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# The Eleventh Circuit's Selective Assault on Sentencing Discretion

ADAM SHAJNFELD\*

Ever since the Supreme Court declared that the sentences which district courts impose on criminal defendants are to be reviewed on appeal for “unreasonableness,” the standard’s contours have remained elusive and mired in controversy, despite the Court’s repeated attempts at elucidation. In few instances is this confounding state of affairs more apparent and acute than in the Eleventh Circuit’s recent lengthy and factious en banc decision in *United States v. Irey*.<sup>1</sup> This article explores *Irey*’s merits, mistakes, and lessons, trying to locate each within the broader context of the Eleventh Circuit’s sentencing jurisprudence. In doing so, the article advances three principal arguments. First, *Irey* represents a serious and unlawful encroachment on district courts’ sentencing discretion, one based in part on misguided notions of culpability, mental illness, deterrence, the severity of supervised release, and obedience to the Sentencing Guidelines. Second, *Irey*’s lasting impact is likely an increased yet largely unjustified pressure on district courts to sentence defendants more harshly, particularly for sexual offenses. Third, *Irey* and its predecessors demonstrate that in 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. Recognizing the pretextual nature of much sentencing discourse—in which stakeholders inconsistently advance varying degrees of appellate review suspiciously consonant with the practical sentencing outcomes they desire—the article concludes with a call for appellate judges to transcend such partisanship and exercise dispassionate, reasoned, and balanced (i.e., double-edged) sentencing review.

## I. THE EVOLUTION OF FEDERAL SENTENCING

Federal sentencing enjoys a circuitous past. Historically, while Congress set the lower and upper limits of punishment, district judges were “delegated almost unfettered discretion . . . to determine what the

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1. 612 F.3d 1160 (11th Cir. 2010) (en banc).

sentence should be within the customarily wide range so selected.”<sup>2</sup> Underlying this practice was the commitment to a rehabilitative model of punishment demanding flexibility and individualization,<sup>3</sup> and an implicit faith in the competence of courts to exercise such discretion properly.

Beginning in the 1970s, the discretionary paradigm came under attack as a result of widespread sentencing disparities and the decline of the rehabilitative commitment.<sup>4</sup> Congress responded with the Sentencing Reform Act of 1984,<sup>5</sup> which (1) eschewed the rehabilitation-centric model in favor of a conception of punishment as serving retributive, educational, deterrent, and incapacitative goals;<sup>6</sup> (2) established the United States Sentencing Commission, an agency which it tasked with devising mandatory sentencing guidelines (“Guidelines”);<sup>7</sup> (3) required judges to explicitly state the reasons for imposing particular sentences and permitted deviation from the Guidelines only under specific circumstances;<sup>8</sup> and (4) limited appellate review to cases in which the sentence deviated from the Guidelines or the Guidelines range was calculated incorrectly.<sup>9</sup>

Under the mandatory Guidelines regime, the judge resembled an automaton. Sentencing was a rote exercise that, for the most part, required only that the judge locate the prescribed sentencing range along a Guidelines grid after mechanical application of factors accounting for offense and offender characteristics.<sup>10</sup> That all changed, though, with the Supreme Court’s decision in *United States v. Booker*.<sup>11</sup>

Booker was charged with possession with intent to distribute at least fifty grams of crack cocaine, and the jury convicted him on the

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2. *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

3. *See id.* at 363.

4. *Id.* at 365–66.

5. *See generally* 18 U.S.C. § 3551 (Supp. IV 1982); 28 U.S.C. §§ 991–998 (Supp. IV 1982).

6. *Mistretta*, 488 U.S. at 367.

7. *See id.* (The Sentencing Reform Act “consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission.”).

8. *Id.* at 367–68.

9. *See id.* at 368 (The Sentencing Reform Act “permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline.”).

10. Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 473 (2006) (discussing the eighteen-year era of mandatory Federal Sentencing Guidelines, in which judges were required to “plot” convicted criminals along an official Guideline table and then assign a sentence as specified in the appropriate “cell”).

11. 543 U.S. 220 (2005).

basis of evidence that he possessed 92.5 grams in a duffel bag.<sup>12</sup> That alone required the district court to impose a Guidelines sentence of 210 to 262 months in prison.<sup>13</sup> But the district court conducted a sentencing proceeding at which it—not a jury—determined, by a preponderance of the evidence, that Booker had in fact possessed an additional 566 grams of crack and was guilty of obstructing justice.<sup>14</sup> The district court did so pursuant to a confluence of the Guidelines, which instructed that the base offense level for certain crimes take into account all acts “that were part of the same course of conduct or common scheme or plan as the offense of conviction”; the Sentencing Reform Act, which made application of the Guidelines mandatory; and a rule of criminal procedure requiring the judge to resolve such factual issues.<sup>15</sup> Under the Guidelines, these supplemental findings mandated an additional decade of incarceration, which the district court imposed.<sup>16</sup> Booker challenged the enhanced sentence as a violation of the Sixth Amendment right to trial by jury,<sup>17</sup> and the case produced two holdings by different majorities of the Supreme Court, one addressing constitutionality, the other a significant but controversial ameliorative. First, the Guidelines violated the Sixth Amendment insofar as they directed sentence-enhancements based on facts beyond those contained in the jury’s verdict or admitted by the defendant.<sup>18</sup> Second, rather than, as the dissenters suggested, require that such additional facts be submitted to the jury, the “remedial majority” instead cured this constitutional infirmity by excising those portions of the Sentencing Reform Act which mandated application of the Guidelines and set forth the standard by which appellate courts were to review sentences imposed thereunder.<sup>19</sup>

As judicially amended by *Booker*, the Sentencing Reform Act requires judges to consider the now-“advisory” Guidelines in their sentencing calculi<sup>20</sup> and implicitly provides that appellate courts may review for “unreasonableness.”<sup>21</sup> In assessing reasonableness, appellate courts are to be guided by those factors set forth in § 3553(a)—the same

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12. *Id.* at 227.

13. *Id.*

14. *Id.*

15. *Id.* at 314–16 (Thomas, J., dissenting) (citation omitted).

16. *Id.* at 227 (first majority opinion).

17. *Id.* at 226 (“The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment.”).

18. *Id.* at 226–27.

19. *See id.* at 259 (second majority opinion).

20. *Id.* at 259.

21. *Id.* at 261. For the sake of brevity and convenience, this article uses “unreasonableness” and “reasonableness” interchangeably.

factors that are to guide the district court in imposing its sentence.<sup>22</sup> Section 3553(a) provides that the district court is to “impose a sentence sufficient, but not greater than necessary,” to (1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense, (2) serve as a deterrent, (3) protect the public, and (4) provide the most effective correctional treatment or medical care.<sup>23</sup> In fashioning its sentence, the district court is also to consider (5) the nature and circumstances of the offense, (6) the history and characteristics of the offender, (7) the Guidelines range and relevant policy statements, and (8) the need to avoid unwanted sentencing disparities.<sup>24</sup> Reasonableness comprises procedural and substantive components. A sentence is procedurally unreasonable where:

[A] district court fails to calculate or improperly calculates the Guidelines range, treats the Guidelines as mandatory, fails to consider the 18 U.S.C. § 3553(a) sentencing factors discussed, selects a sentence based upon erroneous facts, or fails to adequately explain its chosen sentence and its deviation, if any, from the Guidelines range.<sup>25</sup>

Despite procedural soundness, a sentence may nonetheless be substantively unreasonable “if, under the totality of the circumstances, it fails to achieve the purposes of sentencing listed in 18 U.S.C. § 3553(a).”<sup>26</sup>

Presciently, Justice Scalia’s dissent warned of the confusion *Booker* would engender, anticipating that reasonableness review would “produce a discordant symphony of different standards, varying from court to court and judge to judge . . . .”<sup>27</sup> Indeed, the Supreme Court has in numerous subsequent decisions attempted to give shape to this nebulous standard of review. In *Rita v. United States*, the Supreme Court held that appellate courts could apply a rebuttable presumption of reasonableness to a sentence imposed within the advisory Guidelines range, though no presumption of unreasonableness could attach to sentences outside of the Guidelines range.<sup>28</sup> The Court in *Rita* also clarified that review for reasonableness was synonymous with the “abuse of discretion” standard.<sup>29</sup> The Supreme Court in *Gall v. United States* rejected any rigid or

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

23. *Id.* § 3553(a).

