.g.* Julian V. Roberts, *Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales*, 51 Brit. J. Criminology 997 (2011); Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach*, 12–14 (July 2008).

185. Coroners and Justice Act, (2009) § 124(8) (available at http://www.legislation.gov.uk/ukpga/2009/25/contents); *see also R v. Blackshaw*, [2011] EWCA (Crim) 2312, [1133], [2012] 1 Cr. App. R. (S.) 114 ("[N]othing in the 2009 Act has diminished the jurisdiction of this court, where necessary, to promulgate judgments relating to the principles and approach to be taken to sentencing decisions.").

issue sentencing policy. As the Court of Appeal has itself said, "[t]he relationship between this court and the Sentencing Council proceeds on the basis of mutual respect and comity."[186] For example, when issuing a new Definitive Guideline on an issue where the Court of Appeal has already ruled, the Council has gone out of its way to acknowledge, study, and respond to the Court of Appeal's reasoning on the issue.[187] Conversely, the Court of Appeal usually defers to the Council's judgments on guideline issues and deviates from Definitive Guidelines when compelled to by new facts, new law, or some indication of error in application of established sentencing principles.[188] Furthermore, the Court of Appeal acknowledges the Council's contemplation of guidelines in particular instances and is careful to note the temporary nature of its own guidelines in the meantime.[189] This kind of respectful acknowledgment of the other's expertise and judgment by each institution is necessary to avoid the confusion that would inevitably result from conflicting guidance on the same issue.[190]

On the other hand, it appears just as important that these two institutions do not each completely delegate the role of developing sentencing policy to the other. Both institutions develop sentencing policy, the Court of Appeal through review of the cases that come before it, and the Sentencing Council

186. *R v. Blackshaw*, [2011] EWCA (Crim) 2312, [1133], [2012] 1 Cr. App. R. (S.) 114.

187. *Burglary Offences Guideline: Professional Consultation* (2010), http://sentencing council.judiciary.gov.uk/docs/Burglary_offences_guideline_-_professional_consultation.pdf (May 2011) (discussing Court of Appeal's burglary guidelines in outlining proposed Definitive Guidelines for public comment) (accessed Sept. 23, 2013; copy on file with Journal of Appellate Practice and Process).

188. *See* Andrew Ashworth, *The Struggle for Supremacy in Sentencing*, in Ashworth & Roberts, *supra* n. 180, 15, 16–19, 25–27. For more on the relationship between the Court of Appeal and the Sentencing Council, see *id.*; Julian V. Roberts, *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues*, 76 Law & Contemp. Probs. 1, 14–22 (2013).

189. *See* Ashworth, *supra* n. 188, at 22–23; *see e.g. R. v. Corran*, [2005] [2005] EWCA (Crim) 192; 2 Cr. App. R. (S.) 73 (providing "preliminary" guidelines on sentencing the new offences created by the Sexual Offences Act 2003); *R v. Richardson*, [2006] EWCA (Crim) 3186; [2007] 2 Cr. App. R. (S.) 36 (issuing new guidelines in death-by-dangerous-driving cases, but acknowledging that the SAP had started working on guidelines and thus "further guidance from the Sentencing Guidelines Council" might be forthcoming).

190. *But see* Ashworth, supra n. 188, at 24 (attributing the lack of public differences of opinion between the Sentence Council and the Court of Appeal in part to the presence of members of the Court of Appeal on the Council).

through study and consultation. The Court of Appeal has been quite careful to retain its power to review sentences for incorrect sentencing principles, regardless of whether the error occurs because of the independent judgment of the sentencing court or the application of the Council's Definitive Guidelines. Indeed, the success of the system appears to lie just as much in the willingness of the actors to question each other as in the respect they provide.

2. Guidelines and Excessive-Sentence Review

With regard to the guidelines, the Court of Appeal exercises its lawmaking role when it issues guidelines or makes changes to existing guidelines, while its enforcement role involves both procedural review—to ensure that the guidelines are properly applied and proper procedures followed—and substantive excessive-sentence review. Although these functions have separate purposes, they are often linked because the Court often uses its excessive-sentence review to enforce both its own guidelines and the Definitive Guidelines of the Council.

Since 2003, the primary institution responsible for developing and issuing guidelines has been either the Sentencing Council or its precursor, the SGC. However, sentencing guidelines have existed in England since the 1970s, when the Court of Appeal began to issue guidelines, in the form of "guideline judgments."[191] It did so "as a means of providing assistance to Crown Court sentencers in the disposal of particular types of offence, mainly the most serious forms of crime which attract long prison sentences."[192] Most guidelines judgments issued by the Court of Appeal are "based on the existing practice of the Court of Appeal and are intended to provide a convenient restatement of . . . practice."[193] These judgments often summarize past precedent to provide more accessible and "general guidance on how a particular type of crime should be dealt with."[194] Some guidelines judgments go

191. Thomas, *supra* n. 125, at 261–62.

192. Martin Wasik, *Sentencing Guidelines in England and Wales–State of the Art?* 4 Crim. L. Rev. 253, 253 (2008).

193. Thomas, *supra* n. 125, at 261.

194. *Id.*

further, though, and are "intended to signal a change of the practice of the Court of Appeal," often "in light of changes in the law or public attitudes."[195]

English scholars appear to accept that, "in strict terms," the Court of Appeal's guideline judgments are "massive obiter dicta, since much of what is said is not essential to the decision in the particular case."[196] But it is also quite clear that this does not lessen their binding nature. English observers agree that the mere fact that these judgments are issued by the Lord Chief Justice provides them with an air of authority.[197] Furthermore, "[t]hese judgments . . . were intended to bind lower courts, and were treated as doing so."[198]

Regardless of the institution generating them—the Court of Appeal or the Sentencing Council—guidelines in England take a similar tariff-type format.[199] They usually identify degrees of harm and/or culpability for specific crimes, correlate these with sentencing ranges and starting points, and provide examples of mitigating and aggravating factors that suggest when a sentencing court should impose a sentence either below or above the starting point.[200] As an example, a person convicted of aggravated burglary in England is subject to a maximum sentence of life in prison.[201] The Definitive Guideline indicates an "offence range" for aggravated burglary of from one to

195. *Id.*

196. Ashworth, *supra* n. 145, at 36.

197. *Id.*

198. *Id.*

199. The description that follows represents the primary guidelines model used by the Sentencing Council since the passage of the Coroners and Justice Act of 2009. Roberts, *supra* n. 188, at 4–11. Note, though, that although Guidelines in England all follow the same basic tariff-type structure, they are not in fact identical. *Compare e.g.* Sentencing Guidelines Council, *Burglary Offences: Definitive Guidelines* (2011), http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf (accessed Sept. 24, 2013; copy on file with Journal of Appellate Practice and Process) [hereinafter "*Aggravated Burglary Guidelines*"], *with e.g.* Sentencing Council, *Drug Offences: Definitive Guideline* (2012), http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_(web).pdf. (accessed Oct. 21, 2013; copy on file with Journal of Appellate Practice and Process).

200. Ashworth, *supra* n. 145, at 27–34.

201. Theft Act, (1968) § 10 (defining crime as including burglary committed while in possession of "any firearm or imitation firearm, any weapon of offence, or any explosive") (available at http://www.legislation.gov.uk/ukpga/1968/60/contents).

thirteen years.[202] This means that it will usually be appropriate to sentence an offender convicted of aggravated burglary to a term of between one and thirteen years.[203]

The Definitive Guideline then breaks up the offense of aggravated burglary into three specific categories based on application of various exhaustive factors relating to level of harm and culpability, such as whether the victim was on the premises at the time of the burglary and whether violence was used or threatened. Each category has its own "category range," the lowest being one-to-four years and the highest nine-to-thirteen years. The Guideline also sets a "starting point" for each of these categories, the lowest category having a starting point of two years, and the highest of ten years. Once the category range and starting point are determined, the Guideline then lists various aggravating and mitigating factors that suggest a sentence higher or lower than the starting point. Examples for aggravated burglary include "Gratuitous degradation of victim" and "Good character and/or exemplary conduct."[204] These factors are non-exhaustive, and crown courts have wide latitude in identifying other factors that, in their judgment, affect the appropriate sentence in each case.[205]

The English sentencing guidelines cannot be called mandatory, presumptive, or advisory as those terms are usually understood in the United States. The English guidelines are, in fact, something in between. Sentencing courts in England have a statutory duty to consult the guidelines and to "decide which of the categories most resembles" the defendant in a particular case.[206] Furthermore, sentencing courts in England "must . . . follow" the guidelines "unless the court is satisfied that it would be contrary to the interests of justice to do so."[207] If a court does not "follow" the guidelines, it must provide a statement of reasons explaining its decision.[208] However, this duty to

202. *Aggravated Burglary Guidelines*, *supra* n. 199.

203. Coroners and Justice Act, (2009) § 125(3).

204. *Aggravated Burglary Guidelines*, *supra* n. 199, at 5.

205. Roberts, *supra* n. 188, at 8 n. 31 (citing Ashworth, *supra* n. 145). Readers interested in a more detailed description of the format of the Guidelines in England might review this article in its entirety.

206. Coroners and Justice Act, (2009) § 125(3)(b).

207. *Id.* § 125(1).

208. Criminal Justice Act, (2003) § 174(2)(aa).

"follow" the guidelines extends only to imposing a sentence within the entire *offense range*, not to imposing a sentence within the *category range*.[209] Using the aggravated burglary example above, the court's duty to follow the aggravated burglary guideline means only that the court must sentence within the one-to-thirteen year offense range. The court does not have a separate duty to impose a sentence within the category range; it need only determine the correct category range and starting point and take them into account.

Ultimately, what this means for comparative purposes is that the English guidelines appear to be, in effect, a bit more binding than the post-*Booker* advisory federal Guidelines, but not by much. Two primary factors support this conclusion. First, offense ranges in England are quite wide—certainly far wider than the grid-based guidelines that are a mark of the guidelines regimes in the United States. Compare, for example, the twelve-year offense range for aggravated burglary in England, with the seven-month Guidelines range for a similar offense in federal court in the United States.[210] Accordingly, even with the duty to follow the offense range in England, there is nevertheless significant room for discretion on the part of the sentencing courts.[211]

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209. Coroners and Justice Act, (2009) § 125(3) ("[N]othing in this section imposes on the court a separate duty . . . to impose a sentence which is within the category range."); *see also* Roberts, *supra* n. 184, at 1010 n. 20 (citing Andrew Ashworth, *Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council*, 5 Crim. L. Rev. 389, 395 (2010) [hereinafter "Ashworth, *Coroners and Justice Act*"]); Andrew Ashworth, *Departures from the Sentencing Guidelines*, 2012 Crim. L. Rev. 81, 81–83 [hereinafter "Ashworth, *Departures*"]; Roberts, *supra* n. 188, at 13.

