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Note

Is Twenty-Two Years Enough for the “Millennium Bomber”?: The Threat of Terrorism to Appellate Review of Sentences

Robin Kuntz

INTRODUCTION

In United States v. Ressam, the Ninth Circuit vacated as substantively unreasonable the twenty-two year sentence imposed on the “Millennium Bomber,” an Algerian national named Ahmed Ressam who intended to blow up Los Angeles International Airport on December 31, 1999. The Ressam en banc decision followed in the wake of the Supreme Court’s 2005 abolishment of the mandatory Sentencing Guidelines in United States v. Booker—an
abolishment that sparked discussions about sentencing procedures and the proper role of appellate court review. The now-advisory Sentencing Guidelines afford considerable freedom to district courts in imposing sentences, and the Supreme Court has held that appellate courts must assess the “substantive reasonableness” of these sentences under an abuse-of-discretion standard of review. The application of this standard, however, remains unclear. After Booker, courts have poorly defined the “substantive unreasonableness” standard for appellate review of sentences, and this lack of clarity generally provides appellate courts with flexibility in their review.

Ressam not only exemplifies the uncertain role of appellate courts in reviewing sentences, but it also marks the first case since the establishment of these new appellate review standards that the Ninth Circuit has evaluated the sentence of a terrorist. This Case Note argues that the vague post-Booker “substantive unreasonableness” standard is valuable precisely because of its protean nature. Moreover, this Note emphasizes the acute need for a flexible standard in the context of terrorism. In Ressam, the Ninth Circuit reached the proper result because it had the flexibility to consider the particular circumstances of Ressam’s case, including the heinous nature of his crimes. Part I of this Case Note reviews the development of Supreme Court and appellate case law since the rejection of the mandatory Sentencing Guidelines in Booker. Part II describes the Ninth Circuit’s decision in Ressam, including

offender characteristic categories.” Id. at 1–2. Under a mandatory Guidelines system, a sentencing court would be required to select a sentence within this Guidelines range. Id. at 2. But if a certain case has unique or atypical features, a court may impose a sentence outside the Guidelines range. If a court departs from the Guidelines range, however, 18 U.S.C. § 3553(b) requires it to specify the reasons for that departure. Id. A “downward departure” is a departure from the Guidelines range “that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence.” Id. at 17. An “upward departure” is a departure from the Guidelines range “that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence.” Id. The Commission submitted its initial Guidelines in April 1987, and they took effect on November 1, 1987, applying to all offenses committed on or after that date. Id. at 2. The Commission may submit guideline amendments to Congress once per year. Id.

7. See Rust, supra note 5, at 76 (“The lack of a clear consensus . . . among the Supreme Court Justices [regarding whether the Guidelines should be mandatory] has resulted in a series of post-Booker decisions that have done little to clarify what role, if any, appellate courts should play in sentencing decisions.”).
8. See United States v. Evans, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) (“[T]he Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitable speaking, unclear.”).
9. See, e.g., Sessions, supra note 5, at 97 (noting that after the Guidelines became advisory the sentencing procedures “require a sentencing court to consider the personal characteristics of the offender in establishing a fair and just sentence, factors generally discouraged by the guidelines”).
both the concurring and dissenting opinions. Part III analyzes the problems associated with courts’ attempts to clarify a standard for “substantive unreasonableness” and argues that the majority and dissenting opinions in Ressam highlight the value that a protean standard provides in cases involving terrorists. Finally, Part III advocates a rational, flexible approach to terrorism-related sentencing that takes into account the particular characteristics of the individual offense and offender.

