

Opinion of BREYER, J.

SUPREME COURT OF THE UNITED STATES

No. 09–6822

JASON PEPPER, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[March 2, 2011]

JUSTICE BREYER, concurring in part and concurring in the judgment.

I join Part III of the Court’s opinion as to the second question presented. As to the first question presented, I agree with the Court’s conclusion. And I agree with its opinion to the extent that it is consistent with this concurrence.

Like the majority, I believe *Booker* requires us to hold 18 U. S. C. §3742(g)(2) unconstitutional. See *ante*, at 15–21; *United States v. Booker*, 543 U. S. 220 (2005); see also *Apprendi v. New Jersey*, 530 U. S. 466 (2000). And, like the majority, I believe that the law does not require a sentencing court to follow a Guideline policy statement that forbids taking account of postsentencing rehabilitation. United States Sentencing Commission, Guidelines Manual §5K2.19 (Nov. 2010) (USSG). I would emphasize, however, that this conclusion does not leave a sentencing court free to disregard the Guidelines at will. To the contrary, the law permits the court to disregard the Guidelines only where it is “reasonable” for a court to do so. *Booker, supra*, at 261–262; *Gall v. United States*, 552 U. S. 38, 51–52 (2007); *Kimbrough v. United States*, 552 U. S. 85, 109 (2007). And an appellate court must be guided by the basic sentencing objectives of the statutes that create the Guidelines in determining whether, in disregarding the Guidelines, the sentencing court has acted unreasonably.

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I

The Guideline in question consists of a policy statement that sets forth an exception to normal Guideline rules. Normally, the Guidelines authorize a sentencing judge to consider a departure from an ordinary Guidelines sentence in any case “where conduct significantly differs from the norm” to which “a particular guideline linguistically applies.” USSG ch. 1, pt. A1, §4(b) (discussing the Guidelines’ general approach to departures). The policy statement at issue is one of a handful of Guideline rules that nonetheless forbid departure. It says that a defendant’s “[p]ost-sentencing rehabilitative efforts, even if exceptional, . . . are not an appropriate basis for a downward departure when resentencing.” USSG §5K2.19. The policy statement thereby adds “Post-Sentencing Rehabilitative Efforts” to such factors as race, sex, national origin, creed, religion, and socioeconomic status, which the Guidelines absolutely prohibit the sentencing judge from taking into account. USSG ch. 1, pt. A1, §4(b).

II

Can a sentencing court, despite this policy statement, take account of postsentencing rehabilitation in the particular circumstances that this case presents? I cannot find the answer to this question in the language of the sentencing statutes, in sentencing traditions, in the pre-Guidelines case of *Williams v. New York*, 337 U. S. 241 (1949), or in this Court’s use of the word “advisory.” As the majority points out, a sentencing statute forbids any “‘limitation’” on the “‘information concerning the background, character, and conduct’” that “‘a court . . . may . . . consider.’” *Ante*, at 10 (quoting 18 U. S. C. §3661 (emphasis deleted)). But this provision must refer to all *relevant* information. See USSG §1B1.4 and comment. (generally incorporating §3661, but noting that there are certain factors that should not be considered for any purpose). *If*

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the Guideline policy statement’s absolute prohibition on consideration of postsentencing rehabilitation were legally binding, then information on that score (like information about race, religion, sex, or national origin) would fall outside the scope of this provision, for it would not be *relevant*. Thus, reference to the statute begs the question.

Nor can I find much help in the majority’s reference to a sentencing “tradition” that considers “every convicted person as an individual.” *Ante*, at 9 (quoting *Koon v. United States*, 518 U. S. 81, 113 (1996)). That is because individualized sentencing is not the only relevant tradition. A just legal system seeks not only to treat different cases differently but also to treat like cases alike. Fairness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences. Indeed, when Congress enacted the sentencing statutes before us, it focused upon the unfair way in which federal sentencing failed to treat similar offenders similarly. And Congress wrote statutes designed primarily (though not exclusively) to bring about greater uniformity in sentencing. See, e.g., *Booker*, *supra*, at 253–254. The statutes do so in large part through the creation of a system of Guidelines written by a Sentencing Commission, which Congress intended the courts to follow. See *Mistretta v. United States*, 488 U. S. 361 (1989) (Sentencing Commission constitutional); *Rita v. United States*, 551 U. S. 338, 348–349 (2007); 18 U. S. C. §3553(a) (identifying relevant factors in sentencing, including uniformity).