210. *Compare Aggravated Burglary Guidelines*, *supra* n. 199 (suggesting sentence of between one and thirteen years), *with* United States Sentencing Commission, *Guidelines Manual* § 2B2.1 (2012) (applying an offense level of nineteen, which yields a sentence of thirty to thirty-seven months, for a defendant graded into the lowest criminal-history category after being convicted of burglary of a residence with a firearm).

211. Roberts, *supra* n. 188, at 13; *but see* Kevin R. Reitz; *Comparing Sentencing Guidelines*, in *Sentencing Guidelines: Exploring the English Model* 182, 195 (Andrew Ashworth & Julian V. Roberts eds. Oxford U. Press 2013) (describing critique of the Coroners and Justice Act of 2009 for its failure to promote consistent sentencing by making "departures formally impossible within the offense range"); Ashworth, *Coroners and Justice Act*, *supra* n. 209, at 395–96 (calling the compliance requirement in the 2009 statute "pitifully loose" and arguing that the wide latitude provided to sentencing judges "substantially weakens any objective of increasing transparency and consistency of approach").

Furthermore, sentencing guidelines in England are characterized by a high level of flexibly, to a degree that is generally unknown in the United States. There is an often-quoted phrase used in England that "sentencing guidelines are guidelines not tramlines."[212] The Court of Appeal reaffirmed this principle when it held that the statutory provision declaring that sentencing courts "must follow" the sentencing guidelines "does not require slavish adherence to them."[213] As the Court explained, not only do sentencing courts have "latitude" to sentence anywhere in the wider offense range, but the statute allows departure from the offense range where "the court is satisfied that it would be contrary to the interests of justice to do so."[214] This approach is designed to promote "consistency of approach to sentencing decisions up and down the country without sacrificing the obligation to do justice in the individual and specific case."[215]

To further explain how guidelines work in England, and how the Court of Appeal enforces them, an example is helpful. In *R. v. Xiong Xu*,[216] the Court of Appeal issued a guidelines judgment regarding large-scale cultivation and production of cannabis. At the time, neither the Council nor the Court of Appeal had set out guidelines for this offense. In *Xiong Xu*, the Court stated its intent to "indicate the bracket" appropriate for different categories of the offense in order to achieve "some consistency of sentencing."[217] To do this, the Court granted seven defendants—who together represented a wide scale of

212. *See e.g. R. v. Blackshaw*, [2011] EWCA (Crim) 2312, [1133], [2012] 1 Cr. App. R. (S.) 114.

213. *Id.* (quoting Coroners and Justice Act, (2009) § 125(1)(a)).

214. *Id.* (citing Coroners and Justice Act, (2009) § 125(1), (3)–(4)).

215. *Id.*; *but see* Ashworth, *Departures*, *supra* n. 209, at 93–96 (suggesting that "it would be good practice for courts to give reasons where they adopt a starting point that lies outside the offence-range, even if they subsequently (e.g. by making a reduction for a guilty plea) impose a sentence that comes within the offence-range").

216. [2007] EWCA (Crim) 3129, [2008] 2 Cr. App. R. (S.) 50. In 2012, the Sentencing Council issued a Definitive Guideline on cultivation of cannabis that overtakes *Xiong Xu*. *See* Sentencing Council, *Drug Offenses*, *Definitive Guideline*, http://sentencing council.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_(web).pdf (2012) (accessed Sept. 24, 2013; copy on file with Journal of Appellate Practice and Process).

217. *Xiong Xu*, [2007] EWCA (Crim) 3129, [311].

involvement in the production process—leave to appeal.[218] All had been sentenced to four to five years' imprisonment.[219] On review, the Court of Appeal described the typical operation involved in the cultivation and production of cannabis, from the use of low-paid workers for labor, to the managers who arrange for delivery and distribution of plants, to the operators who obtain the premises and receive the profits.[220] The Court then explained that the problem of cannabis production had become more pronounced, characterized by very high profits, extremely strong drugs, and large-scale operations,[221] and that deterrent sentences are normally required in this context because the operations are extremely profitable, with minimal costs.[222] However, the Court cautioned that deterrent sentences are not necessary for "those at the bottom end of the hierarchy," explaining that "discovery and the threat of deportation" are "probably the most pressing concerns" for low-level workers who are typically "paid either nothing, but provided with board and lodging, or paid simply enough for subsistence."[223]

With these facts in mind, and considering the maximum sentence of fourteen years, the Court described three different categories of offenses. First, for "those involved at the lowest level," the Court set the starting point at three years.[224] The starting point for managers was set at "somewhere between three and seven years depending on the level of their involvement and the value of the cannabis being produced."[225] Finally, for the organizers who "set up and control individual operations," the Court set a starting point of "six to seven years depending upon the quantity of cannabis involved."[226]

The Court then reviewed the sentences of the individual defendants, determining that the sentencing judges used the wrong category ranges for the three defendants who were lower-

218. *Id.* at 311–17 (indicating that appellants ranged from lower-level gardeners to those operating and profiting from the business).

219. *Id.*

220. *Id.* at 310–11.

221. *Id.*

222. *Id.* at 310.

223. *Id.*

224. *Id.* at 310–11.

225. *Id.* at 311.

226. *Id.*

level workers and who had little to no involvement in the management of the business.[227] To determine how much to reduce these sentences, the Court carefully reviewed the facts of the case, identified any mitigating or aggravating circumstances, and set the sentence that, in the Court's own judgment, was appropriate.[228] The Court reduced the sentences of two defendants who did little more than "tend the plants" and of one defendant who had very minor management duties.[229] Conversely, the Court upheld the sentences of several defendants who were all higher-level managers or operators of the cannabis operations.[230] The Court explained that these sentences were within the correct guidelines range.[231] *Xiong Xu* thus perfectly exemplifies the basic two-level structure of appellate review in England as it relates to the guidelines: (1) review only for error in principle if a sentence is within the guidelines offense range, and (2) *de novo* review both of the ultimate sentence choice and for error in principle if the sentence is outside the guidelines range.

If a sentence falls within the relevant guideline range, the Court of Appeal usually says that it will not interfere with the judgment of the court below unless there is some error that amounts to a "wrong in principle."[232] This practice is sometimes referred to as the "no tinker" rule.[233] So, for example, the Court in *Xiong Xu* affirmed the five-and-a-half year sentence of a manager, even though the Court remarked that it was "undoubtedly at the top end of the appropriate bracket."[234] Importantly, the Court still reviewed the manager's sentence for

227. *Id.* at 311–13 (discussing appellants Xiong Xu, Hoang Nguyen, and Hai Hung Nguyen).

228. *Id.*

229. *Id.*

230. *Id.* at 313–17 (discussing appellants Nguyen Van Minh, Dai Van Mguyen, Ha Thi Pham, and Vinh Van Hoang).

231. *Id.*

232. Thomas, *supra* n. 125, at 261; *see also* Sprack, *supra* n. 145, at 483.

233. Meador, *supra* n. 114, at 125, 129.

234. *R v. Xiong Xu*, [2007] EWCA (Crim) 3129, [314], [2008] 2 Cr. App. R. (S.) 50; *see also R v. Bowyer*, [2009] EWCA (Crim) 1112, [2010] 1 Cr. App. R. (S.) 22 (refusing an application to appeal a sentence of six-and-a-half years imprisonment for causing death by dangerous driving—at the very top of the correctly identified guidelines range—despite the fact that, in the Court's opinion, the proper sentence should have been closer to the bottom of the guidelines range, or four years).

error in principle, seeking to determine if the facts that the sentencing court relied on could reasonably support the sentence imposed.[235] However, the Court of Appeal did not substitute its own judgment on what the sentence should have been. If, conversely, a sentence is "outside the range or bracket of sentences which would be permissible for that offence in the circumstances in which it was committed," then the Court will review the sentence closely and substitute its own sentence as it thinks appropriate.[236] This review, which I call "excessive sentence modification," is what the Court did for the lower level workers in *Xiong Xu*.

In short, the guidelines affect the level of scrutiny with which the Court of Appeal will review a sentence. That is, the Court says it will not disturb a sentence within the guidelines unless there is some error in principle, while it will conduct *de novo* review of sentence length—thus in essence resentencing the defendant—if the sentence is outside the guidelines offense range.

Finally, it is important to point out that the *Xiong Xu* Court appears to accept the factual findings of the sentencing courts. This seems to be the general practice of the Court of Appeal in England,[237] just as it is in the federal system. The *Xiong Xu* Court did not decide *de novo*, for example, each defendant's status as organizer, manager, or lower-level worker.[238] Instead, the purpose of the Court's review was to determine whether it was correct in principle to treat lower level workers as harshly as their managers. To the Court of Appeal, the latter question is one of law, which the Court reviews *de novo*, and the former question is one of fact, on which the Court defers to the sentencing court.

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235. *Xiong Xu*, [2007] EWCA (Crim) 3129, [314].

236. Thomas, *supra* n. 125, at 261.

237. *See also R v. Bowyer*, [2009] EWCA (Crim) 1112, [2010] 1 Cr. App. R. (S.) 22 (accepting the crown court's findings of facts in a "causing death by dangerous driving" case noting that "[t]here had been a trial and the judge had the benefit of making his own assessment of the driving," and that assessment "is one with which this Court should not interfere").

238. *See Xiong Xu*, [2007] EWCA (Crim) 3129, [314], [2008] 2 Cr. App. R. (S.) 50 (holding that, based on the facts before it, the crown court was "entitled" to conclude that the defendant was "involved in organising the operation").

3. Review for Error in Principle and Policy Guidance

In the process of deciding cases before it for errors in principle, the English Court of Appeal issues judgments providing crown courts with guidance on general sentencing principles. The Court of Appeal has done this since its creation in 1907.

