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JUDICIAL POLICY NULLIFICATION OF THE ANTITRUST SENTENCING GUIDELINE

Abstract: The Federal Sentencing Guidelines provide for special treatment of hard-core cartel activity to ensure that penalties for antitrust crimes effectively deter and punish criminals. The U.S. Supreme Court's transformational sentencing cases, however, have returned significant discretion to sentencing judges, including the discretion to vary from the Guidelines on policy grounds. Yet, judicial discretion in sentencing is not unlimited. Judges are required by statute to impose sentences that are "sufficient, but not greater than necessary" to achieve the goals of sentencing, subject to appellate review for reasonableness. This Note analyzes whether there is a sustainable basis for judicial policy disagreement with the Antitrust Guideline's use of a proxy to measure economic harm. It proposes that appeals courts apply a sliding scale framework when reviewing policy-based variances, and argues that judicial discretion may, in some instances, promote the goals of white-collar sentencing, including moral condemnation. Finally, this Note concludes that judicial discretion to vary from the Antitrust Guideline's harm proxy, appropriately cabined by appellate review, would not undermine antitrust sentencing policy.

INTRODUCTION

Antitrust law seeks to protect the competitive process, and thereby promote innovation and competition.¹ The Sherman Act ("Sherman Act" or "Act") was drafted in broad brushstrokes to permit regulators and courts to proscribe conduct that threatens the proper functioning of the market, yet evades specific enumeration.² Additionally, the Act provides for both civil remedies and criminal sanctions pursuant to the same general statutory definitions of illegal conduct.³ Such vague standards, however, once raised serious due process concerns when enforced

¹ *E.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (stating that competition ultimately "promotes the consumer interests that the Sherman Act aims to foster"); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (stating that the Sherman Act rests on "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services").

² *See* 15 U.S.C. §§ 1-2 (2006); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933) ("[The Sherman Act] does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.").

³ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

ers pursued criminal prosecutions.⁴ Thus, the U.S. Department of Justice (DOJ) currently limits criminal prosecution under the Act to horizontal cartel agreements, which are per se offenses widely known to cause serious economic harm.⁵

Congress and policymakers agree that harsh penalties are required to deter and punish cartel activity, which disrupts the free market and harms consumers.⁶ Antitrust defendants found guilty of conspiring with competitors to fix prices, rig bids, or allocate markets are sentenced pursuant to the Antitrust Sentencing Guideline (“Antitrust Guideline”), which recommends stiff sanctions for individuals and corporations.⁷ For instance, the Antitrust Guideline recommends prison terms for almost all individual offenders.⁸ Moreover, corporate offenders are subject to large fines, ranging from fifteen to eighty percent of their sales in products or services affected by a conspiracy.⁹

The Antitrust Guideline is promulgated by the U.S. Sentencing Commission (“Commission”), an expert independent agency authorized to develop guidelines for criminal sentencing.¹⁰ The product of

⁴ See *id.* at 439 (noting that criminal enforcement of the Sherman Act is usually reserved for “circumstances where the law is relatively clear and the conduct egregious” to avoid due process concerns); *cf.* *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”).

⁵ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL, at III-20 (4th ed. 2008), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf> (“In General, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements”); see Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 25–26 (2009) (“Because cartel participants conduct themselves in the same furtive manner as other criminal conspirators, U.S. judges and juries tend to be comfortable with treating cartel participants as criminals.”).

⁶ See *infra* notes 46–94 and accompanying text.

⁷ See U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1 cmt. background (2012) (explaining that the Commission promulgated only one guideline covering horizontal agreements traditionally prosecuted as criminal violations). The Antitrust Guideline is included in the Federal Sentencing Guidelines Manual, which prescribes sentencing policy for all federal offenses. See *id.* ch. 1, pt. A, subpt. 1, cmt. 1.

⁸ See *id.* § 2R1.1 cmt. background.

⁹ See *id.* Fines imposed under the Antitrust Guideline, however, may not exceed the statutory maximum of \$100 million. See 15 U.S.C. § 1 (2006). Nevertheless, where the fine is likely to exceed the statutory cap, the government may pursue a fine equal to twice the loss or twice the gain caused by the defendant’s conduct. See 18 U.S.C. § 3571(d) (2006). When using this authority, the government must prove the loss or gain beyond a reasonable doubt. See *S. Union Co. v. United States*, 132 S. Ct. 2344, 2357 (2012) (holding that the *Apprendi* rule applies to criminal fines); see also *infra* notes 109–121 and accompanying text (discussing the U.S. Supreme Court’s 2000 ruling in *Apprendi v. New Jersey* and its subsequent impact on sentencing law).

¹⁰ *Mistretta v. United States*, 488 U.S. 361, 368–69 (1989).

the Commission's work—namely, the Federal Sentencing Guidelines (“Guidelines”)—are designed to promote uniformity, proportionality, and honesty in sentencing by structuring judicial decision making.¹¹ Finally, Congress empowered the Commission to review and revise the Guidelines based on new data and national experience.¹²

Since its debut in 1987, the Antitrust Guideline has been amended to compensate for congressional escalation of Sherman Act penalties.¹³ The Antitrust Guideline was initially designed to correct what the Commission and enforcers perceived as lenient judicial sentencing patterns in white-collar cases.¹⁴ Moreover, policymakers and commentators recognized that past sentencing practices had failed adequately to deter antitrust offenses.¹⁵ Accordingly, the Commission sought to develop a guideline that would fully deter cartel activity while reducing enforcement costs.¹⁶

¹¹ See U.S.S.G. ch. 1, pt. A, subpt. 1, cmt. 3 (describing the purposes of the Sentencing Reform Act of 1984 (“SRA”)); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) (“Reduction of ‘unwarranted sentencing disparities’ was a—probably *the*—goal of the [SRA].”).

¹² U.S.S.G. ch. 1, pt. A, subpt. 1, cmt. 2 (stating that the Commission views the “guideline-writing process as evolutionary” and “expects . . . that continuing research, experience, and analysis will result in modifications and revisions”); see 28 U.S.C. § 994(o)–(p) (2006) (providing statutory authority for the review and revision of the Guidelines).

¹³ See *infra* notes 170–187 and accompanying text.

¹⁴ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20 (1988) (stating that the Commission “decided to require short but certain terms of confinement for many white-collar offenders” to correct “inequities” in previous sentencing practices); see also 28 U.S.C. § 994(m) (granting the Commission discretion to determine which crimes have been punished too leniently, and which too severely).

¹⁵ See Mark A. Cohen & David T. Scheffman, *The Antitrust Guideline: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331, 341–43 (1989) (observing that overdeterrence concerns had not gained complete acceptance in legal and policy circles and that underdeterrence concerns animated the Commission’s policy making); John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 516–18 (2005); Werden, *supra* note 5, at 26 (arguing that “imposing serious sanctions on cartel activity does not chill any legitimate, procompetitive conduct,” and concluding that there is no risk of overdeterrence).

¹⁶ See Cohen & Scheffman, *supra* note 15, at 339–41 (describing the Commission’s effort to develop a guideline that would deter cartel activity without imposing undesirable social costs); Werden, *supra* note 5, at 28 (stating that cartel sanctions must “produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity”). Indeed, the Commission sought to develop sanctions that would force cartel participants to weigh the “net harm to others” against the risk of detection and prosecution. See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CH. L. REV. 652, 656–57 (1983). For example, if a cartel imposes an overcharge of \$1000 and causes market inefficiencies (e.g., deadweight loss, reduced innovation) of \$500, the optimal penalty is \$1500, the net harm to others. *Id.*

More recently, however, a sentencing judge challenged the primacy of deterrence as the theory most relevant to the Antitrust Guideline.¹⁷ In 2011, in *United States v. VandeBrake*, the U.S. District Court for the Northern District of Iowa varied upward from the Antitrust Guideline based, in part, on a policy disagreement with its lenient treatment of cartel offenders.¹⁸ Consequently, the sentencing judge imposed a record forty-eight month jail sentence in an ordinary price-fixing and bid-rigging case.¹⁹

From 1987 through 2005, such a departure would have been unthinkable.²⁰ The Sentencing Reform Act of 1984 (“SRA”),²¹ which created the Commission, also made the Guidelines mandatory.²² Thus, once sentencing judges applied the Guidelines, they were generally confined to the narrow sentencing range established by the Commission.²³ The mandatory Guidelines regime, however, was reviled by many district court judges, and was subjected to withering academic criticism.²⁴ Nonetheless, judges followed the law and faithfully applied the Guidelines.²⁵

¹⁷ See *United States v. VandeBrake (VandeBrake I)*, 771 F. Supp. 2d 961, 987–89, 1000–04, 1011 (N.D. Iowa 2010), *aff’d*, 679 F.3d 1030 (8th Cir. 2012) (*VandeBrake II*), *cert. denied*, 81 U.S.L.W. 3470 (U.S. Feb. 25, 2013) (No. 12-488). *But see* *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) (“Deterrence is the goal most pertinent to the antitrust guideline.”).

¹⁸ See *VandeBrake I*, 771 F. Supp. 2d at 987–89, 1004–05.

¹⁹ See *id.* at 1012–13.

²⁰ See STITH & CABRANES, *supra* note 11, at 145–46 (describing the strict application of the Guidelines under the mandatory regime).

²¹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

²² See 18 U.S.C. § 3553(b)(1) (2006), *invalidated by* *United States v. Booker*, 543 U.S. 220 (2005).

²³ See 28 U.S.C. § 994(b)(2) (2006) (providing that the “maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months”).

²⁴ See, e.g., STITH & CABRANES, *supra* note 11, at 121–23 (observing that the Guidelines’ excessive focus on the quantity of harm inflicted by a defendant marginalizes other factors, including the defendant’s personal characteristics, role in the offense, or potential for rehabilitation); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685–87, 1718–20 (1992) (describing the resistance of Article III judges to new limits on their discretion); see also *Mistretta*, 488 U.S. at 422–24 (Scalia, J., dissenting) (arguing that the Commission is a “branchless” agency with a roving mandate).

²⁵ See, e.g., *United States v. Green*, 346 F. Supp. 2d 259, 279 (D. Mass. 2004) (stating that after the Supreme Court established the Guidelines’ constitutionality, the judiciary “appl[ie]d the Guidelines as sensibly, consistently, and compassionately as their labyrinthine provision [would] allow”); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 9–10 (2010) (stating that the “mandatory [G]uidelines

In the early 2000s, in a series of cases regarding the Sixth Amendment jury right, the U.S. Supreme Court exposed a constitutional infirmity of the mandatory Guidelines regime.²⁶ Specifically, the Guidelines required judges to impose sentences based on facts, other than prior convictions, not found by the jury or admitted by the defendant.²⁷ In 2005, this line of cases culminated in the Court's landmark decision in *United States v. Booker*, which returned discretion to sentencing judges by rendering the Guidelines advisory.²⁸

Following its decision in *Booker*, the Court held that sentencing judges could vary categorically from the advisory Guidelines based on policy disagreements.²⁹ Although some commentators opined that these holdings were limited to the narrow factual circumstances of those cases (i.e., the Guidelines' controversial treatment of crack versus powder cocaine),³⁰ the courts of appeals have concluded that sentencing judges may disagree on policy grounds with *any* guideline, subject to appellate review for reasonableness.³¹ Therefore, commentators worry that enhanced judicial discretion will undermine the Commission's efforts to develop uniform sentencing policy.³²

This Note analyzes whether the Antitrust Guideline's reliance on a proxy to measure the economic harm inflicted by a cartel is susceptible to judicial policy disagreements.³³ To determine the level of deference a reviewing court owes to a sentencing judge's decision to vary from the volume of commerce proxy, this Note applies the sliding scale defer-

regime remained essentially intact for eighteen years" despite strident opposition from scholars, the defense bar, and district court judges).

²⁶ See *infra* notes 99–121 and accompanying text.

²⁷ Freed, *supra* note 24, at 1712–15.

²⁸ *Booker*, 543 U.S. at 245.

²⁹ See *Spears v. United States*, 555 U.S. 261, 263–64 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. 85, 108–10 (2007).

³⁰ See, e.g., Frank O. Bowman, III, *Debauch: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 454 (2010) (observing that the U.S. Supreme Court's 2009 opinion in *Spears v. United States* "leaves open the most difficult problem raised by *Kimbrough*—whether district courts are equally free to disagree with the Commission in all classes of cases, or whether crack cases are *sui generis*"); Nancy Gertner, Gall, *Kimbrough*, and *Me*, 5 OHIO ST. J. CRIM. L. 1, 5 (2008) (stating that "[i]t is conceivable that the only Guideline *really* undermined by *Kimbrough* is the *sui generis* one dealing with crack cocaine").

³¹ See *infra* note 143 and accompanying text.

³² See, e.g., Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 32–34 (2012); Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 56–63 (2011).

