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I. INTRODUCTION

In *United States v. Booker*,[2] the United States Supreme Court made the Federal Sentencing Guidelines (Guidelines) advisory rather than mandatory, severing and excising the statute that, under the Sentencing Reform Act of 1984 (SRA), governed appellate review of district court sentences[3] and instructed that sentences imposed by district courts not be reviewed for "reasonableness."[4] Though *Booker* did not explain how reasonableness review would function in practice,[5] two years later, in *Gall v. United States*, the Supreme Court attempted to clarify this standard of review by holding

1. Assistant Federal Public Defender, Southern District of Florida. This Article does not purport to express the views of the Federal Public Defender's Office. I thank A. J. Kramer and Diane de Gramont for their helpful comments.

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

3. The statute that, pre-*Booker*, had set out the standards of review of sentences under the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. § 3742(e), had been mostly designed to instruct appellate courts on how to review whether the district courts had correctly applied the mandatory Guidelines. *See Booker*, 543 U.S. at 262. Once the Guidelines were no longer mandatory, this statute became inapposite. *See Booker*, 543 U.S. at 260-61.

4. *Id.* at 262.

5. *Id.* at 311 (Scalia, J., dissenting).

that appellate courts should first review sentences for "procedural" reasonableness, and then review them for "substantive" reasonableness.[6]

Post-*Gall*, the scope of "procedural" reasonableness review seems fairly clear,[7] but the scope of "substantive" reasonableness review remains unclear, largely because *Gall* gave "mixed messages"[8] on the content of this latter standard. Some courts of appeals concluded that *Gall* contemplated that "review for substantive reasonableness means that an appellate court must, in some sense, second-guess the weighing of sentencing factors by the district court."[9] Other circuits interpreted *Gall* to hold, to the contrary, that once a district court has "conducted a thorough analysis of the § 3553(a) factors and provided a complete explanation of the reasons underlying [the] sentence," it was not the role of appellate courts to "second-guess" the district court's analysis.[10] As a result, a circuit conflict now exists regarding the scope of "substantive" reasonableness review.

This Article argues that substantive reasonableness review need not involve second-guessing the weight that a district court assigns to sentencing factors. Part I surveys the confusion over substantive reasonableness review. Part II argues that appellate re-weighing of the weight that a district court assigned to sentencing factors is unnecessary to ensure adequate appellate review of sentences, and undermines the individualization of sentences, a core sentencing principle. Part III sets out proposed parameters for substantive reasonableness review.

II. THE CONFLICT OVER SUBSTANTIVE REASONABLENESS REVIEW

When the Supreme Court announced in *Booker* that sentences would be subject to appellate review for "reasonableness," the *Booker* majority opinion instructed, without more, that "[t]he courts of appeals [will now] review sentencing decisions for unreasonableness."[11] The obvious lack of guidance prompted derisive criticism from the dissent regarding the majority's "positively Delphic" announcement of a standard of review.[12]

Two years after it decided *Booker*, the Supreme Court attempted to clarify the reasonableness standard in *Gall*.[13] *Gall* instructed appellate

6. Gall v. United States, 552 U.S. 38, 51 (2007).

7. *See infra* notes 14-15 and accompanying text.

8. United States v. Feemster, 572 F.3d 455, 462 n.4 (8th Cir. 2009) (en banc) (quoting United States v. Levinson, 543 F.3d 190, 197 n.6 (3d Cir. 2008)).

9. William H. Pryor, *Federalism and Sentencing Reform in the Post-*Blakely/Booker *Era*, 8 OHIO ST. J. CRIM. L. 515, 521-23 (2011).

10. United States v. Tomko, 562 F.3d 558, 575 (3d Cir. 2009) (en banc).

11. United States v. Booker, 543 U.S. 220, 264 (2007).

12. *Id.* at 311 (Scalia, J., dissenting) ("[N]o one knows—and perhaps no one is meant to know—how . . . 'unreasonableness' review will function in practice.").

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

courts to review sentences, first, for "procedural" reasonableness, and then for "substantive" reasonableness.[14] *Gall* set out clear contours for "procedural" reasonableness review, instructing appellate courts to review whether a district court (a) incorrectly calculated the Guidelines range, (b) treated the Guidelines as mandatory, (c) failed to consider the statutory sentencing factors listed at 18 U.S.C. § 3553(a), (d) selected a sentence based on clearly erroneous facts, or (e) failed to adequately explain the chosen sentence including any deviation from the Guidelines range.[15] But, when it turned to "substantive" reasonableness review, *Gall* provided much less guidance.

Gall noted that substantive reasonableness review is governed by the "abuse of discretion" standard.[16] The opinion stated that appellate courts should "take into account the totality of the circumstances, including the extent of any variance from the Guidelines Range."[17] The opinion also noted that, in sentencing Gall, "[t]he District Court quite reasonably attached great weight" to a particular sentencing factor: the defendant's potential for rehabilitation.[18] The opinion noted that appellate courts could, but were not required to, presume that a sentence within the Guidelines was reasonable.[19] *Gall* added that appellate courts "may consider the extent of [a] deviation [from the Guidelines range], but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[20] *Gall* added: "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."[21] Finally, *Gall* noted that a sentencing judge is "in a superior position to find facts and judge their import under § 3553(a) in the individual case," noting a sentencing judge's "greater familiarity" with individual defendants, and the fact that district courts "see so many more Guidelines sentences than appellate courts do."[22] *Gall* explained that the court of appeals erred in making its own evaluation of the weight the district court attached to a factor, noting that "it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable."[23]

Plainly, *Gall* indicated that substantive reasonableness review should be deferential, but its observations did not congeal into concrete parame-

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14. *Id.* at 51.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Gall*, 552 U.S. at 57.
19. *Id.*
20. *Id.* at 51.
21. *Id.*
22. *Id.* (citation omitted).
23. *Gall*, 552 U.S. at 59.

ters.[24] The resulting difficulty in applying *Gall* is now well-recognized in both the case law[25] and the legal literature.[26] Though all citing *Gall*, appellate judges disagree sharply regarding whether substantive reasonableness review contemplates the re-weighing of sentencing factors.[27] The disagreement has spawned a conflict among the circuits. Some courts of appeals hold that the re-weighing of sentencing factors is a legitimate part of substantive reasonableness review,[28] while others hold it is not.[29]

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24. Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 967-68 (2010) ("[There is] some bewilderment [in legal opinions] at the lack of guidance as to the proper content of substantive reasonableness analysis.").