I.
POST-BOOKER APPELLATE REVIEW OF SENTENCING

In 1984, Congress enacted the Sentencing Reform Act, which gave authority to a new Sentencing Commission to author and supervise sentencing guidelines that would accomplish several purposes, including a reduction of unwarranted sentencing disparities and the creation of more transparency in sentencing.10 The original Guidelines went into effect in 1987 and “reflected a ‘mandatory’ or ‘presumptive’ system by which federal judges were provided detailed guidance in the exercise of their sentencing authority.”11

After the Supreme Court’s 2005 decision in Booker, however, “the [sentencing] Guidelines are now advisory [in all federal criminal cases], and appellate review of sentencing decisions is limited to determining whether they are [substantively] ‘reasonable.’”12 Booker’s rejection of the mandatory Guidelines thus gives district courts more flexibility to consider the personal characteristics of the offender in their sentencing decisions—a practice that the Guidelines generally discouraged.13 The post-Booker sentencing procedure is governed by 18 U.S.C. § 3553(a), which sets forth several factors a sentencing judge must consider, including “the nature and circumstances of the offense” and the Guidelines range for the applicable offense.14 Therefore, while Booker rejected the mandatory nature of the Guidelines, § 3553(a) still requires that a district court factor the applicable Guidelines range into its determination of an appropriate sentence.15

Booker requires appellate courts to give district courts’ sentencing decisions considerable deference.16 In Gall v. United States,17 the Supreme Court held that “the familiar abuse-of-discretion standard of review now

10. See id. at 89–90.
11. Id. at 91.
13. Sessions, supra note 5, at 97.
15. 18 U.S.C. § 3553(a) (“The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . ..’”).
16. See Ressam, 679 F.3d at 1086 (“It is clear that we are to afford significant deference to a district court’s sentencing decision.”).
applies to appellate review of sentencing decisions."\textsuperscript{18} A district court abuses its discretion when it “makes an error of law, rests its decision on clearly erroneous findings of fact, or when [the appellate court is] left with ‘a definite and firm conviction that the district court committed a clear error of judgment.’”\textsuperscript{19} While this abuse-of-discretion standard affords considerable deference to district court judges, that deference is “not total”\textsuperscript{20}—appellate courts still must assess the procedural and substantive reasonableness of the sentence.\textsuperscript{21} In determining the substantive reasonableness, an appellate court must “take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.”\textsuperscript{22} If the sentence is outside the Guidelines range, however, the court may not presume its substantive unreasonableness.\textsuperscript{23} The court may consider the extent to which the sentence deviates from the Guidelines range, but it must “give due deference to the district court’s decision” that the sentencing factors outlined in 18 U.S.C. § 3553(a) justified this variance.\textsuperscript{24} An appellate court cannot reverse a district

\textsuperscript{18} Id. at 46.

\textsuperscript{19} United States v. Hinkson, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc) (quoting United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln Cnty., Mont., 546 F.3d 613, 617 (9th Cir. 2008)), cert. denied, 131 S.Ct. 2096 (2011). Hinkson laid out a two-part test for determining whether a district court has abused its discretion: (1) the appellate court must consider “whether the district court identified the correct legal standard for decision of the issue before it,” and (2) it then must determine “whether the district court’s findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.” Id. at 1251.

\textsuperscript{20} Ressam, 679 F.3d at 1086. Since Booker, appellate courts have emphasized that appellate review for substantive unreasonableness is not a “rubber stamp.” See, e.g., United States v. Rattoballi, 452 F.3d 127, 132 (2d Cir. 2006) (“Our own review for reasonableness, though deferential, will not equate to a ‘rubber stamp.’”); United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (“Although [a reasonableness] standard clearly requires us to afford a degree of deference to the sentencing decisions of the district court, ‘reasonableness’ is not a code-word for ‘rubber stamp.’”).

\textsuperscript{21} Gall, 552 U.S. at 51 (“Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”). The following procedural errors, for example, may lead an appellate court to find a district court’s sentence procedurally unreasonable: “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [f]actors in 18 U.S.C. § 3553(a), selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.; see also Rita v. United States, 551 U.S. 338, 353 (2007) (holding that the Sixth Amendment does not prohibit appellate courts from presuming that a sentence within the Guidelines range is reasonable). In United States v. Curry, however, the Ninth Circuit declined to embrace such a presumption. United States v. Curry, 520 F.3d 984, 994 (9th Cir. 2008).

