The Problem of Post-*Cunningham* Judicial Review: The Impact of *Gall*, *Kimbrough* and Senate Bill 40 on California Sentencing

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INTRODUCTION

In *Cunningham v. California*,[1] the United States Supreme Court found it unconstitutional that California courts used facts not found by a jury to elevate sentences from a mid-point within a statutory range. Holding that the mid-point of the state's determinate sentencing laws ("DSL") was the *de facto* maximum that a jury could find, the Court blocked judges from elevating sentences beyond this jury-found level of punishment. California was quick to engineer a response. A week after the *Cunningham* ruling, California State Senator Gloria Romero proposed Senate Bill 40, which gives judges the authority to sentence within the original, full statutory ranges of the DSL without having to find specific facts to justify their reasoning. While some commentators opine that the bill reverts California back to the days of indeterminate sentencing,[2] this may be an exaggeration—it still requires judges to sentence defendants according to a defined range. However, they need only give a "reason" supported by the facts of the case for their decision, rather than the unconstitutional fact-finding outlawed in *Cunningham*.

Does this tweak of legal verbiage really solve the *Cunningham* problem? After Senate Bill 40, sentencing authority rests within the "sound discretion of the court" to sentence offenders to a low, middle, or upper term under the DSL. However, the courts have yet to define what that sound discretion actually

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1. 127 S. Ct. 856, 860 (2007). For a more in-depth discussion of *Cunningham*, see Section I, *infra*.

2. Nicole Eiland, *Sentence Stucture*, L.A. LAWYER, 31, 36 (July-Aug. 2007), *available at* http://www.lacba.org/showpage.cfm?pageid=8048.

means. Two recent federal cases, *Gall v. United States*[3] and *Kimbrough v. United States*,[4] provide some guidance on how to implement a post-Senate Bill 40 form of judicial review. This article contends that "sound discretion" has an appropriate place in California sentencing—provided it is subject to meaningful appellate review and that review takes into account a variety of factors, including policy directives handed down by the state legislature.

In order to adequately protect defendants and the public at large from the inconsistent application of the widened ranges of sentences,[5] appellate review must be able to (1) reverse for procedural error, such as misapplying legal factors; (2) reverse for errors of logic, i.e. errors that a reasonable person would not have made; and (3) most contentiously, appellate judges should be able to reverse lower courts' sentences if they are based on reasoning that is in conflict with legislative intent. The United States Supreme Court has accepted the first and second reasons.[6] The third has been implicitly endorsed by federal courts,[7] and California has a unique opportunity to implement this basis of review. A more vigilant court of appeal should now watch the more flexible DSL.

Section I offers a brief history of judicial federal sentencing guidelines reform. Over the past several years, beginning with *Apprendi v. New Jersey*[8] and culminating in two cases decided December 10, 2007, *United States v. Gall,*[9] and *Kimbrough v. United States*,[10] the Supreme Court has cast a flare into the pitch-black confusion that was federal sentencing law post-*Booker*.[11] In particular, the cases challenge both the flexibility of guideline ranges and the discretion of judges to ignore those ranges if they disagree with the intent of the United States Sentencing Guidelines. California can take advantage of the clarification of federal sentencing in order to put forward a possible short-term solution to California sentencing, as well as several suggestions for long-term changes in the state. Section II discusses the reasons that Senate Bill 40 is

3. 128 S. Ct. 586 (2007).

4. 128 S. Ct. 558 (2007).

5. As Justice Alito notes in dissent, the disparities in sentences are largely inevitable if judges have greater discretion in interpreting aggravating and mitigating factors. Gall v. United States, 128 S. Ct. 586, 608 (2007) (Alito, J., dissenting). Disparities could result from differences in opinion as extreme as determining whether a factor should mitigate or aggravate a given offense. Justice Alito uses the factor of being well-established in the community as an example. *Id.* Generally, this factor would seem to mitigate a defendant's level of culpability. However, some would argue that having respect in the community should *increase* a given sentence, as those people have a greater level of public trust.

6. *Id.* at 597.

7. *See id.* The majority utilizes as one factor to determine reasonableness "any relevant policy statement issued by the Sentencing Commission[.]" As Congress has the ability to reject Commission statements, the Court has *implicitly* stated that the Legislature has policy enforcing power over the USSG. *See also id.* at 603 (Alito, J., dissenting) for a more in depth argument for enhanced consideration of congressional policy decisions.

8. 530 U.S. 466 (2000).

9. 128 S. Ct. 586 (2007).

10. 128 S. Ct. 558 (2007).