³³ See *infra* notes 271–339 and accompanying text.

ence standard advanced by Justice Stephen Breyer in his concurrence in the 2011 U.S. Supreme Court case, *Pepper v. United States*.³⁴ The standard properly accounts for the discrete institutional strengths of sentencing judges, appeals courts, and the Commission with respect to promoting the goals of sentencing.³⁵ This Note concludes that such a standard will promote rather than hinder efforts to deter cartel activity by providing judges with sufficient flexibility to deviate from the existing harm proxy.³⁶ Finally, this Note argues that enhanced judicial discretion may advance other legitimate goals of white-collar sentencing, including moral condemnation.³⁷

Part I of this Note discusses criminal antitrust enforcement policy.³⁸ Part II provides a brief history of the Federal Sentencing Guidelines and describes the Antitrust Sentencing Guideline.³⁹ Part III argues that judicial discretion in sentencing—if appropriately cabined by appellate review—may enhance the goals of antitrust sentencing.⁴⁰ It then concludes by evaluating when policy-based variances from the Antitrust Guideline will further antitrust sentencing policy.⁴¹

I. UNCOVERING CARTELS: CRIMINAL ENFORCEMENT UNDER THE SHERMAN ACT

The Sherman Act is a sweeping antitrust statute subject to both civil and criminal enforcement.⁴² This Part focuses on criminal enforcement and sentencing of Sherman Act violations.⁴³ Section A introduces the core provisions of the Act, tracks the development of the legal rules governing its broad proscriptions, and examines the policies underlying its passage.⁴⁴ Section B details the history of the Act's statutory penalties.⁴⁵

³⁴ 131 S. Ct. 1229, 1253–55 (2011) (Breyer, J., concurring).

³⁵ See *infra* notes 139–161 and accompanying text.

³⁶ See *infra* notes 214–346 and accompanying text.

³⁷ See *infra* notes 214–346 and accompanying text.

³⁸ See *infra* notes 42–94 and accompanying text.

³⁹ See *infra* notes 95–213 and accompanying text.

⁴⁰ See *infra* notes 217–259 and accompanying text.

⁴¹ See *infra* notes 260–339 and accompanying text.

⁴² Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 405 (1978).

⁴³ See *infra* notes 46–94 and accompanying text.

⁴⁴ See *infra* notes 46–79 and accompanying text.

⁴⁵ See *infra* notes 80–94 and accompanying text.

A. Criminal Enforcement of the Sherman Act

1. The Development of Legal Standards

The Sherman Act is written in expansive terms.⁴⁶ Section 1 of the Act proscribes “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”⁴⁷ Section 2 makes it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize” any part of interstate or foreign commerce.⁴⁸ Unlike most criminal statutes, the Sherman Act does not specifically enumerate the conduct that it proscribes.⁴⁹ Therefore, Congress left it to the courts to determine whether alleged conduct violates the Act.⁵⁰

In 1911, in *Standard Oil Co. of New Jersey v. United States*, the U.S. Supreme Court held that Congress intended to prohibit only those combinations and contracts that *unreasonably* restrain trade.⁵¹ The Court observed that if the Act were given its plain meaning, then it would invalidate almost every commercial agreement.⁵² Accordingly, the Court applies the “rule of reason” to determine on a case-by-case basis whether an agreement is unreasonable.⁵³ Under the rule of reason, a court weighs the procompetitive benefits of the challenged conduct against its anticompetitive effects and condemns conduct when the anticompetitive effects outweigh the procompetitive benefits.⁵⁴

Conversely, when experience with particular types of conduct establishes that such conduct is plainly anticompetitive and lacks any redeeming virtue, the Court will conclusively presume that such conduct

⁴⁶ See 15 U.S.C. §§ 1–2 (2006); see also Bob Nichols & Eric Schmitt, *Antitrust Violations*, 48 AM. CRIM. L. REV. 335, 336 (2011) (noting that the Supreme Court “has compared the ‘generality and adaptability’ of the Act to that of a constitutional provision” (quoting *Appalachian Coals*, 288 U.S. at 359–60)).

⁴⁷ 15 U.S.C. § 1.

⁴⁸ *Id.* § 2.

⁴⁹ See *U.S. Gypsum*, 438 U.S. at 438 (noting that “[b]oth civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed”).

⁵⁰ 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) (“I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.”).

⁵¹ 221 U.S. 1, 60 (1911).

⁵² *Id.*

⁵³ *Texaco v. Dagher*, 547 U.S. 1, 5 (2006); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98, 103 (1984).

⁵⁴ See, e.g., *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000).

is unlawful.⁵⁵ That is, such conduct is deemed illegal without inquiry as to its actual competitive effects.⁵⁶ This categorical approach, as the Court has explained, provides clear and administrable guidance to the business community and promotes judicial efficiency.⁵⁷ Under current practice, criminal prosecution of the antitrust laws is confined to hard-core cartel conduct, including horizontal agreements between competitors to fix prices,⁵⁸ rig bids,⁵⁹ or allocate markets.⁶⁰ Moreover, these agreements are per se illegal because their only rational purpose is to stifle competition by restricting output and raising prices.⁶¹ Thus, practically all criminal prosecutions under the Act involve conduct covered by a per se rule.⁶²

2. The Sherman Act's Goals: Allocative Efficiency, Fairness, and Moral Condemnation

The fundamental purpose of the Sherman Act is to protect the competitive process.⁶³ As the Court has concluded, the Act “reflects a

⁵⁵ See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (observing that certain “types of restraints . . . have such predictable and pernicious anticompetitive effect[s], and such limited potential for procompetitive benefit[s], that they are deemed unlawful *per se*”). Furthermore, the Court will discard per se rules when economic conditions or new economic learning show that per se condemnation is no longer justified. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (eliminating the per se rule against minimum resale price maintenance); *Sylvania*, 433 U.S. at 57–59 (eliminating the per se rule against vertical non-price restraints).

⁵⁶ *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 350–51 (1982).

⁵⁷ *Sylvania*, 433 U.S. at 50 & n.16. Thus, the application of the per se rule avoids the significant costs in business certainty and litigation efficiency of comprehensive rule-of-reason analysis. *Maricopa*, 457 U.S. at 343–44.

⁵⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (holding that “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*”).

⁵⁹ *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, U.S. DEP’T OF JUSTICE 2, <http://www.justice.gov/atr/public/guidelines/211578.pdf> (last visited Feb. 18, 2013) (defining bid rigging as a practice whereby “competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process”).

⁶⁰ *United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) (defining market allocation as the division of markets between competitors based on geography, product lines, or customer groups).

⁶¹ See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

⁶² See *Baker*, *supra* note 42, at 409 (stating that “most criminal antitrust cases involve hard-core price fixing and market allocations in which the defendants have clear notice” that the conduct is subject to criminal prosecution).

⁶³ See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As the Court explained in the 1958 case, *Northern Pacific Railway Co. v. United States*:

legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”⁶⁴ Cartel activity undermines this key legislative goal because competitors agree on the terms of competition, including price and output.⁶⁵ The resulting agreement reduces consumer welfare by undermining the competitive dynamics of the marketplace, thereby distorting the efficient allocation of scarce resources.⁶⁶ Thus, in view of the intended design of the Act as a charter of economic liberty, hard-core cartel conduct is considered the supreme evil of antitrust.⁶⁷

Commentators argue that the Sherman Act was intended to improve allocative efficiency by targeting conduct that reduces output and raises prices.⁶⁸ According to this view, free competition ensures that society’s scarce resources are put to their highest and best use by creating incentives for producers to increase output until marginal cost equals the market clearing price.⁶⁹ Thus, Congress was concerned with increasing total welfare and did not intend to accomplish goals unrelated to economic efficiency, such as the redistribution of wealth.⁷⁰ Redistributive concerns “could only rest upon a tenuous moral ground.”⁷¹ Therefore, the Sherman Act sought to outlaw conduct found harmful to economic efficiency.⁷²

Other commentators, however, contend that Congress sought to correct the unfair accumulation of wealth that threatened to disrupt

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id.

⁶⁴ *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

⁶⁵ See Werden, *supra* note 5, at 22–23.

⁶⁶ See *Andreas*, 216 F.3d at 667.

⁶⁷ See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

⁶⁸ See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 91 (1978) (“The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”); RICHARD A. POSNER, *ANTITRUST LAW* 28 (2d ed. 2001) (“[W]henver monopoly would increase efficiency it should be tolerated, indeed encouraged.”).

⁶⁹ See BORK, *supra* note 68, at 91.

⁷⁰ *Id.* at 111.

⁷¹ *Id.*

⁷² *Id.* at 91.

the free-enterprise system and to fray the social and political fabric of the nation.⁷³ These commentators argue that Congress condemned anticompetitive conduct because it victimizes consumers by transferring wealth to cartels.⁷⁴ Thus, in their view, cartel behavior is aptly labeled “theft by well-dressed thieves.”⁷⁵ Indeed, as these commentators note, Congress condemned cartels in strong moral terms and even likened the so-called robber barons to common fraudsters.⁷⁶

Therefore, although the pursuit of economic efficiency has strongly influenced U.S. antitrust policy, fairness and moral considerations may still have a place in antitrust.⁷⁷ This is particularly true in the criminal context, where white-collar antitrust crimes are routinely condemned as theft and fraud.⁷⁸ Finally, courts have stressed both the consumer welfare and moral considerations underlying the Act.⁷⁹

⁷³ See, e.g., Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 101 (1982) (“The Sherman Act was intended not only to achieve competitive prices but also to restructure the economy in ways insuring a ‘fair’ process for economic, social, and political decisionmaking by reducing the unfairly accumulated power of the trusts.”); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 611 (2012) (“[A]ntitrust officials who warn about social, moral, and political values polluting antitrust analysis are not arguing for sound competition analysis.”).

⁷⁴ See Lande, *supra* note 73, at 95 (stating that “Congress condemned monopolistic overcharges in strong moral terms, rather than because of their efficiency effects” because such effects were not readily observable); Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 495 (noting that “few people in society, if asked about price fixing, would graph in their minds a triangle representing the deadweight welfare loss”).

⁷⁵ Stucke, *supra* note 74, at 502 (quoting Joel I. Klein, Assistant Attorney Gen., U.S. Dep’t of Justice, The Antitrust Division’s International Anti-Cartel Enforcement Program 5 (Apr. 6, 2000), <http://www.justice.gov/atr/public/speeches/4498.pdf>).

⁷⁶ See Lande, *supra* note 73, at 94–96; see also Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 714 (2001) (observing that “[r]obber barons and cartel conspirators are bad people in the American popular lexicon”); Stucke, *supra* note 74, at 495–503 (positing that “[a]ntitrust for most is ultimately grounded in the moral norm of fairness”). Today, the enforcement organization coordinating the investigation of the LIBOR rate-rigging conspiracy denounces white-collar criminals in similar terms. *About the Task Force*, FIN. FRAUD ENFORCEMENT TASK FORCE, <http://www.stopfraud.gov/about.html> (last visited Feb. 10, 2013) (noting that “[f]inancial fraud takes many different shapes, and fraudsters wear many different masks,” but proclaiming that “the American people have something on their side the fraudsters don’t: the force of the largest coalition of federal, state and local partners ever assembled to combat fraud”).

⁷⁷ See, e.g., Robert H. Lande, *Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 640 (1989) (arguing that in antitrust, the “wealth transfer view is at least as administrable as the efficiency view”); cf. Werden, *supra* note 5, at 24 (describing cartel activity as a “major breach of social norms”).

⁷⁸ See, e.g., *VandeBrake I*, 771 F. Supp. 2d at 1003 (stating that “[b]y rigging bids on these public works projects, VandeBrake effectively robbed several local governments of monies that could have been used for the betterment of their communities”); Werden,

B. Statutory Penalties for Sherman Act Violations

To adequately deter and punish cartel behavior, Congress has steadily escalated the maximum fines and prison terms for criminal violations of the Sherman Act.⁸⁰ When the Sherman Act was enacted in 1890, the penalties were light.⁸¹ Moreover, most early criminal cases under the Act were unsuccessful.⁸² Juries failed to convict, and, when they did, courts eschewed jail sentences, opting for nominal fines.⁸³ Thus, light penalties and lenient judicial sentencing practices reflected a consensus that cartel activities were merely aggressive competition rather than crimes of moral turpitude.⁸⁴ Consequently, penalties imposed under the Act were simply internalized as overhead.⁸⁵

It was not until 1974 when it increased the maximum jail term to three years that Congress made Sherman Act violations felonies.⁸⁶ Yet following this amendment, sentencing judges remained reluctant to

supra note 5, at 23 (stating that “[c]artel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm”).

⁷⁹ See *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 553–54 (1944) (noting that the power of monopolies to “fix prices, to restrict production, to crush small traders, and concentrate large power in the few to the detriment of the many, were but some of [the] numerous evils ascribed to them”); *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 715 (7th Cir. 2006) (“The principal purpose of the antitrust laws is to prevent overcharges to consumers.”).

⁸⁰ See Stucke, *supra* note 74, at 460–61. In addition, Congress provided a gap-filler provision for offenses involving large losses, allowing prosecutors to seek fines equal to twice the loss or twice the gain. Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (codified as amended at 18 U.S.C. § 3571 (2006)).

⁸¹ See Sherman Act, ch. 647, §§ 1–2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–2 (2006)) (imposing a misdemeanor punishable by up to a year in prison and a maximum fine of \$5000).

⁸² See Stucke, *supra* note 74, at 461 n.57 (noting that the government “lost (or dismissed) twenty-three of the thirty-six criminal antitrust cases brought between 1890 and 1910”).

⁸³ See *id.* at 461–62.

⁸⁴ See *VandeBrake I*, 771 F. Supp. 2d at 1003 (discussing the history of overly lenient antitrust sentencing practices); John J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1315–18 (1967); see also Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1614 (1997) (concluding that the “moral content of regulatory offenses is far more complex and varied than previously recognized”).

⁸⁵ See Makan Delrahim, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, *The Basics of a Successful Anti-Cartel Enforcement Program 2* (Apr. 20, 2004), <http://www.justice.gov/atr/public/speeches/203626.pdf> (“If the potential punishments are not sufficiently significant, the potential sanctions will likely be internalized merely as a cost of doing business.”).