\textsuperscript{24} Gall, 552 U.S. at 51. 18 U.S.C. § 3553(a) lists a number of factors that a district court should consider in imposing a sentence, including “the nature and circumstances of the offense and the history and characteristics of the defendant;” the need for the sentence to reflect “the seriousness of the offense, “to provide just punishment for the offense,” “to afford adequate deterrence to criminal conduct,” “to protect the public from further crimes of the defendant,” and “to provide the defendant with needed educational or vocation training, medical care, or other correctional treatment in the most effective manner;” the sentencing range under the Guidelines; pertinent policy statements; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been
court’s sentence just because the appellate court might reasonably have found that a different sentence was appropriate. 25

Despite the Supreme Court’s attempt to provide a framework for the application of “substantive reasonableness” review, the specifics of this application remain unclear. 26 This difficulty in applying the standard may result from a set of conflicting policy goals: on the one hand, maintaining the consistency in sentencing established under the original Sentencing Guidelines, and on the other, allowing district courts considerable discretion in sentencing to preserve defendants’ constitutional rights. 27 This conflict, as well as the lack of clarifying Supreme Court opinions on the subject, has led to a “grab bag of possible solutions” provided by the appellate courts. 28 As this Note explains, critics of this “grab bag” of solutions 29 fail to recognize the value of its flexibility, which especially emerges in cases of terrorism. 30

II. UNITED STATES V. RESSAM

In December 1999, customs inspectors arrested Ahmed Ressam, an Algerian national, after finding powerful explosives in his vehicle. 31 Ressam, who in the previous year had attended three training camps for Islamic terrorists in Afghanistan, had planned to detonate these explosives at the Los Angeles International Airport on December 31, 1999. 32 After a jury convicted Ressam on nine counts in 2001, 33 he signed a cooperation agreement with the

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25. Gall, 552 U.S. at 51.  
26. See United States v. Evans, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) (“[T]he Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear.”).  
27. See Rust, supra note 5, at 101–02.  
28. Evans, 526 F.3d at 168 (Gregory, J., concurring).  
29. See, e.g., United States v. Booker, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting) (“What I anticipate will happen is that ‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . . .”); Rust, supra note 5, at 76 (“Given the heavy volume of appeals, circuit court judges need a standard that they can consistently apply . . . .”).  
30. See infra Part III.  
31. United States v. Ressam, 679 F.3d 1069, 1073 (9th Cir. 2012) (en banc).  
32. Id. at 1071–73.  
Id. at 1071 n.1.
government, promising his cooperation in the investigation of other terrorist activities in exchange for a possible downward departure from the then-mandatory Sentencing Guidelines range of sixty-five years to life imprisonment. Over the course of two years, Ressam provided significant information about terrorist activities around the world, enabling prosecutors to arrest and charge several major terrorists. By 2004, however, Ressam refused to cooperate any longer, and requested a sentencing hearing, at which the district court judge sentenced him to twenty-two years of imprisonment. After a series of appeals and vacatur of the imposed sentence, Ressam sent several letters recanting his prior testimony given in other terrorism trials. At a subsequent hearing in 2008, the district court again sentenced Ressam to twenty-two years of imprisonment. The Government appealed this sentence, leading the Ninth Circuit to vacate the sentence and remand to a different judge for resentencing. Prior to effectuation of this remand, the Ninth Circuit granted Ressam’s petition for an en banc rehearing.

After reviewing the facts of the case in detail, the Ninth Circuit en banc panel noted that the only issue in the case was whether the twenty-two year sentence imposed by the district court was substantively unreasonable. The court outlined the post-Booker standard of review for substantive unreasonableness and then examined the “totality of the circumstances” as instructed by Gall. After noting that Ressam’s twenty-two year sentence represented a “major departure” from the Guidelines range of sixty-five years to life, the Ninth Circuit assessed the district court’s consideration of the § 3553(a) factors. It first found that the terrorist objective of Ressam’s crimes compounded their horrific nature, and that the district court’s sentence failed to take into account the upward adjustment provided by the Guidelines for crimes of terrorism. The court then concluded that the twenty-two year sentence,