24. *Id.*

25. *United States v. Hall*, No. 08-4367, 2011 WL 134232, at \*2 (6th Cir. Jan. 18, 2011).

26. *United States v. Ruiz-Flores*, 382 F. App’x 858, 861 (11th Cir. 2010).

27. *Booker*, 543 U.S. at 312 (Scalia, J., dissenting) (“What I anticipate will happen is that ‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority’s sanguine claim that ‘no feature’ of its avant-garde Guidelines system will ‘ten[d] to hinder’ the avoidance of ‘excessive sentencing disparities.’”).

28. *Rita v. United States*, 551 U.S. 338, 341, 354–55 (2007).

29. *Id.* at 351.

formulaic “proportionality review”—an appellate practice requiring that judges deviating from the Guidelines range offer justifications of an equivalent order of magnitude as the deviation—though in confusing and somewhat self-defeating fashion noted that a significant deviation should be supported by more significant justification than a minor one.<sup>30</sup> Finally, in *Kimbrough v. United States*, the Supreme Court recognized that a district court’s discretion permits it in certain circumstances to deviate from the advisory range based on a policy disagreement with the Guidelines.<sup>31</sup>

## II. THE THREE FACES OF SUBSTANTIVE REASONABLENESS REVIEW

The Eleventh Circuit, when reviewing for substantive reasonableness, will only invalidate a sentence if it is “left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.”<sup>32</sup> A thorough review of post-*Booker* decisions, however, reveals complexity and inconsistency not captured by this platitude.

As Lindsay Harrison detailed, the Eleventh Circuit has charted three conflicting courses of review for reasonableness: deferential, moderate, and functionally de novo.<sup>33</sup> When employing the deferential approach, which is best exemplified in a number of per curiam, unpublished decisions, the Eleventh Circuit affirms a sentence, even one that exceeds the Guidelines advisory range, in summary fashion. For instance, in *United States v. Joseph*, the Eleventh Circuit devoted five paragraphs, most of which were formulaic recitations of the standard of review, to affirm a sentence constituting a 360-percent variance above the high-end of the Guidelines range.<sup>34</sup>

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30. *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

31. *Kimrough v. United States*, 552 U.S. 85 (2007).

32. *United States v. Mateos*, 623 F.3d 1350, 1366 (11th Cir. 2010) (internal quotation marks omitted).

33. See Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1139 (2008) (“Panels have generally taken three approaches. First, panels have elected to conduct their own, de novo review of the sentencing factors to determine what is reasonable. Second, other panels have chosen only to review what the district court said and did and assess whether it is persuasive and rational in light of the statutory factors. Third, still other panels have simply announced that the district court’s sentence is reasonable without further elaboration. The approach that a panel has selected tends to directly implicate the balance between discretion and deference, with the third approach nearly abdicating appellate discretion in favor of total deference, the first approach according almost no deference to the district court, and the middle approach falling somewhere in between.”).

34. See *United States v. Joseph*, No. 10-11656, 2010 WL 4366420, at \*1 (11th Cir. Nov. 5, 2010); see also *United States v. Trapp*, No. 09-13863, 2010 WL 3667028, at \*1–2 (11th Cir. Sept. 22, 2010) (affirming the lower court’s decision to impose a sentence that was “six months above

Under the moderate approach, the Eleventh Circuit examines the facts which the district court found relevant and determines whether they sufficiently support the sentence imposed.<sup>35</sup> The court's decision in *United States v. McBride*<sup>36</sup> is an example of this approach. There, the defendant had been sentenced to eighty-four months' imprisonment and ten years of supervised release after pleading guilty to one count of distributing child pornography, despite a Guidelines advisory range of 151 to 188 months and a recommendation of lifetime supervised release.<sup>37</sup> In varying downward, the district court considered the defendant's horrific childhood: His father was murdered when the defendant was two; he suffered sexual abuse and severe neglect at the hands of his caretakers; and he spent the remainder of his childhood in the foster system.<sup>38</sup> Affirming the sentence in a published opinion, the Eleventh Circuit noted that "[e]ven if [it] were to disagree with the weight that the district court gave to Defendant's history of abuse," it could not reject the sentence unless there were a clear error of judgment, which the court could not locate.<sup>39</sup> Judge Dubina's dissent characterized the sentence as substantively unreasonable.<sup>40</sup> Despite the district court's record statements regarding the seriousness of the defendant's conduct and the substantial sentence imposed, Judge Dubina felt that the district court had ignored all factors other than the defendant's childhood and even noted that, in addition to lengthier incarceration, "the only reasonable sentence for this defendant must include a term of lifetime supervised release."<sup>41</sup> In Judge Dubina's view, not a day less than lifetime supervision would constitute a reasonable exercise of the district court's discretion. It is hard to reconcile Judge Dubina's view with anything but a vacuous notion of discretion, one that offends the word's very definition. Yet his dissent foreshadowed the functionally de novo review that an en banc panel of the Eleventh Circuit would, some three years later, subscribe to

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the 12–18 month recommended Guidelines range for a violation of probation in a case like Defendant's"); *United States v. Dukes*, 380 F. App'x 971, 972–73 (11th Cir. 2010) (affirming the lower court's decision to impose a "20-month above-guidelines range sentence for a single count of passing and uttering, with intent to defraud, counterfeit Federal Reserve notes, in violation of 18 U.S.C. § 472").

35. See Harrison, *supra* note 33, at 1142 ("The panels that take the second approach review sentences with the understanding that '[s]ubstantive reasonableness involves inquiring whether the court abused its discretion in determining that the statutory factors in 18 U.S.C. § 3553(a) support the sentence in question.'" (quoting *United States v. McPherson*, no. 07-13069, 2008 WL 541501, at \*1 (11th Cir. Feb. 29, 2008) (per curiam))).

36. 511 F.3d 1293 (11th Cir. 2007).

37. *Id.* at 1295.

38. See *id.*

39. *Id.* at 1297–98.

40. *Id.* at 1298–99 (Dubina, J., dissenting).

41. *Id.* at 1300.

in *United States v. Irey*.<sup>42</sup>

### III. *UNITED STATES V. IREY*

William Irey, a once-successful entrepreneur and respected family man, engaged in a disturbing spree of sexual indiscretion and crime, resulting in his downfall and begetting a remarkable and unprecedented episode in Eleventh Circuit sentencing jurisprudence. The appellate product of this tragic episode—a prolix and controversial en banc decision—only exacerbates an already muddled state of affairs.