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

problematic—and thus why the DSL continues to have problems without further guidance from the California Supreme Court. Finally, Section III will present proposals, both short and long-term, for California. Section IV offers several possible critiques of these proposals.

At the outset, there are two caveats to this note. First, it does not address any pre-Senate Bill 40 problems with California sentencing.[12] The contentions proposed here would impact only cases that have yet to be decided in a trial by jury or via plea agreement, or were tried after Senate Bill 40 was enacted. Second, because Senate Bill 40 has a sunset provision, it will expire in 2009. The sunset provision is another reason to implement reforms like those proposed by this note. With the discretion that Senate Bill 40 provides expiring in only a few years, California must move quickly to create a new, fluid, and effective sentencing scheme compatible with the Supreme Court's view of the Sixth Amendment.

I. A REVIEW OF CHANGES IN FEDERAL SENTENCING RULES

In order to understand *Cunningham* and its relationship with Senate Bill 40, it may be helpful to look to the federal version of the *Cunningham* problem. The Federal Sentencing Guidelines (USSG) differ in several respects from the California Determinate Sentencing Law (DSL). In contrast to California's three-tiered sentencing system, the USSG create a range inside of which the judge may impose any sentence. In California, prosecutors add "enhancements" to charges, raising the Determinate Sentencing Level. This means the judge, especially prior to the enactment of Senate Bill 40, had little flexibility in modifying the sentence.

The federal discretionary system was radically altered when *United States v. Booker*[13] excised the portion of the USSG that made the Guidelines mandatory. The resulting confusion—for example to what *extent* a judge may depart from the guidelines without being reversed—generated a swath of literature and conflicting caselaw,[14] which required further clarification from the Supreme Court. The following chain of cases, beginning with *Apprendi* and the recent *Gall* and *Kimbrough* decisions, have done much to define constitutional sentencing discretion as it exists today.

12. For a look at several pre-Senate Bill 40 issues after *Cunningham*, see *People v. Black*, 161 P.3d 1130 (Cal. 2007), and *People v. Sandoval*, 161 P.3d 1146 (Cal. 2007).

13. 543 U.S. at 245.

14. Because so many questions were left unanswered by the Justices, circuit courts have had to attempt to find explanations themselves—leading to a four-way circuit split on just the issue of how to deal with defendants sentenced before *Booker*. "The Tenth Circuit alone rendered two *en banc* decisions and some 226 panel decisions (as of [2006]). . . . Nationwide, this retrospective question produced a four-way circuit split and literally thousands of panel decisions." Michael W. McConnell, *The Booker Mess*, 83 DENV. U.L. REV. 665 (2006).

Apprendi, Booker, and Blakely

Until 2000, judges could constitutionally increase sentences when they found, by a preponderance of the evidence, facts which warranted a more severe sentence than that recommended by the USSG. In federal court this is known as a departure. The *Apprendi* and *Blakely* decisions drastically altered that interpretation of the constitutionality of such judicial fact-finding.

In *Apprendi*,[15] the Supreme Court held that a jury must decide any fact that elevates the sentence of a defendant beyond the statutory maximum.[16] To do otherwise meant that the court was finding facts in lieu of the jury, depriving the defendant of his or her Sixth Amendment rights. *Blakely*[17] further defined "statutory maximum," holding that the maximum sentence in a given case is that which the judge could impose by finding no additional facts beyond those the jury had found beyond a reasonable doubt, or those which the defendant had admitted as true.[18]

Because the Court held that judges cannot elevate a sentence without facts found by a jury, departures from the USSG that had been fairly well-accepted before *Apprendi* and *Blakely* now conflicted with the modern interpretation of the Sixth Amendment. In *United States v. Booker*[19] the Court attempted to remedy this inconsistency.

Booker had been found guilty of possession with intent to distribute at least fifty grams of crack cocaine.[20] Based on Booker's criminal history and the amount of drugs alleged in the indictment, the USSG required the judge to impose a sentence within the range of 210 to 262 months.[21] However, the judge found by a preponderance of the evidence that Booker actually possessed 566 grams of crack and sentenced him to 360 months. The Seventh Circuit reversed, citing *Blakely*.[22]

The Supreme Court affirmed the reversal of the Seventh Circuit, and remanded the case for resentencing.[23] The Court, while deciding that it was unconstitutional to depart from the mandatory guidelines due to a fact that had not been decided by a jury, also excised the part of the Guidelines that forced judges stay within those Guidelines. The Court held that the USSG are advisory, effectively granting judges even more discretion than what they had had before judicial fact-finding was curtailed in *Apprendi*.[24] While this