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34. Id. at 1074.
35. Id. at 1075–76.
36. Id. at 1076–77.
37. Ressam appealed his conviction on one of the counts, and the Ninth Circuit reversed, thus vacating Ressam’s sentence and remanding. See United States v. Ressam, 474 F.3d 597, 604 (9th Cir. 2007). The Supreme Court reversed and reinstated the conviction on that count. United States v. Ressam, 553 U.S. 272, 277 (2008). The Ninth Circuit vacated the twenty-two year sentence and remanded for resentencing because the district court judge had not determined the applicable Guidelines range. Order, United States v. Ressam, 538 F.3d 1166, 1167 (9th Cir. 2008).
38. Ressam, 679 F.3d at 1078.
39. Id. at 1082.
40. Id. at 1085.
41. United States v. Ressam, 593 F.3d 1095, 1134 (9th Cir. 2010), amended by 629 F.3d 793 (9th Cir. 2010).
42. Order, United States v. Ressam, 653 F.3d 963 (9th Cir. 2011).
43. Ressam, 679 F.3d at 1085.
44. Id. at 1086–88.
45. The assessed factors included the nature and circumstances of the offense, the goal of protecting the public, Ressam’s cooperation and character, and the need to avoid unwanted sentencing disparities. See id. at 1089–95.
46. Id. at 1090.
which would have provided for Ressam’s release in 2019, failed to protect the public from further crimes.\textsuperscript{47}

Next, and most importantly, the Ninth Circuit found that the district court “significantly overvalued the cooperation provided by Ressam during the time that he provided assistance” because it failed to “take into account the effect of Ressam’s subsequent recantations.”\textsuperscript{48} It added that Ressam’s life history and characteristics, replete with terrorist training and intended attacks, contradicted the district court’s assessment of his character as “a quiet, solitary and devout man whose true character is manifest in his decision to cooperate.”\textsuperscript{49} Finally, the Ninth Circuit concluded that the district court made inappropriate comparisons between the sentences of a number of other convicted terrorists and the sentence in Ressam’s case.\textsuperscript{50} After assessing these factors, the majority concluded that the district court abused its discretion by sentencing Ressam to only twenty-two years and therefore vacated that sentence as substantively unreasonable.\textsuperscript{51}

In a concurring opinion, Judge Reinhardt (joined by Chief Judge Kozinski and Judge Wardlaw) expressed concerns that the unclear principles regarding substantive unreasonableness do not fit a case involving a foreign enemy terrorist, but he acknowledged that the court must attempt to apply them.\textsuperscript{52} He concluded that, given Ressam’s recantation of his cooperation testimony, the district court’s lenient sentence was substantively unreasonable.\textsuperscript{53}

Judge Schroeder (joined by Judges Paez, Berzon, and Murguia) dissented, arguing that the majority did not give the district court the deference it deserved and that the court vacated the sentence simply because it did not like it.\textsuperscript{54} She added that Ressam’s cooperation was very valuable, despite his recantation, and emphasized that the district court had the discretion to assess the net value of Ressam’s cooperation.\textsuperscript{55} Judge Schroeder also faulted the majority for implicitly treating terrorism as “something new and different” under the Guidelines and noted the speculation involved in the assessment of Ressam’s future dangerousness.\textsuperscript{56} The dissent concluded with a reference to the rationale behind the abuse-of-discretion standard: because a district court has more experience with facts, an appellate court should defer to its decisions.\textsuperscript{57}

\textsuperscript{47} Id. at 1090–91.
\textsuperscript{48} Id. at 1092.
\textsuperscript{49} Id. at 1093–94.
\textsuperscript{50} Id. at 1094–95.
\textsuperscript{51} Id. at 1097. The Ninth Circuit remanded to the same district court judge for resentencing.
\textsuperscript{52} Id. at 1097 n.11.
\textsuperscript{53} Id. at 1097–98 (Reinhardt, J., concurring).
\textsuperscript{54} Id. at 1099.
\textsuperscript{55} Id. at 1100–02 (Schroeder, J., dissenting).
\textsuperscript{56} Id. at 1103–04.
\textsuperscript{57} Id. at 1106–07.
\textsuperscript{57} Id. at 1108; see also Gall v. United States, 552 U.S. 38, 51–52 (2007) (“The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.” (quoting Brief for Federal Public and Community Defenders &
III.