#### A. *Conduct, Sentencing, and Initial Appeal*

For some fifteen years, Irey consorted with numerous prostitutes, in the process transmitting a venereal disease to his wife.<sup>43</sup> Unquestionably criminal conduct began in earnest in 2001, when Irey started to spend the weekend-legs of monthly trips to China visiting brothels in various other Asian nations.<sup>44</sup> During a four- to five-year period thereafter, Irey, then in his forties, engaged in sexual conduct with some fifty girls ranging in age from four to sixteen.<sup>45</sup> Images memorializing Irey's crimes, found during a search of his computers, revealed that his conduct was, relative to such cases, particularly heinous.<sup>46</sup> For example, a number of the girls had obscene and objectifying material written on their bodies, and Irey occasionally incorporated objects and insects into his sexual repertoire.<sup>47</sup> Later, Irey bartered the images he had produced for access to various collections of child pornography, and his images achieved ubiquity among collectors.<sup>48</sup>

Law enforcement officials eventually caught wind of Irey's conduct and searched his home and computers in August 2006.<sup>49</sup> He was taken into custody that December and charged in a single-count indictment with violating 18 U.S.C. § 2251(c), which makes it unlawful to use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct outside of the United States for the purpose of producing any visual depiction of such conduct to be or in fact transmitted to

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42. See Harrison, *supra* note 33, at 1144 ("Judge Dubina's dissent in *McBride* previews the final approach taken by a minority of panels in the Eleventh Circuit—the approach in which the panel conducts its own review of the sentencing factors to determine what, in its judgment, is reasonable and compares its result to that of the district court.").

43. *United States v. Irey*, 612 F.3d 1160, 1172 (11th Cir. 2010) (en banc).

44. *Id.* at 1166.

45. *Id.*

46. See *id.* at 1166–67.

47. *Id.* at 1167–68.

48. *Id.* at 1168.

49. *Id.*



the United States.<sup>50</sup> In July 2007, Irey pleaded guilty to that sole count.<sup>51</sup>

Irey appeared before United States District Judge Gregory A. Presnell in the Middle District of Florida for sentencing. As calculated by the United States Probation Office and not disputed by the parties, his net offense level was forty-three, which, under the Guidelines, produced an advisory range of life imprisonment.<sup>52</sup> The statute of conviction, however, prescribed a term of imprisonment of at least fifteen and at most thirty years.<sup>53</sup> Accordingly, the Guidelines recommendation defaulted to the statutory maximum of thirty years.<sup>54</sup>

Irey was examined by two mental health professionals. Psychiatrist Fred Berlin and psychologist Ted Shaw provided expert reports, and the latter testified at the sentencing hearing. Dr. Berlin reported that Irey suffered from heterosexual pedophilia—a disorder that “does not develop as a consequence of a volitional decision”—and was “not generally anti-social or psychopathic.”<sup>55</sup> Dr. Shaw opined that “Irey’s paraphilias clearly drove his behaviors, in spite of being an otherwise moral and responsible individual, upon whom many people, including family, clients and employees, depended.”<sup>56</sup> Dr. Shaw noted that risk assessments administered to Irey placed him in the low-to-moderate range for risk of re-offense.<sup>57</sup> At the sentencing hearing, Judge Presnell inquired of Dr. Shaw about the precise nature of pedophilia. Dr. Shaw, much as Dr. Berlin had written, characterized it as a treatable psychological illness, not of one’s choosing, which plays a crucial causal role in that it creates a desire to offend which would otherwise be absent.<sup>58</sup>

All of Irey’s immediate family members provided statements and testimony on his behalf.<sup>59</sup> His daughter described him as “loving” and stated that he had taught her “how to be strong, respectful, honorable, loyal, and the list can go on and on.”<sup>60</sup> His wife described him as “a loving and wonderful husband and father” who is “mindful of other people’s feelings.”<sup>61</sup> His brother testified how Irey had, as a high-school senior, loaned his coat to an accident victim, exemplary of his “random

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50. *Id.* at 1168–69; *see* 18 U.S.C. § 2251(c) (2006).

51. *Irey*, 612 F.3d at 1169.

52. *Id.*

53. *See* § 2251(c).

54. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (2009).

55. *Irey*, 612 F.3d at 1171.

56. *Id.* at 1172.

57. *Id.*

58. *See id.* at 1173–74.

59. *Id.* at 1175.

60. *Id.*

61. *Id.*

acts of kindness.”<sup>62</sup> Other family members and a friend (who worked in law enforcement) offered similarly effusive support.<sup>63</sup>

The government asked the court to impose a sentence equivalent to the Guidelines range and statutory maximum of thirty years.<sup>64</sup> Irey’s counsel argued that a thirty-year sentence would be greater than necessary to achieve the purposes of § 3553.<sup>65</sup> Each side contended that attendant circumstances bolstered their respective requests. At the hearing’s conclusion, the court issued a number of oral findings and explanations, and sentenced Irey to seventeen-and-a-half years in prison, followed by a lifetime of supervised release.<sup>66</sup> While the court characterized the conduct as horrific, it also was moved by consideration of Irey’s age upon release, post-arrest steps toward treatment and rehabilitation, and the view that Irey’s illegal and immoral conduct stemmed not from a general sociopathy or disregard for the law, but from a recognized mental illness.<sup>67</sup>

Not surprisingly, the government appealed the sentence as substantively unreasonable. On March 3, 2009, then Chief Judge Edmondson,<sup>68</sup> in an opinion joined by Judge Tjoflat and concurred with by Judge Hill, affirmed the sentence.<sup>69</sup> Though they “might have imposed a different sentence,” the judges accepted that the sentence imposed was “within the outside borders of reasonable sentences” for such a case and acknowledged their duty to “respect the district court as sentencer.”<sup>70</sup>

### B. *Resentencing by the En Banc Majority*

On rehearing, Judge Carnes, writing for the majority of a divided en banc panel, vacated the sentence as substantively unreasonable.<sup>71</sup> After noting that, under *Gall*, a major deviation from the Guidelines range requires a more significant justification than a minor one, the majority held that the district court’s justifications were insufficient to support *any* deviation, let alone the one it had granted.<sup>72</sup> The majority

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62. *Id.*

63. *Id.*

64. *Id.* at 1176.

65. *Id.* at 1175–76.

66. *Id.* at 1179–80.

67. *Id.* at 1177–80.

68. As this article concerns sentencing within the Eleventh Circuit, judges’ names are frequently used—rather than generics such as “court” or “panel”—to avoid confusion and provide interested readers with personal judicial perspective.

69. *United States v. Irey*, 563 F.3d 1223 (11th Cir. 2009), *vacated*, 612 F.3d 1160 (11th Cir. 2010).

70. *Id.* at 1227.

71. *See Irey*, 612 F.3d at 1166.

72. *See id.* at 1222.

reasonably criticized the significance the district court accorded to Irey's age and conduct as a husband and father, both of which paled in comparison to his criminal actions. It is in its analysis of the other § 3553 factors that the majority veers off course. The majority's analysis—even in those instances when acceptably applied to Irey's unique facts—contains confusing and potentially pernicious mischaracterizations, generalizations, and errors, and reaches a rather startling and unprecedented conclusion. These defects suggest that the majority's improper conclusion was motivated more by inflammatory circumstances than by fidelity to properly circumscribed appellate review.