15. Apprendi v. New Jersey, 530 U.S. 466 (2000).
16. *Id.* at 492-93.
17. Blakely v. Washington, 542 U.S. 296 (2004).
18. *Id.* at 303. This is the common result of plea agreements, which generally outline the specific facts to which the defendant admits when accepting responsibility.
19. 543 U.S. at 226.
20. *Id.* at 227.
21. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (2003).
22. United States v. Booker, 375 F.3d 508 (7th Cir. 2004).
23. United States v. Booker, 543 U.S. 220 (2005).
24. *Id.*

outcome is logical when considering *Apprendi* and *Blakely*, the procedural remedy threw the federal sentencing rules into chaos. In the words of Justice Scalia "[t]he majority's remedial choice is . . . wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."[25]

Several problems arose post-*Booker*. First, it was unclear what kind of justification, if any, was required to depart from the now advisory USSG. A number of judges in the federal courts began to opine that the Guidelines were still effectively mandatory in that judges would not depart from them while the Guidelines were still presumptively reasonable.[26] Apprehension about deviating from the Guidelines led to the problem of judges remaining in the guidelines range in order to avoid reversal. The Court addressed this in its 2007 term with *Gall v. United States.*[27] Second, if the Guidelines were truly only advisory, might then a judge completely *ignore* them in imposing a sentence? In *Kimbrough v. United States* a judge did just that—rejecting the Guidelines justification for a 100-to-1 disparity in powder and crack cocaine sentences. The Court decided these cases simultaneously.[28]

Kimbrough v. United States

Derrick Kimbrough, in federal court:

> [P]led guilty to four offenses: conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than fifty grams of crack cocaine; possession with intent to distribute powder cocaine; possession with intent to distribute over fifty grams of powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense.[29]

His plea created a minimum aggregate sentence of fifteen years to life under the guidelines. According to the federal statute that criminalizes crack cocaine, a drug dealer selling crack is subject to the same punishment that someone would receive for dealing 100 times that amount in powder cocaine.[30]

While after *Booker* it was entirely within the judge's discretion to deviate from the guidelines, the judge chose to do so because he felt the sentence was "greater than necessary" to accomplish the purposes of sentencing and that the 100 to 1 ratio was simply inappropriate to deal with crack offenses.[31] The trial court found that the statutory minimum sentence—five years below the recommended guidelines range—was "clearly long enough" to accomplish

25. *Id.* at 304 (Scalia, J., dissenting).
26. *See* McConnell, *supra* note 14, at 681.
27. Gall v. United States, 128 S. Ct. 586, 591 (2007).
28. Both were decided December 10, 2007.
29. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).
30. 21 U.S.C. § 841.
31. *See Kimbrough*, 128 S. Ct. at 559.

Section 3553(a) objectives.[32]

The Fourth Circuit reversed. In an unpublished *per curiam* opinion, the Court of Appeals cited Circuit precedent that a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."[33]

The Supreme Court granted certiorari and reversed. Holding that a judge is allowed to depart from the advisory guidelines with reference to the crack cocaine disparity,[34] the Court rejected the Government's argument that the Anti-Drug Abuse Act of 1986 prohibits sentencing courts from disagreeing with the 100-to-1 ratio.[35] Rather, the Court distanced the crack disparity from congressional intent:

> [N]othing in Congress' 1995 reaction to the commission-proposed 1-to-1 ratio suggested that crack sentences must exceed powder sentences by a ratio of 100-to-1. To the contrary, Congress' 1995 action required the Commission to recommend a "revision of the drug quantity ratio of crack cocaine to powder cocaine."[36]

Kimbrough shows that judges may depart from the Guidelines if they feel that the facts of the case do not warrant the sentence recommendation of the USSG *even if they use reasons that the USSG expressly rejects*. The only limitation appears to be that if Congress expressly supports a policy, judges may not disagree.[37]

Gall v. United States

The court decided *Gall* the same day that it handed down the *Kimbrough* decision. In February of 2000, Brian Gall had joined an ongoing conspiracy that involved the selling of "ecstasy."[38] Gall was a student at the University of Iowa at the time, and was a user of several types of hard drugs.[39] Over the course of several months Gall netted over $30,000 in profits, and then voluntarily withdrew from the venture.[40] Apparently, he had not sold or used drugs since. He had held down several steady jobs and was fully cooperative

32. *Id.* at 565.