⁸⁶ Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (codified as amended at 15 U.S.C. §§ 1–3).

impose jail sentences.⁸⁷ In 1990, Congress increased the maximum fines to \$10 million for corporations and \$350,000 for individuals.⁸⁸ More recently, in 2004, Congress dramatically escalated criminal penalties under the Act.⁸⁹ The 2004 amendment provides for maximum jail terms of ten years and fines of up to \$100 million for corporations and \$1 million for individuals.⁹⁰ Thus, each time Congress has revisited the issue it has found that existing penalties suboptimally deter cartel activity.⁹¹

The 2004 amendment was intended to signal that “criminal anti-trust violations are serious white-collar crimes that should be punished in a manner commensurate with other felonies.”⁹² Moreover, enforcers note that Congress’s gradual escalation of Sherman Act criminal penalties reflects both the greater moral opprobrium attached to white-collar crime and a determination that cartel activity is not adequately deterred.⁹³ Yet one sentencing judge recently opined that the penalties currently imposed for antitrust offenses are not proportionate with similar felonies.⁹⁴

⁸⁷ See Baker, *supra* note 76, at 706 (stating that sentencing judges often viewed white-collar defendants as “pillars of the community” and therefore were reluctant to impose prison sentences); see also Stucke, *supra* note 74, at 463–64 (noting that in the late 1970s, a “higher percentage of persons convicted of violating migratory bird laws were sentenced to prison, and for longer terms, than antitrust offenders”).

⁸⁸ Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880 (codified as amended at 15 U.S.C. §§ 1–3).

⁸⁹ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (codified as amended at 15 U.S.C. §§ 1–3).

⁹⁰ *Id.*

⁹¹ See Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 130–31 (1997). Some commentators, however, warn that excessive criminal penalties for hard-core cartel conduct could chill legitimate business activity. See Cohen & Scheffman, *supra* note 15, at 341.

⁹² 150 CONG. REC. 11,281 (2004) (statement of Reps. James Sensenbrenner & John Conyers).

⁹³ See Baker, *supra* note 76, at 713–14; Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 4–5* (Feb. 25, 2010), <http://www.justice.gov/atr/public/speeches/255515.pdf> (noting that penalties imposed for cartel offenses have dramatically increased, in part, because judges recognize the seriousness of cartel conduct). *But cf. VandeBrake I*, 771 F. Supp. 2d at 1001 (observing that, “[g]iven the important purpose served by the Sherman Act, the relatively low maximum sentence . . . and the rather lax sentencing structure under the Sentencing Guidelines for Sherman Act violations is surprising”).

⁹⁴ See *VandeBrake I*, 771 F. Supp. 2d at 1002–03.

II. JUDICIAL TRANSFORMATION OF THE FEDERAL SENTENCING GUIDELINES

This Part provides a brief review of the U.S. Supreme Court's sentencing jurisprudence, which is essential to understanding the ongoing institutional struggle over sentencing policy.⁹⁵ Section A provides a brief history of the Guidelines and discusses the Court's transformational sentencing jurisprudence.⁹⁶ Section B describes the procedure for post-*Booker* application of the advisory Guidelines, including the role of appellate review in cabining judicial discretion.⁹⁷ Finally, Section C describes individual and corporate sentencing under the Antitrust Sentencing Guideline and related provisions.⁹⁸

A. A Brief History of the Federal Sentencing Guidelines

Federal district court judges were traditionally afforded almost unbridled discretion to sentence defendants within the broad statutory ranges provided by Congress.⁹⁹ Under this system of "indeterminate" sentencing, similarly situated defendants would receive dissimilar sentences based on the judge assigned to their case.¹⁰⁰ Moreover, sentencing decisions generally were not subject to appellate review.¹⁰¹ This system undermined respect for the rule of law.¹⁰² Thus, in 1984, Congress passed the SRA, imposing a mandatory sentencing regime that substantially curtailed judges' sentencing discretion.¹⁰³ The SRA sought to reduce unwarranted sentencing disparities between similarly situated defendants by channeling a sentencing judge's discretion within the

⁹⁵ See *infra* notes 99–213 and accompanying text.

⁹⁶ See *infra* notes 99–121 and accompanying text.

⁹⁷ See *infra* notes 122–161 and accompanying text.

⁹⁸ See *infra* notes 162–213 and accompanying text.

⁹⁹ See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”).

¹⁰⁰ See *Pepper v. United States*, 131 S. Ct. 1229, 1257 (2011) (Alito, J., concurring) (“[E]ach federal district judge was free to implement his or her individual sentencing philosophy, and therefore the sentence imposed in a particular case often depended heavily on the spin of the wheel that determined the judge to whom the case was assigned.”); Scott, *supra* note 25, at 8 (“A principal purpose of the [SRA] was to reduce inter-judge disparity in sentencing.”).

¹⁰¹ STITH & CABRANES, *supra* note 11, at 9.

¹⁰² See FRANKEL, *supra* note 99, at 5–6.

¹⁰³ See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

statutory ranges provided for federal crimes.¹⁰⁴ To that end, Congress created the Commission and delegated the authority to promulgate mandatory sentencing guidelines.¹⁰⁵

In 1989, two years after the Guidelines had taken effect, the U.S. Supreme Court upheld the SRA against a constitutional challenge in *Mistretta v. United States*.¹⁰⁶ Following the Court's decision, the mandatory Guidelines regime flourished as sentencing judges complied with the Court's command.¹⁰⁷ Nonetheless, district court judges recognized that the mandatory Guidelines limited their discretion, ignored their institutional expertise, and violated the constitutional rights of defendants.¹⁰⁸

After nearly two decades of experience with mandatory sentencing, the Supreme Court began to address these concerns.¹⁰⁹ In 2000, in *Apprendi v. New Jersey*, the Court invalidated a state statute that permitted sentencing judges to impose sentences beyond the statutory maximum based on facts not proven to the jury beyond a reasonable doubt.¹¹⁰ Similarly, in 2004, in *Blakely v. Washington*, the Court held that

¹⁰⁴ See Breyer, *supra* note 14, at 4–6; Scott, *supra* note 25, at 8 & n.33.

¹⁰⁵ See 28 U.S.C. § 994(g) (2006).

¹⁰⁶ 488 U.S. 361, 412 (1989). The Court upheld the SRA against challenges that it violated the non-delegation doctrine and separation of powers principles. *Id.* First, the Court held that Congress's broad delegation of authority to the Commission, an independent agency in the judicial branch, to promulgate sentencing guidelines for a wide range of offenses was "sufficiently specific and detailed to meet constitutional requirements." *Id.* at 374, 412. Second, the Court held that placement of the Commission within the judicial branch did not threaten to undermine the judiciary's independence, and was consistent with a flexible understanding of separation of powers. *Id.* at 380–412.

¹⁰⁷ See *United States v. Green*, 346 F. Supp. 2d 259, 279 (D. Mass. 2004) (noting that after the Supreme Court established the Guidelines' constitutionality, district court judges faithfully applied them); see also Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 531–36 (2007) (describing how district court judges succumbed to the mandatory sentencing regime and failed adequately to defend their institutional prerogatives and expertise).

¹⁰⁸ See, e.g., *United States v. Kandirakis*, 441 F. Supp. 2d 282, 283 (D. Mass. 2006) (noting that "a generation of federal trial judges ha[d] lost track of certain core values of an independent judiciary because they ha[d] been brought up in a sentencing system that strip[ped] the words 'burden of proof,' 'evidence,' and 'facts' of genuine meaning"); Gertner, *supra* note 107, at 530 (noting that a common theme among judicial criticism of the mandatory Guidelines regime was that "sentencing was a judge's special expertise and that sentencing guidelines represented a risk to judicial independence").

¹⁰⁹ See *Bowman*, *supra* note 30, at 379 (describing the "agonizing doctrinal train wreck the Supreme Court has engineered at the intersection between the structured sentencing movement and the Sixth Amendment jury right").

¹¹⁰ 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

Washington State's mandatory sentencing regime violated a defendant's Sixth Amendment right to have a jury determine beyond a reasonable doubt every fact legally essential to the sentence imposed.¹¹¹ Thus, the stage was set for the Court's invalidation of the Federal Sentencing Guidelines, which likewise required judges to impose sentences based on facts not proven to the jury or admitted by the defendant.¹¹²

In 2005, in *United States v. Booker*, a fractured Court concluded that the SRA violated a defendant's Sixth Amendment right to a jury trial and imposed a remedy that rendered the Guidelines advisory.¹¹³ The Court produced two majority opinions.¹¹⁴ First, Justice John Paul Stevens, writing for a majority on the question whether the Guidelines violated a defendant's constitutional right to a jury trial, extended the Court's holdings in *Apprendi* and *Blakely*.¹¹⁵ Justice Stevens concluded that the fundamental role of the jury had been usurped because the Guidelines required judges to impose sentences based on factual findings—other than prior convictions—not found by the jury or admitted by the defendant.¹¹⁶

Instead of adopting Justice Stevens's preferred remedy of requiring a jury to find every fact legally essential to the punishment,¹¹⁷ a separate remedial majority salvaged the Guidelines by rendering them advisory.¹¹⁸ The remedial majority, led by Justice Stephen Breyer—a member of the original Sentencing Commission¹¹⁹—invalidated the constitutionally defective sections of the SRA that required judges to

¹¹¹ 542 U.S. 296, 303 (2004) (holding that “the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” (emphasis omitted) (internal quotation marks omitted)).

¹¹² See Bowman, *supra* note 30, at 424–25 (noting that the Guidelines required judges to assess “relevant conduct,” including unconvicted crimes and misconduct of co-conspirators); see also Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's “Elements” Jurisprudence*, 117 HARV. L. REV. 1236, 1250–52 (2004) (concluding that the *Apprendi* rule rendered the Guidelines unconstitutional).

¹¹³ 543 U.S. 220, 236–37, 245 (2005).

¹¹⁴ *Id.* at 226, 244.

¹¹⁵ *Id.* at 243–44 (Stevens, J., delivering the opinion in part).

¹¹⁶ *Id.* at 236–37. The Guidelines require judges to impose sentences based on real offense conduct—that is, based on adverse factual information determined by the judge at the sentencing stage merely by a preponderance of the evidence. See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1626–29 (2012); Freed, *supra* note 24, at 1712–15.

¹¹⁷ *Booker*, 543 U.S. at 284–85 (Stevens, J., dissenting in part).

¹¹⁸ *Id.* at 244–46 (Breyer, J., delivering the opinion in part).

¹¹⁹ See STITH & CABRANES, *supra* note 11, at 49–50 (describing Breyer's appointment to the Commission and commitment to sentencing reform); see also Breyer, *supra* note 14, at 1–2 (defending the work of the Commission).

impose Guidelines sentences and courts of appeals to enforce that mandate through de novo review of sentencing decisions.¹²⁰ Then, presumably to cabin judicial discretion, the remedial majority required courts of appeals to review sentencing decisions for “reasonableness.”¹²¹

B. Application of the Advisory Guidelines: Individualized Assessments and Appellate Review for Reasonableness

I. Individualized Assessments

The Court’s post-*Booker* sentencing decisions have returned discretion to sentencing judges.¹²² The precise scope of that discretion, however, is unclear.¹²³ In 2007, in *Gall v. United States*, the Court reiterated its position in *Booker* that the advisory Guidelines are entitled to great respect.¹²⁴ Therefore, to reduce sentencing disparity and to encourage deference to the advisory Guidelines, the Court outlined a three-step process by which a court should determine a defendant’s sentence.¹²⁵

First, the court is required to calculate the proper Guidelines range.¹²⁶ As the Supreme Court has explained, relying on the advisory Guidelines as the “initial benchmark” helps to ensure nationwide consistency in sentencing outcomes and signifies deference to the Com-

¹²⁰ *Booker*, 543 U.S. at 259; see 18 U.S.C. § 3553(b)(1) (2006) (requiring sentencing judges to impose sentences within the Guidelines); *id.* § 3742(e) (requiring de novo appellate review of departures from the Guidelines’ range). As courts and commentators have observed, the remedial majority in *Booker* does not squarely address the constitutional violation. See, e.g., *Booker*, 543 U.S. at 302 (Stevens, J., dissenting in part) (observing that the remedial majority “eliminated the very constitutional right *Apprendi* sought to vindicate”); Barkow, *supra* note 116, at 1626–29 (noting that under the advisory Guidelines regime, judges are still permitted to base sentencing decisions on acquitted conduct). As Judge William G. Young has observed, the remedial majority in *Booker* did not focus the remedy on who was performing the fact-finding (i.e., the judge), but rather sought to render those “facts unnecessary by making the Guidelines effectively advisory.” See *Kandirakis*, 441 F. Supp. 2d at 289–90 (internal quotation marks omitted).

¹²¹ See *Booker*, 543 U.S. at 260–64; Bowman, *supra* note 30, at 440 (“Without appellate authority to reject some sentences as unreasonable correlations between facts and outcomes, the sentencing power of judges would be unconstrained . . . and thus not subject to the rule of law.”); see also David J. D’Addio, *Sentencing After Booker: The Impact of Appellate Review on Defendants’ Rights*, 24 YALE L. & POL’Y REV. 173, 192 (2006) (“[T]o the degree that ‘reasonableness’ cabins discretion, the Sixth Amendment problem resurfaces.”).

¹²² See Bowman, *supra* note 30, at 447–55.

¹²³ See *id.*

¹²⁴ See *Gall v. United States*, 552 U.S. 38, 46 (2007); see also *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (noting that the Guidelines do not exist “merely as a body of casual advice” (internal quotation marks omitted)).