### 1. IMPROPERLY DISCOUNTING THE SEVERITY OF SUPERVISED RELEASE

As a general matter, it is hard to quarrel with the majority's assessment of "the nature and circumstances of the offense"<sup>73</sup> and "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."<sup>74</sup> Given Irey's repulsive conduct, these related factors certainly militated for severity. However, in its analysis, the majority once again<sup>75</sup> spurns Supreme Court precedent, discounting the significance of the lifetime of supervised release which the district court imposed on Irey.<sup>76</sup> The Supreme Court in *Gall* criticized an approach to reasonableness review that focused primarily on the degree to which the incarceration imposed varied from that recommended by the Guidelines as "giv[ing] no weight to the 'substantial restriction of freedom' involved in a term of supervised release or probation."<sup>77</sup> As early as 1910, the Supreme Court recognized the significance of a punishment similar to federal supervised release, describing the supervised defendant's predicament in these terms:

His prison bars and chains are removed, it is true . . . , but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within the voice and view of the criminal magistrate, not being able to change his domicile without giving notice to 'the authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tor-

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73. 18 U.S.C. § 3553(a)(1) (2006).

74. *Id.* § 3553(a)(2)(A).

75. See Harrison, *supra* note 33, at 1150–51 (describing this same error in the context of another Eleventh Circuit decision).

76. See *Irey*, 612 F.3d at 1209–10.

77. *Gall v. United States*, 552 U.S. 38, 48 (2007).

menting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.<sup>78</sup>

In the context of sexual offenses involving children, such restriction is extraordinary, particularly when, as is often the case, imposed for life.<sup>79</sup> A standard condition of supervised release is the defendant's consent to warrantless searches.<sup>80</sup> Many courts require that the defendant "not possess any sexually explicit material and not enter any establishment where sexually explicit material can be obtained,"<sup>81</sup> even though such material, when it involves adults, often bears no relation to the offense of conviction and may in fact serve as a useful and therapeutic substitute for illegal material. This restriction could even be interpreted to preclude entry to movie theatres and bookstores, as well as possession of dramatic or romantic novels. A number of courts have prohibited possession or use of computers,<sup>82</sup> which, in this day and age, can be tantamount to a ban on the use of a telephone. These are but a few examples<sup>83</sup> of onerous and broad conditions that often impede, if not prevent, reintegration, employment, development of healthy sexual habits, and any semblance of a normal life.<sup>84</sup> They should not be trivialized, particularly by those who have never had to exist under their repressive stranglehold.

## 2. MORALLY IMPOVERISHED CONCEPTIONS OF MENTAL ILLNESS, VICTIMHOOD, AND CULPABILITY

The majority, considering Irey's "history and characteristics,"<sup>85</sup>

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78. *Weems v. United States*, 217 U.S. 349, 366 (1910).

79. See U.S. SENTENCING GUIDELINES MANUAL § 5D1.2 (2010) (recommending, in a policy statement, that lifetime supervised release be imposed for sexual offenses).

80. See 18 U.S.C. § 3583(d) (2006).

81. *United States v. Miles*, No. 09-6214, 2010 WL 4948961, at \*2 (10th Cir. Dec. 7, 2010).

82. See, e.g., *United States v. Brigham*, 569 F.3d 220, 232–35 (5th Cir. 2009) (revoking supervised release because defendant used a computer and watched a video of himself having sexual relations with an adult girlfriend). See generally Christopher Wiest, *The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage by Those Convicted of a Crime Involving a Computer*, 72 U. CIN. L. REV. 847, 848–49 (2003) (surveying Internet restrictions and appellate treatment thereof).

83. See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008) (examining post-incarceration restrictions imposed on sex offenders).

84. See generally Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339 (2007) (providing a survey of employment and residence restrictions imposed on sex offenders throughout the United States); Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81 (2006) (discussing the effects of notification and registration restrictions on sex offenders).

85. § 3553(a)(1).

took issue with the district court's characterization of Irey as, in some sense, a "victim."<sup>86</sup> The majority saw in the district court's statement an "implicit finding that child pornography on the internet caused Irey" to abuse children and an improper suggestion that Irey might occupy the same moral plane as the children he abused, both of which convinced the majority that the district court had given too much weight to its skewed version of Irey's personal characteristics.<sup>87</sup> But the district court made no such finding or suggestion. Instead, it was noting that Irey suffered from a terrible mental illness which, of course, he did not choose to be afflicted with. In that sense, the district court's characterization can hardly be disputed. There is no principled reason to conclude that one is not a victim of the blind cruelty of mental illness merely because it results in an interest or predisposition to illegal conduct. If anything, he who must battle such illness, often without society's support, concern, or sympathy, is more a victim of illness than those fortunate enough to suffer from ailments that garner compassion and humanity. And Irey's illness is relevant in the "but-for" sense of causation; it is unlikely that he would have committed such crimes were he not a pedophile. None of this is to say that Irey should avoid responsibility for his ghastly conduct, though that apparently is what the majority took the district court to mean despite its imposition of a significant sentence. A victim can also be a terrible criminal, as the two are not mutually exclusive. The district court was merely acknowledging that Irey's criminal conduct was in some morally relevant sense different from that of, for instance, one who, for no psychopathological reason, chooses to engage in a spree of destructive conduct.

This acknowledgment avoids the normative myopia displayed in *Garcia v. Quarterman*,<sup>88</sup> a decision which the majority cites approvingly. There, the Fifth Circuit lambasted the "suggestion that pedophilia may be considered 'mitigating' of a defendant's moral culpability," as "[t]here is no sense in which reasonable people could view [defendant]'s pedophilia as morally mitigating of guilt, any more than reasonable people would find a defendant's uncontrollable compulsion to commit incest or eat human flesh 'mitigating.'"<sup>89</sup> The Fifth Circuit blatantly ignores a rich and longstanding philosophical and legal debate over culpability.<sup>90</sup> One can reasonably consider pedophilia morally (and perhaps

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86. *United States v. Irey*, 612 F.3d 1160, 1198 (11th Cir. 2010) (en banc).

87. *Id.*

88. 456 F.3d 463 (5th Cir. 2006).

89. *Id.* at 471–72.

90. See Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1157 (2005) ("[W]e have never developed a wholly satisfactory way of evaluating the impact of mental illness on criminal culpability.").

legally) mitigating, especially if it were, as the Fifth Circuit analogized it to, a mental illness producing an “uncontrollable” urge. Criminal law has done similarly since time immemorial, such as in its recognition that a person who willfully kills another under the influence of an extreme emotional disturbance or provocation is guilty of a lesser degree of homicide,<sup>91</sup> or in the Supreme Court’s reversal of numerous capital sentences on the ground that counsel was ineffective for failing to advance evidence of mental illness as a factor mitigating culpability.<sup>92</sup>

The nuanced and sensitive approach to mental illness advanced by the district court is most appropriately applied and best understood in a different context: when comparing the otherwise successful, functional, and beneficent viewer of child pornography with a violent gang member or perpetual con-artist. If asked, many child-pornography viewers are likely to admit that while they have aberrant criminal inclinations, they wish each second that they did not. The violent gang member or perpetual con-artist is unlikely to care, let alone be disturbed by, his devastating conduct. There is a normative difference between one whose discrete criminal conduct is inextricably linked to a discrete, recognized, and unchosen mental illness, and one who commits an offense or exhibits a general lack of moral character though is not inclined to do so by virtue of discrete psychological impairment. This is precisely why so many observers are astonished by the child pornography phenomenon, which sees a torrent of otherwise productive and decent members of society pass through the criminal justice system, and further demonstrates the specific and singularly aberrant effect of this mental illness.<sup>93</sup>

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91. See WAYNE R. LAFAYE, 2 SUBSTANTIVE CRIMINAL LAW § 15.2 (2d ed. 2010) (“Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.”); see also ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-9.3 (1984) (“Evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender.”).