First, it is important to explain that in England review for "error in principle" is far broader than review for "error of law" in the United States. Of course, some aspects of review for error in principle in England mirror review for legal error in the federal courts of appeals. For example, review of sentencing decisions for error in principle in England includes review for procedural error, including review to ensure that the sentencing court identified the appropriate category range,[239] provided a guilty plea discount as required by law,[240] and correctly identified and considered all of the relevant mitigating and aggravating facts.[241] Furthermore, the Court will ensure that a sentencing decision complies with applicable legislative mandate and that the crown court correctly interpreted legislative commands in applying the sentence.[242]

However, review for error in principle in England involves much more than simply statutory interpretation and procedural review; the Court of Appeal also reviews *de novo* any issue of sentencing policy affecting the sentence before it.[243] This includes sentencing courts' decisions on how to interpret and weigh the sentencing purposes identified by Parliament via

239. *See e.g. id.*, [2007] EWCA (Crim) 3129, [2008] 2 Cr. App. R. (S.) 50 (reviewing crown court determinations of sentencing brackets).

240. *See* Thomas, *supra* n. 125, at 261.

241. *See e.g. R. v. Mills*, [2002] EWCA (Crim) 26, [233–34], [2002] 2 Cr. App. R. (S.) 52 (quashing a sentence of imprisonment for a defendant convicted of obtaining services by deception due in part to the crown court's failure to take into account as a mitigating factor the fact that the defendant was the mother of dependent children).

242. *See e.g. R. v. Rehman & Wood*, [2005] EWCA (Crim) 2056, [410–15, 417–19], [2006] 1 Cr. App. R. (S.) (interpreting the "exceptional circumstances" exception in a mandatory minimum statute to include a defendant who thought he was purchasing a toy model gun online); *R v. Collins*, [2009] EWCA (Crim) 2534, [18–19], [2010] 2 Cr. App. R. (S.) 3 (considering the meaning of the phrase "particularly grave injury" in the grievous bodily harm with intent Guideline to determine whether a sentencing court identified the correct category range for the appellants).

243. *See* Thomas, *supra* n. 125, at 260–61 (describing the types of sentencing decisions that are reviewed for "error in principle").

statute. *Xiong Xu*[244] is illustrative of this point: Whether lower level workers of a cannabis operation should be subject to lower sentences as a general matter, and based on what principles of sentencing, is a legal issue subject to *de novo* review in England.

Examples of this kind of review for, and development of, sentencing policy abound. For instance, the Court of Appeal has determined that deterrence is the primary legislative policy in cases in which the defendant possesses a firearm, and it has used this policy to distinguish between different defendants.[245] The Court of Appeal also reviews sentences for incorrect application of non-offense-specific penological philosophy. For example, it has held that, as a matter of law, the statutory maximum need not be reserved for "the worst possible case which can realistically be conceived."[246] Instead, a lower court may sentence a defendant to the maximum "in cases which in the statutory context are identified as cases of the utmost gravity."[247] And "[i]n a series of decisions the Court of Appeal has stressed the need for parsimony in punishment, especially when the prisons are full."[248] Indeed, the Court of Appeal developed this parsimony principle as early as the 1980s, long before Parliament solidified the principle in the Act of 2003.[249]

Important for purposes of this comparative analysis, the Court of Appeal in England reviews sentencing decisions not just to ensure that the sentencing court was motivated by a reasonable penal philosophy, but to ensure that the sentencing court was motivated by the correct penal philosophy. An

244. *See supra* nn. 216–31 and accompanying text.

245. *See R. v Rehman & Wood*, [2005] EWCA (Crim) 2056, [413, 417–18], [2006] 1 Cr. App. R. (S.) (reducing a sentence for a defendant who thought he was purchasing a toy model gun online, noting that "if an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect upon him," but affirming a sentence for a defendant who inherited his gun from his grandfather, noting that he was a long-time gun collector and firearms instructor who should have known the law).

246. *R v. Bright*, [2008] EWCA (Crim) 462, [588], [2008] 2 Cr. App. R. (S) 102.

247. *Id.*; *see also R. v. Butt*, [2006] EWCA (Crim) 47, [367], [2006] 2. Cr. App. R. (S) 304 ("[W]hen judges were asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of case." (quoting an earlier unreported case)).

248. Wasik, *supra* n. 192, at 260 (citing *R. v. Bibi*, [1980] 1 W.L.R. 1193; *R. v. Ollerenshaw*, [1999] 1 Cr. App. R. (S.) 65; *R. v. Baldwin*, [2002] EWCA (Crim) 2647; *R. v. Seed & Stark*, [2007] EWCA (Crim) 254, [2007] 2 Cr. App. R. (S.) 69).

249. Criminal Justice Act, (2003) § 153(2).

excellent example is *R. v. Mills*,[250] in which the defendant appealed her eight-month sentence for obtaining credit by deception.[251] The Court of Appeal held it was "wrong in principle" to sentence the defendant to any time in prison due to the fact that she was the mother of two dependent children, was of good character, and used the money she obtained "to make a home for her children."[252] It is significant that the Court did not simply hold that the trial court failed to consider these factors and remand (as might have happened in the United States). Instead, the Court held as a matter of law that, "in cases of dishonesty, particularly when an offence is committed by a woman of previous good character who has responsibilities for children," sentencing courts "should strive to avoid sending [defendants] to prison and instead use punishments in the community which enable offenders to repay the harm they have done."[253] Regardless of whether one agrees with the Court's approach, there is now a consistent rule guiding sentencing courts on an important policy issue: how to weigh a defendant's status as a sole caregiver of dependent children. This is a far different exercise than the one performed by courts of appeal in the federal system after *Kimbrough*, where trial courts are left to decide on their own issues of such magnitude.

Although federal sentencing scholars might consider the broader English definition of "legal error" in sentencing a novel approach, it is actually quite similar to the federal appellate courts' practice in other areas of the law. Making this argument in their critique of *Kimbrough*'s requirement of deference to district court decisions rejecting the crack/powder ratio, a team of scholars has asserted that "policy conclusions about what the appropriate sentencing range should be for run-of-the-mill crack offenses" are no different from the "determination whether to hold a driver to a standard of negligence or strict liability for any injuries he causes."[254] Both are legal issues that "would ordinarily be subject to *de novo* review," as both "depend[ ] not on the specific facts of the case, but on a balance of policy

250. [2002] EWCA (Crim) 26, [2002] 2 Cr. App. R. (S.) 52.

251. *Id.* at 231.

252. *Id.* at 232–34.

253. *Id.* at 231–33.

254. Hessick & Hessick, *supra* n. 80, at 26–27.

considerations such as keeping the roads safe, compensating those who are injured, and avoiding overdeterring people from driving."[255]

Perhaps because observers of the federal system are so familiar with a broad appellate review for issues of law, the idea of translating this practice to sentencing appeals should not be difficult to accept. However, it gets a bit more complicated when one considers that both the English Court of Appeal and the federal appellate courts must also perform an enforcement function related to the sentencing guidelines, on top of their lawmaking roles. The tension between these roles has led many observers in the federal system to reject an expanded lawmaking appellate role out of concern that the courts' enforcement role would expand in a parallel manner. Fortunately, England provides a strikingly similar model for testing this concern, in that since 2003, the Court of Appeal in England has also been enforcing the Sentencing Council's Definitive Guidelines. Has its new guidelines-enforcement role changed the English Court of Appeal's lawmaking role? And has the English Court's historically broad lawmaking role resulted in a coordinate expanded enforcement of the Guidelines, as many observers of the federal courts fear would happen here in the United States? Answering these questions is critical, as they get to the heart of the three primary arguments against robust appellate review in the federal system and raise the potential for a new federal appellate court model.

4. Appellate Review and the Definitive Sentencing Guidelines

The Court of Appeal in England retained its full lawmaking powers as a jurisdictional matter after the creation of the Sentencing Council in 2003. Parliament specifically provided as much in the Coroners and Justice Act of 2009, which states that the creation of the Sentencing Council did not abrogate the power of the Court of Appeal to "provide guidance relating to the sentencing of offenders in a judgment of the court."[256] Accordingly, after the creation of the Sentencing Council, the Court of Appeal has continued to update and revise the

255. *Id.*

256. Coroners and Justice Act, (2009) § 124(8).

guidelines to reflect "developments in the law or otherwise."[257] This includes revision of both the Council's Definitive Guidelines and the Court of Appeal's own guidelines.[258] The Court also interprets both sets of guidelines, defining terms provided by the Council that are vague in context.[259] And, finally, the Court reviews applications of the guidelines, including how to apply the guidelines in cases where new sets of facts "do not fit easily within the guideline categories."[260]

Again, how this works in practice becomes clearer after reviewing some examples. *R. v. Collins*[261] illustrates the Court of Appeal's most basic function related to the guidelines: interpretation. In *Collins*, the Court considered the meaning of the phrase "particularly grave injury" to determine whether a sentencing court identified the correct category range for the appellants.[262] In that case, the appellants, acting together, brought a gun to a bar to confront the victim, and, after an altercation, one of them shot the victim twice; one shot perforated the victim's colon close to his liver and kidney, the other hit his groin area.[263] At the time, the Definitive Guideline broke up the offense of grievous bodily harm with intent into three categories.[264] Since the crime involved premeditation, the Guideline placed the defendants in the highest category range (ten to sixteen years) if the "[v]ictim suffered . . . particularly grave injury," and in the middle category range (seven to ten years) if the victim did not.[265] The sentencing court held that the victim did indeed suffer "particularly grave injury," placed the defendants in the highest category, and sentenced two of them—

257. D.A. Thomas, *Sentencing: Manslaughter by Reason of Provocation—Relevance of Sentencing Guidelines Council Guidelines*, 5 Crim. L.R. 415, 418 (2011).

258. *Id.* at 418–19.

259. *Id.*

260. *Id.* at 419 (quoting *R. v. Hussain*, [2010] EWCA Crim 94, [2010] 2 Cr. App. R. (S.) 60).

261. [2009] EWCA (Crim) 2534, [2010] 2 Cr. App. R. (S.) 3.

262. *Id.* at 18–19.

263. *Id.* at 17–18.

264. Sentencing Guidelines Council, *Assault And Other Offences Against The Person, Definitive Guideline* at 12–17, http://webarchive.nationalarchives.gov.uk/+/http://www.sentencingcouncil.org.uk/docs/Assault_and_other_offences_against_the_person_accessible.pdf (Feb. 2008) (accessed Sept. 26, 2013; copy on file with Journal of Appellate Practice and Process).