¹²⁵ See *Gall*, 552 U.S. at 49–51.

¹²⁶ *Id.*

mission's expertise.¹²⁷ Second, the court must determine whether a departure is appropriate under the circumstances.¹²⁸ Third, the court is required to consider whether the recommended sentence is "sufficient, but not greater than necessary," to achieve the goals of sentencing listed in 18 U.S.C. § 3553(a) (the "sentencing factors").¹²⁹ If the court concludes that the recommended sentence fails to satisfy this so-called parsimony provision, it may impose an upward or downward variance¹³⁰ based on its analysis of the sentencing factors.¹³¹

Under the advisory Guidelines regime, judges are required to balance the sentencing factors prescribed by Congress in the SRA to "make an individualized assessment based on the facts presented."¹³² Among other things, the sentencing judge must assess the "nature and circumstances of the offense and the history and characteristics of the defendant";¹³³ the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense";¹³⁴ and the need for a sentence "to afford adequate deterrence to criminal conduct."¹³⁵ Furthermore, the judge must consider "any pertinent policy statement" issued by the Commission, the "sentencing range established" for similar offenses, and the "need to avoid unwarranted sentence disparities" among similarly situ-

¹²⁷ See *id.*; see also *id.* at 63 (Alito, J., dissenting) (stating that "[d]istrict courts must not only 'consult' the Guidelines, they must 'take them into account'" (quoting *Booker*, 543 U.S. at 244–45)). In addition, appellate courts may presume that a within-Guidelines sentence is "reasonable." *Rita v. United States*, 551 U.S. 338, 350–51 (2007) (reasoning that a presumption of reasonableness for within-Guidelines sentences "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in [ordinary] cases, it is probable that the sentence is reasonable"); see 28 U.S.C. § 994(g) (2006) (requiring the Commission to develop guidelines "to meet the purposes of sentencing as set forth in section 3553(a) (2) of title 18").

¹²⁸ *Gall*, 552 U.S. at 49–51. Departures are enhancements of, or subtractions from, a Guidelines calculation based on a specific Guidelines departure provision. See *Irizarry v. United States*, 553 U.S. 708, 714–15 (2008).

¹²⁹ 18 U.S.C. § 3553(a) (2006); see *Gall*, 552 U.S. at 49–51; see also *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (describing the parsimony clause of § 3553(a) as an "over-arching provision").

¹³⁰ Variances are discretionary changes to a Guidelines sentence based on a judge's review of the § 3553(a) sentencing factors. See *United States v. Chase*, 560 F.3d 828, 830–31 (8th Cir. 2009).

¹³¹ See *Gall*, 552 U.S. at 50–51; see also *Cavera*, 550 F.3d at 194 (stating that "discretion is like an elevator in that it must run in both directions").

¹³² *Gall*, 552 U.S. at 50.

¹³³ 18 U.S.C. § 3553(a) (1).

¹³⁴ *Id.* § 3553(a) (2) (A).

¹³⁵ *Id.* § 3553(a) (2) (B).

ated defendants.¹³⁶ In practice, however, these factors may frequently conflict.¹³⁷ Consequently, no single factor is dispositive.¹³⁸

2. Reasonableness Review and the Sliding Scale Framework for Appellate Review of Judicial Policy Disagreements

Once the district court imposes its sentence, either the government or the defendant may challenge the sentence for procedural defects or substantive reasonableness.¹³⁹ The remedial majority in *Booker*, however, offered little guidance on the scope of reasonableness review.¹⁴⁰ Then, in 2007, in *Kimbrough v. United States*, the Court held that a sentencing judge could vary from the now-advisory Guidelines based on his or her categorical policy disagreement with the one-hundred-to-one ratio for crack versus powder cocaine.¹⁴¹ The Court reiterated this holding in 2009, in *Spears v. United States*, when it held—again in the context of cocaine sentencing—that a judge may categorically reject the Guidelines on policy grounds in ordinary cases.¹⁴² Courts of appeals have almost uniformly concluded that the holdings of *Kimbrough* and *Spears* apply with equal force outside the cocaine context.¹⁴³

Although the Court has not yet offered binding guidance on the level of deference reviewing courts should afford a sentencing judge's

¹³⁶ *Id.* § 3553(a)(4)–(6).

¹³⁷ *Rita*, 551 U.S. at 350 (noting the “abstract and potentially conflicting nature of § 3553(a)’s general sentencing objectives”).

¹³⁸ *See, e.g., Cavera*, 550 F.3d at 193 (“[W]e do not require ‘robotic incantations’ that the district court has considered each of the § 3553(a) factors.”).

¹³⁹ 18 U.S.C. § 3742 (providing for appellate review of district court sentencing decisions); *accord Chase*, 560 F.3d at 830 (“If the sentence is procedurally sound, we then review its substantive reasonableness under an abuse-of-discretion standard.”).

¹⁴⁰ *See Gall*, 552 U.S. at 66–67 (Alito, J., dissenting) (stating that “*Booker* restored to the district courts at least a measure of the policymaking authority that the [SRA] had taken away,” but that the issue was *how much* authority was actually restored); *see also Kandirakis*, 441 F. Supp. 2d at 286 (noting that “[h]ow logically to implement [*Booker*’s] two majority opinions has been a question with which the lower federal courts have been grappling ever since”).

¹⁴¹ *See* 552 U.S. at 108–10.

¹⁴² *See* 555 U.S. 261, 263–65 (2009) (per curiam).

¹⁴³ *See, e.g., United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc) (“We understand *Kimbrough* and *Spears* to mean that district judges are at liberty to reject *any* Guideline on policy grounds—though they must act reasonably when using that power.”); *United States v. Carr*, 557 F.3d 93, 106 (2d Cir. 2009) (“[T]he sentencing court has discretion to deviate from the Guidelines-recommended range based on the court’s disagreement with the policy judgments evinced in a particular guideline.”); *United States v. Gardellini*, 545 F.3d 1089, 1092 (D.C. Cir. 2008) (“*Kimbrough* . . . held that district courts are free in certain circumstances to sentence outside the Guidelines based on policy disagreements with the Sentencing Commission—and that appeals courts must defer to those district court policy assessments.”).

policy disagreement with a guideline, the justices have offered one potential framework.¹⁴⁴ In *Kimbrough*, the Court suggested that a sentencing judge's policy determination may attract greater scrutiny when the judge varies from the Guidelines "based solely on the judge's view that the [advisory] Guidelines range fails properly to reflect [the goals of sentencing] even in a mine-run case."¹⁴⁵ The Court further noted that although the Guidelines are advisory, they are nonetheless entitled to respect, especially when the Commission is fulfilling its "characteristic institutional role" analyzing "empirical data and national experience."¹⁴⁶ Conversely, the Court reasoned that a policy-based variance would attract the "greatest respect" where the Guidelines fail to account for the facts of the case.¹⁴⁷

Justice Breyer's recent concurrence in the 2011 U.S. Supreme Court case, *Pepper v. United States*, further elaborates on this sliding scale framework.¹⁴⁸ According to Justice Breyer, the reasonableness standard announced in *Booker* demands that appellate courts review sentencing judges' decisions more closely "when they rest upon [a] disagreement with Guidelines policy."¹⁴⁹ Conversely, appellate courts should review sentencing decisions with "greater deference" when they are based on case-specific factors.¹⁵⁰ Thus, rather than grant sentencing judges the

¹⁴⁴ See Bowman, *supra* note 30, at 448–49, 454–55.

¹⁴⁵ 552 U.S. at 109 (internal quotation marks omitted).

¹⁴⁶ *Id.*; see *Cavera*, 550 F.3d at 193 (noting that "varying from the Guidelines in a 'mine-run' case may invite closer appellate review, especially when the Guidelines at issue are a product of traditional empirical and experiential study"); see also *Gall*, 552 U.S. at 62, 68 (Alito, J., dissenting) (stating that sentencing judges may not simply give the "Guidelines a polite nod [and] then proceed essentially as if the [SRA] had never been enacted," and concluding that "[a]ppellate review for abuse of discretion is not an empty formality"). Additionally, the Court in *Kimbrough* noted that the Commission itself disagreed with the differential treatment of crack and powder cocaine offenders. 552 U.S. at 109–10 (declining to apply the sliding scale framework for policy disagreements to the Guidelines' treatment of cocaine offenders, which the Court suggested was neither the product of empirical analysis nor supported by the Commission). In 2012, the U.S. Court of Appeals for the Eighth Circuit held that the Antitrust Guideline is not the product of empirical study. *United States v. VandeBrake (VandeBrake II)*, 679 F.3d 1030, 1037–40 (8th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3470 (U.S. Feb. 25, 2013) (No. 12-488). Rather, the Eighth Circuit concluded that the Commission's policy choices echoed Congress's antitrust policies. *Id.* at 1038. Accordingly, the sentencing judge's policy variance from the Antitrust Guideline did not implicate *Kimbrough*'s "closer review" standard. *Id.* 1038–39.

¹⁴⁷ *Kimbrough*, 552 U.S. at 109.

¹⁴⁸ See 131 S. Ct. at 1253–55 (Breyer, J., concurring).

¹⁴⁹ *Id.* at 1255; see *Gall*, 552 U.S. at 61 (Alito, J., dissenting) (stating that sentencing judges "must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision").

¹⁵⁰ *Pepper*, 131 S. Ct. at 1255 (Breyer, J., concurring).

freedom to “disregard the Guidelines at will,” this approach permits a judge to vary when the facts of a case would make it “reasonable” to do so.¹⁵¹

Thus, according to Justice Breyer, this framework ensures that judges remain faithful to Congress’s primary objective in creating the Commission: promoting consistency and uniformity in sentencing.¹⁵² In addition, it provides sentencing judges with sufficient flexibility to do justice in individual cases.¹⁵³ The framework thereby accounts for the “discrete institutional strengths” of the Commission, appellate courts, and sentencing judges by preserving the Commission’s role in devising nationally uniform sentencing policies while recognizing that sentencing judges usually have a firmer grasp of particular cases.¹⁵⁴

Furthermore, as Justice Breyer argues, *Booker* preserved the Guidelines in their advisory form to remain faithful to Congress’s basic intent to foster uniformity and proportionality in sentencing.¹⁵⁵ Congress delegated to the Commission the authority to develop and refine sentencing practices and policy over time.¹⁵⁶ Accordingly, this framework ensures that the Commission is given the opportunity to collect sentencing judges’ reasons for policy-based variances, to examine appellate court reactions, and to develop statistical and other empirical information to aid in the “iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system.”¹⁵⁷

¹⁵¹ *Id.* at 1252. The Solicitor General, however, has argued that imposing limits on sentencing judges’ discretion to vary from the Guidelines for policy reasons could leave the Guidelines effectively mandatory in some cases. Brief for the United States at 9–11, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020, at *9–11. The Solicitor General reasoned that such a scheme is “fundamentally inconsistent” with the Court’s remedy in *Booker*. *Id.* Commentators have opined that this position invites guideline-by-guideline scrutiny by sentencing judges, and thus may ultimately prompt Congress to impose a new mandatory sentencing scheme. Hardiman & Heppner, *supra* note 32, at 34.

¹⁵² See *Pepper*, 131 S. Ct. at 1253 (Breyer, J., concurring).

¹⁵³ See *id.* at 1253–54.

¹⁵⁴ See *id.* (noting that “trial court[s] typically better understand[] the individual circumstances of particular cases . . . while the Commission has comparatively greater ability to gather information [and] to consider a broader national picture”); see also *Rita*, 551 U.S. at 348 (noting that the sentencing judge and the Commission each attempt to develop sentences that reflect the goals of sentencing, albeit “one, at retail, the other at wholesale”).

¹⁵⁵ *Pepper*, 131 S. Ct. at 1253–54 (Breyer, J., concurring).

¹⁵⁶ See *id.* at 1255.

¹⁵⁷ *Id.*; *Rita*, 551 U.S. at 350 (“The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”); see U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING pt. A, at 112–13

The general unreviewability of sentencing decisions in the pre-Guidelines era raised significant abuse of power concerns, thereby undermining faith in the rule of law.¹⁵⁸ Thus, as one commentator has noted, appellate authority to “reject some sentences as unreasonable correlations between facts and outcomes” is an essential element of the advisory Guidelines regime.¹⁵⁹ Without such authority, courts could return to pre-Guidelines practices and issue sentences anywhere within the broad statutory range for an offense.¹⁶⁰ Therefore, meaningful appellate review for substantive reasonableness may help minimize disruption to the Commission’s sentencing policies while providing an avenue for the Guidelines’ gradual development.¹⁶¹

C. *The Antitrust Sentencing Guideline*

Sentencing under the Antitrust Guideline is complex and has evolved over time in response to shifting social norms and congressional escalation of statutory penalties.¹⁶² The Antitrust Guideline tracks the structure of the other guidelines, providing a base offense level and adjustments based on specific offense conduct.¹⁶³

Base offense levels “measure[] society’s initial disapprobation for the type of activity in question.”¹⁶⁴ The offense level then gradually increases based on specific offense conduct, including the amount of harm caused by the defendant and other factors such as the defendant’s role in the offense.¹⁶⁵ To measure specific offense conduct for both corporate and individual defendants, the Antitrust Guideline uses a proxy for the economic harm inflicted by a cartel: the volume of commerce.¹⁶⁶ The volume of commerce measures the sales of a participant in a con-

(2012) (recommending that Congress require heightened review of sentences based on policy disagreements with the Guidelines).

¹⁵⁸ STITH & CABRANES, *supra* note 11, at 170–72.

¹⁵⁹ Bowman, *supra* note 30, at 440.