25. United States v. Irey, 612 F.3d 1160, 1186 n.14 (11th Cir. 2010) (noting that the difficulty in applying substantive reasonableness review "has not gone unnoticed"); United States v. Feemster, 572 F.3d 445, 467 (8th Cir. 2009) (Colloton, J., concurring) ("[After *Gall*] one searches in vain for a principled basis on which to conduct a consistent and coherent appellate review for reasonableness."); United States v. Evans, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) ("I must conclude that the Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear.").

26. *See, e.g.*, Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1586 (2012) (noting "the federal appeals courts' inability to give meaning to substantive reasonableness sentencing review"); D. Michael Fisher, *Still in Balance? District Court Discretion and Appellate Review Six Years After Booker*, 49 DUQ. L. REV. 641, 652 (2011) ("The confusion over what reasonableness means . . . has led the courts of appeals to take an ad hoc approach to sentencing review . . . ."); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 2-3 (2008) ("[C]onfusion remains regarding appellate review of sentencing decisions."); James L. Fant, Comment, *Is Substantive Review Reasonable: An Analysis of Federal Sentencing in Light of* Rita *and* Gall, 4 SETON HALL CIR. REV. 447, 484 (2008) ("[T]he cases reflect a core disagreement among circuit courts over the scope of substantive review.").

27. *Compare* United States v. Irey, 612 F.3d 1160, 1192 n.18 (11th Cir. 2010) (en banc) ("[*Gall*] actually confirms that appellate courts, with the proper measure of deference, should review the reasonableness of the weight placed on a § 3553(a) factor by the sentencing court." (citing *Gall*, 552 U.S. at 56-57)), *with id.* at 1260-61 (Edmondson, J., dissenting) (claiming that the majority "disregards the Supreme Court's analysis in *Gall*"), *and* United States v. Ressam, 679 F.3d 1069, 1087, 1090 (9th Cir. 2012) (en banc) (rejecting the dissent's argument that "re-weighing" of sentencing factors is improper under *Gall*, because *Gall* instructs a court of appeals to "ensure that the justification [for a variance from the Guidelines] is sufficiently compelling" (citing *Gall*, 552 U.S. at 50)), *with id.* at 1105 (Schroeder, J., dissenting) (claiming that, by finding that the district court gave "too little weight" to a sentencing factor, the majority engaged in the "de novo review" that *Gall* foreclosed (citing *Gall*, 552 U.S. at 45)).

28. United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) ("[W]e consider whether the factor, as explained by the district, can bear the weight assigned it under the totality of the circumstances in the case."); United States v. Abu Ali, 528 F.3d 210, 265 (4th Cir. 2008) (2-1 decision) ("[T]he sentencing court['s] . . . justifications [for its sentence] were not 'sufficiently compelling' . . . ."); United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (10-1 decision) (a district court abuses its discretion when it commits a clear error of judgment "in weighing [the sentencing] factors"); United States v.

The parameters of substantive reasonableness review affects the appeals (and the appealability) of thousands of federal sentences imposed each year. Five circuits have addressed this issue in fractured en banc decisions.[30] It is the kind of issue for which the Supreme Court can be expected to grant review.[31]

Madera-Ortiz, 637 F.3d 26, 30 (1st Cir. 2011) (inviting appellants to "persuade [the court of appeals] that the district judge was unreasonable in balancing pros and cons"); United States v. Mantanes, 632 F.3d 372, 376 (7th Cir. 2011) ("[T]he judge here did not place unreasonable weight on the need to protect the public from Mantanes . . . ."); United States v. Bistline, 665 F.3d 758, 761 (6th Cir. 2012) ("[A] sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent relevant sentencing [18 U.S.C.] § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor." (brackets and citations omitted)); *Ressam*, 679 F.3d at 1087 ("[W]e have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.").

29. United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008) ("We may not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo."); *id.* ("'[I]t is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable,'. . . and we must therefore defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to be such findings." (quoting *Gall*, 552 U.S. at 59)); United States v. Merced, 603 F.3d 203, 216-17 (3d Cir. 2010) (rejecting the argument that the district court's sentence did not afford certain sentencing factors—criminal history or seriousness of the offense—enough weight, because a "'district court's failure to give [certain] factors the weight the [government] contends they deserve' does not mean that those factors were not considered." (quoting United States v. Bungar, 478 F.3d 540, 546 (3d Cir. 2007))) (noting that once a district court has "conducted a thorough analysis of the § 3553(a) factors and provided a complete explanation of the reasons underlying [the] sentence," it is not the role of appellate courts to "second-guess" the district court's analysis) (citing United States v. Tomko, 562 F.3d 558, 575 (3d Cir. 2009) (en banc) (citation omitted)); United States v. Gardellini, 545 F.3d 1089, 1094 n.6, 1100 (D.C. Cir. 2008) (2-1 decision) (affirming sentence over dissent's objection "that the District Court did not afford deterrence adequate weight and that the sentence is therefore unreasonable"). The Fifth Circuit appears to presume that a district court "has considered all the factors for a fair sentence set forth in the Guidelines." United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009). Its statements regarding the substantive reasonableness review standard do not mention re-weighing of sentencing factors, focusing instead on whether a sentence "was arbitrary." *See* United States v. Rhine, 637 F.3d 525, 530 (5th Cir. 2011) (2-1 decision) (upholding upward variance because "[f]rom a substantive standpoint . . . [it] was hardly arbitrary"); *id.* at 542 (Dennis, J., dissenting) (finding that the district court's sentence was substantively unreasonable because it was "arbitrary," i.e., "there is no connection drawn between the specific decision made and the bases for that decision").