DISCUSSION

Justice Scalia, in his dissent in *Booker*, made the following prediction about appellate review of sentences under the newly advisory Sentencing Guidelines: “What I anticipate will happen is that ‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . . .”58 While this “discordant symphony” seems to have played out in the wake of *Booker*, with different appellate courts attempting to articulate varying standards of “substantive unreasonableness,”59 Justice Scalia’s fears are partly unfounded. It is true that this uncertainty may decrease uniformity in sentencing—counteracting Congress’s goal in establishing the Sentencing Guidelines in the first place60—but a flexible appellate review standard serves as an important check on district court judges, who are no longer constrained by the Sentencing Guidelines.61 The majority’s decision in *Ressam* exemplifies the benefits of this flexible standard. Because the Ninth Circuit was able to take into consideration all aspects of Ressam’s case—including the heinous nature of his crimes, the effect of his recanted cooperation, and the advisory Guidelines sentence—the majority correctly concluded that a twenty-two year sentence was substantively unreasonable.62

The problem with formulating a standard application for “substantive unreasonableness” is that the post-*Booker* sentencing regime naturally resists

the National Ass.’n of Federal Defenders as Amici Curiae Supporting Petitioner at 16, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949)).


59. Craig D. Rust divides the post-*Booker* appellate court interpretations of “substantive unreasonableness” into two groups. Rust, supra note 5, at 90–91. The first group, including the Fourth and Ninth Circuits, adopts a “purely procedural review” of sentences that is extremely deferential to the district court. Id. at 91–96 (citing United States v. Evans, 526 F.3d 155 (4th Cir. 2008); United States v. Ruff, 535 F.3d 999 (9th Cir. 2008); United States v. Whitehead, 532 F.3d 991 (9th Cir. 2008)). The second group, including the Second, Third, and Seventh Circuits, adopt a “re-weighing” approach that acknowledges that substantive unreasonableness review requires appellate courts “to examine the district court’s reasoning for imposing a given sentence, especially where there has been a large departure from the recommended Guidelines range.” Id. at 96–100 (citing United States v. Cutler, 520 F.3d 136 (2d Cir. 2008); United States v. Howe, 543 F.3d 128 (3d Cir. 2008); United States v. Omole, 523 F.3d 691 (7th Cir. 2008)). Rust also points out that both the Sixth and Eleventh Circuits face intra-circuit conflict between these interpretations. Id. at 91–92, 96–98 (citing United States v. Funk, 534 F.3d 552 (6th Cir. 2008) (adopting the “re-weighing” approach); United States v. Grossman, 513 F.3d 592 (6th Cir. 2008) (adopting the deferential approach); United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008) (adopting the “re-weighing” approach); United States v. McBride, 511 F.3d 1293 (11th Cir. 2007) (adopting the deferential approach)).

60. See id. at 76 (“This confusion [regarding the substantive unreasonableness standard among appellate courts] threatens to undermine the policy goals Congress sought to promote in overwhelmingly passing sweeping sentencing reform more than twenty years ago.”).

61. Importantly, the removal of mandatory Sentencing Guidelines gives district courts much greater discretion in sentencing. However, statistics show that sentencing disparities have increased since *Booker* made the Guidelines advisory. See Sessions III, supra note 5, at 100–02 (reviewing post-*Booker* sentencing statistics and noting that they “suggest signs of increasing disparities among districts and circuits and within individual courthouses”).

standards. In 1984, Congress enacted the Sentencing Reform Act (“SRA”), which included the mandatory Sentencing Guidelines, “with the goal of providing certainty and fairness as well as avoiding unwarranted sentencing disparities among defendants with similar records convicted of similar offenses.” By making the Guidelines advisory, Booker removed some of the certainty and regularity that the SRA instilled in sentencing procedures at the district court level. But Booker’s rejection of the mandatory Guidelines also increases fairness on an individual level because it requires courts to consider the specific characteristics of each defendant and each offense. Some legal scholars have thus argued that the current sentencing regime is “the best of both worlds”—it requires district courts to use the well-researched Guidelines as a baseline, and it affords them discretion to deviate from those Guidelines for compelling reasons.