33. United States v. Kimbrough, No. 05-4554, 2006 U.S. App. LEXIS 11524, at *2 (4th Cir. May 9, 2006) (citing United States v. Eura, 440 F.3d 625, 633-34 (4th Cir. 2006)).

34. *Kimbrough*, 128 S. Ct. at 574.

35. *Id.* at 571.

36. *Id.* at 572 (citing Disapproval of Amendment to Sentencing Guidelines, Pub. L. 104-38, § 2(a)(1)(A), 109 Stat. 334, 335 (1995)).

37. *Id.* The Court declines to find congressional intent by implicit rejections of compromise ratios. Yet the Court notes that if Congress had not ordered the Commission to modify the 100-1 ratio, it would have been unable to "read[] intent into congressional inaction." *Id.* at 573.

38. *Gall*, 128 S. Ct. at 591. Ecstasy's scientific name is "methylenedioxymetham phetamine."

39. *Id.*

40. *Id.*

with government authorities investigating the ecstasy ring.[41]

The USSG recommended a sentencing range of thirty to thirty-seven months of imprisonment.[42] However, citing numerous influences that showed Gall's "self-rehabilitation" and successful life inside the law, the trial judge sentenced Gall to thirty-six months of probation.[43]

The Supreme Court granted certiorari in order to clarify the standard of review for sentences below the guidelines range. The Court held that because district courts have a much greater ability to interpret accurately the facts of a case, they should receive a certain level of discretion.[44] However, the Court also pointed out that the further a sentence deviates from the Guidelines' recommendation, the stronger the level of review required.[45]

Gall clarified the intent of the Court in the line of cases from *Booker* to *Gall* and *Kimbrough*. The Guidelines are much more flexible than they were only a few years prior, but a level of review has been imposed that in part still directs judges to deviate from the guidelines only when either (1) the Guidelines are defective in some way;[46] or (2) factors not effectively addressed by the Guidelines convince the judge to impose a different sentence from that recommended by the USSG. The only real difference is that instead of finding facts, the judges must have justifications. Has the federal system returned to a pre-*Apprendi* status?

As hinted above, only parts of the federal sentencing changes can help guide California. Obviously, holdings indicating that increasingly significant departures require more significant explanations are of little probative value for our purposes. However, the overall purpose of increased judicial discretion at the trial court level followed by a meaningful—if somewhat lax—appellate review remains. Now, we can take the best features of the federal system and attempt to modify the California sentencing scheme post-Senate Bill 40. But even post *Cunningham*, certain attributes that the federal system does not require—such as a more thorough appellate review for conformity with legislative intent—are more important in California as a result of the state's more rigid sentencing structure.

II. A STATE OF EMERGENCY: *CUNNINGHAM*, SENATE BILL 40 AND CALIFORNIA SENTENCING LAW

The California sentencing scheme is different from the federal system in

41. *Id.*
42. *Id.* at 592.
43. *Id.*
44. *Gall*, 128 S. Ct. at 596-97.
45. *Id.*
46. *See generally Kimbrough*, 128 S. Ct. 558 (2007). Also, see generally the crack sentencing disparity argument. *See, e.g.*, Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, THE BOSTON GLOBE, July 5, 2006, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

that it is not a guidelines system. Rather, each offense has specific upper, middle, and lower terms.[47] Courts then have the option of imposing statutory enhancements beyond these terms for particular circumstances.[48] Until recently, the middle range was mandatory unless the judge found aggravating or mitigating factors by a preponderance of the evidence.[49] On balance, these factors would allow the judge to either elevate the sentence to the upper term, or to reduce the sentence to the lower term.[50]

Over the last several years there have been substantial changes in California sentencing law. The following is a timeline of events, beginning with *Cunningham*, which will frame further discussion of reform. *Black*[51] has been included to demonstrate California's court activity on the subject, though it impacts only pre-Senate Bill 40 convictions.

Cunningham v. California

John Cunningham was convicted of continuous sexual abuse of a child under the age of fourteen in 2003.[52] According to California's then-mandatory DSL, this meant Cunningham was eligible for one of three terms: a lower term of six years, a middle term of twelve years, or an upper term of sixteen years.[53] Unless the judge found "circumstances in aggravation," he was obliged to sentence a defendant to the middle term.[54] The judge found six such aggravating factors for Cunningham.[55] There was one factor in mitigation: a lack of previous criminal convictions.[56]

The judge concluded that the aggravating factors outweighed any mitigation and sentenced Cunningham to the upper term of sixteen years.[57] The Court of Appeal affirmed, though one prescient dissent argued the trial court had imposed an upper range sentence in violation of the Sixth Amendment as interpreted by *Apprendi*.[58] The California Supreme Court denied review, but the United States Supreme Court granted certiorari.