¹⁶⁰ *See Pepper*, 131 S. Ct. at 1253 (Breyer, J., concurring).

¹⁶¹ *Id.* at 1255.

¹⁶² *See* U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1 (2012); *infra* notes 170–187 and accompanying text.

¹⁶³ *See* U.S.S.G. § 2R1.1.

¹⁶⁴ *United States v. Napoli*, 179 F.3d 1, 10 (2d Cir. 1999).

¹⁶⁵ *See id.*; *see also* STITH & CABRANES, *supra* note 11, at 55, 68–70 (observing that the Guidelines “are structured to ensure that every unit of additional harm is met with an additional unit of punishment”).

¹⁶⁶ *See* U.S.S.G. § 2R1.1 cmt. background (explaining that the Antitrust Guideline relies on a proxy for economic harm because of the administrative complexity of establishing antitrust damages); *see also Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 263–65 (1946) (describing the counterfactual inquiry required to determine antitrust damages).

spiracy “or his principal in goods or services that were affected by the violation.”¹⁶⁷ The procedure used to determine the final sanction in cartel cases, however, differs for individuals and corporations.¹⁶⁸

This Section begins by describing the evolution of antitrust sentencing policy and then summarizes the current sentencing procedure for corporations and individuals under the Antitrust Guideline.¹⁶⁹

1. The Evolution of Antitrust Sentencing Policy

In 1987, the initial Antitrust Guideline’s principal goal was to deter cartel activity.¹⁷⁰ The Commission, however, concluded that past sentencing practice—used to develop guidelines for most other offenses—was too lenient for white-collar crimes, including antitrust, fraud, and tax offenses.¹⁷¹ Accordingly, the Commission departed from its default empirical method for devising guidelines and mandated stiffer penalties for white-collar criminals, including prison sentences.¹⁷²

The DOJ, through its *ex officio* membership on the Commission, argued that sanctions imposed under the Antitrust Guideline should optimally deter cartel activity.¹⁷³ Optimal penalties seek to reduce the sum of three costs: (1) the costs of the undesirable conduct; (2) the costs of enforcement, including detection; and (3) the costs of inflicting punishment, including the economic inefficiencies caused by underdeterrence or overdeterrence.¹⁷⁴ Therefore, optimal penalties must ensure that businesses refrain from cartel behavior without imposing unnecessary costs.¹⁷⁵

¹⁶⁷ U.S.S.G. § 2R1.1(b). As the commentary to the Antitrust Guideline explains, “[t]ying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun.” *Id.* § 2R1.1 cmt. background.

¹⁶⁸ *See id.* § 2R1.1 cmt. 2–3.

¹⁶⁹ *See infra* notes 170–213 and accompanying text.

¹⁷⁰ *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) (“Deterrence is the goal most pertinent to the antitrust guideline.”).

¹⁷¹ Breyer, *supra* note 14, at 20–21.

¹⁷² *See id.* at 17–18, 20–21. These policy-based departures, however, were not devoid of empirical or experiential support. *See infra* notes 241–244 and accompanying text.

¹⁷³ Cohen & Scheffman, *supra* note 15, at 342–43.

¹⁷⁴ *See* Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 1–2 (1989).

¹⁷⁵ Landes, *supra* note 16, at 656 (concluding that an optimal fine “should equal the net harm to persons other than the offender”); Werden, *supra* note 5, at 28–29 (arguing that cartel sanctions “must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity”).

The optimal penalty for cartel activity equals the social cost of the activity divided by the probability of detection.¹⁷⁶ Based on its analysis of prior cases, the DOJ concluded that the average overcharge imposed by a price-fixing conspiracy is ten percent.¹⁷⁷ It also found that the probability of detection is only one in ten.¹⁷⁸ The DOJ recommended these figures to the Commission, which adopted them as core assumptions underlying the Antitrust Guideline.¹⁷⁹ And, although these estimates have received hearty academic criticism,¹⁸⁰ the Commission has not revisited this issue since 1987.¹⁸¹

The Commission, however, periodically amended the Antitrust Guideline to reflect the gradual escalation of statutory penalties for Sherman Act offenses.¹⁸² For example, in 2004, Congress substantially increased penalties under the Act to signal dissatisfaction with the lenient treatment of antitrust crime relative to other sophisticated frauds.¹⁸³ Shortly thereafter, the Commission eliminated language in the Antitrust Guideline commentary¹⁸⁴ that stated that general deterrence was its controlling consideration.¹⁸⁵ Thus, as penalties for Sherman Act violations grew more punitive, the Commission opened the door to consid-

¹⁷⁶ Landes, *supra* note 16, at 657; *accord* Cohen & Scheffman, *supra* note 15, at 342 (citing Statement of Douglas H. Ginsburg, Assistant Attorney Gen., U.S. Dep't of Justice 8–9 (July 15, 1986)). Therefore, if the total harm inflicted by a cartel is 100 and the probability of detection and successful prosecution is 0.10, then the optimal penalty for the offense is 1000 (100/0.10). See Landes, *supra* note 16, at 657.

¹⁷⁷ Cohen & Scheffman, *supra* note 15, at 342–43.

¹⁷⁸ *Id.* at 347–49.

¹⁷⁹ See Connor & Lande, *supra* note 15, at 524–26.

¹⁸⁰ See, e.g., POSNER, *supra* note 68, at 304; Cohen & Scheffman, *supra* note 15, at 343–49 (questioning the assumptions underlying the Antitrust Guideline); Connor & Lande, *supra* note 15, at 523–32 (arguing that the average cartel overcharge exceeds ten percent).

¹⁸¹ See U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1 cmt. 3 (2012) (stating that the average cartel overcharge is ten percent).

¹⁸² See *supra* notes 80–94 and accompanying text.

¹⁸³ U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines 7 (Apr. 29, 2005), http://www.usc.gov/Legal/Amendments/Official_Text/20050429_Amendments.pdf (“Th[is] amendment responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds”); see *supra* notes 92–94 and accompanying text.

¹⁸⁴ The Guidelines state that the official commentary “is to be treated as the legal equivalent of a policy statement.” U.S.S.G. § 1B1.7. The commentary “may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline,” and therefore, may guide reasonableness review. See *id.*

¹⁸⁵ Compare U.S.S.G. § 2R1.1 cmt. background (2004) (“The controlling consideration underlying this guideline is general deterrence.”), with U.S.S.G. § 2R1.1 cmt. background (2005) (omitting language concerning general deterrence).

eration of other penological goals, including just deserts.¹⁸⁶ Moreover, to the extent the Supreme Court's decision in *Booker*, which rendered the Guidelines advisory, expands a sentencing judge's discretion, sentences for cartel activity may rely on other theories of criminal punishment.¹⁸⁷

2. Treatment of Organizations

The Antitrust Guideline was the first guideline to contain provisions related to sentencing corporate defendants.¹⁸⁸ In its current iteration, the Antitrust Guideline advises a sentencing judge to use twenty percent of the volume of commerce affected by an antitrust violation as the base corporate fine.¹⁸⁹ Once a sentencing judge determines the volume of commerce,¹⁹⁰ she is directed to the Organizational Guideline, which provides detailed instructions for sentencing organizations.¹⁹¹

The Antitrust Guideline works in tandem with the Organizational Guideline to vary the fine imposed according to the firm's culpability.¹⁹² Once the judge determines the volume of commerce and calculates the base fine (twenty percent), she refers to the Organizational

¹⁸⁶ See *supra* notes 182–185 and accompanying text; cf. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 79 (2013) (proposing that “while liability rules should still depend primarily on desert, punishment rules that focus on the utilitarian goals of specific deterrence, rehabilitation, and incapacitation . . . are not only superior at accomplishing crime prevention but can also usually assuage society's urge for retribution”).

¹⁸⁷ See 543 U.S. at 304–05 (Scalia, J., dissenting in part) (noting that the judge's consideration of the statutory goals of sentencing requires that the judge make a choice between the “fundamental criteria governing penology,” thereby “authoriz[ing] the judge to apply his own perceptions of just punishment”); *United States v. VandeBrake* (*VandeBrake I*), 771 F. Supp. 2d 961, 999–1011 (N.D. Iowa 2010), *aff'd*, 679 F.3d 1030 (8th Cir. 2012) (*VandeBrake II*), *cert. denied*, 81 U.S.L.W. 3470 (U.S. Feb. 25, 2013) (No. 12-488); *infra* notes 221–244 and accompanying text.

¹⁸⁸ Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 699 & n.6 (2002).

¹⁸⁹ U.S.S.G. § 2R1.1(d)(1).

¹⁹⁰ *Id.* Although the volume of commerce proxy was intended to simplify the harm calculation in antitrust sentencing, the courts of appeals are divided on the interpretation of the Antitrust Guideline's “affected by” language. See Julia Schiller et al., *Towards Convergence: The Volume of “Affected” Commerce Under the U.S. Sentencing Guidelines and “Impact” Analysis Under the Clayton Act*, 18 GEO. MASON L. REV. 987, 991–94 (2011).

¹⁹¹ See U.S.S.G. ch. 8, introductory cmt. (noting that the assessment of an organization's culpability is based on such factors as the prior history of the organization and the existence of a corporate compliance program). See generally U.S. Sentencing Comm'n, *Chapter Eight Fine Primer: Determining the Appropriate Fine Under the Organizational Guidelines* (Apr. 2011) [hereinafter *Organizational Fine Primer*], http://www.ussc.gov/Legal/Primers/Primer_Organizational_Fines.pdf (describing the process for determining corporate fines).

¹⁹² See U.S.S.G. § 2R1.1(d) cmt. 3.

Guideline to determine a firm's final offense level.¹⁹³ First, the judge calculates a culpability score based on aggravating and mitigating factors.¹⁹⁴ This score, in turn, corresponds to a pair of minimum and maximum "culpability multipliers."¹⁹⁵ The judge then multiplies the base fine amount by the minimum and maximum culpability multipliers to arrive at the fine range.¹⁹⁶ At this point, the judge is directed to impose a fine within the fine range after considering various sentencing factors, including those provided by statute.¹⁹⁷ For antitrust offenses, however, the multipliers may only vary between .75 and 4, thereby producing a total fine between fifteen and eighty percent of the volume of commerce.¹⁹⁸

As the Commission's commentary explains, the Antitrust Guideline considers both the gains to the cartel and the losses suffered by its victims.¹⁹⁹ Thus, once the Commission adopted the DOJ's estimate that the average cartel overcharge (i.e., the gain for the cartel) was ten percent,²⁰⁰ it doubled the figure to account for losses.²⁰¹ Such losses include economic inefficiencies and injury to consumers who are priced out of the market.²⁰² In cases where the actual overcharge appears to vary significantly from this estimate, the Commission recommends that "this factor should be considered in setting the fine *within* the guideline fine range."²⁰³ Accordingly, the base fine of twenty percent of the volume of commerce is intended to provide adequate deterrence to criminal conduct, even though the actual overcharge may differ from case to case.²⁰⁴

¹⁹³ See *id.*

¹⁹⁴ See *id.* § 8C2.5; *Organizational Fine Primer*, *supra* note 191, at 3–5.

¹⁹⁵ See U.S.S.G. § 8C2.6; *Organizational Fine Primer*, *supra* note 191, at 5.

¹⁹⁶ See U.S.S.G. § 8C2.7; *Organizational Fine Primer*, *supra* note 191, at 5.

¹⁹⁷ See U.S.S.G. § 8C2.8; *Organizational Fine Primer*, *supra* note 191, at 5 (describing the court's consideration of the sentencing factors under 18 U.S.C. §§ 3553(a) and 3572(a) (2006)).

¹⁹⁸ See U.S.S.G. §§ 2R1.1(d)(2), 8C2.6 cmt. 1.

¹⁹⁹ *Id.* § 2R1.1 cmt. 3.

²⁰⁰ See *supra* notes 176–181 and accompanying text.

²⁰¹ See U.S.S.G. § 2R1.1 cmt. 3.

²⁰² See *id.* ("The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices."); see also Connor & Lande, *supra* note 15, at 523 ("[T]he Guidelines' commentary implies that the doubling could be due to such factors as the allocative inefficiency harms of market power, the disruptive effects on victims, the lack of prejudgment interest . . . and/or the umbrella effects of market power." (footnote omitted)).

²⁰³ U.S.S.G. § 2R1.1 cmt. 3 (emphasis added).

²⁰⁴ See *supra* notes 170–181 and accompanying text.

3. Treatment of Individuals

For individuals, the Antitrust Guideline applies a base offense level of twelve,²⁰⁵ and provides for adjustments based on the quantity of harm.²⁰⁶ Again, harm is primarily measured by the volume of commerce.²⁰⁷ As with corporate defendants, however, the sentencing judge is also instructed to consider other factors, including the defendant's role in the offense, cooperation with enforcers, and acceptance of responsibility.²⁰⁸

The most significant feature of the Antitrust Guideline's individual sentencing framework is prison sentences.²⁰⁹ As the commentary explains, the Commission believes that prison sentences, which were either extremely short or simply not used in pre-Guidelines practice, are necessary to deter antitrust crime.²¹⁰ Moreover, the Commission continues to recommend that alternatives to imprisonment—so-called public service sentences—not be used.²¹¹

In addition to imprisonment, the Antitrust Guideline recommends fines for individual offenders of between one and five percent of the volume of commerce.²¹² These stiff sanctions represented a dramatic departure from pre-Guidelines practice, and thus were intended to underscore the seriousness of cartel conduct.²¹³

²⁰⁵ U.S.S.G. § 2R1.1. For a first-time offender, an offense level of twelve corresponds to a prison term of between ten and sixteen months. *Id.* ch. 5, pt. A.