92. *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003) (vacating death sentence for ineffective assistance of counsel where counsel failed to present mitigating evidence of defendant’s dysfunctional family background).

93. See, e.g., *United States v. Syzmanski*, No. 3:08 CR 417, 2009 WL 1212252, at \*1 (N.D. Ohio Apr. 30, 2009) (“These cases become especially difficult at sentencings as judges often balance a defendant who has no previous criminal history and who is an otherwise productive member of the community, against truly disgusting images . . .”); Tim McGlone, *As Child Porn Activity Grows, Efforts to Trap Offenders Do, Too*, VIRGINIAN-PILOT, Jan. 16, 2011, <http://hamptonroads.com/2011/01/child-porn-activity-grows-efforts-trap-offenders-do-too> (“The majority of offenders are white males, of all ages, with no criminal history or previous evidence of pedophilia. Researchers and therapists say the lure of child pornography, which grips addicts as intensely as crack cocaine, targets no singular class. Offenders’ educational and occupational backgrounds vary widely: They are convenience store workers and college professors, enlisted sailors and naval officers, police officers, the homeless, and even the FBI’s own.”).

Putting aside the wisdom of doing so, Congress may decide that the harm of certain conduct is such that mental illness should not, as a practical matter, bear much weight as a legally mitigating factor. The Sentencing Commission has gone farther, noting in a policy statement that “mental and emotional conditions may be relevant” only where “present to an unusual degree” such as to “distinguish the case from the typical case covered by the guidelines.”<sup>94</sup> In this vein, the majority may be correct that mental illness is not a factor to be given much, if any, weight in the present analysis. This is especially so because Irey demonstrated an ability to control his urges when it enabled him to avoid detection (he only offended when outside the United States), and his crimes were particularly gruesome and harmful. Nonetheless, the majority paints in strokes too broad. Instead of straightforwardly asserting the immateriality of pedophilia on these specific facts, it mischaracterizes the district court’s statements and discards nuanced and multifaceted approaches to victimhood and moral culpability in favor of ones which, while popular, are crude and unilluminating. The majority attempts to conflate moral and legislatively/administratively defined culpability, perilously drawing questionable normative conclusions that have no place in appellate decisions. District courts should not be dissuaded by *Irey* from justifiably considering mental illness as a factor mitigating moral culpability and potentially warranting a variance from the Guidelines range.<sup>95</sup> Unlike departures—which are “enhancements of or subtractions from a guidelines calculation based on a specific Guidelines departure provision”—variances “are discretionary changes to a guidelines sentencing range based on a judge’s review of all the § 3553(a) factors”<sup>96</sup> and may be based on the district court’s policy disagreement with the Guidelines.<sup>97</sup> And there is certainly good reason to question the Sentencing Commission’s general disregard for mental illness. The Guidelines pursue “uniformity among defendants convicted of the same crime with the same

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94. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010).

95. See *United States v. Rhodes*, No. 10-5126, 2010 WL 4882833, at \*8 (6th Cir. Nov. 24, 2010) (vacating sentence where the district court “did not acknowledge [defendant’s] mental condition as it contributed to his commission of the offense . . . much less explain [the] reasons for rejecting these factors as grounds for a variance”); *United States v. Moreno-Hernandez*, No. CR 06-1837, 2007 WL 2219419, at \*6 (D.N.M. May 7, 2007) (“While the Court does not think that Moreno-Hernandez’s mental illness is an appropriate basis for it to grant a downward departure, the Court believes that his condition does mitigate his culpability to some degree and counsels for a variance from the sentence the Guidelines recommend.”).

96. *United States v. Brown*, 578 F.3d 221, 225–26 (3d Cir. 2009) (internal quotation marks omitted).

97. See *Spears v. United States*, 555 U.S. 261, 261 (2009) (per curiam) (“That was indeed the point of *Kimbrough*: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”).

criminal history, at the expense of the judicial discretion to consider an offender's personal characteristics,"<sup>98</sup> abnegating any serious individualized consideration of "blameworthiness."<sup>99</sup> The Guidelines appear to flout the Sentencing Reform Act's "mandate to consider both the nature and characteristics of the offense and the history and characteristics of the defendant by placing disproportionate emphasis on the offense while ignoring the offender."<sup>100</sup> This "extraordinarily cramped reading of 'mental disability' as a mitigator,"<sup>101</sup> reflecting a conception of mental disability as an "all or nothing absolute construct,"<sup>102</sup> is in large measure based on "myths about mentally disabled criminal defendants" and a failure to engage in a comprehensive and reasoned analysis of the philosophy underlying culpability.<sup>103</sup> The Guidelines also do not take account of a district court's obligation to impose a sentence sufficient, but not greater than necessary, to serve the § 3553(a)(2) goals,<sup>104</sup> rendering it all the more important that the district court temper the Guidelines with those goals in mind.

### 3. AN UNREALISTIC VIEW OF DETERRENCE

In its discussion of the "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct,"<sup>105</sup> the majority criticized the district court's "idiosyncratic doubts about whether pedophiles could be deterred from committing crimes involving the sexual abuse of children,"<sup>106</sup> which, the majority believed, led the district court to undervalue the need for general deterrence.<sup>107</sup> The majority appears to advocate the canard of a hyper-sensitive and mathematically precise conception of general deterrence, quoting (yet extending) the Seventh Circuit's decision in *United States v. Goldberg* for the proposition that "[t]he logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced."<sup>108</sup> That is an unrealis-

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98. Christina Chiafolo Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 31 (1993).

99. *Id.* at 33.

100. *Id.* at 56 (internal quotation marks omitted).

101. Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 442, 452, 455–56 (1995).

102. *Id.* at 452 (internal quotation marks omitted).

103. *Id.* at 455–56.

104. *United States v. Irey*, 612 F.3d 1160, 1239–40 (11th Cir. 2010) (en banc) (Tjoflat, J., dissenting).

105. 18 U.S.C. § 3553(a)(2)(B) (2006).

106. *Irey*, 612 F.3d at 1210.

107. *Id.*

108. *Id.* at 1212 (quoting *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007)).



tic view of deterrence. Below a certain point, as the length of a sentence increases, its deterrent value is likely to increase proportionally. At a point, however, the marginal deterrent value of additional length plateaus—i.e., additional length does not produce any additional deterrent effect. After all, is one really likely to consider committing rape for a fifteen-year sentence but not a thirty-year one? There is little evidence to suggest that, when it comes to a class of lengthy sentences, the human mind is so discerning and plenty of empirical evidence to the contrary.<sup>109</sup>

Had the district court, instead of questioning the ability of a lengthy sentence to have deterrent effect on pedophiles, simply stated that the seventeen-and-a-half-year sentence imposed was so long a portion of one's life as to cause any potential offender to think twice, would the majority have had ground to object? The district court, after all, did not hold that a pedophile was impervious to deterrence, only that the extent of such an effect was not entirely clear. And the district court did impose a lengthy sentence, an action hardly consistent with a disregard for deterrence. Should the district court's statement vitiate the sentence even though the sentence might, on this factor, have passed muster had a different justification been explicitly proffered? If so, the appropriate remedy would be remand, enabling the district court to articulate that justification. That, as will be seen, was not what the majority had in mind.