On January 22, 2007, the Supreme Court reversed the court of appeal, holding that California's DSL violated the Sixth Amendment right to trial by

47. *See* CAL. PENAL CODE § 1170(a)(3) (West 2004).

48. *See, e.g.*, CAL. PENAL CODE § 288.5(a) (West 1999) (delineating six, twelve or sixteen years' imprisonment for ongoing sexual abuse of a child under the age of fourteen).

49. CAL. PENAL CODE § 1170(b) (West 2004).

50. CAL. R. CT. 4.420(b) (West 2004).

51. State v. Black, 41 Cal. App. 4th 799 (2007) ("Black II").

52. *Cunningham*, 127 S. Ct. at 860.

53. *Id.*

54. *Id.*

55. *Id.* These factors included the vulnerability of the victim, and Cunningham's violent conduct, which indicated a greater danger to society.

56. *Id.*

57. *Cunningham*, 127 S. Ct. at 860.

58. 530 U.S. 466 (2000).

jury as foretold by the dissenting appellate justice.[59] When judges find facts in "aggravation" of an offense, and thus sentence someone to a higher term, they are taking away a power granted to the jury.[60] Judges are not allowed to impose a sentence greater than that which the jury has authorized. By elevating the sentence above the middle term, the Court held, the judge is engaging in unconstitutional fact-finding.[61] To find facts in this way only required a preponderance of the evidence, and not a reasonable doubt standard.[62] Quickly, the state courts had to deal with convictions that were the result of now-unconstitutional judicial fact-finding. *Black* attempted to resolve some of these disputes.

State v. Black ("Black II")[63]

Black addresses the question of which defendants appealing their sentences received an improper upper-range sentence. In *Black*, the defendant was charged with one count of continuous sexual abuse of a child, and two counts of lewd and lascivious conduct with a child.[64] Black was sentenced to an upper term.[65] This was affirmed by the California Supreme Court[66] and was subsequently reversed by the United States Supreme Court in light of *Cunningham*.[67] The Supreme Court remanded the case to California in order to establish the presence or absence of improper judicial factfinding.[68] On remand, the case was known as *Black II*.[69]

In *Black II*, the defendant argued that he was sentenced to an upper term because of judicial fact-finding in violation of the holding of the line of cases beginning with *Apprendi* and ending with *Cunningham*.[70] The California Supreme Court rejected this argument, holding that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established [beyond a reasonable doubt] . . . any additional factfinding engaged in by the trial court . . . does not violate the defendant's right to jury trial."[71] In this case, one of the charges stated "defendant committed the offense by use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury."[72] As a result, Black was eligible for

59. *Cunningham*, 127 S. Ct. at 871.
60. *Id.* at 868.
61. *Id.*
62. *Id.*
63. 41 Cal. 4th 799 (2007).
64. *Id.* at 806.
65. *Id.*
66. People v. Black, 35 Cal. 4th 1238 (2005).
67. Black v. California, 127 S. Ct. 1210 (2007).
68. *Id.*
69. *Id.* at 809.
70. *Black*, 41 Cal. 4th. at 812-13.
71. *Id.* at 812.
72. *Id.* at 806 (internal quotation marks omitted).

the upper term even if the judge did not explicitly use that fact in sentencing.

In sum, as it stands a defendant can be charged with an aggravating circumstance and, if found guilty on that count, is eligible for the upper term. However, this patch fix does not show how appellate review will function now that Senate Bill 40 has been passed.[73]

Senate Bill 40

California had two main options when faced with *Cunningham*. First, the State could further "determine" sentences by requiring that the middle term be used absent jury-found aggravating facts. The other alternative was to relax the determinative nature of the California sentencing scheme. The State chose the latter: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court."[74] California made the three-tier system discretionary, rather than requiring any specific findings of fact by the judge. Senate Bill 40 is the California version of the remedy introduced by the *Booker* Court.

> The amendment [of § 1170(b) by Senate Bill 40] made three changes: (1) eliminated the mandatory midterm and gave the trial court discretion to select an appropriate term, (2) requires trial courts to select the term that "best serves the interests of justice" and (3) requires trial courts to support their sentencing selections with *reasons*, not *facts*.[75]

In essence, Senate Bill 40 has made the three possible terms of California's Determinate Sentencing Law entirely discretionary. Aside from the verbal irony of this result, Senate Bill 40 created problems for the courts of appeal. As it stands, appellate review for sentencing post-Senate Bill 40 is unclear. An appropriate standard of review for sentences in this now-discretionary range is abuse of that discretion. This is also the standard of review recently imposed by the Supreme Court for federal sentencing in *Kimbrough* and *Gall*.[76] However, *what* is to be considered abuse? There are several options: (1) procedural error only; (2) a lack of logical reasoning; or (3) both of these combined with abuse when a judge rejects policy of either the legislature or higher courts.