²⁰⁶ *See id.* § 2R1.1.

²⁰⁷ *See id.* § 2R1.1 cmt. background; *supra* notes 164–168 and accompanying text.

²⁰⁸ *See id.* § 2R1.1 cmt. 1–2.

²⁰⁹ *See* Belinda A. Barnett, Senior Counsel, U.S. Dep't of Justice, Criminalization of Cartel Conduct: The Changing Landscape 1 (Apr. 3, 2009), <http://www.justice.gov/atr/public/speeches/247824.pdf> (observing that prison sentences are necessary to deter hard-core cartel conduct because “[c]ompanies only commit cartel offenses through individual employees”). *But see* Cohen & Scheffman, *supra* note 15, at 342–43, 352–54 (arguing that jail time is not appropriate for economic crimes and that the Antitrust Guideline's requirement of jail time may chill efficient business conduct).

²¹⁰ *See* U.S.S.G. § 2R1.1 cmt. background (“Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice.”). *See generally* Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917 (1987) (arguing that prison sentences for hard-core cartel conduct are necessary to achieve general deterrence and do not risk chilling potentially procompetitive conduct).

²¹¹ U.S.S.G. § 2R1.1 cmt. 5.

²¹² *Id.* § 2R1.1(c)(1). If the court finds that a defendant is unable to pay a fine, restitution is recommended. *Id.* § 2R1.1 cmt. 2.

²¹³ *See id.* § 2R1.1 cmt. background; *supra* notes 170–172 and accompanying text.

III. JUDICIAL POLICY DISAGREEMENTS WITH THE ANTITRUST SENTENCING GUIDELINE

The framework for appellate review of judicial policy disagreements with the Guidelines discussed in Part II promotes the gradual development of sentencing policy while preserving a role for sentencing judges to dispense moral judgment.²¹⁴ Section A of this Part examines how judicial discretion to vary from the Antitrust Guideline, subject to appellate review for reasonableness, may further the goals of antitrust sentencing.²¹⁵ Section B evaluates the potential for policy disagreement with the Antitrust Guideline's volume of commerce proxy, and then applies Justice Stephen Breyer's proposed sliding scale deference framework to illustrate when such disagreements may properly survive reasonableness review.²¹⁶

A. *The Complementary Roles of Judicial Discretion and Appellate Review in Advancing the Goals of Antitrust Sentencing*

Effective deterrence depends, in part, on the uniformity and predictability of serious and swift punishment.²¹⁷ Yet basic notions of just punishment demand that criminal sanctions are reasonably related to culpability.²¹⁸ Judicial policy disagreements with the Guidelines, including the Antitrust Guideline, are largely a byproduct of sentencing judges' efforts to balance these competing values of criminal punish-

²¹⁴ See STITH & CABRANES, *supra* note 11, at 147 (“[T]he most important capacity that judges bring to criminal sentencing is the ability to pronounce moral judgment that takes into account all aspects of the crime and the offender.”); Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1581 (2012) (“We must call upon our life experiences and the wisdom and judgment that hopefully we have gained as we weigh competing considerations to arrive at a just and fair sentence.”). *But see* FRANKEL, *supra* note 99, at 21 (“[S]weeping penalty statutes allow sentences to be ‘individualized’ not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench.”).

²¹⁵ See *infra* notes 217–259 and accompanying text.

²¹⁶ See *infra* notes 260–346 and accompanying text.

²¹⁷ See Werden, *supra* note 5, at 28–29.

²¹⁸ *Cf.* Breyer, *supra* note 14, at 13 (describing the Commission's struggle to balance the goals of uniformity and proportionality).

ment.²¹⁹ Reasonableness review under the advisory Guidelines regime is still developing, but may help harmonize these sentencing objectives.²²⁰

1. Individualized Assessments in Antitrust Sentencing

The concealed antitrust conspiracies typically targeted for criminal prosecution disrupt competitive markets and harm consumers.²²¹ Although the Antitrust Guideline initially sought to promote general deterrence, the stiff sanctions currently recommended by the Commission also place an emphasis on the moral wrongfulness of cartel conduct.²²² This evolution of antitrust sentencing policy was prompted by both congressional escalation of Sherman Act penalties and shifting social norms.²²³

Additionally, under the advisory Guidelines regime, judges may weigh the goals of sentencing and impose sentences based on the facts of particular cases.²²⁴ Consequently, enhanced judicial discretion may destabilize the uniform antitrust sentencing policies promulgated by the Commission in the Antitrust Guideline.²²⁵ For instance, sentencing judges may vary from the Antitrust Guideline to better calibrate fines and prison terms based on a particular offender's culpability.²²⁶ As a general matter, however, sentencing judges must first calculate and consider the recommended Guidelines sentence and provide reasons for any variance.²²⁷ Judges who decide to vary from the Antitrust

²¹⁹ See STITH & CABRANES, *supra* note 11, at 22 (noting that “even if deterrence of crime is the general aim of a system of criminal prohibitions, ‘just desert’ (or retribution) should be a limit on the distribution of punishment”).

²²⁰ See *Pepper v. United States*, 131 S. Ct. 1229, 1253–55 (2011) (Breyer, J. concurring); *cf.* STITH & CABRANES, *supra* note 11, at 170 (arguing that appellate review of sentencing decisions will create a “federal common law of sentencing”).

²²¹ See *Werden*, *supra* note 5, at 25–26; *supra* notes 46–79 and accompanying text.

²²² See Caron Beaton-Wells, *Capturing the Criminality of Hard Core Cartels: The Australian Proposal*, 31 MELB. U. L. REV. 675, 677–78 (2007); *supra* notes 182–187 and accompanying text.

²²³ See *supra* notes 182–187 and accompanying text; *cf.* Stucke, *supra* note 74, at 487–88 (urging courts and enforcers to rely on society’s “moral intuition” when condemning cartel conduct).

²²⁴ See *supra* notes 122–138 and accompanying text.

²²⁵ See *Priester*, *supra* note 32, at 55–63; *cf.* *United States v. Booker*, 543 U.S. 220, 263–65 (2005) (Breyer, J., delivering the opinion in part) (holding that an advisory Guidelines regime, subject to appellate review for reasonableness, will continue to fulfill Congress’s goals of advancing uniformity, proportionality, and honesty in sentencing).

²²⁶ See *United States v. VandeBrake (VandeBrake I)*, 771 F. Supp. 2d 961, 999–1011 (N.D. Iowa 2010), *aff’d*, 679 F.3d 1030 (8th Cir. 2012) (*VandeBrake II*), *cert. denied*, 81 U.S.L.W. 3470 (U.S. Feb. 25, 2013) (No. 12-488).

²²⁷ See *supra* notes 122–138 and accompanying text.

Guideline ought to consider the seriousness of hard-core cartel conduct, the gradual escalation of Sherman Act penalties, and the deterrence goals of the Commission.²²⁸ In most cases, these factors should weigh heavily against downward variances from the Antitrust Guideline, which seeks to deter conduct that inflicts serious economic harm.²²⁹

Nevertheless, in a particular case, a judge may find that the Antitrust Guideline fails to produce a sentence that is “sufficient, but not greater than necessary” to deter and punish cartel activity.²³⁰ For instance, the Antitrust Guideline’s simplifying assumptions may lead to anomalous results.²³¹ In the context of corporate penalties, the volume of commerce proxy may dramatically understate or overstate the actual cartel overcharge.²³² Similarly, when sentencing an individual to prison, the Antitrust Guideline’s offense level enhancement scheme, which is linked to the volume of commerce, may fail to account adequately for actual offense conduct.²³³ In such cases, the judge may impose a variance because the nature of the offense takes the case outside the “heartland” of cases to which the Antitrust Guideline was intended to apply.²³⁴ Thus, with sufficient flexibility, judges can better account for the actual harm inflicted by individual cartels, and thereby calibrate particular sentences to the offender’s culpability.²³⁵

Additionally, placing greater focus on the moral content of cartel offenses may promote honesty in sentencing by better reflecting the policy goals of courts, enforcers, and the Commission.²³⁶ For instance,

²²⁸ See *supra* notes 63–67, 80–94, 170–187 and accompanying text.

²²⁹ See Stucke, *supra* note 74, at 465–66 (noting that Congress has repeatedly disagreed with commentators who have concluded that Sherman Act penalties are excessive); Werten, *supra* note 5, at 26 (arguing that cartel activity cannot be mistaken for procompetitive activity, and therefore that serious sanctions do not risk overdeterrence).

²³⁰ See *VandeBrake I*, 771 F. Supp. 2d at 999–1011.

²³¹ See *id.* at 1002–03.

²³² ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 301 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; Schiller et al., *supra* note 190, at 994–1002 (reasoning that reliance on the volume of commerce proxy runs afoul of the Court’s command that judges make an individualized assessment of the sentencing factors in each case, and arguing that the twenty percent volume of commerce proxy is likely too harsh for the average antitrust case).

²³³ See *VandeBrake I*, 771 F. Supp. 2d at 1002–03 (finding that the defendant’s participation in three regional price-fixing conspiracies for ready-mix concrete resulted in a more harmful monopoly).

²³⁴ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); see *VandeBrake I*, 771 F. Supp. 2d at 987–89 (discussing the applicability of the Supreme Court’s recent sentencing decisions to judicial policy disagreements with the Antitrust Guideline).

²³⁵ *VandeBrake I*, 771 F. Supp. 2d at 999–1011.

²³⁶ See Stucke, *supra* note 74, at 487–88, 537.

sentencing discretion may permit judges to openly pursue other valid goals of white-collar sentencing, including moral condemnation.²³⁷ Hard-core cartel conduct is subject to the per se rule and prosecuted criminally because all agree that such conduct causes significant disruption to free markets, and thereby harm to consumers.²³⁸ Indeed, cartel conduct not only harms economic efficiency, but also transfers wealth from consumers to price fixers.²³⁹ Thus, judges may punish cartel offenses as violations of moral norms against cheating and stealing.²⁴⁰

Finally, although the Commission departed from its traditional empirical method of assessing past sentencing practice to develop the Antitrust Guideline, the Commission did not lack an empirical basis for its policy choices.²⁴¹ Rather, it relied on a DOJ study of price-fixing cases that found an average cartel overcharge of ten percent.²⁴² Based on this estimate, it developed the volume of commerce proxy for total economic harm used to calculate the base fine for corporate defendants and to calibrate jail sentences for individuals.²⁴³ The Commission, however, should frequently reevaluate its reliance on these simplifying assumptions to better insulate the Antitrust Guideline from judicial policy disagreements.²⁴⁴

2. Appellate Review Promotes Deterrence of Cartel Conduct by Policing the Outer Bounds of Sentencing Discretion

To deter cartel conduct, criminal penalties must be set such that aspiring cartellists can readily determine that the costs of conspiring to fix prices, rig bids, or allocate markets substantially outweigh the bene-

²³⁷ *Id.* at 488 (concluding that “courts . . . should not rely solely upon [optimal deterrence] theory in determining the optimal sanctions to deter antitrust violations, especially when morality, an older and more powerful sanction, is available to supplement the economic penalty”).

²³⁸ See *supra* notes 46–79 and accompanying text.

²³⁹ See Lande, *supra* note 73, at 75–77, 93–96.

²⁴⁰ See *supra* notes 73–76, 182–187 and accompanying text; cf. STITH & CABRANES, *supra* note 11, at 177 (“In a world in which discretion cannot be avoided—because justice must be administered by human beings—we must learn once again to trust the exercise of judgment in the courtroom . . .”).

²⁴¹ See U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1 cmt. background (2012) (“The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well.”).

²⁴² See *supra* notes 176–181 and accompanying text.

²⁴³ See *supra* notes 176–181, 188–213 and accompanying text.

²⁴⁴ See ANTITRUST MODERNIZATION COMM’N, *supra* note 232, at 300–02.

fits.²⁴⁵ Insofar as judicial discretion in sentencing undermines predictability, the deterrent effect of the Antitrust Guideline may be compromised.²⁴⁶ Thus, meaningful appellate review for reasonableness preserves the Guidelines' deterrent effect.²⁴⁷

The discretion returned to sentencing judges post-*Booker* is cabined in several important ways.²⁴⁸ First, a sentencing judge is required to use the recommended Guideline sentencing range as an initial benchmark.²⁴⁹ This tends to have an anchoring effect.²⁵⁰ Indeed, the SRA itself requires judges to consider the recommended Guideline range and to determine whether a variance would cause unwarranted disparity among similarly situated defendants.²⁵¹ Second, the judge must ground departures in an applicable Guideline provision.²⁵² Third, the judge must explain why any variances (i.e., non-Guideline departures) are justified in light of the congressionally prescribed goals of sentencing.²⁵³ And fourth, appellate review for abuse of discretion ensures that sentencing outcomes reasonably correspond to the facts of particular cases.²⁵⁴

The Supreme Court has declined to articulate a clear standard for reasonableness review of judicial policy disagreements with the Guidelines.²⁵⁵ In 2007, in *Kimbrough v. United States*, the Court noted that disagreements based solely on a judge's view that a guideline fails to achieve the goals of sentencing in ordinary cases may attract greater scrutiny.²⁵⁶ The pro-discretion tilt of the Court's most recent sentencing cases, however, casts doubt on whether appellate courts may, in fact, ap-

²⁴⁵ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206 (1985) ("Once the expected punishment cost for the crime has been set, it becomes necessary to choose a combination of probability and severity of punishment that will bring that cost home to the would-be offender.").