30. *See* United States v. Irey, 612 F.3d 1160 (11th Cir. 2010) (8-5 decision); *Feemster*, 572 F.3d 455 (10-1 decision); *Tomko*, 562 F.3d 558 (8-5 decision); *Cavera*, 550 F.3d 180 (10-4 decision); *Ressam*, 679 F.3d 1069 (7-4 decision).

31. *See, e.g.*, David C. Holman, *Death by a Thousand Cases: After* Booker*,* Rita*, and* Gall*, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 309 (2008) (urging the Supreme Court to address the substantive reasonableness standard).

III. APPELLATE COURTS SHOULD NOT BE AUTHORIZED TO SECOND-GUESS THE WEIGHT A DISTRICT COURT ASSIGNS TO SENTENCING FACTORS

This Article submits that when *Gall* required appellate courts to give "due deference" to the sentences imposed by district courts,[32] it meant to require a difference akin to that required of federal courts when they review whether administrative agency action is "arbitrary and capricious."[33] In that context, the role of "a federal court is not to substitute its judgment for that of the agency, but to ensur[e] that agencies have engaged in reasoned decisionmaking."[34] Just as deference is owed to administrative agencies in light of their "expertise" over a subject matter,[35] appellate courts should afford a similar deference to district court sentencing decisions, a matter within the district courts' expertise.[36]

The imposition of a criminal sentence involves a distinctly "intuitive" decision.[37] It involves weighing case-specific mitigating and aggravating circumstances[38] and making value judgments[39] regarding extremely broad sentencing factors such as "the nature and circumstances of the offense," or "the need . . . to protect the public from further crimes of the defendant."[40] The factors underlying a sentence reflect penological principles—retribution, deterrence, and incapacitation—that do not always point in the

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

33. Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011) (quoting Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011)).

34. *Id.* (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 53 (1983)).

35. *Id.*

36. *See Gall*, 552 U.S. at 51 ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case [because he] sees and hears the evidence . . . and gains insights not conveyed by the record.") (internal quotation marks omitted).

37. *See* Rebecca Krauss, *Neuroscience and Institutional Choice in Federal Sentencing Law*, 120 YALE L.J. 367, 370 (2010) (scientific studies indicate that the mental process of assigning criminal punishment involves an "intuitive" decision).

38. Mistretta v. United States, 488 U.S. 361, 373 (1989) (citing 28 U.S.C. § 994(c)(1)-(7)).

39. *Mistretta*, 488 U.S. at 414 (Scalia, J., dissenting) ("[D]ecisions made by the [Sentencing] Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments."); *see also* Schriro v. Summerlin, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) (stating that the fact finder's application of aggravating factors in a capital case involves "not simply the finding of brute facts, but also the making of . . . community-based value judgments").

40. *See* 8 U.S.C. § 3553(a)(1), (2)(C).

same direction.[41] "[S]entencing, in the end, is an intensely intuitive or qualitative determination that eludes precise quantification."[42]

Appellate courts are comparatively poorly situated[43] to make such intensely qualitative judgments.[44] Traditionally, therefore, sentencing discretion is reserved for the district judges who have the opportunity to observe first-hand the defendants they are sentencing.[45]

Focus on the decision-making process, as opposed to the end-result, is implicit in the Supreme Court's recent application of substantive reasonableness review in *Setser v. United States*.[46] In *Setser*, the defendant claimed that his sentence was substantively unreasonable because one could not discern whether a state or federal judgment should determine whether his federal sentence ran concurrently or consecutively with his state sentence.[47] Summarily rejecting this challenge, *Setser* held that "facts that . . . make it difficult, or even impossible to implement [a] sentence" do not make the sentence substantively unreasonable.[48] The Supreme Court noted that the defendant "identifie[d] no flaw in the District Court's decisionmaking process, nor anything available at the time of sentencing that the District Court failed to consider."[49] This analysis indicated that the focus of substantive reasonableness analysis is not on the end-result, but on the soundness of the decision-making process that led to a sentence.[50] A number of courts of appeals similarly have formulated the substantive reasonableness review

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41. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 75-76 (2005).

42. United States v. Convington, 818 F. Supp. 159, 162 (E.D. Va. 1993).

43. *See* Greenlaw v. United States, 554 U.S. 237, 254 (2008) (noting that appellate courts lack authority to correct sentencing errors "on their own initiative"; resentencing of defendants on account of errors is reserved for district courts "exercising discretion"); *Accord* United States v. Larsen, 615 F.3d 780, 789 (7th Cir. 2010) (the "weight" given to "mitigating factors" by the sentencing court "is not for us to second-guess").

44. *See* Koon v. United States, 518 U.S. 81, 97 (1996) (stating that the Sentencing Reform Act did not "vest in appellate courts wide-ranging authority over district court sentencing decisions [but instead] retain[ed] much of [district courts'] traditional sentencing discretion"); *see also* Setser v. United States, 132 S.Ct. 1463, 1468 (2002) (noting that, when silent on a specific sentencing matter, the Sentencing Reform Act maintains in place the district courts' traditional sentencing discretion regarding whether sentences imposed should run concurrently or consecutively).

45. *See* Gall v. United States, 552 U.S. 38, 51-52 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than . . . the appeals court." (quoting Rita v. United States, 551 U.S. 338, 357-58 (2007))); *Rita*, 551 U.S. at 363 (noting the "institutional advantage" district courts have over appellate courts because of their "vantage point" (quoting Koon v. United States, 518 U.S. 81, 98 (1996))).

46. Setser v. United States, 132 S. Ct. 1463 (2012).

47. *Id.* at 1473.

48. *Id.* at 1472-73.