A simple hypothetical serves to highlight the inherent problem of review for cases post-Senate Bill 40. A seventeen year-old is convicted of having intercourse with another minor, an offense that has a low, middle, and high sentencing range of a $500 fine, six months of probation, and six months of imprisonment, respectively. The trial court, stating in the sentencing decision that the middle range is "ridiculous," sentences the minor to the upper term,

73. Senate Bill 40 modified CAL. PEN. CODE § 1170.
74. CAL PEN. CODE § 1170.
75. People v. Evans, No. E039680, 2007 WL 2800188 *5 (Cal. App. 4 Dist., 2007).
76. *See Gall*, 128 S. Ct. 586 (2007); *Kimbrough*, 128 S. Ct. 558 (2007).

with no other reasoning on the record.

The Court of Appeal could interpret the post Senate Bill 40 DSL as purely discretionary and affirm. If it does this then a deviation *up* for no reason other than the judge thinking the middle term is ridiculous is *unreviewable*. This creates two significant due process concerns. First, for our court system to function, it is imperative that the discretion of district court or superior court judges be reviewed for error. If a defendant has no way to challenge the sentence imposed, then that defendant is being denied the layers of protection that the courts of appeal and Supreme Court represent. Second, it would reduce sentence parity. California enacted a DSL and the Guidelines were created in order to reduce perceived discrepancies in sentences, both because of geography and because of differing views by judges. If there is no system of effective appellate review then sentences are bound to vary to a more significant degree.

In the alternative, the reviewing court could reverse on the basis of lack of justification for the upper-term sentence. If the court of appeal did this, then it would be in the same position as before *Cunningham*: the three-tier system would again not be truly discretionary, and constitutional concerns would return. While *Gall* and *Kimbrough* offer advice on when it may or may not be appropriate to depart from the federal Guidelines, the federal system still requires at the very least "lip-service" to the Guidelines even when departing from them.[77] In contrast, the language of Senate Bill 40 says nothing about a time when the judge could *not* choose to utilize either the upper or lower term. As it stands, there is essentially no way for the reviewing court to reverse unless a judge breaks procedure, as it is currently impossible to "abuse" a judge's discretion. Thus, if the court reverses a judge because of an unreasonable sentence, then the court is imposing the middle term as the *Blakely* maximum again—eliminating the possibility of an upper term.

Finally, the court of appeal could reverse because explicit policy concerns of the California legislature are directly opposed to a reduction in the sentence. The Legislative History and Commentaries provide great insight into the intentions of the legislature when it crafted various sentencing laws. For a move to the upper or lower term to be reasonable, it should have to conform with (or at the very least not directly oppose) those intentions. Suppose the policy of the California legislature was to treat teen abstinence as a goal, but not one worthy of significant state punishment except in extraordinary situations. The legislative history of the offense charged might indicate that an upper term is only appropriate in "appalling" circumstances. "Appalling" would not be a fact for a judge to determine; rather it would be a judgment call requiring no additional facts other than those that the jury found to be true. If courts of appeal are permitted to reverse because of such policy considerations,

77. *See Gall*, 128 S. Ct. at 604 (Alito, J., dissenting).

then the danger of disparate sentencing practices among judges would be significantly reduced. The fear of many—that Senate Bill 40 "essentially reverts sentencing law back to California's pre-1977 indeterminate sentencing days"[78]—would be mitigated.

III. SUGGESTIONS FOR APPELLATE REVIEW FOR THE DURATION OF SENATE BILL 40 AND BEYOND

Senate Bill 40 expires in 2009. At that time, a new system will be forced to deal with the limitations imposed by *Cunningham*. In the meantime, courts must be able to review criminal convictions effectively. In addition, any system post-Senate Bill 40 will consider the effectiveness the bill has had on sentencing. Several questions still remain: (1) What level of review should judges impose? (2) What types of issues should be reversible under this new discretionary system? (3) How much can the federal sentencing scheme help California in deciding these issues? This section examines each of these questions in turn.