265. *Id.*

considered the "organizer" and the "gunman"—to fourteen years and the third one, who had a lesser role, to ten years.[266]

On appeal, the defendants argued that they should not have been sentenced in the highest category range because the injuries sustained by the victim were not permanent, did not involve multiple fractures, and thus were not "particularly grave."[267] The Court of Appeal affirmed the sentence and dismissed the appeal. In doing so, the Court analyzed the legal issue of the meaning of "particularly grave," holding that an injury did not need to be permanent to be particularly grave, and that injuries involving bullet wounds to "vital parts of the body" and requiring major surgeries were particularly grave.[268] As a result of this decision, it is now the law that such injuries are "particularly grave."[269]

The lawmaking appellate function reflected in *Collins*—Guidelines interpretation—is familiar to observers of federal sentencing. Indeed, federal courts of appeals will review district courts' interpretation of the sentencing Guidelines *de novo*.[270] However, a second example, *R. v. Anigbugu*,[271] shows a less familiar appellate lawmaking function in the context of the Guidelines—that is, what the Court of Appeal does when the application of a specific guidelines range, properly calculated, leads to an error in sentencing principles. *Anigbugu* involved several appeals by the government, all challenging the sentences

266. *Collins*, [2009] EWCA (Crim) 2534, [19].

267. *Id.*

268. *Id.* at 19–20.

269. The Court has over time created a common law defining "particularly grave" injury. *See R. v. Olawo*, [2008] EWCA (Crim) 528, [646-47], [2008] 2 Cr. App. R. (S.) 113 ("[T]he expression particularly grave injury must be read in the context, which is that of the offence of inflicting grievous bodily harm. Particularly serious harm must mean harm which is particularly serious by the standards of grievous bodily harm generally."); *R. v. Shannon*, [2008] EWCA (Crim) 2131, [553-54], [2009] 1 Cr. App. R. (S.) 95 (holding that a fractured jaw is not a "particularly grave injury" within the meaning of the Guideline); *R. v Howard*, [2009] EWCA (Crim) 1984, [579-80], [2010] 1 Cr. App. R. (S.) 88 (same regarding a broken hip).

270. *See e.g. U.S. v. Serfass*, 684 F.3d 548, 550–51 (5th Cir. 2012) (holding that sentence enhancement under U.S.S.G. § 2D1.1(b)(5) for importation of amphetamine or methamphetamine does not have a knowledge requirement); *U.S. v. Chauncey*, 420 F.3d 864, 877–78 (8th Cir. 2005) (holding that manslaughter is a "crime of violence" under U.S.S.G. § 4B1.2).

271. *Attorney General's References Nos. 73, 75, and 03 of 2010*, [2011] EWCA (Crim) 633, [2011] 2 Cr. App. R. (S.) 100.

of defendants convicted of the same crime.[272] In all three cases, the defendants forced entry into the victim's home for the purpose of burglarizing it, and while in the home, raped the victims living there.[273] At the time, the Council's Definitive Guideline broke up the offense of rape into three different categories; the defendants all fell into the lowest category, which applied to "a single offense of rape by a single offender."[274] This category had a starting point of five years, with a range of four to eight years.[275] The two higher ranges, which went up to nineteen years in prison, did not apply to the defendants, as these ranges targeted cases with specific aggravating factors, none of which applied in *Anigbugu*.[276] The trial courts sentenced two of the defendants to eight years imprisonment and one to six years imprisonment with an extension period of six years.[277] The Attorney General sought review of the sentences for being unduly lenient.

The Court's description of the specific crime involved in these cases— rape in a home during a burglary—is notable for its empathy for the victims, calling this a "pitiless, wicked crime."[278] The Court called it the "ultimate nightmare" when the home, "our safest refuge," where we are at our most "defenceless," is violated.[279] There was "no room in the sentencing process for mercy" for defendants who committed

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272. *Id.* ¶¶ 1–9.

273. *Id.*

274. Sentencing Guidelines Council, *Sexual Offenses Act 2003, Definitive Guideline*, http://sentencingcouncil.judiciary.gov.uk/docs/web_SexualOffencesAct_2003.pdf 25 (Apr. 2007) (accessed Sept. 26, 2013; copy on file with Journal of Appellate Practice and Process) [hereinafter "*Sexual Offences Guideline*"]. The Sentencing Council recently closed consultation on a new Definitive Guideline for sexual offenses that considers the impact of rape in one's home, and thus, when issued, would presumably override *Anigbugu*. *See* Sentence Council, *Sexual Offenses Guideline Consultation*, http://sentencingcouncil.judiciary.gov.uk/docs/sexual_offences_consultation_guideline_(web).pdf (2012) [hereinafter "*Sexual Offenses Guideline*"] (accessed Sept. 26, 2013; copy on file with Journal of Appellate Practice and Process).

275. *Sexual Offences Guideline*, *supra* n. 274.

276. The listed aggravating factors were: "abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); sustained attack." *Id.* at 25.

277. *Anigbugu*, [2011] EWCA (Crim) 633, [¶¶ 11, 26, 51].

278. *Id.* ¶ 3.

279. *Id.* ¶¶ 2–3.

such "pitiless, life-scarring, deliberately committed crimes."[280] According to the Court, because "culpability of the criminal is at its highest and the harm done to the victim is at its most grave" in these types of cases, "they should be approached as if they were among the most serious offences of their kind."[281]

The Court of Appeal acknowledged the conflicting Definitive Guideline on rape, but declared that it would be "wrong in principle" for offenses like these, where rape has been committed after breaking into the home, "to be treated as a single offence or rape by a single offender" as the Guideline required.[282] As the Court explained, "no sentence should be an unjust sentence and . . . no guideline can require that an unjust sentence should be imposed."[283] But the Court exercised its authority to "explain or to offer a definitive sentencing guideline of its own" for cases of "rape committed after or in the course of burglary in a home," identified a new starting point—twelve years—and discussed potential aggravating facts for such an offense.[284] Separately analyzing each of the defendants' cases, the Court then raised two of the sentences to fifteen years and one to fourteen and a half.[285]

Anigbugu highlights the undiminished power of the Court of Appeal to review sentences for error in principle, despite the existence of controlling Sentencing Council guidelines. The *Anigbugu* Court explicitly stated that the creation of the Sentencing Council has left "undiminished" the "jurisdiction of the Court of Appeal Criminal Division to amplify, to explain or to offer a definitive sentencing guideline of its own, to issue guidelines if it thinks fit."[286] In short, the Court will not hesitate to overrule a Definitive Guideline where its application will result an error in principle. In *Anigbugu*, for example, it was an error in principle to treat rape in the context of a home burglary as if it were the same as a "single offense of rape."

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280. *Id.* ¶ 3.
281. *Id.* ¶ 4.
282. *Id.*
283. *Id.* ¶ 5.
284. *Id.* ¶¶ 5–8.
285. *Id.* ¶¶ 10–71.
286. *Id.* ¶ 5.

Importantly, *Anigbugu* did not involve a legal error in the application of Definitive Guideline in the sense that lawyers and judges use that term in the United States. The sentences originally imposed were within the properly calculated category range set out in a Guideline that would have been subject to a presumption of reasonableness in many of the federal courts of appeals. Accordingly, and considering the fact that the Definitive Guideline was clearly intended to cover the field of sentencing in rape cases, it would not be a stretch to say that reversal in one of the federal courts of appeals would have been extremely unlikely. However, in England, because the application of the Definitive Guideline resulted in an error in principle, the Court of Appeal did not hesitate to correct the error by suggesting a new starting point for calculation of the appropriate sentence.

While *Anigbugu* and *Collins* exemplify how the Court of Appeal functions in cases in which it must interpret or supplement the Council's Definitive Guidelines, *R. v. Thornley*[287] shows how the Court of Appeal deals with potential errors in the Guidelines themselves. In *Thornley*, the defendant pleaded guilty to manslaughter by reason of provocation for stabbing and killing the victim with a kitchen knife.[288] The defendant had armed himself with a knife prior to going to confront the victim to "threaten" him, and deliberately stabbed him twice.[289] In cases involving a low degree of provocation, as was the case in *Thornley*, the Council's Definitive Guideline set a starting point of twelve years, with a range of ten years to life.[290] The crown court sentenced the defendant to sixteen years, varying the sentence primarily because the defendant used a knife in the commission of the crime.[291] The defendant sought leave to appeal, arguing that the sentencing court weighed the fact that he used a knife too heavily in the sentencing decision.[292] Although the Guideline for manslaughter by reason

287. [2011] EWCA (Crim) 153; [2011] 2 Cr. App. R. (S.) 62.

288. *Id.* at 363–64.

289. *Id.* at 364.

290. *Id.* at 366.

291. *Id.* at 365 (discussing, among other factors, "the need for courts to be alert on appropriate occasions to impose deterrent sentences on those who carry knives").

292. *Id.*

of provocation lists a number of aggravating factors that justify increasing the sentence above twelve years, none refer to the particular weapon used.[293]

The Court held that the crown court properly relied on the use of knife as a significant aggravating feature.[294] It also acknowledged that the Sentencing Council's Definitive Guideline did not contemplate possession of a knife as a particularly aggravating factor, but stated that several new "developments" required that the use of a knife in the commission of a crime be "regarded as a more significant feature of aggravation than it was when the guideline was published."[295] The Court was careful to point out that each of these developments had occurred since the Sentencing Council issued its Definitive Guideline.[296] However, as the Court explained, interpretations of the Guidelines must include "consideration of the subsequent thinking of this Court and of the legislature on sentencing issues."[297]

IV. FINDINGS ABOUT ENGLISH APPELLATE REVIEW AND PROPOSED MODEL FOR THE FEDERAL COURTS OF APPEALS

A. Observations—Freeing Appellate Review from a Binary Mold

This survey of English appellate review undermines several aspects of the normative, functional, and institutional arguments against robust substantive review of criminal sentences in the federal courts of appeals.

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293. *See generally* Sentencing Guidelines Council, *Manslaughter by Reason of Provocation, Guideline*, http://www.banksr.co.uk/images/Guidelines/Definitive%20Guidelines/Provocation_in_Manslaughter_cases_2005.pdf (Nov. 2005) (accessed Sept. 26, 2013; copy on file with Journal of Appellate Practice and Process).

294. *Thornley*, [2011] EWCA (Crim) 153, [366]. Ultimately, however, the Court reduced Thornley's sentence from sixteen years to twelve, due to the crown court's failure to consider certain mitigating features. *Id*

295. *Id.* at 366. These developments included, for example, recent Court of Appeal decisions emphasizing the importance of deterrence in knife-related cases and a "legislative change[]" that raised the minimum term for those committing murder with a knife from fifteen years to twenty-five years. *Id.*

296. *Id.*

297. *Id.* at 365.