49. *Id.*

50. *Id.*

standard by identifying the potential arbitrariness of the district court's decision making as the subject of inquiry.[51]

Moreover, it is appropriate to make substantive reasonableness review deferential because this review occurs once sentences already have survived scrutiny of "procedural error."[52] Procedural error review is rigorous; it entails de novo review of, inter alia, whether district courts (1) correctly calculated the advisory Guidelines range, and (2) adequately explained any deviation from this range.[53] Often, therefore, procedural error review obviates the need for any substantive unreasonableness review; if a sentence suffers from "procedural error" because the district court failed to adequately explain its sentence, or failed to calculate the Guidelines range correctly, the court of appeals may reverse the sentence without the need to address possible substantive unreasonableness.[54] If a sentence contains no procedural error, this means the district court has considered the § 3553(a) factors properly and adequately explained the reasons for the sentence. Having thus survived meaningful scrutiny, the sentence need only be subject to deferential, indeed—a "highly deferential"[55]—substantive reasonableness review.

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51. *See* United States v. Haley, 529 F.3d 1308, 1311 (10th Cir. 2008) ("We generally defer to [a district court's] balancing of the § 3553(a) factors [unless] it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable."); United States v. Rhine, 637 F.3d 525, 530 (5th Cir. 2011) (2-1 decision) (upholding "upward variance" because "[f]rom a substantive standpoint . . . [it] was hardly arbitrary.").

52. Gall v. United States, 552 U.S. 38, 49-51 (2007).

53. *See, e.g.*, United States v. Paneto, 661 F.3d 709, 715 (1st Cir. 2011) ("In evaluating the correctness of guideline calculations, we review factual findings for clear error and legal rulings interpreting or applying the sentencing guidelines de novo."); United States v. Boling, 648 F.3d 474, 483 (7th Cir. 2011) (whether a district court failed "to adequately explain a departure from the guidelines recommendation" is reviewed de novo).

54. *See, e.g.*, United States v. Merced, 603 F.3d 203, 214 (3d Cir. 2010) ("If the district court commits procedural error, our preferred course is to remand the case for resentencing without going any further." (quoting United States v. Ausburn, 502 F.3d 313, 328 (3d Cir. 2007))); United States v. Wilkinson, 590 F.3d 259, 269 (4th Cir. 2010) ("Only if we conclude that the district court committed no significant procedural error in sentencing Wilkinson, may we move on to the second step of considering the substantive reasonableness of his sentence under an abuse of discretion standard." (citing United states v. Carter, 564 F.3d 325, 328 (4th Cir. 2009))); United States v. Warshak, 631 F.3d 266, 330 (6th Cir. 2010) (declining to reach a substantive reasonableness issue because the sentence was being reversed on procedural error grounds); United States v. Johnson, 612 F.3d 889, 897 (7th Cir. 2010) (reversing a sentence because the judge failed to give adequate explanation for his sentence); United States v. Bradley, 644 F.3d 1213, 1299-1300 (11th Cir. 2011) (vacating a sentence based on improper application of Guidelines enhancement, without reaching substantive reasonableness of the sentence).

55. *See* United States v. Taylor, 532 F.3d 68, 70 (1st Cir. 2008) (once an appellate court is assured that "the district court has followed the proper procedures [its] review of substantive reasonableness is highly deferential"); United States v. Vrdolyak, 593 F.3d 676,

Finally, deferential substantive unreasonableness review promotes the individualization of sentencing. Individualized sentencing is a fundamental tenet of the federal sentencing statutes.[56] Individualized sentencing is also, as the Supreme Court recently recognized, a principle implicit in the Eighth Amendment's prohibition on cruel and unusual punishment.[57] Highly deferential substantive review promotes the individualization of sentencing because it allows district courts, without wariness of second-guessing, to give force to the specific factors that determine the appropriate sentence for individual offenders.[58]

It has been argued that "robust" appellate review of district court sentences creates a safeguard against "outlier sentences,"[59] that is, that "heightened [appellate review] . . . reduce[s] . . . sentencing disparity at the district court level."[60] Presumably, those who hold these views would permit appellate second-guessing of the weight assigned to sentencing factors in order to eliminate "outlier" sentences and the resulting sentencing disparities.[61]

Yet, post-*Booker*, under a system of non-mandatory Guidelines, sentencing disparity is inevitable.[62] It is doubtful whether reduction of sentenc-

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683 (7th Cir. 2010) (2-1 decision) ("Review turns deferential when the issue is the substantive reasonableness rather than the procedural regularity of the sentencing determination.").

56. *See* Pepper v. United States, 131 S. Ct. 1229, 1240 (2011) (noting the federal judicial tradition "to consider every convicted persona as an individual and every case as unique case study"); William v. New York, 337 U.S. 241, 248 (1949) (noting "[t]oday's philosophy of individualizing sentences").

57. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (holding that a sentencing scheme that mandates a term of imprisonment without the possibility of parole for juvenile homicide offenders "runs afoul" of the Eighth Amendment's "requirement of individualized sentencing").

58. *Cf.* United States v. Gardellini, 545 F.3d 1089, 1096 (D.C. Cir. 2008) (2-1 decision) (noting that the more deferential appellate review in place after *Booker* gave district judges "far more substantive discretion in sentencing"); United States v. Irey, 612 F.3d 1160, 1268 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part) (pointing out that a district court subject to second-guessing by an appellate court "may be inclined to pay mere lip service to its § 3553(a) duty"); *id.* at 1276 (Edmondson, J., dissenting) ("One of the important duties of appellate judges is to allow District Judges room to carry out the[ir] duties.").

59. Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2166 (2010) ("Appellate courts are able to identify and correct outlier sentences . . . .").

60. D. Michael Fisher, *Still in Balance? Six Years After* Booker, 49 DUQ. L. REV. 641, 673 (2011).

61. Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2166 (2010) (claiming that appellate decisions that "correct outlier sentences [become] shared benchmarks for lower courts").