The *Williams* case is similarly unhelpful. That is because Congress in the Sentencing Reform Act of 1984—the law before us—disavowed the individualized approach to sentencing that that case followed. *Williams* emphasized the importance of a sentencing court’s legal power to tailor punishment ability to fit the circumstances of each individual offender. 337 U. S., at 247 (emphasizing “modern concepts individualizing punishment”). But Congress,

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concerned that individualized sentencing had gone too far, wrote a new sentencing law designed to help correct “disparities” among similar defendants sentenced by different judges. See S. Rep. No. 98–225, p. 45 (1983) (“Sentencing disparities” are “unfair both to offenders and to the public”); *id.*, at 38 (disparities “can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence”).

Booker’s description of the Guidelines as “advisory” offers somewhat greater assistance—but only if that word is read in light of the Sixth Amendment analysis that precedes it. This Court has held that the Sixth Amendment forbids Congress (through the Commission) to create Guidelines that both (1) require judges (without juries) to find sentencing facts and also (2) tie those facts to the mandatory imposition of particular sentences. 543 U. S., at 226, 244; see also *Apprendi*, 530 U. S., at 490 (Sixth Amendment requires jury findings in respect to factual matters that require judge to increase sentence); *Blakely v. Washington*, 542 U. S. 296, 303–304 (2004) (same in respect to a State’s mandatory guidelines). In light of this Sixth Amendment prohibition, the Court, believing that Congress would not have intended to introduce new juries into each sentencing proceeding, excised the few particular provisions of the sentencing statutes that specified that application of the Guidelines was mandatory. *Booker*, 543 U. S., at 259. The Court believed that the relevant statutes remained workable without those few provisions, that their excision could further Congress’ basic sentencing intentions, and that excision was more likely to do so than invalidation of the entire statutory scheme. With an occasional exception (such as the statutory provision we strike down today), there is no reason to think that the sentencing statutes as limited in *Booker* run afoul of the Sixth Amendment. *Ibid.*

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Booker made clear that the remaining statutory provisions, while leading us to call the Guidelines “advisory” (rather than “mandatory”), do not give a sentencing judge *carte blanche* to apply, or not to apply, the Guidelines as that judge chooses. Rather, the “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” *Id.*, at 264. Moreover, *Booker* held that appellate court review of sentencing is valid. *Booker* explained that the “statutory language, the structure of the [Sentencing Reform Act], and the sound administration of justice,” taken together, require appellate courts to apply “reasonableness standard[s]” of review. *Id.*, at 260–261, 262 (internal quotation marks omitted). Reasonableness standards, we added, are “not foreign to sentencing law.” *Id.*, at 262. And the “Act has long required their use in important sentencing circumstances—both on review of departures . . . and on review of sentences imposed where there was no applicable Guideline.” *Ibid.* See also *id.*, at 261 (appellate courts will apply “a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness]’”); *id.*, at 264 (“[C]ourts of appeals” will “review sentencing decisions for unreasonableness”).

We have also indicated that, in applying reasonableness standards, the appellate courts should take account of sentencing policy as embodied in the statutes and Guidelines, as well as of the comparative expertise of trial and appellate courts. Thus, in *Kimbrough*, we observed that in light of the “discrete institutional strengths” of the Sentencing Commission and sentencing judges, “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case ‘outside the “heartland” to which the Commission intends individual Guidelines to apply.’” 552 U. S., at 109 (quoting *Rita*, *supra*, at 351). We noted, however, that “while the Guidelines are no longer binding,

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closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect §3553(a) considerations' even in a mine-run case." 552 U. S., at 109.