The English experience most clearly provides a rebuttal to the functional argument that there is no principled way to implement substantive reasonableness review without simply resorting to re-sentencing defendants on appeal. Although the English Court of Appeal does re-sentence some defendants, it does not do so in every case: When the sentence falls within the guidelines range, the Court of Appeal explicitly says that it will not tinker with it. In these cases, the Court takes a mixed-deference approach, deferring to the sentencing court's ultimate decision and findings of facts, but retaining *de novo* review of sentencing principles. By setting principled and clear limits on appellate review like the no-tinker rule, the Court has stopped itself from becoming essentially a second trial court for sentencing issues. At the same time, the Court retains the ability to issue guidance on broad issues of sentencing policy, thus promoting application of uniform, consistent, and clear sentencing policies throughout the country.

This survey also suggests flaws in the normative argument against appellate review—that deference is necessary to prevent over-enforcement of guidelines and to ensure individualized sentences. In fact, England's appellate model tells us that appellate review of sentences need not be solely focused on enforcement of guidelines. Instead, review to establish sentencing principles and review to enforce sentencing guidelines can occur independently, each cabined by separate limits. In England, the no-tinker rule results in enforcement of the guidelines, but it does not limit the Court's ability to provide general policy guidance and correct errors in legal principle such as occurred in *Anigbugu*. Similarly, the Court enforces the guidelines by deferring to the Sentencing Council on issues of sentencing policy (i.e. the guidelines), but retains some measure of its lawmaking power by reviewing application of the guidelines to ensure compliance with new developments in the law or taking note of some indication of error in applying past principles. Of course, these two roles are intertwined. When the Court of Appeal defers to the Sentencing Council, for example, it both enforces the guidelines and gives up some of its lawmaking role. But the English practice demonstrates that it is a mistake to lump these two functions together as we so often do

in the United States. Doing so unnecessarily limits the function and usefulness of the appellate courts.

Finally, the English experience provides evidence that both supports and undercuts the institutional (or you-are-there) argument against robust appellate review. On the one hand, the Court of Appeal routinely re-sentences defendants, and this practice is generally accepted as the norm: Research revealed no critics of this practice among English observers based on an "expertise" rationale. Proponents of the you-are-there rationale, however, will counter that the Court of Appeal, unlike our federal courts of appeals, has the power to hear new evidence.[298] Indeed, the ability to modify sentences and the ability to hear new evidence appear to be linked, as the Court of Appeal presumably retains the ability to make the "right" sentencing choice by hearing further evidence. This provides some support for the argument that, in a system in which the appellate courts are limited to reviewing the record below, the trial courts are indeed the better institutional actors to make sentencing decisions.

But in practice it appears relatively rare for the Court of Appeal to hear new evidence.[299] The Court will decline to hear new evidence for a number of reasons, including a refusal to hear evidence that could have been presented at trial.[300] Accordingly, it is doubtful that the Court of Appeal has access to the type of demeanor evidence that proponents of the institutional critique envision when urging the retention of all sentencing discretion in the district courts. And yet there is better evidence undermining the institutional critique: the English Court's mixed deference to trial court sentencing decisions when a sentence falls within the guidelines range. The Court of Appeal does not simply modify sentences and re-sentence defendants on each appeal. When the sentence on appeal falls within the guidelines range, the Court of Appeal explicitly will not tinker with it. Instead, the Court defers to the

298. *See supra* nn. 159–62 and accompanying text.

299. Email from Andrew Ashworth, Professor of English Law, U. Oxford (Apr. 15, 2013, 8:31 a.m. EST) (on file with author).

300. *See* Sprack, *supra* n. 145, at 491–93; *How to Appeal: A Guide to the Criminal Appeal System* 34 (Justice ed. 2011) (pointing out that "[i]f there is new evidence which was not available for the trial, the Court of Appeal will sometimes look at the new evidence and decide if it might have led the jury to reach a not guilty verdict.").

sentencing court on the ultimate sentencing decision and the findings of facts, but retains *de novo* review of sentencing principles.

This mixed-deference appellate model is no doubt an institutional choice reflective of the accepted wisdom in England that various actors in the criminal justice system can, and should, share responsibility for making the sentencing decision. While sentencing judges might have a better view of demeanor evidence, the individual defendant, and the specific case, appellate judges might be better at developing consistent and uniform judgments about community norms and policies, understanding and interpreting legislative intent, and making difficult judgments about generally applicable purposes of sentencing.

It is thus important that those who are involved in designing the post-*Booker* sentencing regime avoid equating the jurisprudential idea of discretion with the institutional practice of deference. When we say that a trial court needs "discretion" in the sentencing context, we usually mean the ability to choose among a wide range of options to arrive at a sentence that is appropriate for the individual defendant. This is not about *who* should make the sentencing choice, but about *how* the choice should be made. The English example shows that appellate courts are perfectly capable of providing guidance on sentencing law and policy, while still providing trial courts the discretion they need to craft sentences that are appropriate for each individual defendant.

B. Proposed Model

With these observations in mind, I propose a new model of substantive reasonableness review in which the federal appellate courts borrow several aspects of the English Court of Appeal's "mixed deference" approach to review of criminal sentences. First, to promote consistent application of sentencing principles throughout the jurisdiction, courts of appeals in the federal system should conduct *de novo* review of sentencing law and principles, including review of guidelines interpretation and decisions on how to weigh the § 3553(a) factors. Appellate courts would give no deference to trial courts on these legal

issues. At the same time, however, courts of appeals should also apply principled limits to their review of sentencing decisions, including, for example, adopting a presumption of reasonableness and deferring to trial courts on factual findings, the choice of actual sentence, and the application of sentencing principles and law to the facts.

This proposed model would resemble the English appellate review in many respects. First, the federal courts of appeals would interpret and apply the statutory sentencing principles codified by Congress in § 3553(a): the retributive principle of just deserts, which requires that sentences be proportional to the culpability of the offender and the harm caused, the goal of incapacitation and protection of society from harmful individuals, the principle of rehabilitation, and specific and general deterrence.[301] Appellate courts should be obliged to confront, interpret, and provide guidance on the meanings of these purposes. They should identify broad sentencing principles and penological philosophies that guide the application of these principles in broad categories of cases—such as the English rule barring a maximum sentence except in "cases of the utmost gravity."[302] As an example, federal appellate courts could provide a definitive interpretation of the statutory directive that rehabilitation is not a justification for imprisonment and give guidance on when and how non-prison sanctions should be used.[303]

In addition to providing general guidance on the meaning of the statutory factors, the federal courts of appeals would also have a duty to provide guidance on how to weigh the § 3553(a) factors in specific types of cases or in cases involving specific types of offenders.[304] Instead of simply allowing trial courts to treat crack cocaine cases as harshly or as leniently as they wish, under my proposal the Supreme Court would have articulated a

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301. 18 U.S.C. § 3553(a) (available at http://uscode.house.gov).

302. *See supra* text accompanying nn. 246–47.

303. *Cf.* Miller, *supra* n. 4, at 477–78 (articulating rehabilitation and non-prison sanctions as areas in which the Commission could provide further guidance and "bring purposes of sentencing into the guideline system").

304. *Cf. id.* at 464–65 (arguing that, in order to facilitate appellate review, trial courts must "evaluate purposes in terms of offense and offender factors shared by similar defendants, or . . . they should evaluate the purposes to be achieved in terms of paradigms identifying common crimes and unusual elements").

clear policy in *Kimbrough* that did not just reject the crack-to-powder ratio, but that also provided general guidance on how to determine when a crack-related offense is more serious than a powder-related offense. Similarly, in *McBride*[305] the court of appeals would have provided clear, direct, and binding guidance to trial courts on the importance of incapacitation and incarceration in specific types of child-pornography cases. The *McBride* court could have, for example, held that incapacitation is the primary purpose of sentencing in cases involving defendants who have prior convictions for hands-on sexual offenses. Were there such a rule, it would be clear to sentencing judges that evidence of a defendant's having experienced physical abuse would be of diminished importance as a mitigating factor in sentencing if he was also likely to commit additional sexual offenses.

I emphasize that I do not intend here to debate or support specific sentencing principles. Scholars far more versed in criminal philosophy than I have done that at length, and their work, along with research from the Sentencing Commission, can provide valuable information for courts attempting to apply the model proposed here. My purpose is simply to point out that we as a society should be making these hard penological decisions, and that empowering the federal courts of appeals to use robust review in the context of the post-*Booker* sentencing regime would be a good place to start.

While the model I propose calls for expanded appellate review of sentencing law and principles, much of the remaining aspects of the sentencing decision—deferential review of factual findings, for example, the choice of actual sentence, and the application of sentencing principles and law to the facts—would still be reviewed deferentially. Of course, as any legal realist would point out, deferring to trial courts on the application of sentencing principles to facts and the ultimate formulation and imposition of sentence opens up the possibility of disparity in sentencing. One judge's view of how long a sentence must be to incapacitate a defendant can easily differ from another judge's view on the same topic.

305. *See supra* text accompanying nn. 53–62.

However, several factors suggest this is an acceptable risk. First, research after *Booker* has shown persuasively that the existence of the advisory guidelines provides an anchor to ensure that similar cases result in sentences generally within a relatively close range.[306] Moreover, adopting the English model as proposed here would add a second level of sentencing guidance, and therefore sentencing consistency, which does not exist in the post-*Booker* sentencing regime: guidance that is tied to general sentencing principles, not to the Sentencing Guidelines.

Furthermore, I am of the view, as are others, that some disparity of result is acceptable, if not required, in a proper sentencing regime.[307] Indeed, "[u]niformity can itself be 'unwarranted': when unprincipled, blind uniformity promotes *inequality*."[308] Any proposal for expanded appellate review must balance both the need for consistent application of sentencing principles and the need for individualized sentences tailored to the circumstances of each individual defendant. Through this proposal, I seek to do just that. To borrow from an eminently reasonable English sentencing philosophy, the main goal of expanded appellate review in the post-*Booker* regime should be "uniformity of approach, not uniformity of outcome."[309] The goal is to allow sentencing judges to pass judgment "within a

306. *See e.g.* 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, 146 (2008) (noting that "[t]he psychology of decision-making reveals that once a judge calculates the Guidelines range, she will be influenced by that range, even if she ultimately decides to impose a sentence that falls outside of it"). Experts like Professor Exum are critical of the anchoring effect of the Guidelines. *Id.* at 146–50 (proposing a range of alternatives, from repositioning the Guidelines calculation in the sentencing process so that it does not occur as a first step to reinventing the Guidelines as a statistical reporting measure instead of a calculation of sentence); *but see* Sutton, *supra* n. 97, at 86 (arguing that "appellate courts ought to be able to treat the guidelines as an organizing principle" in order to protect the consistency principle animating those guidelines). I agree that any outcome-focused consistency measure like the Guidelines must be designed, at both the appellate and trial levels, in a way that that prevents over-enforcement and allows for individualization of sentences. The study of the English system presented here supports the work of Professor Exum and others who argue that consistency in sentencing can be achieved in ways other than through strict enforcement of the Guidelines.