62. *Cf.* United States v. Booker, 543 U.S. 220, 263 (2005) ("We cannot and do not claim that use of a 'reasonableness' standard [of review] will provide the uniformity in sentencing that Congress originally sought to secure [under mandatory Guidelines].").

ing disparity remains a realistic goal of appellate review of sentencing.[63] Even if it did, appellate second-guessing of the weight assigned to sentencing factors would not be the way to achieve it.[64] This second-guessing gives appellate courts an undefined, and therefore standardless, power to reverse sentences. The power to substitute one's view for another's view does not ensure a reduction in disparity. To date, the exercise of this power has simply created a new level of sentencing disparity among circuit courts.[65]

Moreover, one can be skeptical whether the very broad range of reasonable sentences that exists in a system of advisory Guidelines[66] can be viewed as the kind of bucolic legal landscape in which appellate courts can spot "outlier" sentences. To be sure, some judges can be expected to "splash[] paint where it does not belong."[67] But, generally, one can only identify an "outlier" sentence after the passage of time, once it has clearly drifted out of the mainstream.[68] Until sufficient time has passed—more time than it takes to complete an appeal—a sentence may look like an "outlier" only in the eyes of a particular reviewing court.

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63. *Gardellini*, 545 F.3d at 1096 ("This new [post-*Booker*] sentencing regime inevitably will lead to sentencing disparities and inequities that can be explained by little more than the identities of the sentencing judges."); *see also* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 816 (2006) (asking whether, as an organizing principle for sentencing, "uniformity [has] run its course").

64. *See* United States v. Irey, 612 F.3d 1160, 1269 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part) ("[O]ur fact-intensive resentencing decisions will be incapable of generalization and will hinder our ability to establish clear guidance for the district courts . . . .").

65. *Compare* United States v. Edwards, 595 F.3d 1005, 1020 (9th Cir. 2010) (Bea, J., dissenting in part) ("'Substantive unreasonability' in the Ninth Circuit is a one-way street that is posted to lead sentences only downwards."), *with* United States v. Early, 686 F.3d 1219, 1223 (11th Cir. 2012) (Martin, J., concurring) (noting the Eleventh Circuit's failure, in its case law, "to exercise similar deference toward a sentencing court's decision to grant a downward variance" as opposed to its deference when sentencing courts impose an upward variance), *and* Adam Shajnfeld, *The Eleventh Circuit's Selective Assault on Sentencing Discretion*, 65 U. MIAMI L. REV. 1133, 1133 (2011) ("[I]n reviewing for unreasonableness, the Eleventh Circuit unnecessarily and unfairly wields a single-edged sword, capable of striking what is perceived as an unduly lenient sentence yet impotent against an unduly harsh one.").

66. *Cf.* Gall v. United States, 552 U.S. 38, 51 (2007) ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

67. *But cf.* J. Harvie Wilkinson, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663, 1677 (2010) (criticizing judges who behave like modern artists by rejecting traditional form and structure).

68. *Cf.* Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 87 (2009) ("An outlier . . . [is] a decision that is sufficiently different from the norm as to draw undue attention. . . . A few outliers are inevitable and many will go uncorrected . . . .").

Perhaps, in order to deflect criticism that their substantive unreasonableness review improperly second-guessed the judgment of district courts, some courts of appeals attempt to distinguish their analysis of whether the district court's weighing was unreasonable—an analysis they claim was legitimate—from their own weighing of the statutory factors—an analysis they would concede is illegitimate.[69] But this identifies a distinction without a difference.[70] Giving weight to a sentencing favor, such as the "seriousness of the offense,"[71] is an exercise that is simply too intuitive for a meaningful difference to exist between how an appellate court evaluates a district court's weighing of a factor and how the appellate court weighs it on its own.[72] Any consideration by an appellate court of the weight given to statutory factors by a district court regarding the sentence necessarily substitutes its judgment for that of the district court, and thereby illegitimately appropriates the district court's sentencing function.[73]

In another attempt to justify their second-guessing of the weight assigned to sentencing factors, appellate courts applying substantive reasonableness review occasionally fault district courts for having made a "clear error in judgment."[74] But what is a "clear error in judgment?" Unless a "clear error in judgment" involves a deviation from an established legal rule it does not constitute an "abuse of discretion."[75] Additionally, the Supreme Court has made it "pellucidly clear" that sentences are reversible on appeal for substantive unreasonableness only if they result from an abuse of discretion.[76]

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69. *See Irey*, 612 F.3d at 1192 n.18; *Cavera*, 550 F.3d at 191 ("[W]e [the Court of Appeals] do not consider what weight we would ourselves have given a particular [sentencing] factor. Rather, we consider whether the factor, as explained by the district, can bear the weight assigned it under the totality of the circumstances in that case." (citing *Gall*, 552 U.S. 38 (2007)) (citation omitted).

70. *See Irey*, 612 F.3d at 1261-62 (faulting the majority for drawing a line that "blurs" when its distinguishes "conduct[ing] the § 3553(a) inquiry for itself" from "reviewing the district court's reasoning from its § 3553(a) factfindings to its conclusion").

71. *See* 18 U.S.C. § 3553(a)(2)(A).

72. *Cf.* United States v. Ressam, 679 F.3d 1069, 1088 (9th Cir. 2012) (en banc) (acknowledging that a substantive unreasonableness review standard that allows second-guessing of a district court's sentence is "dependent on the informed intuition of the appellate panel" (citing United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009))).

73. *See Gall*, 552 U.S. at 51 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."); *id.* at 59 ("It is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient.").

74. *Ressam*, 679 F.3d at 1087; *Irey*, 612 F.3d at 1203.

75. *See* Koon v. United States, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

76. *Gall*, 552 U.S. at 46 (citing United States v. Booker, 543 U.S. 220, 260-62 (2005)).