Senate Bill 40 gives judges near total discretion in imposing sentences within the range allowed by statute for criminal offenses. As a result, if California wants to retain the goal of commensurate sentences for like-kind offenses, then appellate courts must carefully watch the courts below to ensure that sentences remain consistent and do not begin to resemble the problematic pre-1977 discretionary system. The first question is what level of review is appropriate for this discretionary system. The federal system lends a helping hand with analysis:

> [A]ppellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.[79]

The Federal Guidelines, though advisory, cannot simply be ignored. The same should be true for the middle term of the DSL. As it stands, a judge simply has to support a decision for departing from the middle term. This is open to potential abuse. A quick response from the courts of appeal and from the California Supreme Court is essential to engineer a consistent and reliable system.

My proposal is to review post-Senate Bill 40 sentences for abuse of discretion. In doing so, appellate courts should be able to give some deference to the middle term, possibly even rising to the federal "presumptively reasonable" standard of sentences inside the federal guidelines range.[80] Any

78. Eiland, *supra* note 2.
79. *Gall*, 128 S. Ct. at 594.
80. Rita v. United States, 127 S. Ct. 2456, 2465-66 (2007).

departure from this middle term should be explained, and if the explanation lacks sufficient reasoning, the departure must be reversed.

"Abuse of discretion is not an empty formality[,]"[81] and allowing trial judges discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review."[82] Rather, by imposing an abuse of discretion standard, the courts would be allowing judges to depart for legitimate reasons while simultaneously holding them accountable for reasonableness.

Similar to the relatively deferential standard created by *Gall*, reviewing courts should defer to the reasoning of trial judges unless the court finds the reasoning unjust or illogical. This deference is critical in allowing judges to set sentences as they see fit; if courts are in constant fear of reversal on near-*de novo* review by courts of appeal, then they will be hesitant to depart from the middle term.[83]

This proposed deferential review standard deviates from the normal abuse-of-discretion standard in that it must be accompanied by a sharp eye for departures from legislative intent. When higher courts review for intent, especially in a state as large as California, it must only be the intent of the state legislature that can lead to reversal. While local norms will continue to develop, this legislative intent will only address issues at an important statewide level. If both state and local intents are used, then it would be easy to run into conflicting ideologies.

The Supreme Court implicitly endorses reversing on policy grounds. When reversing the decision in *Kimbrough*, the Court was quick to note that "Congress has shown that it knows how to direct sentencing practices in express terms"[84] and that "Congress did not *expressly* direct the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines."[85]

This need to keep an eye on congressional or legislative intent is not merely smoke-and-mirrors; *Gall* dealt with just such a situation. In *Gall* the sentencing judge disagreed with the USSG recommendation in several areas. "Giving petitioner additional credit for [lack of criminal history when that history had already resulted in a lower USSG recommendation] was nothing more than an expression of disagreement with the policy determination reflected in the Guidelines range."[86] In *Kimbrough* the judge disagreed with the 100-to-1 crack to cocaine sentencing ratio, expressly departing from the Guidelines solely because he disagreed with them.[87] The same problem seems inevitable in California sentencing cases unless courts of appeal impose a

81. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).
82. *Id.*
83. *See generally* McConnell, *supra* note 14.
84. 128 S. Ct. 558, 571 (2007).
85. *Id.*
86. *Id.* at 608 (Alito, J. dissenting).
87. *See Kimbrough*, 128 S. Ct. 558.

standard of review that requires judges to follow the intent of the legislature.

Justice Alito emphasized the need for stringent review as to congressional intent in his dissenting opinion in *Gall*:

> "[S]entencing judges must still give some significant weight to the guidelines sentencing range, the Commission's policy statements, and the need to avoid unwanted sentencing disparities. . ."[88]

The *Gall* majority disagrees with this statement only in scope. "[E]ven though the guidelines are advisory . . . they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[89]

The resulting proposal contains these key areas:

(1) The standard of review in sentencing cases should be abuse of discretion.

(2) This standard should have teeth; Appellate courts must reverse cases that deviate from the middle term with little or no logical reasoning.

(3) Appellate courts should also reverse lower courts if they use policy that is at odds with the state legislative intent.

(4) The middle term should be presumptively reasonable, similar to the federal standard created by *Rita v. United States*.[90]

An observer might note that this puts sentencing in much the same situation as before *Cunningham*. This is more or less accurate. While judges would not be permitted to engage in judicial fact-finding, they would be *de facto* encouraged to sentence to the middle range, barring a rather significant reason for mitigation or aggravation of the sentence. However, by implementing this proposal or one similar, California would pass constitutional muster under the *Apprendi* line of cases while still keeping a large portion of the "determinativeness" in the Determinate Sentencing Law intact.