III

Unlike the majority, I would decide the question *Kimbrough* left open. And I would follow its suggested framework for evaluating "reasonableness." As *Kimbrough* suggests, doing so takes proper account of the comparative institutional abilities of trial courts, appellate courts, and the Sentencing Commission. The trial court typically better understands the individual circumstances of particular cases before it, while the Commission has comparatively greater ability to gather information, to consider a broader national picture, to compare sentences attaching to different offenses, and ultimately to write more coherent overall standards that reflect nationally uniform, not simply local, sentencing policies.

Applying *Kimbrough's* suggested framework, I would reason very much as does the majority. The first question is whether a sentencing judge might *sometimes* take account of a (resentenced) offender's postsentencing rehabilitation—despite a Guideline policy statement that says *never*. I would find that it is reasonable for the judge to disregard the Guidelines' absolute prohibition, despite the Commission's comparatively greater policy-formation abilities. That is because the Guideline policy statement itself runs counter to ordinary Guideline sentencing policy, which rarely forbids departures and then for very strong policy reasons. *Supra*, at 2. See USSG ch. 1, pt. A1, §4(b).

The Commission offers no convincing justification for creating this exception with respect to postsentencing rehabilitation. The Commission's commentary says that for a judge at resentencing to lower a sentence for this

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reason (reflecting good behavior while the case is on appeal) would conflict with the use of other mechanisms, such as “good-time” credits, for that purpose. But how is that so? A defendant, after sentencing but while his case is on appeal, may or may not be entitled to “good time.” That may depend upon whether he remains on bail or upon particular “good-time” rules. Regardless, the resentencing judge can take account of any such matter. See also *ante*, at 26–28.

The Commission’s commentary also suggests it would be *inequitable* to allow an offender who is being resentenced to receive any kind of credit for his good behavior, say while his case was on appeal. But why is that so? After all, the Guidelines permit a judge to take account of an offender’s good behavior after arrest but before initial sentencing. That time period could last longer than the time taken up on appeal. Why should pretrial behavior count but appeal time behavior not count? Like the majority, I find this justification for the policy statement unconvincing. See *ante*, at 25–26.

The second question is whether, given the sentencing court’s power to disregard the policy statement forbidding departures based on postsentencing rehabilitation, the facts and circumstances here could warrant a departure (or variance) for that reason. And the answer, in my view, is yes. This case presents unusual rehabilitative circumstances. As the majority observes: “By the time of his second resentencing in 2009, Pepper had been drug-free for nearly five years, had attended college and achieved high grades, was a top employee at his job slated for a promotion, had reestablished a relationship with his father, and was married and supporting his wife’s daughter.” *Ante*, at 14. These are case-specific facts and circumstances, and they are of the kind that should lead appellate courts to show their “greatest respect” for a sentencing decision, including a departure or variance,

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that rests upon them.

IV

In sum, the sentencing statutes, as we have interpreted them, require courts of appeals to review sentences for reasonableness, including sentences that depart or vary from a specific Guideline. The appellate courts should review those decisions more closely when they rest upon disagreement with Guidelines policy. *Kimbrough*, 552 U. S., at 109. They should review those decisions with greater deference when they rest upon case-specific circumstances that place the case outside a specific Guideline’s “heartland.” See *ibid.*; *Rita*, 551 U. S., at 351; *Koon*, 518 U. S., at 98–99.

By interpreting the sentencing statutes in this way, we can remain faithful to Congress’ basic intent in writing them—despite the need to invalidate statutory provisions that conflict with the Sixth Amendment. The statutes create a Sentencing Commission with authority to develop sentencing policy embodied in the Guidelines. The Guidelines are to further the statutes’ basic objective, namely greater sentencing uniformity, while also taking account of special individual circumstances, primarily by permitting the sentencing court to depart in nontypical cases. By collecting trial courts’ reasons for departure (or variance), by examining appellate court reactions, by developing statistical and other empirical information, by considering the views of expert penologists and others, the Commission can revise the Guidelines accordingly. See USSG ch. 1, pt. A1, §3. Trial courts, appellate courts, and the Commission all have a role to play in what is meant to be an iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system. See *id.*, at 1–15. I would interpret the statutes before us accordingly.