#### 4. MISTAKING FACTS FOR LAW

The majority plausibly concluded that the sentence imposed would not adequately "protect the public from further crimes of the defendant,"<sup>110</sup> though its discussion of this factor is riddled with unnecessary factual assertions masquerading as law. Dissatisfied with the district court's minimization of Irey's risk of re-offending upon release, the majority cites to numerous cases and studies in support of the view that recidivism among sex offenders remains a serious concern at any age and under any battery of restrictions short of incarceration.<sup>111</sup> These include a Supreme Court decision expressing "grave concerns over the high rate of recidivism among convicted sex offenders as a class" and

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109. See generally ANDREW VON HIRSCH, ANTHONY BOTTOMS, ELIZABETH BURNLEY & P-O. WIKSTROM, *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* (1999); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003); David Farrington, Paul Langan, Per-Olof H. Wikstrom, *Changes in Crime and Punishment in America, England and Sweden Between the 1980s and the 1990s*, 3 STUDIES IN CRIME PREVENTION 104 (1994).

110. *Irey*, 612 F.3d at 1216; see § 3553(a)(2)(C).

111. See *Irey*, 612 F.3d at 1264–66.

characterizing “[t]he risk of recidivism posed by sex offenders” as “frightening and high.”<sup>112</sup> In an attempt to parry the argument that an appellate court should not be introducing factual material not addressed below, the majority framed the exercise as one of applying legal conclusions: “Judge Tjoflat’s separate opinion argues that we should not consider any of the decisions of the Supreme Court and this Court about the high recidivism rate of pedophiles. . . . We, like all courts, have a duty to find and apply the correct law.”<sup>113</sup> That the Supreme Court makes a factual finding—if one can even characterize its remarks as such—on the record before it does not transform the proposition into binding or even persuasive *legal* precedent.<sup>114</sup> Such remarks are not law; they do not obviate a district court’s obligation to find facts based on the specific circumstances of the case at hand and should not supplant the court’s case-specific factual findings on appeal. Perhaps implicitly recognizing the flimsiness of characterizing these remarks and findings as law, the majority disclaimed reliance thereon and assumed, for purposes of the appeal, that the district court’s factual findings were correct, though it did so on the ground that the government failed to challenge them. Again, the ultimate conclusion—that the sentence imposed does not adequately protect the public—is certainly plausible, though the majority confuses matters by suggesting that courts can circumvent fact-finding responsibilities by the expedient of citation to prior decisions’ factual findings and remarks.

##### 5. KNOWING WHEN TO RESPECT THE GUIDELINES

The majority tenably reckoned that the district court neglected the § 3553 factor requiring consideration of the Guidelines range and relevant policy statements by failing to accord any real weight to the Guidelines. This is not to say, though, that the Guidelines should actually have been given greater weight in the district court’s sentencing calculus, but only that the district court failed to provide sufficient justification for

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112. *Id.* at 1214–15 (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)). Bizarrely, the majority attempts to bolster its analysis by quoting from *McKune v. Lile*, where the Supreme Court found that “[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.” *Id.* at 1215 (quoting *McKune v. Lile*, 536 U.S. 24, 33 (2002)). This finding is hardly enlightening. Of course convicted sex offenders are more likely to be rearrested for a new rape or sexual assault. Would one have expected released arsonists or burglars to be more likely to commit sexual offenses? *McKune* merely states the unremarkable factual proposition that convicted sex offenders are more likely than other offenders to commit sex crimes. *McKune*, 536 U.S. at 33.

113. *Irey*, 612 F.3d at 1215 n.33.

114. See *Bonanno v. United States*, 12 Cl. Ct. 769, 771 (1987) (“The previous decisions which are binding precedent under *stare decisis*, of course, do not include findings of fact but only determinations of law.”).

discounting them. District courts should hesitate to draw any broader conclusions about the weight to be given the Guidelines.

At least one district court seems to have drawn just such a broader conclusion. *United States v. Vadnais*<sup>115</sup> was, relative to others in its class, a run-of-the-mill, non-production child pornography case involving a defendant with no prior criminal record who had served honorably in the armed services, was a father, and had recently suffered the loss of his wife from ovarian cancer.<sup>116</sup> After pleading guilty to a single count of receipt of child pornography—a count carrying no mandatory minimum sentence—the district court imposed the statutory maximum twenty-year sentence. At sentencing, the district court asked defense counsel if he had read *Irey* and noted that in it the majority had “reversed the district court’s judgment to impose a sentence below the guideline sentence.”<sup>117</sup> The court added that *Irey* “was a very instructive and informative opinion for all of us who have to deal with these kinds of cases, defense counsel, prosecutors, judges, in terms of the analysis that should inform our decision when it comes to sentencing in these cases and, in particular, with respect to requests for sentences below the advisory guideline sentences and what, at least this circuit, would interpret to be a reasonable sentence under the circumstances.”<sup>118</sup> The district court was obviously yet improperly moved by *Irey*, which it interpreted as expressing a categorical Eleventh Circuit policy against Guidelines variances in child pornography cases.

*Kimbrough* recognized a court’s power to deviate from the Guidelines on the basis of a policy disagreement, and in few other circumstances is that power more relevant and appropriately exercised than in cases involving sexual crimes, particularly those involving child pornography.<sup>119</sup> In *United States v. Dorvee*, the Second Circuit recognized what lower courts and commentators had known for some time: that the child pornography Guidelines are “fundamentally different from most and . . . unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires.”<sup>120</sup> It noted that the Sentencing Commission “did not use [its typical] empirical approach in formulating the Guidelines for child pornography”;<sup>121</sup> instead, its hand was forced by direct congressional amendments to the Guidelines, which

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115. No. 10-CR-14017 KMM (S.D. Fla. Nov. 8, 2010).

116. See *id.*

117. Tr. of Sentence 13:9-10, Sept. 3, 2010, ECF No. 46.

118. *Id.* at 13:19-14:2.

119. *Kimbrough v. United States*, 552 U.S. 85, 89 (2007).

120. *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010).

121. *Id.*

“[t]he Sentencing Commission has often openly opposed.”<sup>122</sup> Nor had Congress given the matter much thought. A former United States Attorney aptly summarized one of the more blatant examples of such legislative negligence:

[T]he proponents of this legislation sought to minimize the opportunity for debate or opposition. The reforms were appended at the eleventh hour to a politically-popular piece of child abduction legislation that no legislator could easily oppose. The first time that Congress gave serious consideration to the changes was in a House-Senate conference, hastily convened just days before Congress' spring recess. Last-minute revisions to the bill were circulated at 1:00 in the morning on April 9, as a result of a process that Senator Diane Feinstein compared to “rewrit[ing] the criminal code on the back of an envelope.”<sup>123</sup>

The Second Circuit concluded by reminding district courts that they were “dealing with an eccentric Guideline of highly unusual provenance.”<sup>124</sup> The Third Circuit has reached the same conclusion,<sup>125</sup> as have numerous scholars.<sup>126</sup>

In an unpublished per curiam opinion in *United States v. Gray*, the Eleventh Circuit expressed its disagreement with the Second Circuit, noting that it had “previously rejected the same argument” and found “that the Guidelines pertaining to child pornography offenses adequately take into account empirical data and national experience.”<sup>127</sup> The prior case mentioned in *Gray*, *United States v. Pugh*, offered little-to-nothing by way of analysis, merely stating, in a footnote, that the Guidelines range was derived in part from early Parole Guidelines and that the Sentencing Commission had not, as it had with regard to the crack-cocaine

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122. *Id.* at 184–85.

123. Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. R. 310, 315 (2003).

124. *Dorvee*, 616 F.3d at 188.

125. See *United States v. Grober*, 624 F.3d 592, 608 (3d Cir. 2010) (“As described in the Commission’s 2009 Report, and as discussed by the Second Circuit in *Dorvee*, and, by now, numerous district courts, § 2G2.2 was not developed pursuant to the Commission’s institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives.”).

126. See generally Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 579–80 (2009); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); John Gabriel Woodlee, Note, *Congressional Manipulation of the Sentencing Guideline for Child Pornography Possession: An Argument for or Against Deference?*, 60 DUKE L.J. 1015 (2011); Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (Jan. 1, 2009), [http://www.fd.org/pdf\\_lib/child%20pom%20july%20revision.pdf](http://www.fd.org/pdf_lib/child%20pom%20july%20revision.pdf).

127. *United States v. Gray*, No. 10-11524, 2010 WL 5096059, at \*2 (11th Cir. Dec. 15, 2010).

disparity, levied any explicit criticism.<sup>128</sup> *Dorvee* and its progeny belie such sycophantic contentions. Even the majority in *Irey* appears to acknowledge as much, noting that it would “not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines” and adding that in *Irey*, as in *Pugh*, “the district court did not come close to doing so.”<sup>129</sup> In this respect, *Irey* is important because it quite reasonably opens the door to future *Dorvee*-inspired arguments, a door that the Eleventh Circuit had previously and improperly sought to shut.

#### 6. APPELLATE SENTENCING AND THE ASSAULT ON DISCRETION

As is apparent from its lengthy and critical discussion, the majority was utterly dissatisfied with the district court’s sentence. Its ultimate holding, however, was unprecedented. “Nothing less than the advisory guidelines sentence of 30 years, which is the maximum available, will serve the sentencing purposes set out in § 3553(a).”<sup>130</sup> On remand, the district court would be obligated to impose that exact sentence and not a day less. The dissent cried foul.

If the majority’s claimed acceptance of what it deemed to be the district court’s erroneous factual findings is to be credited, precisely what factors did the majority consider in assessing the sentence’s reasonableness? Working against *Irey* were the horrific nature and duration of his crime and the vast number of victims. In his favor (as purportedly accepted, under protest, by the majority) were his partial volitional impairment resulting from mental illness, low risk of recidivism, conduct as a father and community member, acceptance of responsibility, age upon anticipated release, and the strong deterrent effect of the sentence imposed (which included a lifetime of severely restrictive post-imprisonment supervised release). It is difficult to imagine that these factors could not justify a sentence even a single day less than the statutory maximum, and the majority’s claim to the contrary is disingenuous. The majority, in essence, reweighed the evidence—supplementing it with its own appellate fact-finding—and resentenced the defendant. In so doing, the majority usurped the role of district courts and exceeded the bounds of appellate jurisdiction. The majority turned its back on *Gall*, which stressed the institutional advantages that district courts enjoy, when compared to appellate courts, in assessing evidence and

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128. See *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008).

129. *United States v. Irey*, 612 F.3d 1160, 1212 n.32 (11th Cir. 2010) (en banc). The majority seems to view *Pugh* as a limited holding grounded on the district court’s failure to articulate the reasons for its policy disagreement, while the *Gray* panel viewed *Pugh* as a general vindication of the child pornography Guidelines.

130. *Id.* at 1222.

making individualized sentencing determinations.<sup>131</sup>

Judge Tjoflat's dissent correctly criticized the majority for its appellate fact-finding, particularly in light of the government's failure to raise such arguments or introduce contrary evidence during the district court proceedings. However, it relegated a critical element of the analysis to a footnote: Acknowledging that the majority attempted to meet his criticism by its putative disclaimer of reliance, Judge Tjoflat, questioning why the majority would nonetheless "take[ ] the time to conjure new evidence and arguments," expresses his suspicion—at least regarding the majority's consideration of Irey's mental illness—that its disclaimer was pretextual.<sup>132</sup> Judge Edmondson reached a similar conclusion, though it is expressed in more circumspect fashion. According to his dissent, when reviewing a sentence, "appellate courts first need to ask only one question: could an objectively reasonable District Judge looking at the record 'on the whole' have found the ultimate sentence imposed to be a 'sufficient' one when the record . . . is viewed in the light most favorable to the sentence."<sup>133</sup> If so, the appellate court must affirm the sentence.<sup>134</sup> Disagreeing with the majority, and conceding that he may have been harsher with the defendant, Judge Edmondson maintained that seventeen-and-a-half years of imprisonment, followed by a lifetime of supervised release, was within the range of sentences an objectively reasonable district judge could impose in such a case.

### C. *The District Court Responds*

Much about *Irey* is unprecedented, including its aftermath. After the en banc panel issued its decision, the defendant filed an unopposed motion requesting a continuance of resentencing on the chance that the Supreme Court would grant writ of certiorari. The district court seized this seemingly trivial opportunity to issue a written opinion and crafted what Professor Douglas Berman aptly characterized as a "*de facto* amicus brief" in support of a petition that had yet to be filed.<sup>135</sup> The district court lived up to its promise to "respond to certain aspects of the appellate decision . . . with information that only the [district court] possesses[d]" and to discuss implications of the majority's decision that "might not be apparent to the parties themselves," all in an effort to

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131. See *Gall v. United States*, 552 U.S. 38, 51–52 (2007).

132. *Irey*, 612 F.3d at 1264 n.93 (Tjoflat, J., dissenting).

133. *Id.* at 1272 (Edmondson, J., dissenting).

134. *Id.*

135. Douglas A. Berman, *Remarkable Opinion with Postponement of Resentencing in Notorious Irey Case*, SENT'G L. & POL'Y (Oct. 25, 2010, 3:26 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2010/10/remarkable-opinion-with-postponement-of-resentencing-in-notorious-irey-case.html](http://sentencing.typepad.com/sentencing_law_and_policy/2010/10/remarkable-opinion-with-postponement-of-resentencing-in-notorious-irey-case.html).

“assist the Supreme Court in determining whether the [anticipated] petition ought to be granted.”<sup>136</sup> First, the district court, attempting to explain the “disconnect” between its judgment and the majority’s, noted that, while the majority focused primarily on the rape and torture of over fifty children, the offense of conviction was a single count of production and transportation of child pornography. The “implicit holding of the majority opinion is that [the district court] was obligated to sentence Irey for the surrounding conduct, rather than the particular crime with which he was charged.”<sup>137</sup> Second, the district court expressed its puzzlement that the majority criticized its failure to account for the Sentencing Commission’s policy statements, despite that these statements only apply to departures from the Guidelines, as opposed to variances (the district court had imposed a variance).<sup>138</sup> Conceding “that the majority opinion raises valid concerns about the reasonableness of the sentence,” the district court concluded by noting that it would have taken these concerns under consideration on remand and lamented that neither the court, nor Irey, would “be given the opportunity to confront the facts and arguments raised for the first time on appeal.”<sup>139</sup> On November 24, 2010, Irey filed a petition for writ of certiorari before the Supreme Court.<sup>140</sup>

### III. THE IMPACT OF *IREY* AND THE FUTURE OF SENTENCING IN THE ELEVENTH CIRCUIT

It is easy to overestimate *Irey*’s import. To its most vociferous detractors, the majority opinion heralds the end of discretion. That prognosis is too severe. *Irey* must be viewed in the context of practical sentencing discourse within the Eleventh Circuit. Such analysis reveals that *Irey* is only a selective assault on discretion, though a pernicious one that should be corrected.