IV. PROPOSAL CRITIQUES

The above proposal for California sentencing has a few weaknesses which I will attempt to refute below. However, most ironing out of these types of ideas can only be done in hindsight with appellate review.

A. Judges Have Significantly More Discretion in Sentencing Post-Senate Bill 40 Under an Abuse-of-Discretion Standard

By implementing this standard of review there is a significant shift in sentencing power from the prosecutor's office to the judiciary. Arguably, this

88. *Gall*, 128 S. Ct. at 604 (Alito, J., dissenting).
89. *Gall*, 128 S. Ct. at 603.
90. 127 S. Ct. at 2459.

is intentional. A major problem with California sentencing is due to the arbitrary nature of enhancements created by the legislature. Shifting the overall sentencing power to judges limits the mandatory nature of these enhancements.

The haphazard nature of sentencing enhancements in California does much to reduce any parity in sentencing. While defendants convicted of the exact same offense may both receive the enhancement, the enhancements themselves are incredibly arbitrary and difficult for the layperson to understand. By improving the ability of judges to adjust sentences based on their view of fairness, disparity will *decrease*. This would be because of an increased watchdog presence over political knee-jerk public safety reactions and—sometimes arbitrary—enhancements.[91]

While a more complete overhaul to the enhancement system is needed in California, this note does not intend to propose a sweeping solution. Rather, what may at first appear to be a danger in giving power to judges in sentencing, would actually serve to reduce disparity among defendants.

B. Without a Sentencing Commission the Major Problems of Arbitrary Enhancements and High Mandatory Minimums Will Continue to Lead to Overcrowding in Prisons.

This proposal does not purport to solve many of the problems in the California prison and justice systems. In 2007, a sentencing commission was proposed and rejected,[92] and so this proposal simply proposes a system to optimize the faulty system currently in place. A sentencing commission would likely improve the above proposal's ability to streamline California sentencing.

Sentencing enhancements provide discretion to District Attorneys where the DSL attempts to remove the same discretion from judges. The result has been extraordinary increases in punishment for various offenses over the last several decades. Under this proposal, however, judges would have an improved ability to guard against arbitrary enhancements. The only true solution would be to eliminate enhancements altogether and replace the system with the kind of guidelines used by federal courts. This solution could maintain the three-tier system, while providing more reasonable overall sentencing ranges.

91. Take, for example, the enhancement of a DUI offense if driving near or on the Golden Gate Bridge. *Drunk Driving Laws*, DUI Law Enforcement – DUI in Safety Enhancement Zone, http://www.caduilaw.com/drunk_driving_laws/enhancements/safety_zone.html (last visited Dec. 21, 2007).

92. For a discussion of the politics behind the creation of a sentencing commission, see Warren Ko, Summary, *2007 California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?*, 13 BERKELEY J. CRIM. L. 97, 111-12 (2008).

C. *"Legislative Intent" May be Difficult to Define in Order to Have a Uniform System of Appellate Review.*

Exactly what "legislative intent" should be is somewhat beyond this note's scope, and subsequent case law would do a much better job in both recommending and implementing specific definitions. However, the major decision that can be addressed here is whether the legislative intent requirement should also apply to local governments. What of the differences between sentencing goals in San Francisco and Los Angeles Counties?

Only requiring judges to look to statewide legislative intent solves this problem. A definition of legislative intent that only restricts courts with regards to the intentions of the statewide body would also allow local judges to create and further local norms. The reason is thus: the intentions of the state legislature would only result in reversal on appeal when the lower court expressly went *against* the intentions of the state legislature. Courts of appeal would not reverse simply because the legislature did not endorse a norm or view.

This means that local judges and communities would be free to create their own local sentencing goals, as long as those goals did not expressly violate the intentions of the state legislature.

CONCLUSION

California, spurred into action by federal chastising from *Cunningham*, is now presented with an opportunity to revise its sentencing scheme to introduce a certain amount of discretion, while at the same time guiding the trial courts to a higher level of sentencing conformity than ever before. Allow trial judges—those closest to the action of a criminal prosecution and those most likely to understand what a defendant deserves in terms of sentencing—to have discretion to impose sentences. At the same time, allow courts of appeal to identify and make corrections when those judges impose an irrational sentence, or one that goes against public policy. The resulting system will have increased conformity of sentences, punishments commiserate with the offense, and the flexibility to incorporate further reforms such as sentencing enhancements or other prison reforms.