²⁴⁶ See Werden, *supra* note 5, at 28–29.

²⁴⁷ See *Gall v. United States*, 552 U.S. 38, 62 (2007) (Alito, J., dissenting) (stating that "sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance").

²⁴⁸ See *supra* notes 122–161 and accompanying text.

²⁴⁹ *Gall*, 552 U.S. at 49–50.

²⁵⁰ Cf. Scott, *supra* note 25, at 45 (concluding that sentencing judges may "assign too much weight to the guideline range, just because it offers some initial numbers").

²⁵¹ See 18 U.S.C. § 3553(a) (4), (6) (2006); *supra* notes 122–138 and accompanying text.

²⁵² See U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 1B.1(b) (2012).

²⁵³ See *Gall*, 552 U.S. at 49–50; *supra* notes 122–138 and accompanying text.

²⁵⁴ See *Booker*, 543 U.S. at 262–64 (Breyer, J., delivering the opinion in part); Bowman, *supra* note 30, at 440.

²⁵⁵ Bowman, *supra* note 30, at 554–55; see *supra* notes 139–157 and accompanying text.

²⁵⁶ *Kimbrough*, 552 U.S. at 109.

ply meaningful scrutiny to maintain a role for the Guidelines.²⁵⁷ The Commission's efforts to deter cartel activity were mostly policy driven.²⁵⁸ Therefore, meaningful appellate scrutiny of judicial policy disagreements is necessary to ensure that sentencing judges give appropriate deference to the Commission's policy choices and that Congress's goals of uniformity and proportionality in sentencing are respected.²⁵⁹

B. *Testing the Sentencing Commission's Antitrust Sentencing Policies*

Pursuant to its statutory authority to depart from past sentencing practice,²⁶⁰ the Commission chose to prescribe substantial increases over average prior sentences for white-collar offenses.²⁶¹ In doing so, the Commission sought to correct perceived inadequacies in white-collar sentencing.²⁶² The Commission, however, departed from its default empirical method for developing these guidelines, namely, analysis of prior sentencing data.²⁶³ Instead, it developed guidelines for anti-trust, fraud, and tax offenses that provided a stronger deterrent to criminal conduct.²⁶⁴ Thus, the Commission's decisions in these areas were driven by policy considerations.²⁶⁵

In 2005, in *United States v. Booker*, the U.S. Supreme Court salvaged Congress's structured sentencing regime by rendering the Guidelines advisory.²⁶⁶ Since *Booker*, however, the Court has stressed that sentencing judges should continue to use the Guidelines as an initial benchmark to promote respect for the Commission's institutional expertise.²⁶⁷ Moreover, the Court has observed that when Guidelines are based on the Commission's experience with particular conduct and review of empirical data, they are likely to produce recommended sentences that are sufficient, but not greater than necessary to achieve the

²⁵⁷ See Bowman, *supra* note 30, at 447–55; see also Pepper, 131 S. Ct. at 1257 (Alito, J., dissenting) (warning that the *Booker* line of cases will eventually be reexamined if it sanctions a return to the system that prevailed prior to the SRA's enactment).

²⁵⁸ See *supra* notes 170–187 and accompanying text.

²⁵⁹ See *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc) (“We do not, however, take the Supreme Court’s comments concerning the scope and nature of ‘closer review’ to be the last word on these questions.”).

²⁶⁰ 28 U.S.C. § 994(m) (2006).

²⁶¹ See *supra* notes 170–172 and accompanying text.

²⁶² See *supra* notes 170–172 and accompanying text.

²⁶³ See *supra* notes 170–172 and accompanying text.

²⁶⁴ See *supra* notes 170–187 and accompanying text.

²⁶⁵ See Breyer, *supra* note 14, at 20–21.

²⁶⁶ 543 U.S. at 245 (Breyer, J., delivering the opinion in part); see *supra* notes 99–121 and accompanying text.

²⁶⁷ See *supra* notes 126–127 and accompanying text.

goals of sentencing.²⁶⁸ Thus, if a court varies from a guideline in an ordinary case exclusively because it disagrees with the Commission's policy choice, its decision should draw more exacting appellate scrutiny.²⁶⁹ This result furthers Congress's intent to insulate the Commission from outside influence.²⁷⁰

1. The Efficacy of the Ten Percent Cartel Overcharge Assumption and the Twenty Percent Volume of Commerce Proxy

Unlike some other white-collar crimes, the Commission decided to streamline the economic harm inquiry in antitrust cases.²⁷¹ It thereby avoided importing the complex disputes over damages common in civil antitrust litigation.²⁷² The Commission established the twenty percent volume of commerce proxy in 1991, yet it has not reevaluated or explained its rationale in over twenty years.²⁷³

Commentators have noted that the Commission primarily relied on a relatively small—and now dated—DOJ study of price-fixing cases

²⁶⁸ See *supra* note 127 and accompanying text.

²⁶⁹ See *supra* notes 139–161 and accompanying text.

²⁷⁰ See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1636–40 (2012) (describing how the SRA insulated the Commission from the political branches). Indeed, despite its exceedingly broad rulemaking authority, the Commission is not subject to appellate review under the Administrative Procedure Act (“APA”). See 28 U.S.C. § 994(x) (2006) (selectively applying the APA’s notice-and-comment rulemaking procedures); S. REP. NO. 98-225, at 181 (1984) (“There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.”). Judicial nullification of Commission policy, however, may serve as the functional equivalent of such review. See Priestler, *supra* note 32, at 56–63 (describing how judges may use their new-found discretion to challenge the policy choices of the Commission); *infra* notes 340–346 and accompanying text.

²⁷¹ Compare U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1(d) (2012) (instructing the sentencing judge to apply the twenty percent volume of commerce proxy to determine a corporation’s fine in antitrust cases), with *id.* § 8C2.4(a)–(b) (instructing the sentencing judge to inquire into the pecuniary gain or loss from the offense caused by an organization in other white-collar cases, including tax and fraud offenses).

²⁷² See *supra* notes 164–168 and accompanying text. But see ANTITRUST MODERNIZATION COMM’N, *supra* note 232, at 301 (recommending that the Commission reevaluate the feasibility of individually tailored harm calculations in light of the “current ability of lawyers and economists to estimate harm” in antitrust cases); Schiller et al., *supra* note 190, at 1010–11 (arguing that criminal defendants should be permitted to dispute the volume of commerce proxy by relying on econometric techniques used to calculate damages in civil antitrust cases).

²⁷³ Cohen & Scheffman, *supra* note 15, at 342; Connor & Lande, *supra* note 15, at 522–23; see ANTITRUST MODERNIZATION COMM’N, *supra* note 232, at 300–01 (recommending that the Commission reassess the twenty percent proxy in light of new empirical data).

to support this “simplifying assumption.”²⁷⁴ Unlike the DOJ, these commentators have estimated that the average cartel overcharge is twenty-five percent, with higher overcharges possible.²⁷⁵ The DOJ’s recent prosecutions of major cartels lend considerable anecdotal support to these findings.²⁷⁶ Accordingly, the Commission’s twenty percent volume of commerce proxy may substantially underdeter cartel activity.²⁷⁷

Alternatively, an older study estimated that the average overcharge in price-fixing cases is, in fact, far below ten percent.²⁷⁸ Moreover, its authors argued that the risk of erroneous prosecution chills legitimate business conduct.²⁷⁹ Yet, the reliability of the Commission’s ten percent overcharge assumption has not been subjected to vigorous judicial scrutiny.²⁸⁰ To compensate for possible variation among individual cases, the Antitrust Guideline instructs sentencing judges to consider evidence that the actual overcharge is substantially lower or higher than ten percent.²⁸¹ Judges, however, are to consider this evidence only to set the fine within the narrow guideline range.²⁸² Therefore, this instruction, taken alone, fails to provide judges with sufficient flexibility to punish cartel offenders in outlier cases.²⁸³

²⁷⁴ Connor & Lande, *supra* note 15, at 525–26 (noting that the “Commission’s simplifying assumption that cartels raise prices by 10%—is supported by a surprisingly small amount of evidence”).

²⁷⁵ *Id.* at 540–41. Indeed, in 2000, the Federal Trade Commission (FTC) settled charges against four pharmaceutical companies that had conspired to fix prices for generic anti-anxiety medications. Press Release, Fed. Trade Comm’n, FTC Reaches Record Financial Settlement to Settle Charges of Price Fixing in Generic Drug Market (Nov. 29, 2000), <http://www.ftc.gov/opa/2000/11/mylanfin.shtm>. The FTC alleged that the defendants had succeeded in raising prices by up to three thousand percent. *Id.*

²⁷⁶ See, e.g., Press Release, U.S. Dep’t of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), http://www.justice.gov/atr/public/press_releases/2012/287189.pdf (LCD price-fixing cartel); Press Release, U.S. Dep’t of Justice, Samsung Agrees to Plead Guilty and to Pay \$300 Million Criminal Fine for Role in Price-Fixing Conspiracy (Oct. 13, 2005), http://www.justice.gov/atr/public/press_releases/2005/212002.pdf (dynamic random access memory price-fixing cartel).

²⁷⁷ See Connor & Lande, *supra* note 15, at 561–62.

²⁷⁸ Cohen & Scheffman, *supra* note 15, at 343–45.

²⁷⁹ *Id.* at 353–54. *But see* Werden, *supra* note 5, at 26 (stating that serious cartel sanctions “do[] not chill any legitimate, procompetitive conduct that could be mistaken for cartel activity; there is no risk of over-deterrence”).

²⁸⁰ See *supra* note 273 and accompanying text.

²⁸¹ U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1 cmt. 3 (2012).

²⁸² See 28 U.S.C. § 994(b)(2) (2006); U.S.S.G. § 2R1.1 cmt. 3.

²⁸³ See U.S.S.G. § 2R1.1 cmt. 3; *supra* notes 221–235 and accompanying text. Of course, a sentencing judge is no longer strictly confined by this instruction. See *Booker*, 543 U.S. at 244–46 (Breyer, J., delivering the opinion in part).

Furthermore, in 2007, the Antitrust Modernization Commission (“AMC”) recommended that the Sentencing Commission “reevaluate and explain its rationale” for the ten percent cartel overcharge assumption, which underlies the twenty percent volume of commerce proxy.²⁸⁴ The DOJ opposed this recommendation, reasoning that fines under the Antitrust Guideline are intended to promote general deterrence, not to calculate harm with the precision demanded in civil treble damages actions.²⁸⁵ To date, the Commission has not acted.²⁸⁶

Additionally, the AMC recommended that the Commission reconsider whether reliance on a proxy is consistent with the principle that punishment should be calculated based on actual harm (i.e., real offense conduct) in individual cases.²⁸⁷ Although the AMC found that the Commission adopted the volume of commerce proxy to simplify the complex harm calculation process, it noted that advances in economic learning may negate the Commission’s administrability concerns.²⁸⁸ The AMC further opined that use of a simplifying proxy was in tension with *Booker’s* constitutional holding that facts not proven to the jury or admitted by the defendant may not be used to increase a defendant’s sentence.²⁸⁹ Ultimately, the AMC proposed that the Commission consider allowing defendants or the government to rebut the ten percent overcharge assumption underlying the volume of commerce proxy.²⁹⁰

The AMC’s concerns are now amply supported by the Supreme Court’s post-*Booker* sentencing jurisprudence.²⁹¹ This Note now considers what level of deference a sentencing judge’s decision to vary from the volume of commerce proxy should receive when reviewed by appellate courts for substantive reasonableness.²⁹²

²⁸⁴ ANTITRUST MODERNIZATION COMM’N, *supra* note 232, at 301 (“The Sentencing Commission should determine whether the existing proxy is empirically sound and accurately reflects the best estimate of typical harm in antitrust cases.”).

²⁸⁵ Scott D. Hammond, Assistant Attorney Gen., U.S. Dep’t of Justice, Statement Before the Antitrust Modernization Commission 7 (Nov. 3, 2005), <http://www.justice.gov/atr/public/testimony/247499.pdf> (stating that “it is difficult and time consuming to establish gain or loss in antitrust cases and . . . general deterrence does not require an exact correlation between harm and punishment”).

²⁸⁶ *See* U.S.S.G. § 2R1.1(d)(1).

²⁸⁷ ANTITRUST MODERNIZATION COMM’N, *supra* note 232, at 301.

²⁸⁸ *See id.*

²⁸⁹ *See id.* at 302.

²⁹⁰ *See id.*

²⁹¹ *See supra* notes 122–138 and accompanying text.

²⁹² *See infra* notes 293–346 and accompanying text.

2. Applying the Sliding Scale Deference Framework to Variances Based on Cartel Overcharge Anomalies

Suppose, for example, that Company A and Company B are leading pharmaceutical companies that produce two competing medications used to treat migraine headaches.²⁹³ Patients depend on the medications offered by A and B to treat their chronic and debilitating headaches, and thus demand is highly inelastic.²⁹⁴ A and B conspire to fix the price of their drugs to increase revenues, an agreement that lasts for two years before it is uncovered by a DOJ investigation.²⁹⁵ Prior to sentencing, an expert economic analysis reveals that the conspiracy imposed an overcharge of twenty-five percent.²⁹⁶

When the conspiracy is uncovered, A and B have each earned sales of \$10 million.²⁹⁷ The Antitrust Guideline recommends base fines equal to twenty percent of the volume of commerce.²⁹⁸ Thus, A and B are each assessed base fines of \$2 million.²⁹⁹ Further assume that the Organizational Guideline prescribes the same culpability score for each firm, yielding identical minimum and maximum culpability multipliers.³⁰⁰ The judge will then assess the various sentencing factors to set the fine within the applicable range.³⁰¹ Depending on the assignment of a culpability score and the judge's assessment of the sentencing factors, the total fine for each firm could range between \$1.5 million and \$8 million (i.e., between fifteen and eighty percent of the volume of commerce).³⁰²

Further assume, however, that the sentencing judge determines by a preponderance of the evidence that, in fact, the firms imposed an

²⁹³ Cf. Press Release, Fed. Trade Comm'n, *supra* note 275 (announcing the settlement of the FTC's investigation of price-fixing between generic drug makers).