This system may be the best of both worlds for district courts, but it creates complications at the appellate review level. While post-Booker appellate review of sentences is deferential, the district courts’ enhanced discretion requires appellate courts to essentially re-weigh the facts in the context of the § 3553(a) factors. Because district courts now have the freedom to emphasize individual characteristics in sentencing an offender, appellate courts, in their reasonableness review, must dig deeper into “the actual sentence itself” and review the “particulars of each case.” While this assessment does not amount to de novo review, it requires appellate courts to review the specific circumstances of the case in an effort to determine whether the sentence is substantively reasonable. In this process, the appellate court

64. See Sessions, supra note 5, at 100–01 (“[P]atters in post-Booker sentencing statistics suggest signs of increasing disparities among districts and circuits and within individual courthouses.”). These disparities are especially notable among circuits. For example, in 2010, Fifth Circuit judges imposed Guidelines-range sentences in 71.3 percent of their cases, but District of Columbia Circuit judges imposed Guidelines-range sentences in only 33.4 percent of their cases. Id. at 101.
65. See Ramos-Vega, supra note 63, at 17 (“[T]he [advisory] guidelines provide the flexibility that sentencing judges need to be able to deviate from the guidelines when there is a valid and fair justification for doing so.”).
66. See id.
67. See Ressam, 679 F.3d at 1088 (“In sum, our review of the substantive reasonableness of a sentence is deferential and will provide relief only in rare cases.”).
68. See United States v. Evans, 526 F.3d 155, 169 (4th Cir. 2008) (Gregory, J., concurring) (noting that the substantive reasonable analysis employed by the Second and Eleventh Circuits consisted of a re-weighing of the facts of the cases under § 3553(a)).
70. See Ressam, 679 F.3d at 1088.
71. See Gall v. United States, 552 U.S. 38, 59 (2007) (“It is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable.”).
72. See Ressam, 679 F.3d at 1088–89.
must “assess[,] the district court’s rationale for the sentence and review[,] its application of the facts to the guidelines and § 3553(a).”73

Why, then, did Ressam present such a difficult and divisive issue for the Ninth Circuit en banc panel? In Ressam, for the first time since Booker, the Ninth Circuit had to review the sentence of a terrorist. While the majority and the dissent both acknowledged the severity of Ressam’s crimes, they disagreed on how, if at all, his status as a terrorist should factor into his sentencing.74 The majority explained that the district court failed to adequately account for the terrorist nature and serious consequences of Ressam’s offenses.75 It added that the twenty-two year sentence imposed by the district court “effectively negated” the “substantial upward adjustment” that the Sentencing Guidelines provide for federal terrorism crimes.76 The dissent, on the other hand, argued that the majority put undue focus on the terrorist nature of Ressam’s crimes and advocated treating “each offense and offender individually.”77

The dissent’s view, however, partially ignores the way in which the post-Booker sentencing regime operates. A district court, and a reviewing appellate court, must assess each case on an individual basis, accounting for the “nature and circumstances of the offense.”78 In Ressam, this included intended acts of horrific terrorism.79 The Fourth Circuit advocated this viewpoint in United States v. Abu Ali,80 another terrorism case in which the appellate court found the district court’s below-Guidelines sentence substantively unreasonable.81 As in Ressam, the dissent in Abu Ali argued that the majority, in focusing on the terrorist nature of the defendant’s crimes, “invoked some sort of ‘terrorism exception’” to the deferential standard of appellate review established in Gall.82 The Abu Ali majority explained that its decision “creates no blanket exception, but rather rests on the specific nature of these circumstances.”83 In other words, as required by Gall and the factors in § 3553(a), the majority in Abu Ali