307. *See* Lynch, *supra* n. 7, at 6; Gertner, *supra* n. 4, at 584; Wasik, *supra* n. 192, at 260.

308. Stith & Cabranes, *supra* n. 4, at 105–06 (emphasis original).

309. Wasik, *supra* n. 192, at 259.

framework of principles and guidelines set out in advance, so that court decisions are consistent in their approach and the outcomes are reasonably predicable."[310] The combination of these overarching principles and a "structured methodology" in sentencing promotes consistency in sentencing and ensures that "difference[s] between dispositions [are] likely to reflect legally relevant factors."[311] Just as in the English system, under my proposal, consistency of approach can be achieved across the federal courts of appeals through a "structured methodology"—here sentencing procedures developed and enforced through procedural reasonableness review—and through "a framework of principles and guidelines"—here a combination of the advisory guidelines and sentencing principles established by the courts, Congress, and the Commission that are enforced through substantive reasonableness review. While this method may not guarantee consistency of outcome, it should at least ensure, as in England, that outcomes are "reasonably predictable."[312]

At the same time, focusing on uniformity of approach will allow the federal courts of appeals "to structure judicial discretion, rather than to eliminate it."[313] Importantly, because the increased appellate scrutiny proposed here is not tied to specific sentencing outcomes such as specific Guidelines ranges, sentencing judges would have the discretion to do what they do best: apply general legal rules to individual cases, and arrive at sentencing decisions that are appropriate for each individual defendant.

C. Impediments to Full Implementation of the English Model

While appellate review under my proposed model would, in many respects, resemble appellate review in England, at least two aspects of English appellate review would not be as easily or appropriately transferred to the federal courts of appeals:

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310. Ashworth, *supra* n. 145, at 28.

311. Roberts, *supra* n. 188, at 15.

312. Ashworth, *supra* n. 145, at 28.

313. Wasik, *supra* n. 192, at 254 (citing Andrew von Hirsch, *The Sentencing Commission's Functions*, in *The Sentencing Commission and Its Guidelines* (Andrew von Hirsch, Kay A. Knapp & Michael Tonry eds. N.E. U. Press 1987)).

excessive sentence modification and the development of full guidelines judgments.

1. Excessive Sentence Modification

I see several impediments to adopting the English practice of excessive sentence modification, which I define as an appellate court's *de novo* review of a sentence and substitution of a different sentence if the sentence imposed by the trial court falls outside the guidelines range.

One impediment is the inability of the federal courts of appeals to hear evidence not introduced in the trial court.[314] The English practice, in contrast, reflects a fundamental difference in thinking about the role of appellate review generally, and in sentencing specifically: The purpose of sentence review in England is not just to determine whether the law was followed and the sentence had a sound basis, but to determine the correct sentence at the time of the appeal. Imposing such a dramatic shift in understanding of the function of our courts of appeals is unlikely as a practical matter.

Furthermore, excessive sentence modification most implicates the cost and efficiency concerns of those opposed to expanded appellate review.[315] Indeed, as the analysis above shows, modification of excessive sentences in England is, at least in part, re-sentencing at the appellate level. Although the Court of Appeal has implemented measures—like the no-tinker rule—to limit the expense and reach of such a broad power, it is perhaps wise to focus reform in the federal courts of appeals on a more confined expansion designed to ensure consistency of sentencing approach rather than consistency of outcome.

2. Issuance of Guidelines Judgments on Appeal

The second aspect of appellate review that I would not adopt for the federal courts of appeals is articulation of full guidelines judgments like those announced in *Anigbugu* to divide entire offenses into categories and suggest a range of specific sentences for each. First, judicial development of such

314. *See supra* nn. 159–62 and accompanying text.

315. *See* discussion *infra* § V(D)(2).

broadly applicable guidelines would require (and often does require in England) the federal courts of appeals to issue decisions that go far afield from the matters at issue in the cases before them. In England, the Court of Appeal has a history of authority providing a basis for these decisions, but there is no similar history in the federal courts of appeals that would justify and legitimize such a practice here. On the contrary, there is long tradition in the United States that both discourages courts' use of advisory opinions and maintains the distinction between holdings and dicta.[316] This tradition, which has its roots in the federal constitution's Case or Controversy Clause,[317] limits appellate consideration to issues specifically in controversy.

Guidelines judgments would also be of limited utility in the federal courts of appeals, especially as developing guidelines is one of the Sentencing Commission's primary duties. Furthermore, without the power to re-sentence, the federal courts of appeals will not be able to tie their sentencing policies to particular sentences. And the power to issue guidelines judgments would be unnecessary, as the federal courts of appeals would simply interpret or clarify guidelines as needed in specific cases. For example, if the *Anigbugu* appeal had been heard before one of the federal courts of appeals, the court could have held that a rape committed during a home-invasion burglary must be treated with far more seriousness than would a "single case of rape." The court would then have remanded the case to the trial court for re-sentencing in light of this newly announced principle.

Furthermore, the fact that dictum is not binding does not prevent the federal courts of appeals from surveying history and current circumstances, reasoning by analogy, drawing broad conclusions, and engaging in discussions that can be characterized as dicta. Appellate courts do this all the time to provide guidance, to suggest to other branches the need for potential action, or simply to provide context for their

316. *See* 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3529.1 (3d ed. 1999–2013); *Culombe v. Conn.*, 367 U.S. 568, 635–36 (1961) (Warren, C.J., concurring) ("It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither presented by the record nor necessary to a proper disposition of the issues raised.").

317. U.S. Const. art. III, § 2, cl. 1. (providing that "[t]he judicial Power shall extend" only to certain enumerated cases and controversies).

holdings.[318] So had one of the federal courts of appeals decided *Anigbugu*, it could legitimately have suggested that the Commission provide new guidelines addressing cases involving rape in the home, and further suggested various considerations and aggravating circumstances that might be involved in categorizing such cases.

And finally, the Court of Appeal's decision to continue issuing guidelines judgments after the creation of the Sentencing Council has been criticized by criminal-sentencing experts in England, who have voiced concern over the potential confusion in roles that might result from continuing this practice when the Sentencing Council has been specifically tasked with researching, developing, and implementing these kinds of broad, system-wide guidelines.[319] Thus, considering the dubious benefits and the sure backlash that would result from granting the federal courts of appeals the power to issue guidelines, it is perhaps wise to limit their guidelines interpretations to the controversies before them, in line with the historic American approach.

In sum, the model I propose here would require the federal courts of appeals to adopt the English model in part by reviewing *de novo* solely issues related to sentencing principles. However, that review would be limited by the traditional rules addressing the weight and interpretation of dicta and the limitations on advisory opinions, and the courts of appeals

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318. *See e.g.* Marc McAllister, *Dicta Redefined*, 47 Willamette L. Rev. 161, 177–80 (2011).

319. *See* Ashworth, *Coroners and Justice Act*, *supra* n. 209, at 394 (expressing concern that sharing responsibility for articulation of guidelines could result in a "confusion of roles" between the Court of Appeal and the Sentencing Council and suggesting that "the Court of Appeals should confine itself to legal interpretation . . . and guidance incidental to deciding particular cases") (footnote omitted); Wasik, *supra* n. 176, at 17–18 (cautioning that the Court of Appeal and the Council should "avoid cutting across each other in further development of sentencing guidelines"); Archbold, *supra* n. 145, at § 5-144 (noting that "the suggestion that the court retains a power to issue guidelines (with recommended ranges, etc.) is highly controversial," as it "runs counter" to the current legislative intent to have guidelines "issued by a second statutory body with membership reflecting a broad range of expertise and interests, and only after full consultation and within the context of a rigid statutory framework"); *but see* D.A. Thomas, *Sentencing: Burglary of Dwellings—General Guidance*, 4 Crim. L. Rev. 295, 299 (2009) (praising the Court of Appeal's decision in *R v. Saw*, [2009] EWCA (Crim) 1, [2009] 2 All E.R. 1138, to issue a new guideline for sentencing in cases of domestic burglary, and warning against any efforts by Parliament to "subordinate the Court of Appeal to the proposed new Sentencing Council").

would not assume any new power to modify sentences or review the resulting sentences for excessiveness.

C. Changes to the System Necessitated by Adoption of the English Model

From a system-design perspective, implementation of the expanded appellate review that I propose here should be fairly straightforward. The jurisdiction for such review already exists.[320] And such review could fit seamlessly into the substantive reasonableness review mandated by the Supreme Court in *Booker* and revised in later cases such as *Rita* and *Gall.* The federal courts of appeals also have the benefit of Camp II cases like *Pugh*, *Amezcua-Vasquez*, and *Padilla*, which provide models for how searching *de novo* review of sentencing principles can be conducted within the context of a *Booker* substantive reasonableness review analysis.[321] And finally, the federal courts of appeals already have the expertise necessary to begin immediately reviewing issues of sentencing policy *de novo*. They routinely review issues of law and policy *de novo* in many other areas of the law, and can easily translate the procedures and standards of such review to the criminal-sentencing context.[322]

That being said, implementing the model suggested here will require several changes to statutory and judicial procedure. An obvious example is the reversal of decisions like *Kimbrough* that require appellate deference to district court decisions on sentencing policy. These decisions, which set the appellate standard for review of district court decisions on sentencing principles at abuse of discretion, are inconsistent with the expanded appellate review I propose.

In addition, this proposal would require greater written explanation of sentencing purposes, both at the trial and appellate levels, but scholars have long argued that both the federal district courts and the federal courts of appeals should clearly tie their sentencing decisions to their sentencing

320. *See* Rosenbaum, *supra* n. 2, at 920–21.

321. *See supra* nn. 67–76 and accompanying text.