Moreover, as emphasized above, assigning weight to sentencing factors is an intuitive decision.[77] If an appellate court is merely relying, as one court of appeals put it, on its "informed intuition,"[78] its finding of a "clear error in judgment" is nothing more than "substituting its own view for the discretion of the trial judge."[79] This is not principled decision making. Indeed, since appellate review exists to foster stability in the law,[80] standardless second-guessing undermines the very thing that appellate review is designed to maintain.[81]

In sum, to afford a district court the appropriate level of deference, an appellate court should avoid "substitut[ing] its judgment for that of the sentencing court."[82] Or, as a legal commentator put it: "[w]hen a [federal] court of appeals begins questioning how the district court weighs the statutory [sentencing] factors, it crosses the threshold of necessary deference."[83]

IV. A PROPOSED STANDARD, FOCUSED ON WHETHER A SENTENCING COURT ENGAGED IN REASONED DECISION MAKING

Appellate review of criminal sentences should be channeled to yield principled decisions—decisions that promote consistency and coherence in sentencing.[84] This Article proposes that, like judicial review of administrative agency rulings, appellate review of sentences imposed by a district court should focus on the decision-making process.[85] Thus, substantive reasonableness analysis should address whether a sentence was (1) arbitrary,

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77. *See supra* notes 40-48 and accompanying text.

78. United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009), *quoted in Ressam*, 679 F.3d at 1088.

79. United States v. Jayyousi, 657 F.3d 1085, 1131 (11th Cir. 2011) (Barkett, J., dissenting).

80. *See* Meehan Rasch, *Not Taking Frivolity Lightly; Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 250 (2009) ("The appeals process . . . plays an important role in maintaining the stability and trustworthiness of the judicial system at large.").

81. Lee Dionne, Comment, *Let the Punishment Fit the Crime: Should Courts Exercise the Power of Appellate Sentence Review in Cases Involving Narcotics and Other Stigmatized Crimes*, 99 J. CRIM. L. & CRIMINOLOGY 255, 284 (2009) ("Undoubtedly, an unprincipled expansion of appellate sentence review would undercut uniformity and consistency in the law.").

82. Solem v. Helm, 463 U.S. 277, 290 (1983), *quoted in* Koon v. United States, 518 U.S. 81, 97 (1996).

83. Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1116 (2008).

84. United States v. Feemster, 572 F.3d 455, 467 (8th Cir. 2009) (Colloton, J., concurring).

85. Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011) (noting that judicial review of agency action addresses whether the agency engaged in "reasoned decisionmaking").

or (2) based on impermissible factor(s).[86] These parameters do not involve the re-weighing of sentencing factors, but, instead, focus on the soundness of a sentencing court's reasoning.[87]

Admittedly, when "substantive" reasonableness review focuses on the potential arbitrariness of a judge's decision-making process, rather than the end-result, the review may seem more "procedural" than "substantive" in nature. Ultimately, however, the (often obscure) procedural/substantive distinction is maintained.[88] The review of whether a district court failed to adequately explain a sentence is an element of "procedural" review because it focuses on the sentencing proceedings,[89] whereas the inquiries proposed below are fairly categorized as "substantive" because they probe the content of that explanation for lack of logic, its reliance on implausible theories, or its reliance on impermissible factors.

A. IRRATIONAL, ILLOGICAL, OR ARBITRARY SENTENCES

Substantive reasonableness review should examine whether a sentence is "irrational or arbitrary,"[90] for example, when a sentence appears to be "inconsistent with the explanation given."[91] "A [sentence] is arbitrary when there is no connection drawn between the specific decision made and the basis for that decision."[92] An example of this factor being applied can be observed in *United States v. Omole*, where the Seventh Circuit found the sentence to be substantively unreasonable, because the district court's ex-

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86. The approach proposed in this Article shares much in common with the parameters proposed in Lindsay Harrison's *Appellate Discretion*, *see* Harrison, *supra* note 83, though it does not advocate Harrison's proposal that the failure to consider a relevant § 3553(a) factor should be part of *substantive* reasonableness review, because *Gall* categorized this factor as part of procedural reasonableness review. *See Gall*, 552 U.S. at 51 (stating a "significant procedural error" includes "failing to consider the 3553(a) factors").

87. *See* Fant, *supra* note 26, at 481 ("[W]hile an appellate court could not reweigh the section 3553 factors, a sentence issued by a district court based on patently flawed logic, impermissible circumstances, or clearly erroneous facts is both substantively and procedurally deficient.").

88. *Cf. id.* ("[S]ubstance and procedure often overlap.").

89. *See* United States v. Mitchell, 681 F.3d 867, 881 (6th Cir. 2012) (stating that the district court adequately responded to the defendant's request for leniency when it explained why a substantial sentence was merited and that the record did not support the request for a shorter sentence); United States v. Negroni, 638 F.3d 434, 446 (3rd Cir. 2011) (reversing a district court because "at no point did it describe" how the factors justified the sentence).

90. Harrison, *supra* note 83.

91. *Id.* at 1155.

92. United States v. Rhine, 637 F.3d 525, 542 (5th Cir. 2011) (2-1 decision) (Dennis, J., dissenting); *see also* United States v. Irey, 612 F.3d 1160, 1258 (Tjoflat, J., concurring in part and dissenting in part) ("I would therefore vacate Irey's sentence on the ground that it is not supported by the district court's findings, as I am able to understand them.").

planation of its sentence gave "irreconcilable pictures" of the defendant, and made "completely . . . speculative" assertions.[93]

The connection between the explanation for a sentence and the sentence imposed becomes tenuous, and therefore vulnerable to reversal on substantive reasonableness review, when the connection involves an implausible theory—as evidenced in the divergent opinions of the en banc Second Circuit in *Cavera*.[94] In *Cavera*, the defendant was convicted of dealing in firearms.[95] The district court enhanced the sentence above the recommended Guidelines range on the ground that the firearms were being transported into New York City, an area where firearms-dealing generated higher profits than elsewhere, and therefore warranted greater punishment to effect a greater deterrent.[96] Reviewing the enhancement for substantive reasonableness, the en banc majority noted that the district court's economic theory, though "not uncontroversial," did not constitute an abuse of discretion because sentencing courts justifiably "rely on this form of reasoning."[97] Thus, the *Cavera* majority focused on the district court's form of reasoning, that is, on whether one could plausibly reach the district court's result from its starting point. Several Second Circuit judges disagreed with the majority.[98] But the dissenting judges also focused on the plausibility "of the district court's theory of general deterrence," finding this theory "unrealistic," and "highly subjective."[99]

Admittedly, the divergence between the majority and dissenting *Cavera* opinions indicates that appellate judges will continue to disagree about whether a sentence is substantively unreasonable, even when the review is focused on the plausibility of a theory, that is, on a sentence's reasoning rather than on the weight given to sentencing factors.[100] But this focus is nonetheless useful. Once an appellate court holds that a theory is plausible, or implausible, it puts future district courts on notice regarding the viability of this theory. This principled review is conducive to consistency and coherence in sentencing.