²⁹⁴ See EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 188 (2d ed. 2011) (noting that demand is inelastic when buyers are less willing to switch to other products in response to an increase in price).

²⁹⁵ Cf. Press Release, Fed. Trade Comm'n, *supra* note 275.

²⁹⁶ See *supra* notes 287–290 and accompanying text (summarizing the AMC's proposal that the Commission consider permitting individualized inquiry into the economic harm inflicted by cartels). The DOJ's Antitrust Division employs a significant number of expert economists capable of analyzing the economic effects of individual cartels. *Economic Analysis Group*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/about/eag.html> (last visited Feb. 23, 2013).

²⁹⁷ See U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2R1.1(d)(1) (2012).

²⁹⁸ *Id.*

²⁹⁹ See *id.*

³⁰⁰ See *id.* § 2R1.1(d)(2); *supra* notes 192–198 and accompanying text.

³⁰¹ See U.S.S.G. § 2R1.1 cmt. 3; *supra* notes 192–198 and accompanying text.

³⁰² See U.S.S.G. § 2R1.1(d)(2) cmt. background; *supra* notes 192–198 and accompanying text.

overcharge of twenty-five percent.³⁰³ The Antitrust Guideline instructs that where “the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine *within* the guideline fine range.”³⁰⁴ Yet, the sentencing judge finds that the facts of this case justify a variance from the Antitrust Guideline.³⁰⁵ Both firms knew that their customers depended on the drugs for the treatment of a chronic condition and that their customers could not switch to substitutes (i.e., that demand was highly inelastic).³⁰⁶ Thus, the judge considers the Antitrust Guideline’s twenty percent volume of commerce proxy as well as the overcharge departure guidance, calculates the recommended fine, and determines that an upward variance is required to ensure that the sentence is sufficient, but not greater than necessary to promote general deterrence and punish the offenders.³⁰⁷

The judge imposes a base fine equal to fifty percent of the volume of commerce, doubling the actual cartel overcharge to account for the losses inflicted by the conspiracy.³⁰⁸ Thus, each firm is assessed a base fine of \$5 million.³⁰⁹ The judge then calculates the fine range using the culpability multipliers.³¹⁰ Accordingly, the total fine for each firm could range between \$3.75 million and \$20 million (i.e., between 37.5% and 200% of the volume of commerce).³¹¹

The judge finds that the high overcharge in this case justified her disagreement with the Antitrust Guideline’s recommendation to remain within the fine range.³¹² Furthermore, she determines that a harsh punishment for the cartel participants is justified because their

³⁰³ Connor & Lande, *supra* note 15, at 540–41; *see supra* notes 274–277 and accompanying text.

³⁰⁴ U.S.S.G. § 2R1.1 cmt. 3 (emphasis added).

³⁰⁵ *See supra* notes 122–138 and accompanying text.

³⁰⁶ *See supra* notes 293–296 and accompanying text.

³⁰⁷ *See Kimbrough*, 552 U.S. at 111 (holding that the sentencing judge “appropriately framed [his] final determination in line with § 3553(a)’s overarching instruction to ‘impose a sentence sufficient, but not greater than necessary,’ to accomplish the sentencing goals advanced in § 3553(a)(2)”).

³⁰⁸ *See* U.S.S.G. § 2R1.1 cmt. 3 (reasoning that the estimated cartel overcharge, which measures the gain to the cartel, should be doubled to account for losses inflicted on victims and society).

³⁰⁹ *See id.* § 2R1.1(d)(1).

³¹⁰ *See id.* § 2R1.1(d)(2); *supra* notes 192–198 and accompanying text.

³¹¹ *See* U.S.S.G. § 2R1.1(d)(2) cmt. background; *supra* notes 192–198 and accompanying text.

³¹² *See* U.S.S.G. § 2R1.1 cmt. 3.

product was used to treat a serious medical condition.³¹³ Finally, the judge concludes that this fine will send a clear message to other companies that would consider fixing prices in settings where high overcharges are possible, thus promoting general deterrence.³¹⁴ Accordingly, the judge concludes that this fine is sufficient, but not greater than necessary to achieve the goals of sentencing.³¹⁵

Under the framework for reviewing judicial policy disagreements described by the Supreme Court in *Kimbrough*, and elaborated by Justice Breyer in his concurrence in *United States v. Pepper*, the sentencing judge's variance in the above example would likely survive reasonableness review.³¹⁶ An appellate court could conclude that case-specific factors, including strong evidence of the twenty-five percent overcharge and the price-fixing of a product necessary to treat a chronic medical condition, supported the sentencing judge's variance in this case.³¹⁷ Moreover, the Commission could then consider the sentencing judge's variance, along with variances made by other judges, to make gradual adjustments to the twenty percent volume of commerce proxy.³¹⁸

Another example may help clarify the point.³¹⁹ Assume a judge is assigned to a case involving three corporate defendants who plead guilty to fixing prices for a critical input used in the manufacture of ion-selective electrodes.³²⁰ Further assume that the judge simply concludes that the Commission's twenty percent volume of commerce proxy is wrong,³²¹ and credits studies indicating that the average cartel overcharge is less than ten percent.³²² Thus, the judge determines that a harm proxy of five percent is more appropriate.³²³ Despite the government's objection that a downward variance from the twenty percent volume of commerce proxy may encourage other would-be price fixers,

³¹³ Cf. *VandeBrake I*, 771 F. Supp. 2d at 999–1011 (imposing an upward variance on an individual antitrust defendant based, in part, on the factual circumstances of his case).

³¹⁴ See *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994).

³¹⁵ 18 U.S.C. § 3553(a) (2006).

³¹⁶ See *supra* notes 139–161 and accompanying text.

³¹⁷ See *supra* notes 139–161 and accompanying text.

³¹⁸ See *Pepper*, 131 S. Ct. at 1255 (Breyer, J., concurring); *supra* notes 144–157 and accompanying text.

³¹⁹ See *infra* notes 320–327 and accompanying text.

³²⁰ Cf. *Pepper*, 131 S. Ct. at 1257 (Alito, J., dissenting) (warning of the horizontal inequities that result when the selection of a judge impacts sentencing outcomes).

³²¹ See *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008) (observing that a sentencing judge “should think long and hard before substituting his personal penal philosophy for that of the Commission”).

³²² See Cohen & Scheffman, *supra* note 15, at 343–45.

³²³ See *id.*

the judge doubles the overcharge, sets the base fine equal to ten percent of the volume of commerce, and applies the Organization Guideline to calculate the final fine amount.³²⁴

The government appeals, arguing that the sentencing judge improperly relied on his own policy judgment regarding average cartel overcharges and failed adequately to justify the variance based on the facts of the case.³²⁵ The government notes that the judge's categorical rejection of the volume of commerce proxy undermines the Commission's role in setting nationally uniform antitrust sentencing policy.³²⁶ Accordingly, the government asserts that the categorical rejection of the Commission's proxy in this case is substantively unreasonable.³²⁷

In 2009, the U.S. Supreme Court's decision in *Spears v. United States* presented an opportunity for the Court to consider facts somewhat similar to the above example—albeit in the context of cocaine sentencing.³²⁸ Unfortunately, the Court's terse analysis did not fully resolve the dispute over the appropriate standard of review for judicial policy disagreements.³²⁹ As Chief Justice John Roberts observed in his *Spears* dissent, there is a legitimate dispute regarding whether individualized case-by-case assessments are necessary to determine whether a variance from a Guideline sentence is reasonable.³³⁰ Under Justice Breyer's proposed framework, "closer review" is required in this case because the judge has disregarded the Commission's policy choice in an ordinary antitrust case without supporting the variance by case-specific analysis.³³¹ Accordingly, the appellate court could reject the judge's sentence as substantively unreasonable because the judge has effectively usurped the role of the Commission and devised her own sentencing policy when the facts of the case do not support a variance.³³²

³²⁴ See *supra* notes 192–204 and accompanying text.

³²⁵ See *Kimbrough*, 552 U.S. at 109.

³²⁶ See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring).

³²⁷ See *Kimbrough*, 552 U.S. at 109.

³²⁸ 555 U.S. 261, 267 (2009) (per curiam) (stating that *Kimbrough* held "that district courts are entitled to vary from the crack-cocaine guidelines in a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range").

³²⁹ See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring).

³³⁰ *Spears*, 555 U.S. at 269–70 (Roberts, C.J., dissenting).

³³¹ *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring); see *supra* notes 139–161 and accompanying text.

³³² See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring); see also *Kimbrough*, 552 U.S. at 116 (Alito, J., dissenting) (noting that although the *Booker* remedy does not permit appellate courts to treat the Commission's policy choices as binding, sentencing judges must give those policy choices "significant weight").

The benefits of this approach to reviewing judicial policy disagreements with the Antitrust Guideline are manifold.³³³ First, permitting sentencing judges to vary the volume of commerce proxy when the facts of the case support a variance ensures that sanctions are proportional to the actual harm inflicted.³³⁴ Second, requiring sentencing judges to ground policy-based variances in the facts of the case will facilitate informed appellate review.³³⁵ This ensures that the appeals process holds sentencing judges accountable, and thereby promotes respect for the rule of law.³³⁶ Third, allowing the Commission to collect and analyze sentencing judges' reasons for variances from the volume of commerce proxy respects the institutional role and expertise of the Commission.³³⁷ It permits the Commission to consider whether, based on national experience, an adjustment to the volume of commerce proxy is needed, or indeed whether use of a proxy is appropriate.³³⁸ Therefore, this framework for appellate review fulfills Congress's objective of creating uniform and effective sentencing policies through the Commission.³³⁹

It is unclear what degree of deference an appellate court owes a sentencing judge who categorically rejects the Commission's policy choice as not adequately supported by empirical evidence.³⁴⁰ This Section merely applied one suggested framework whereby a sentencing judge's decision to vary from a guideline based solely on policy grounds is subjected to greater scrutiny.³⁴¹ This standard gives judges the flexibility to do justice in particular cases while respecting the Commission's central role in devising national sentencing policies.³⁴²

The Supreme Court's decisions in *Kimbrough* and *Spears* do not necessarily command this limited result.³⁴³ Rather, these cases may sup-

³³³ See *infra* notes 334–339 and accompanying text.

³³⁴ See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring).

³³⁵ See *id.*; see also *Cavera*, 550 F.3d at 191 (noting that the reasonableness standard “ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions”).

³³⁶ Cf. STITH & CABRANES, *supra* note 11, at 170 (arguing for reliance on appellate review as the most appropriate mechanism to constrain judges' discretion).

³³⁷ See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring); see also *supra* notes 155–157 and accompanying text (describing how appellate review of judicial policy disagreements will inform Commission policy making).

³³⁸ See *Pepper*, 131 S. Ct. at 1253–55 (Breyer, J., concurring).

³³⁹ See *id.*

³⁴⁰ See *supra* notes 139–147 and accompanying text.

³⁴¹ See *supra* notes 293–339 and accompanying text.

³⁴² See *supra* notes 333–339 and accompanying text.

³⁴³ See *Bowman*, *supra* note 30, at 454–55.

port the far broader proposition that a sentencing judge is permitted to subject the Commission's policy choices to a more searching Administrative Procedure Act ("APA") style "arbitrary and capricious" review.³⁴⁴ This alternative interpretation would subject the Commission's policy choices to the type of judicial scrutiny that Congress sought to avoid by exempting the Commission from judicial review under the APA.³⁴⁵ Thus, it would significantly alter the distribution of power struck by Congress.³⁴⁶

CONCLUSION

The Supreme Court's remedy in *United States v. Booker* left many questions unanswered. Although the Court's recent sentencing decisions evince a clear trend toward enhanced judicial discretion in sentencing, it remains unclear whether and to what extent a sentencing judge may vary from a particular guideline for policy reasons. This issue is of critical importance to the integrity of the Guidelines. As this Note explains, the integrity of the Antitrust Guideline depends on the predictability of stiff sanctions. The history of lax white-collar sentencing demonstrates that unchecked policy-based variances from the Guidelines could easily justify lenient sentences, thereby reducing the deterrent effect of the DOJ's criminal antitrust enforcement program.

As with many other guidelines, the Commission chose to calibrate the punishment for antitrust offenses according to the quantum of harm inflicted by a conspiracy. Unfortunately, its reliance on a small DOJ study of cartel overcharges conducted in the early 1980s in developing the crucial volume of commerce proxy may render the Antitrust Guideline susceptible to policy-based variances. The role of reasonableness review, however, in ensuring a correlation between facts and outcomes may blunt the impact of judicial scrutiny of the Antitrust Guideline. Finally, judicial flexibility in antitrust sentencing may permit judges to express moral condemnation in appropriate cases.

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³⁴⁴ Gertner, *supra* note 30, at 4.

³⁴⁵ See *supra* note 270 and accompanying text (describing how Congress sought to insulate the Commission from political influence by selectively applying the APA's provisions).

³⁴⁶ See *supra* note 270 and accompanying text.