322. *See supra* nn. 254–55 and accompanying text.

purposes.[323] As the Sentencing Reform Committee of the bipartisan Constitution Project explained,

> careful statements of reasons are essential to meaningful appellate review of sentencing decisions. They are extraordinarily useful to other sentencing judges faced with analogous cases. They form an important component of the feedback to sentencing rule makers necessary for improving any sentencing system. And they inform litigants, the Sentencing Commission, Congress, and the public about how the law is being applied, which is essential if the country is to understand and have confidence in the federal sentencing system.[324]

Put simply, unless appellate courts can evaluate the reasons behind sentencing decisions, a common law of sentencing cannot develop.[325]

Another less obvious, but no less important, practice that would require change is the Supreme Court's policy of denying certiorari on guidelines-interpretation issues. In *Braxton v. United States*, the Court held that it would be "restrained and circumspect" in using its certiorari power to resolve circuit conflicts on issues of guidelines interpretation, deferring to the Commission in such instances.[326] The Court's hesitancy to approach and decide issues of guidelines interpretation is inconsistent with the broad review of sentencing policy as law advocated here. It fosters inconsistency of approach, and unnecessarily defers to the Commission on issues that it may never resolve. Indeed, others have lamented that the Commission is notoriously slow to identify and resolve

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323. *See supra* nn. 94–96 and accompanying text.

324. Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post*-Booker *World*, 18 Fed. Senten. Rep. 310, 317 (June 2006).

325. *See* Berman, *supra* n. 4, at 111.

326. 500 U.S. 344, 348 (1991) (noting as well that the Commission has not only the duty to "review and revise" the Guidelines but also the "unusual" power to give retroactive effect to Guidelines amendments reducing sentences, and seeming to take this to mean that the Commission holds the initial and primary responsibility of guidelines interpretation); *see also* Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 Fed. Senten. Rep. 142, 142–45 (1994) (describing and criticizing the Sentencing Commission's role as a "Guidelines Supreme Court" after the *Braxton* decision); Ronald F. Wright, *Sentencing Law in the Supreme Court's 1990–91 Term*, 4 Fed. Senten. Rep. 58, 58, 59 (1991) (lamenting that the Court in *Braxton* had "decided . . . to wash its hands of sentencing" by determining that it should not "develop or express its own views about the wisdom of sentencing policies").

guidelines conflicts and that its eventual resolutions lack empirical foundation, are based on unwise political pressure, and are unsupported by public comment.[327] As the Court of Appeal in England does, the Supreme Court should resolve circuit splits on issues of sentencing policy throughout periods of change, promoting consistent and clear application of sentencing policy throughout the federal courts.

This, of course, doesn't mean that the Commission can play no role in the interpretation of the Guidelines. But again, the English experience provides a more moderate example than the stark avoidance policy of the Supreme Court: The Court of Appeal defers to the Sentencing Council's Definitive Guidelines, but will nevertheless provide a contradictory interpretation when the law compels it. In *Thornley*, for example, the Court of Appeal acted to update the Sentencing Council's Definitive Guideline on manslaughter by reason of provocation to take into account later developments in the law on knife violence. *Thornley* is typical of the relationship between the Sentencing Council and the Court of Appeal, which is characterized by both shared lawmaking responsibility and mutual respect and deference.[328] In short, the Supreme Court could apply some deference to the Commission's interpretation of its own guidelines, as it would for any agency, without the Court's avoiding its responsibility to resolve circuit conflicts and ensure correct and consistent application of the law.

D. Potential Criticisms

1. Concerns about Judicial Minimalism and Judicial Activism

A legitimacy concern is raised whenever the judiciary takes on a significant lawmaking role, as is suggested here. One might ask whether Congress or the Sentencing Commission should be developing the criminal policies and laws that are applied throughout our country. The short answer is yes. Ideally, Congress, the broadly populist branch of the federal government, should be setting those policies. And the

327. *See e.g.* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Pa. L. Rev. 1631, 1643–44 (2012).

328. *See supra* nn. 186–90 and accompanying text.

Sentencing Commission, which can view sentencing from a wider perspective and is made up of sentencing experts, should be researching, developing, and implementing sentencing policy. However, both institutions have been the subject of criticism for failing to fully perform these tasks.[329] Although Congress has identified general goals of punishment—the proportionality, rehabilitation, deterrence, incapacitation, and retribution goals of § 3553(a)—these goals are abstract and may often conflict in specific cases.[330]

Instead of providing particularized guidance, Congress delegated at least part of the task to the Sentencing Commission, directing it "to establish sentencing policies and practices" that "[a]ssure the meeting of the purposes of sentencing as set forth in section § 3553(a)(2)."[331] But as a number of scholars have pointed out, instead of making decisions about which sentencing philosophies and purposes control in which kinds of cases, the Commission chose to study historical sentencing outcomes and develop a system of sentencing outcomes unmoored by sentencing purposes.[332] This decision has been widely criticized, particularly for emphasizing consistency of outcome at the expense of important concerns of individualization.[333]

Furthermore, even if the Commission was inclined to consider sentencing purposes in a meaningful way, the Supreme Court effectively eliminated the Commission's ability to ensure sentencing consistency when it made the Guidelines advisory in *Booker*. This is where the utility of courts of appeals becomes apparent. "Congress did not intend to vest the Commission with sole authority to consider purposes in sentencing; this responsibility was to be shared by the Commission and sentencing judges."[334] Section § 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the [statutory] purposes."[335] Through

329. *See supra* nn. 89–93 (collecting authorities) and accompanying text.

330. Berry, *supra* n. 90, at 637 (quoting the Sentencing Reform Act of 1984).

331. 28 U.S.C. § 991(b)(1)(A) (available at http://uscode.house.gov).

332. *See supra* nn. 89–93 and accompanying text.

333. *See id.*; *see also* Berry, *supra* n. 90, at 661 (calling the Sentencing Guidelines "intellectually bankrupt" and asserting that they include "no intelligible philosophical principle by which sentences are considered or justified").

334. Miller, *supra* n. 4, at 428.

335. 18 U.S.C. § 3553(a) (available at http://uscode.house.gov).

this parsimony provision, Congress specifically delegated to the courts the duty and the authority to consider and interpret the statutory factors as they are applied in specific cases.[336] This authority does not replace Congressional authority to enact conflicting or additional sentencing laws or policies and of course legislative enactments would always take precedence over judicially created common law. However, in the absence of legislative guidance, the courts can and should fill the gaps.[337]

Nor does the judicial contribution to the common law of sentencing prevent the Sentencing Commission from fulfilling its duty to "establish sentencing policies and practices" for the federal criminal justice system that: " (1) "assure the meeting of the [§ 3553(a)] purposes of sentencing," (2) "provide certainty and fairness," (3) "avoid[] unwarranted sentencing disparities," and (4) "reflect . . . advancement in knowledge of human behavior."[338] Indeed, England's Sentencing Council was created in the 1980s because developing a law of sentencing solely through the common law courts was found to be an inadequate means of establishing system-wide sentencing principles.[339]

It is perhaps uncontroversial to state, then, that a central agency, divorced from the case or controversy requirement, and having the time and resources necessary to conduct empirical and sociological research and to consult public opinion, should have a hand in developing policies that affect the entire criminal justice system. Following this logic, the Supreme Court announced in *Kimbrough* that it had "preserved a key role for the Sentencing Commission" in the post-*Booker* sentencing regime,[340] holding that advisory guidelines issued after the Sentencing Commission has "exercise[d] its characteristic institutional role" by researching and compiling "empirical data

336. Miller, *supra* n. 4, at 426–28.

337. Of course, the federal courts of appeals have historically rejected any opportunity to provide meaningful guidance on sentencing policy. *See* Reitz, *supra* n. 9, at 1458–71 (describing the federal appellate role as largely a self-imposed enforcement function); Berman, *supra* n. 4, at 102–06 (lamenting "the judiciary's failure to fulfill its lawmaking role" in the sentencing process). However, as a result of the Supreme Court's mandates in *Booker* and subsequent cases, the appellate role has been broadened beyond mere enforcement, and thus the courts of appeals must rethink their former unwillingness to articulate sentencing policy via appellate review.

338. 28 U.S.C. § 991(b)(1).

339. *See supra* nn. 177–84 and accompanying text.

340. *Kimbrough*, 552 U.S. at 108.

and national experience"[341] would be entitled to judicial deference.[342] As shown through the English experience, the federal sentencing Commission and the federal courts can work in tandem, as they do in England, to ensure that they are respectful to each other's expertise in creating a consistent and fair justice system. So long as judicial deference to Commission guidance does not consist only of blind acceptance of guidelines ranges (thus equating to mere guidelines enforcement), the Supreme Court's *Kimbrough* approach appears to be a sensible practice in a system that relies on the development of consistent, rational, and well-informed sentencing principles.

2. Concerns about Cost and the Expansion of Appellate Review

Another criticism of robust appellate review is the added cost and expense that could result from a substantial increase in the appellate docket. Certainly cost is a legitimate concern, especially in today's environment of budget cutbacks and difficulty in confirming federal appellate judges. However, the English experience suggests that the model of appellate review proposed here is feasible despite these concerns.

First, the federal courts of appeals could enact limits on appellate review to narrow the number of issues on appeal. For example, as in England, they would continue to review factual findings for clear error. Also, once the court of appeals determines that the district court has committed no legal error (including an error in sentencing principles), it can then review with deference—only for reasonableness or abuse of discretion—the choice of sentence and the application of sentencing principles and law to the facts. As an example, in a case like *McBride*,[343] a court of appeals could review for reasonableness the trial court's decision that a defendant had a sufficient history of hands-on sexual exploitation to warrant making incapacitation the primary goal of his sentencing in a child-pornography case. It could also review with deference the ultimate choice of sentence as one that properly reaches that goal.

341. *Id.* at 109.

342. *Id.* at 108–10.

343. *See supra* text accompanying nn. 53–63.

Furthermore, courts of appeals could limit reasonableness review appeals by continuing a modified version of the current federal "presumption of reasonableness," by which the court of appeals presumes that a sentence is reasonable if it is within the guidelines range.[344] In *Rita* the Court endorsed the presumption of reasonableness as both constitutional and practical,[345] explaining that the presumption "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[346]

However, the presumption of reasonableness would have to change in one material respect under my proposed model: The presumption cannot apply to review of sentencing principles because they are matters of law that appellate courts should review *de novo*, regardless of whether the sentence is inside or outside of the guidelines range. But this should not result in a significant expansion of the burden on the federal courts of appeals. Appellants would be responsible for identifying specific errors in sentencing principles applied by the district courts and explaining their significance. Ours is not a system in which the appellant simply makes a request for resentencing, or a mere statement that the sentence is in some way unfair or is too high. And even in the English system, where the Court of Appeal has the power to modify sentences, appellants must state specific reasons for appealing a sentence.[347]

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344. This presumption is essentially a version of the no-tinker rule, under which the English Court of Appeal does not interfere with a sentencing court's decision on the length of a sentence if it is within the guidelines range. *See supra* nn. 226–32 and accompanying text.

345. *Rita*, 551 U.S. at 347, 350–54.