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93. United States v. Omole, 523 F.3d 691, 700 (7th Cir. 2008).
94. United States v. Cavera, 550 F.3d 180, 184 (2d Cir. 2008).
95. *Id.* at 185.
96. *Id.* at 197.
97. *Cavera*, 550 F.3d at 197.
98. *See id.* at 209 (Straub, J., dissenting); *id.* at 216 (Sotomayor, J., dissenting).
99. *Cavera*, 550 F.3d at 223 (Sotomayor, J., dissenting).
100. *See id.* at 196 n.15 (majority opinion) (stating that a district court's reliance on "theories that are sufficiently clearly junk science" would make its sentence "unreasonable").

B. SENTENCES BASED ON IMPERMISSIBLE FACTORS

As Justice Scalia anticipated in his concurring opinion in *Rita v. United States*, sentences based on "impermissible factors" should be subject to reversal as substantively unreasonable.[101] The Sixth Circuit applied this test in *United States v. Walker* when it vacated a sentence as "substantively unreasonable" because the district court improperly increased the sentence in order to promote the defendant's "need for rehabilitation," an "impermissible factor" for a sentence enhancement under congressional statutes.[102] Similarly, in *United States v. Velasquez*, the Eleventh Circuit held "that a judge may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual's immigration status or on his personal views of immigration policy."[103] In *United States v. Johnson*, the Fifth Circuit reversed a sentence where the district court improperly based a sentence on the similarity of the offense of conviction with the defendant's prior arrests.[104] In *United States v. Smith*, the Eleventh Circuit, on remand from the Supreme Court, overruled its prior ruling that post-sentence rehabilitation was an impermissible factor,[105] and recognized that, in light of intervening Supreme Court law, this was a permissible sentencing factor.[106]

A corollary to reversal based on reliance on impermissible factors is affirmance based on reliance on permissible factors. For instance, the Supreme Court in *Kimbrough v. United States* held that a district court may deviate from a sentencing guideline based on a policy disagreement with the crack cocaine guidelines.[107] In effect, *Kimbrough* held that a disagree-

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101. Rita v. United States, 551 U.S. 338, 382 (2007) (Scalia, J., concurring) ("[The] creation of reasonableness review gave appellate courts the necessary means to reverse a district court that . . . considers impermissible factors."); *accord* Harrison, *supra* note 83, at 1155.

102. United States v. Walker, 649 F.3d 511, 512-14 (6th Cir. 2011) (quoting United States v. Webb, 403 F.3d 373, 385 (6th Cir. 2005)). One could label review of whether a sentence is based on an impermissible factor as "procedural" reasonableness review rather than substantive reasonableness review. *Cf.* United States v. Henderson, 649 F.3d 955, 964-65 (9th Cir. 2011) (holding that the district court committed procedural error when it failed to appreciate its discretion to disagree with a guideline on policy grounds). On balance, however, since this inquiry often involves substantive policy considerations, it seems more apt to consider it part of substantive reasonableness review.

103. United States v. Velasquez, 524 F.3d 1248, 1253 (11th Cir. 2008).

104. United States v. Johnson, 648 F.3d 273, 278 (5th Cir. 2011).

105. United States v. Smith, 638 F.3d 1351, 1352 (11th Cir. 2011).

106. *Id.* (citing Pepper v. United States, 131 S. Ct. 1598 (2011)).

107. Kimbrough v. United States, 552 U.S. 85, 91 (2007); *see* United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008) (finding that a disagreement with the Sentencing Commission's policy judgment as expressed in a guideline is "permissible" under *Kimbrough*); United States v. Mays, 593 F.3d 603, 610 (7th Cir. 2010) (rejecting a substantive

ment with a Sentencing Commission policy may be a permissible factor in sentencing.

Kimbrough also suggested a dynamic dimension for substantive reasonableness review.[108] At the time Kimbrough was sentenced, the applicable advisory crack cocaine guidelines had been the subject of sustained, widespread criticism for being unduly harsh.[109] By the time the case reached the Supreme Court, the Sentencing Commission had reduced the recommended Guidelines punishment for crack cocaine offenses[110] (and the punishment has since been further reduced).[111] Thus, *Kimbrough* involved guidelines that were in the process of becoming obsolete, a circumstance that can require reversal for substantive unreasonableness.[112] A discredited guideline is, in effect, another example of an "impermissible factor."

Ordinarily, the Sentencing Guidelines promulgated by the Sentencing Commission can be expected "to carry out [the] § 3553(a) objectives."[113] It is for this reason that a district court must consider the Guidelines at sentencing.[114] But some guidelines take effect at Congress's direction, without the support of, or empirical study by, the Sentencing Commission.[115] Such guidelines can fail to provide guidance on how a sentencing court should carry out the § 3553(a) objectives; indeed, they might recommend punishment for the vast majority of like offenders at or above the statutory maximum.[116] This aggregation of all offenders in the same small cluster would

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reasonableness challenge because the district court relied on a permissible factor as a basis for enhancing the sentence: acquitted conduct).

108. *See* Scott Michelman & Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1088-89 (2012) (noting that *Kimbrough* created a "new step" in sentencing analysis because it made room for consideration of "policy-based" concerns).