#### A. *The Sentence-Review Debate in Practice*

There is a quality of pretext to a large portion of the debate over sentencing review, one which mirrors that attending much of constitutional jurisprudence. It is often the case, once one leaves the confines of academic constitutional discussion, that ideological commitments are dynamic, masking underlying unprincipled policy preferences.<sup>141</sup> That is

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136. United States v. Irey, No. 6:06-cr-237-Orl-31DAB, 2010 WL 4260033, at \*1 (M.D. Fla. Oct. 22, 2010).

137. *Id.* at \*3.

138. *Id.* at \*8.

139. *Id.* at \*11.

140. Petition for Writ of Certiorari, *Irey v. United States*, No. 10-727 (Nov. 24, 2010), 2010 WL 4914505.

141. See generally Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover*

why many conservative federalists embrace national moral legislation in spite of a commitment to states' rights. It is also why many liberals seek expansive state intervention to ensure socioeconomic welfare, often requiring redistribution of wealth, while rejecting other forms of encroachment on individual rights and privileges. There is little attempt to reconcile what are often widely held yet inconsistently principled choices.<sup>142</sup> The same can be said of sentencing, which does not occur in a theoretical vacuum. In practice, few prosecutors, judges, or defense attorneys are "sentencing purists." Lawyers are advocates, and judges, like other mortals, are not unbiased. When a judge imposes a harsh sentence, liberals yearn for probing appellate review. And when a liberal judge imposes a lenient one, conservatives similarly seek to abandon appellate deference. In this way, the sentencing process is often a zero-sum game. The situation is unlikely to improve, unless the judiciary becomes a political monolith. The very nature of discretionary sentencing, coupled with the power for policy disagreement engendered by *Kimbrough*, invite, if not explicitly countenance, subjectivity and political discord. Practitioners will, of course, consistent with their ethical obligations, advocate whichever form of appellate review is most likely to benefit their clients. But there is hope for judges, who are not so constrained, to establish consistency and fairness in sentencing by applying "equality" in review.

### B. *The Equality Principle*

Since *Booker*, the Eleventh Circuit has exercised its authority to reverse a sentence as substantively unreasonable in only five cases.<sup>143</sup> In none of those cases, however, was the sentence found unreasonably severe. And that does not owe to an absence of cases presenting such opportunities. Consider *United States v. Alberto Del Cid*, where the defendant appealed his sentence for reentering the United States illegally after having been previously deported.<sup>144</sup> Though the Guidelines recommended imprisonment of zero to six months, the district court varied considerably, imposing a twenty-four month, statutory maximum sen-

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*Federalism in the Wake of the War on Terror*, 69 BROOKLYN L. REV. 1277, 1306–08 (2004); David Boaz, *No Federalism on the Right* (May 13, 2005), <http://www.cato.org/research/articles/boaz-050513.html>.

142. This is not to say that there are no principled ways to reconcile these various positions. For many, however, no such attempt is ever made, and with plenty of other positions, it cannot be.

143. See *United States v. Irey*, 612 F.3d 1160, 1222 (11th Cir. 2010) (en banc); *United States v. Livesay*, 587 F.3d 1274, 1278–79 (11th Cir. 2009); *United States v. Pugh*, 515 F.3d 1179, 1193–1203 (11th Cir. 2008); *United States v. Martin*, 455 F.3d 1227, 1238–39 (11th Cir. 2006); *United States v. Crisp*, 454 F.3d 1285, 1290 (11th Cir. 2006).

144. *United States v. Alberto Del Cid*, 253 F. App'x 852, 852–53 (11th Cir. 2007).



tence.<sup>145</sup> In a brief, per curiam unpublished decision, the Eleventh Circuit merely noted that the district court had considered the statutory factors and determined that a sentence within the Guidelines range would be insufficient.<sup>146</sup> Given the extreme degree of the variance and the absence of factors that would remove the case from the typical one envisioned by the Guidelines, the Eleventh Circuit's affirmance and threadbare analysis is hard to reconcile with the functionally de novo approach of *Irey*.

Nor does it appear that the Eleventh Circuit might strike down, let alone seriously question, a massive upward variance from a mandatory minimum sentence which already exceeded the applicable Guidelines range, despite its willingness to do so when, as in *Irey*, the sentence is a significant downward variance from a statutory maximum well below the Guidelines range. In *United States v. Perez*, the defendant appealed his eighty-four month sentence for smuggling aliens for financial gain.<sup>147</sup> The Guidelines range was twenty-four to thirty months, though it defaulted to the statutory mandatory minimum of thirty-six months.<sup>148</sup> In an unpublished, per curiam decision, the Eleventh Circuit affirmed this 233% variance as substantively reasonable, even though the factors that the district court relied on to increase the sentence were already accounted for in the Guidelines calculation.<sup>149</sup>

Compounding the problem is the Eleventh Circuit's inconsistent and unequal position on consideration of factors already accounted for in the Guidelines calculation. When a district court varies upward from the Guidelines based on factors already accounted for in the Guidelines calculation, not so much as a word of protest or caution is uttered.<sup>150</sup> Yet the contrary does not hold true. Reversing a sentence as substantively unreasonable in *United States v. Martin*, the Eleventh Circuit criticized the district court's emphasis on the defendant's lack of criminal record and the aberrational nature of his conduct, noting that the defendant's Guidelines "criminal history category of I already takes into account his lack of a criminal record."<sup>151</sup> Putting aside this inconsistent and unequal position, is it conceivable that the Eleventh Circuit would ever reverse a sentence such as that meted out in *Perez* and remand with instructions

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145. *Id.*

146. *Id.* at 854.

147. *United States v. Perez*, 282 F. App'x. 747, 748–49 (11th Cir. 2008).

148. *Id.*

149. *See id.* at 750.

150. *See United States v. McDavid*, 368 F. App'x. 61, 63 (11th Cir. 2010) ("[W]e have recognized that district courts may impose a variant sentence based on factors already considered in the Guidelines calculation.").

151. *United States v. Martin*, 455 F.3d 1227, 1239 (11th Cir. 2006).

that the statutory minimum be imposed? If not, which seems likely, the Eleventh Circuit is not reviewing similarly deviant sentences in equally probing degrees, but applying greater scrutiny to those which it finds lenient.

The Eleventh Circuit should institute and employ equality in sentencing review. To apply a familiar Kantian moral maxim, the Eleventh Circuit should treat appellate review not as a means to an end—i.e., greater severity—but as an end in itself,<sup>152</sup> demonstrating a commitment to review that does not smack of political or social instrumentalism. Its review should be double-edged, capable of striking an unreasonably harsh sentence just as it has proven singularly capable of reversing what it perceives to be an unduly lenient one.

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152. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 37–38 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (“So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”).