346. *Id.* at 350–51.

347. The Notice and Grounds form that defendants must complete to appeal their sentences specifically states that appeals must be "accompanied by detailed reasons" to be accepted for review. And it provides further that appeals with "[w]ording such as . . . 'the sentence is in all the circumstances too severe' will be rejected." Form NG—*Notice and Grounds of appeal or application for permission to appeal against conviction or sentence to The Court of Appeal Criminal Division* ¶ 8, http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage (Jan. 2012) (scroll down to Part 68 "Appeal to the Court of Appeal about conviction or sentence"; click on "CrimPR Part 68, Rule 68.3 Notice and Grounds of Appeal, or application for permission to appeal, against conviction or sentence to the Court of Appeal, Criminal Division [CAO form NG]") (accessed Sept. 30, 2013; copy on file with Journal of Appellate Practice and Process).

Ultimately, the limited review for legal error I propose should not result in significant expansion of appellate review. In fact, to the contrary, final resolution of legal issues at the appellate level would surely result in fewer redundant appeals and clearer, more efficient outcomes. However, even if some slight increase in the appellate docket were to result, this is a price we should pay to ensure consistent application of sentencing law throughout the federal courts.[348]

3. Concerns about the Effect of Plea Bargaining on Appellate Review

Finally, I would be remiss if I failed to consider the role that plea bargaining plays in the federal sentencing process. About ninety-seven percent of all federal criminal sentences arise from guilty pleas, rather than trials.[349] As a practical matter, this means that the overwhelming majority of sentences result from bargaining rather than from the application of sentencing guidelines and principles by a sentencing judge. Furthermore, many defendants who plead guilty through a plea

348. Of course, other cost-saving measures are available and are in fact used in England. For example, the English Court of Appeal uses a screening procedure to control the volume of appeals that reach the full court. Most applications for criminal appeals are first sent to a single judge of the Court of Appeal, who will then review the application "in chambers" to decide whether to grant leave to appeal to the full court. Sprack, *supra* n. 145, at 485–86, 488–89 (describing the single-judge process). Such a measure would undoubtedly be controversial if applied in the United States. As another example, only sentences imposed by the crown courts may be appealed to the Criminal Division, effectively meaning that only crimes punishable by up to one year in prison can be appealed. *See supra* n. 168. Although proposals for limiting the appellate jurisdiction of the federal courts in criminal cases to felonies have been considered in the United States, *see ABA Project on Minimum Standards for Criminal Justice—Standards Relating to Appellate Review of Sentences* 13–20, 86–88 (1st ed. ABA 1969) (discussing practical reasons for limiting the types of sentencing cases heard on appeal and collecting specific bills introduced in Congress in the 1960s to limit appellate review to felony cases), such proposals seem highly unlikely to win support today.

349. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, at tbl. 5.34.2010, http://www.albany.edu/sourcebook/pdf/t534 2010.pdf (showing that, in fiscal year 2010, 81,217 of 83,941 criminal defendants in federal district courts pled guilty) (accessed Sept. 30, 2013; copy on file with Journal of Appellate Practice and Process).

bargain—perhaps as many as two thirds—also waive their right to appeal their sentences.[350]

These characteristics of the system in the United States are in sharp contrast to the English system, even though plea bargaining is commonplace in England. Defendants in the English system are encouraged to plead guilty by: (1) a statutory sentence discount of up to one-third, depending on when the defendant pleads guilty, and (2) fact-and-charge bargaining with the prosecuting barrister.[351] However, English prosecutors cannot bargain with a defendant by promising a certain sentence length.[352] Until quite recently, they could not even recommend a certain sentence length to the judge[353] because sentencing is seen in England as "uniquely judicial in nature."[354] While defendants in England can predict their sentences by applying the sentencing guidelines and statutory guilty plea discount, sentencing judges still make discretionary—and appealable—sentencing decisions in each case.

The heightened role that plea bargaining plays in the United States leads to questions about the value of appellate review as a source of sentencing law. Specifically, can a common law of sentencing result despite a low rate of appeal? And, if it can, will any common law of sentencing that develops adequately cover the full extent of federal sentencing law?[355]

Here again, my study of the English experience provides some insight on these points. First, it shows that an appellate common law of sentencing is feasible, despite limits on the rate of appeals. Sentences are appealed at similar low rates in

350. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

351. Ashworth, *supra* n. 145, at 170–75, 377; Daniele Alge, *Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?* 19(1) Web JCLI, http://ojs.qub.ac.uk/index.php/webjcli/article/view/203/272 (2013).

352. Ashworth, *supra* n. 145, at 377–78 (noting that the code of conduct for the bar provides that "the prosecutor 'should not attempt by advocacy to influence the court in regard to sentence'").

353. Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 Crime & Just. 1, 25 (2012).

354. *Id.* (citing Ashworth, *supra* n. 145).

355. *See* King & O'Neill, *supra* n. 350, at 211–13 (arguing that appellate waivers diminish the value of appellate review as a source of consistent and uniform sentencing policy).

England and in the federal courts of the United States. Only about two percent of criminal sentences are appealed in England,[356] compared to a seven percent appeal rate for criminal sentences in the federal courts of the United States.[357] Even with this low rate of appeal, the Court of Appeal in England has been able to develop a common law of sentencing.

Federal appellate courts undoubtedly have plenty of opportunities to hear sentencing issues: 5,875 appeals of sentences were commenced in the federal courts of appeals in 2011.[358] However, because it is impossible to determine how many of these appeals would have presented genuine issues of sentencing law or policy, as opposed to issues of fact or discretionary issues, it is difficult to determine how many would have presented opportunities to develop sentencing common law. But further evidence can be found by comparing to appeals in other areas of the law. In 2011, approximately five percent of non-prisoner, non-bankruptcy private civil claims were appealed in federal courts[359]—a number not all that different from the

356. *See* Ministry of Justice, *Judicial and Court Statistics 2011*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf at 11 (June 28, 2012) (recording 7,475 applications to appeal criminal sentences in fiscal year 2011) (accessed Oct. 1, 2013; copy on file with Journal of Appellate Practice and Process); Ministry of Justice, *Statistics Bulletin, Criminal Justice Statistics–June 2012, Sentencing Tables–June 2012* tbl. Q5.1, https://www.gov.uk/government/publications/criminal-justice-statistics-in-england-and-wales-earlier-editions-in-the-series (recording that 347,342 criminal defendants were sentenced on indictable offences in 2011).

357. *See* Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table55.pdf (accessed Oct. 21, 2013; copy on file with Journal of Appellate Practice and Process). Appeal rates are derived by dividing the number of appeals filed by the number of defendants convicted that year.

358. *Id.*

359. The private civil appeal rate—four percent—was derived by dividing the 12,646 "Other Private Civil" appeals commenced during the year ending in March 2012 by the 243,195 of those cases terminated in United States District Courts during the year ending in March 2012. *See* Administrative Office of the U.S. Courts, *United States Courts, Caseload Statistics 2012*, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B01Mar12.pdf (Table B1: *U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2012*); Administrative Office of the U.S. Courts, *United States Courts, Caseload Statistics 2012*, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/ Statistics/FederalJudicialCaseloadStatistics/2012/tables/C01Mar12.pdf (Table C1: *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending March 31, 2012*) (both accessed Oct. 9, 2013; copies on file with Journal of Appellate Practice and Process).

seven percent appeal rate of criminal sentences. Nevertheless, common law has successfully developed across the spectrum of federal private civil law, including in copyright, patent, and employment discrimination, to name just a few. This is how common law develops: through a deliberate process of resolving issues in actual cases, that over time results in the development of a body of law.

While these numbers should calm some concerns related to the opportunities to hear sentencing issues at the appellate level, it does not solve the second concern that the issues making it to the appellate courts may not be representative of the whole range of potential sentencing law. Thus, plea "bargaining skews appellate lawmaking because rules that survive the bargaining process receive attention and development that rules waived as part of bargains do not."[360] As a result there is a danger that appellate lawmaking will result in distorted law.[361]

There can be no doubt as to the validity of this concern, especially considering the inequities that have been widely documented as a result of plea bargaining and the powers of prosecutors in the federal system. But the English experience both supports this concern, and provides a fix. English experts recognized that appellate development of sentencing common law was not a perfect model, and, in particular that the Court of Appeal was unable to adequately address system-wide sentencing issues. Accordingly, Parliament established a source of sentencing law and policy other than that generated by the appellate court, creating the Sentencing Council in the 1980s precisely to fill the gaps in sentencing law left by the judiciary at the time.[362]

My proposal would follow England's lead, suggesting that the federal Sentencing Commission would continue to provide guidance on sentencing issues that are not being reached by the federal courts of appeals. To the extent that limits on the appellate court function—including limits caused by plea bargaining design flaws—make those courts unable to reach the full body of sentencing law, the Commission could, and should, step in to fill the gaps.

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360. King & O'Neill, *supra* n. 350, at 253.

361. *Id.* at 252–53.

362. *See supra* nn. 177–84 and accompanying text.

V. CONCLUSION

Ultimately, if the English experience shows us anything, it is that the appellate role cannot fit into a binary mold as is often assumed here in the United States. The appellate function in sentencing is not limited to either enforcement or lawmaking; it can include aspects of both. Nor does the standard of review have to be either *de novo* or full deference; it can include a mix of both. And appellate review does not automatically inhibit individualized sentences; appellate review can expand to guide sentencing discretion in a way that retains the kind of discretion necessary to sentence each individual as appropriate in a particular case. Blind acceptance of deference as an institutional model based on assumptions like these is not only inaccurate, but may lead to the rejection of reforms at the appellate level that could further the goals of uniformity and fairness in sentencing.

In rendering the Federal Sentencing Guidelines advisory, the Supreme Court has explained that it expects appellate review to play a prominent role in providing the sentencing consistency that the now-advisory Guidelines cannot. However, as cases like *Kimbrough* and *McBride* show, such consistency is unlikely to occur without reform like robust substantive appellate review of criminal sentences. The mixed-deference model of appellate review practiced in England shows how an appellate court can review sentencing decisions for substantive reasonableness without unwarranted encroachment on discretion of sentencing judges and without over-enforcement of the Guidelines. My proposal borrows the aspects of English appellate review that would allow the appellate courts and the Sentencing Commission to share responsibility for issuing general guidance on sentencing policies. Through this approach, the sentencing common law developed in the federal courts of appeals would work in tandem with the advisory federal Guidelines, providing sentencing courts with benchmarks to guide the sentencing decision while allowing for the discretion needed in the trial courts to reach individualized sentences.