109. *Kimbrough*, 552 U.S. at 99-100 (citing the Sentencing Commission's own reports urging Congress to address the 100-to-1 disparity between crack and powder cocaine sentences).

110. *See id.* at 105-06 (noting that the crack cocaine guidelines were amended in 2007).

111. *See* United States v. Jackson, 678 F.3d 442, 444-46 (6th Cir. 2012) (remanding case for resentencing in light of Amendment 750 to the Sentencing Guidelines, which, pursuant to the Fair Sentencing Act of 2010, retroactively lowered the Guidelines offense levels for crack cocaine offenders).

112. *See* United States v. Dorvee, 616 F.3d 174, 183, 185-86, 188 (2d Cir. 2010) (citing criticism of the child pornography guidelines, and reversing the sentence for a child pornography offender who received a "within-Guidelines sentence").

113. Rita v. United States, 551 U.S. 338, 348 (2007).

114. *See id.*

115. United States v. Riley, 655 F. Supp. 2d 1298, 1300-01 (S.D. Fla. 2009) (discussing the child pornography guidelines).

116. *See* United States v. Dorvee, 616 F.3d 174, 186 (2d Cir. 2010) ("The § 2G2.2 sentencing enhancements . . . routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases.").

be inconsistent with the purposes of § 3553(a), which aims to identify the mitigating and aggravating factors of individual offenders.[117]

Further, a guideline is designed to identify the punishment for the "heartland" of cases.[118] But when a guideline is becoming obsolete, it no longer represents the "heartland" because judges are so frequently imposing sentences outside the Guidelines. For example, the Sentencing Commission reported that last year 48.3% of child pornography offenders received a sentence outside the Guidelines range, a percentage that rose to 65.8% if one included defendants for whom the government recommended a downward variance or departure.[119] For such a guideline, one cannot speak of a "heartland" since the same conduct served as the basis for the sentence, roughly as frequently, both in cases where a defendant was sentenced within the Guidelines range, and in cases where a defendant was sentenced outside this range.

When guidelines do not carry out the purposes of § 3553(a) and do not point toward any heartland, they "no longer provide any guidance."[120] Such guidelines "can easily generate unreasonable results."[121] If a district court adhered to a discredited advisory Guidelines range, the resulting sentence is substantively unreasonable[122]—most especially when the district court ignored countervailing sentencing factors.[123]

In sum, as with review of implausible theories, appellate delimitation of permissible and impermissible sentencing factors ensures that sentencing remains consistent with congressional sentencing purposes, as expressed in the sentencing statutes. It enhances coherence and consistency.

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117. Pepper v. United States, 131 S. Ct. 1229, 1239-40 (2011).

118. *See* Apprendi v. New Jersey, 530 U.S. 466, 560 (2000) (Breyer, J., dissenting) (citing U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 4(b) (2004) (explaining that the Sentencing Guidelines are designed to apply "in typical cases (those that lie in the 'heartland' of the crime as the statute defines it"))).

119. *See* United States Sentencing Commission, *Placement of Sentences Under U.S.S.G. § 2G2.2—FY 2011*, OFFICE OF DEFENDER SERVICES, http://www.fd.org/docs/select-topics---sentencing/placement-of-sentences-under-u-s-s-g-2g2-2---fy-2011.pdf?sfvrsn=8 (last visited Jan. 15, 2013).

120. United States v. Zauner, 688 F.3d 426, 432 (8th Cir. 2012) (Bright, J., concurring) (commenting on the child pornography guidelines).

121. *Dorvee*, 616 F.3d at 188 (concluding that the child pornography guideline is "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results").

122. *See id.* (noting that Dorvee "never had any contact with an actual minor," and reversing the sentence as "substantively unreasonable").

123. For example, if the district court gave little weight to a legitimate sentencing factor, for example, post-sentencing rehabilitation, *see* Pepper v. United States, 131 S. Ct. 1229 (2011), and based the sentence entirely on a guideline that was becoming obsolete, the result would be substantively unreasonable.

V. CONCLUSION

Prior to Congress's adoption of the SRA in 1984, district courts enjoyed broad sentencing discretion. So long as a sentence a district court imposed was "within statutory limits [it] was, for all practical purposes, not reviewable on appeal."[124] The SRA created mandatory Sentencing Guidelines, and established appellate review "to ensure that the Guidelines were followed."[125] Now, post-*Booker*, the Guidelines are no longer mandatory. Consequently, Congress's original reason for creating appellate review no longer exists. If appellate review of district court sentences continues to be necessary to carry out congressional intent, its principal function would be to ensure that district courts, as required by *Booker*, consulted the Guidelines, and took them into account.[126] Once this review is assured, it is doubtful, in light of the pre-SRA experience, whether Congress would intend for appellate courts to have any additional role, much less a power to second-guess the weight a district court assigned to these factors. As explained above, such power is unnecessary to ensure adequate appellate review of sentences, and undermines individualized sentencing.

It is time to resolve the inter-circuit conflict[127] and intra-circuit division[128] that have developed regarding the scope of substantive reasonableness review by adopting a clear, uniform standard. The more limited review proposed in this Article would authorize appellate courts to inquire into the connection between a sentence and the bases for the sentence, focusing on possible infirmities in how a district court, though citing permissible factors, nonetheless might have reached an arbitrary decision by relying, for example, on an implausible theory. Appellate courts would also be authorized to review whether a district court, though making a valid connection between the basis for a sentence and the sentence imposed, nonetheless erred because the basis for the sentence was an impermissible sentencing factor. Both of these inquiries ought to yield principled sentencing decisions and promote coherence and consistency. This is, after all, the function of appellate review.

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124. Koon v. United States, 518 U.S. 81, 96 (1996).

125. United States v. Irey, 612 F.3d 1160, 1235 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part).

126. United States v. Booker, 543 U.S. 220, 264 (2005).

127. *See supra* notes 31-32.

128. *See supra* note 30.