73. Evans, 526 F.3d at 169 (Gregory, J., concurring).
74. Ressam, 679 F.3d at 1090; id. at 1106 (Shroder, J., dissenting).
75. Id. at 1090 (majority opinion) (“That Ressam’s crimes were in furtherance of a terrorist attack compounded the severity of the crimes.”).
76. Id.; see also UNITED STATES SENTENCING COMMISSION, supra 3, at 339, § 3A1.4(a) (“If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels . . . .”). While the Guidelines are not mandatory after Booker, district court judges must still calculate the Guidelines range and factor it into their sentencing decision. See 18 U.S.C. § 3553(a)(4) (2006). If the crime at issue is a federal terrorism crime, the judge must increase the offense level by twelve in the calculation of the proper Guidelines range. See UNITED STATES SENTENCING COMMISSION, supra note 3, at 339, § 3A1.4(a).
77. Ressam, 679 F.3d at 1106 (Schroeder, J., dissenting) (“The majority’s implicit assumption that terrorism is different, and must be treated differently, . . . flies in the face of the congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses.”).
79. See Ressam, 679 F.3d at 1090.
80. 528 F.3d 210 (4th Cir. 2008).
81. Id. at 269.
82. Id. at 269; id. at 271 (Motz, J., dissenting).
83. Id. at 269 (majority opinion).
undertook an analysis that necessarily included consideration of the terrorist nature of the defendant’s offense.

Beyond its emphasis of § 3553(a)’s requirement that courts take into account the nature and circumstances of an offense, the Fourth Circuit in *Abu Ali* offered some insightful dicta for terrorism-related cases. If courts ignore or downplay the heinous nature of the crime when sentencing a foreign enemy terrorist, the majority explained, they lose sight of the “broader reality: that the defendant sought to destabilize our government and shake it to its core.”84 Therefore, when district courts sentence a terrorist, and when appellate courts review that sentence, they should “not lose sight of the immensity and scale of wanton harm that was . . . [the defendant’s] plain and clear intention.”85 As in *Ressam*, the district court in *Abu Ali*, because it downplayed the terrorism factor, failed to account for the realities of the crime’s nature and circumstances.

The rational approach to terrorism-related sentencing advocated in *Abu Ali* highlights the danger of establishing a clear “standard” for substantive unreasonableness review. Judge Reinhardt, in his *Ressam* concurrence, aptly described this problem: “The more specific we try to be as to how we must go about determining whether a sentence is substantively unreasonable, the less likely that the rules we adopt will bring us to a just and fair result in the wide range of cases that will come before us.”86 As Judge Reinhardt pointed out, cases involving terrorists are even more resistant to the application of a clear standard because the nature of the offense does not align with the sentencing goals in § 3553(a).87 The goal of providing the defendant “with needed educational or vocational training, medical care, or other correctional treatment,”88 does not seem to apply to a terrorist nor does the goal of “afford[ing] adequate deterrence to criminal conduct”—it is extremely unlikely that a possible prison sentence will deter a terrorist working “at the behest of Al Qaeda or similar groups to damage our country.”89 Because substantive reasonableness review depends on whether the sentence imposed was sufficient to accomplish these goals,90 that review is especially difficult when several of the goals do not apply to the terrorism-related case at issue.

Judge Reinhardt posited that “[n]o case could be more atypical and less suited for the development of general substantive unreasonableness rules than the case of a foreign enemy terrorist who enters the United States to wage war

84.  *Id.*
85.  *Id.*
87.  *See id.* at 1098.
90.  *See Ressam*, 679 F.3d at 1098 (Reinhardt, J., concurring).
91.  *Id.* at 1089 (majority opinion) (citing United States v. Crowe, 563 F.3d 969, 977 n.16 (9th Cir. 2009) (quoting 18 U.S.C. § 3553(a))).
on this nation.” 92  He also suggested, without elaboration, that perhaps we should treat terrorism offenses like those committed by Ressam as acts of war, rather than as ordinary crimes. 93  Alternatively, Judge Reinhardt suggested that sentencing of foreign enemy terrorists “should be pursuant to special statutes or rules designed to afford particularized treatment to foreign enemies.” 94  The Ressam opinion, however, proves that the post-Booker system of appellate review, even when dealing with a terrorist, actually works. The Ninth Circuit, giving appropriate deference to the district court, reviewed the totality of the circumstances—including the severity of Ressam’s terrorism-related crimes—and decided that the twenty-two year sentence imposed was substantively unreasonable. 95

Appellate courts, therefore, should spend less effort trying to establish a uniform standard for “substantive unreasonableness” when reviewing sentences and more effort examining the particular circumstances of each case. In doing so, they will avoid the danger of overly mechanical review—which is precisely what Booker abolished when it deemed the Sentencing Guidelines advisory. 96  The Ressam dissent faulted the majority for focusing “on the nature of the offense, rather than on any of the other relevant statutory factors, because the majority . . . thinks . . . that terrorism is different . . . .” 97  But terrorism is different, at least with respect to a court’s evaluation of the § 3553(a) factors. 98  Not only are crimes of terrorism especially heinous in nature, but also, as Judge Reinhardt explained, several of the established sentencing goals do not apply to foreign enemy terrorists, thus making these statutory factors somewhat irrelevant. 99

Furthermore, the Ressam majority did exactly what Gall compelled it to do in focusing on the nature of the offense. 100  Section 3553(a) requires courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant” as well as “the need for the sentence imposed . . . to reflect the seriousness of the offense . . . ” when sentencing, or reviewing the sentence of, any convicted criminal. 101  Focusing on the heinous nature of Ressam’s crimes, and discounting Ressam’s cooperation because he recanted much of his testimony, led the Ninth Circuit to the proper conclusion—that a twenty-two year sentence was substantively unreasonable in these particular circumstances. 102

92.  Id. at 1098 (Reinhardt, J., concurring).
93.  Id. at 1099.
94.  Id.
95.  See id. at 1088–96 (majority opinion).
97.  Ressam, 679 F.3d at 1106 (Schroeder, J., dissenting).
98.  See United States v. Abu Ali, 528 F.3d 210, 269 (4th Cir. 2008).
99.  See Ressam, 679 F.3d at 1097 (Reinhardt, J., concurring).
102.  See Ressam, 679 F.3d at 1097.
Cases like Ressam and Abu Ali exemplify the ability of appellate courts to review the sentences of terrorists and to correct the clear errors of district courts. At this point, special sentencing rules for terrorists are not necessary. Rather, courts should focus on adapting terrorism cases to the existing rules. District courts should begin the sentencing process “by determining the applicable Guidelines range.” The court should then consider and apply the § 3553(a) factors, including the nature and circumstances of the specific, terrorism-related offense. Given the inapplicability to foreign enemy terrorists of several of the sentencing goals outlined in § 3553(a), the court should focus on the need for the sentence imposed “to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense,” and “to protect the public from further crimes of the defendant.”

If the court then “decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” In reviewing the substantive reasonableness of a terrorist’s sentence, an appellate court should assess the § 3353(a) factors in the same way and then decide whether the district court’s sentence is unreasonable in light of the appellate court’s determination.

CONCLUSION

By affording judges the flexibility to deviate from the Sentencing Guidelines range, the post-Booker sentencing system avoids undesirable and mechanistic uniformity among sentences and allows judges to consider the particulars of each defendant’s case. This system, which embraces individualized sentencing considerations by requiring both district and appellate courts to assess the factors in § 3553(a), inherently conflicts with the idea that courts should establish a uniform standard for reviewing these sentencing decisions.

The search for clarity in “substantive unreasonableness” distracts from the more important task—ensuring that a district court’s sentence properly reflects the particular circumstances of each case. United States v. Ressam, because it involved a foreign enemy terrorist, exemplifies the importance of this individualized consideration. By embracing this particularized review, acknowledging the different circumstances of each crime and criminal, and focusing less on a unifying standard for “substantive unreasonableness,” appellate courts can come to the proper conclusions in their review of district courts’ sentences.

103 United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008). This determination should include the enhancement for federal crimes of terrorism as outlined in the Sentencing Guidelines. See UNITED STATES SENTENCING COMMISSION, supra note 3, at 339, § 3A1.4(a).